Filed 12/6/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JOHNNY LIRA, on Habeas Corpus.	H036162 (Santa Clara County Super. Ct. No. 76836)

I. INTRODUCTION

After 11 parole hearings and 29 years in prison under an indeterminate life sentence, defendant Johnny Lira was released on parole with a three-year term. In a habeas petition, Lira sought credit against his parole term for time spent in prison after 2005, when the Board of Parole Hearings (the Board) erroneously found him unsuitable for parole and after 2008, when the Board found him suitable but the Governor vetoed that decision. The superior court granted habeas relief and ordered the Board to grant the credit Lira sought. The issue before us is the propriety of that order.

Under Penal Code section 2900, an inmate is entitled to have all time served in prison credited against his or her "term of imprisonment." Penal Code section 2900.5, subdivision (c) defines " 'term of imprisonment' " to include "any period of imprisonment and parole," and in *In re Bush* (2008) 161 Cal.App.4th 133 (*Bush*), the court construed this phrase to mean any period of imprisonment *lawfully* served.

Applying these provisions as construed, we hold that Lira was not entitled to credit for the period of continued incarceration caused by the Board's erroneous denial of parole, but he was entitled to credit for the period of continued incarceration caused by the Governor's veto of the Board's later decision to grant parole.

II. STATEMENT OF CASE

Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation (CDCR), appeals from an order of the superior court directing the Board to grant Lira nearly four years of credit against his three-year parole term.[1] The CDCR claims the court lacked authority to order credit; and even if it had the authority, Lira was not entitled to any credit.

We conclude that Lira is entitled to some but not all of the credit ordered by the superior court. Accordingly, we modify the order to reduce the amount of credit and affirm the order as modified.

III. PROCEDURAL HISTORY

Lira was sentenced to prison for 15 years to life with a two-year firearm enhancement after he was convicted of second-degree murder for shooting his wife Allison. He entered prison in July 1981. His minimum eligible parole date was April 7, 1992.

In December 2005, the Board held Lira's ninth parole hearing and for the ninth time found him to be unsuitable for parole. He filed a petition for a writ of habeas corpus challenging that decision on the ground that it was not supported by some evidence and therefore violated his right to procedural due process. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658, 664 (*Rosenkrantz*) [denial of parole without evidentiary support violates state constitutional right to procedural due process].) The superior court agreed, granted the writ, and ordered a new parole hearing. This court upheld that decision. (*Lira on Habeas Corpus* (July 30, 2008, H031227) [nonpub. opn.].)

In November 2008, the Board conducted a new hearing, found Lira suitable for parole, and set his term of imprisonment at 216 months (18 years). In April 2009, then

[1] We refer to appellant hereafter as the CDCR.

Governor Schwarzenegger vetoed the Board's decision, finding that Lira would pose a danger if released. In December 2009, Lira filed a writ petition challenging the Governor's decision. He alleged that it was not supported by some evidence and thus violated his right to procedural due process. In November 2009, while that petition was pending, the Board held another hearing, again found Lira suitable for parole, and set his term of imprisonment at 228 months (19 years). Current Governor Brown declined to review that decision. The Board then ordered Lira released on parole for three years effective April 8, 2010.

On April 22, 2010, Lira filed a supplemental petition seeking immediate discharge from parole. He claimed that his continued incarceration after December 2005 due to the Board's erroneous denial of parole and the Governor's allegedly erroneous veto of the Board's subsequent decision to grant parole was unlawful, and therefore, he was entitled to almost four years of credit.[2] The superior court granted the supplemental petition and ordered the Board to grant Lira credit against his parole term for the period of incarceration after May 11, 2006.

IV. MOOTNESS AND PROPRIETY OF THE REMEDY

The CDCR contends that Lira's release in 2010 rendered his habeas petition moot, and therefore the superior court should have dismissed it. The CDCR also claims that regardless of whether Lira was lawfully incarcerated after December 2005, the superior court lacked authority to grant credit as a remedy because doing so disregarded public safety and violated the doctrine of separation of powers, penal statutes, and the terms of Lira's sentence.

[2] In his supplemental petition, Lira alternatively claimed that he was entitled to credit against his three-year parole term for the 10 years in prison that exceeded the base term set by the Board.

A. Mootness

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*Mills v. Green* (1895) 159 U.S. 651, 653; *Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863, 167 P.2d 725.) "A question becomes moot when, pending an appeal . . . events transpire that prevent the appellate court from granting any effectual relief. [Citations.]" (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 419.)

In his initial habeas petition, Lira challenged the Governor's veto and sought to have the Board's 2008 decision to grant parole reinstated. We agree with the CDCR that Lira's subsequent release on parole rendered that remedy moot and made it unnecessary to review the propriety of the Governor's veto. However, in his supplemental petition, Lira sought different relief—credit against his parole term—based on a claim that he was unlawfully incarcerated from 2005 to 2010. That claim hinges, in part, on the propriety of the Governor's veto. Since Lira remains under the constructive custody of parole, his release did not render his claim for additional credit moot. On the contrary, if he is entitled to credit, then he is entitled to get it.

Accordingly, we reject the CDCR's contention that the superior court should have simply dismissed Lira's initial and supplemental petitions.

B. Propriety of the Remedy

The CDCR claims that the only remedies available to a court when it determines that a gubernatorial veto violated due process are a remand back to the Governor or reinstatement of the Board's decision to grant parole. Thus the CDCR argues that even if the Governor's veto were erroneous, the superior court erred in directing the Board to grant Lira credit against his parole term. In support of this claim, the CDCR relies on *In*

re Prather (2010) 50 Cal.4th 238 (*Prather*) and *In re Miranda* (2011) 191 Cal.App.4th 757 (*Miranda*).

In *Prather*, the Supreme Court resolved two cases—*In re Prather* and *In re Molina*—and addressed a very limited procedural question: what is the proper scope of a remand order when a court concludes that the Board's decision to deny parole is not supported by some evidence and therefore violates the inmate's right to due process. (*Prather, supra*, 50 Cal.4th at p. 243.) Before *Prather*, reviewing courts had issued remand orders that restricted the Board's authority and discretion in determining suitability for parole. In *Prather*, the court ordered the Board to find Prather suitable for parole unless, after another hearing based on new and different evidence of Prather's subsequent conduct, the Board concluded that he was currently dangerous. (*Id*. at p. 246.) In *Molina*, the remand order simply directed the Board to release Molina on parole. (*Id*. at p. 248.) The Supreme Court explained that because parole decisions are within the exclusive powers of the executive branch, judicial orders restricting the Board's discretion impermissibly impair the exercise of the Board's executive power in determining suitability and thereby violate the constitutional principle of separation of powers. (*Id*. at pp. 254-256.)[3] The court found that the orders in both *Prather* and *Molina* suffered from this defect. (*Prather, supra*, 50 Cal.4th at pp. 244, 255-257.) The court advised that a decision granting habeas relief for a due process violation by the Board "generally should direct the Board to conduct a new parole-suitability hearing in accordance with due process of law and consistent with the decision of the court, and

[3] Penal Code section 3000 "explicitly delegates parole authority to the Board of Parole Hearings," and "[t]he board has sole authority, within the confines set by the Legislature, to set the length of parole and the conditions thereof. [Citations.]" (*Bergman v. Cate* (2010) 187 Cal.App.4th 885, 898.)

All further unspecified statutory references are to the Penal Code.

should not place improper limitations on the type of evidence the Board is statutorily obligated to consider." (*Id*. at p. 244.)

The facts of *Miranda, supra,* 191 Cal.App.4th 757 are somewhat similar to those here. The Board granted Miranda parole in 2003, the Governor vetoed that decision, and Miranda sought habeas relief. Finding no evidence to support the veto, the superior court granted relief, and the Governor appealed. In 2004, before the appellate court decided the case, Miranda was released. In 2006, the appellate court reversed the superior court, finding that there was some evidence to support the Governor's 2003 veto. Nevertheless, Miranda remained out of prison until 2007, when the Board held another hearing. At that time, the Board denied parole, and in 2008, Miranda was returned to prison. In 2009, Miranda sought habeas relief in the appellate court, challenging the Board's 2007 denial and seeking release on parole. While the habeas petition was pending, the Board held another hearing and found Miranda suitable for parole. The Governor declined to review, and Miranda was released on parole. (*Id*. at pp. 761-762.)

Meanwhile, in the pending habeas proceeding, Miranda pressed his challenge to the Board's 2007 denial of parole. He argued that if the denial was improper, it would show that he was entitled to some credit against his parole term, which the court could then direct the Board to grant. (*Miranda, supra*, 191 Cal.App.4th at p. 762.) The appellate court declined to review the Board's 2007 decision because it considered the underlying petition to be moot. The court noted that the only relief Miranda had *formally* requested in the petition was his immediate release on parole, and Miranda had already been released. (*Miranda, supra,* 191 Cal.App.4th at p. 762.)

Citing *Prather*, the court further explained that even if the Board's 2007 decision were erroneous, the only remedy it had authority to provide was a new suitability hearing. (*Miranda, supra*, 191 Cal.App.4th at p. 763.) The court opined that a judicial determination that the Board's denial of parole violated due process "is not a get-out-of-

jail-free card. Instead, the determination mandates further Board proceedings and then review by the Governor, if appropriate. Here, Miranda would have us bypass that proper procedure and conclude that he was entitled to be released as of his 2007 parole-suitability hearing. Based on that conclusion, he would have us order a reduction of his parole period. For the reasons stated in *Prather*, we cannot reach this conclusion. If we were to find that the Board violated Miranda's due process rights at the 2007 parole-suitability hearing, the remedy would be to direct the Board conduct a new parole-suitability hearing consistent with due process and our decision. [Citation.] Because that has already occurred, with the result that Miranda has been released, there is no beneficial remedy available from this court." (*Ibid*.)

We agree with *Miranda* that *Prather* restricts a court's remedial authority when an inmate seeks a new hearing based on a claim that the Board's denial of parole violated due process. However, because Miranda informally sought credit against his parole term, *Miranda* suggests that *Prather* bars any remedy except a new hearing, even if the inmate does not seek a new hearing but instead seeks credit.

" ' "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered." ' [Citation.] 'An appellate decision is not authority for everything said in the court's opinion but only "for the points actually involved and actually decided." ' [Citation.]" (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155.) Thus, we view *Prather* in light of its factual context and the issues before it. *Prather* addressed only the proper scope of a remand order where a court has granted habeas relief. *Prather* did not involve a parolee's claim for credit against the term of parole. Nor did *Prather* discuss whether a court has authority to review such a claim and direct the Board to grant credit if the claim has merit. Moreover, nothing in *Prather* implies that a court lacks authority to determine entitlement to credit and grant credit when

appropriate. In short, we disagree with *Miranda's* suggestion that *Prather* bars such relief in this case.

Indeed, *Prather* reaffirmed the notion that "an inmate's due process rights 'cannot exist is any practical sense without a remedy against its abrogation.' [Citations.]" (*Prather, supra*, 50 Cal.4th at p. 251, quoting *Rosenkrantz, supra*, 29 Cal.4th at p. 664.) In habeas proceedings in general, courts are vested with the power to craft an appropriate remedy "as the justice of the case may require." (§ 1484; *In re Crow* (1971) 4 Cal.3d 613, 619.) "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriage of justice within its reach are surfaced and corrected." (*Harris v. Nelson* (1969) 394 U.S. 286, 291.)

The CDCR notes that the amount of credit Lira was granted would, as a practical matter, require his immediate discharge from parole. Thus, the CDCR claims that the court's order violated the doctrine of separation of powers because it impermissibly arrogated the Board's exclusive authority to set the length of parole or to waive parole altogether. The CDCR further argues that the order improperly abrogated Lira's parole, which is a statutorily mandated consequence of his conviction; and in doing so, the order defeated the purpose and intent of section 3000. Last, the CDCR argues that the court's order was improper because it is inconsistent with the rehabilitative and safety goals of parole.[4]

Concerning the doctrine of separation of powers, the court in *Prather* explained that it does not "prohibit one branch from taking action that might affect those of another branch"; rather the doctrine is violated only "when the actions of one branch 'defeat or

[4] Because we ultimately conclude that Lira was not entitled to the amount of credit ordered by the superior court and because the amount he is entitled to does not exceed his three-year term of parole, our discussion of the CDCR's claims focuses generally on the propriety of a judicial order that results in a reduction of a parole term.

materially impair the inherent or core functions of another branch.' [Citation.]" (*Prather, supra*, 50 Cal.4th at p. 254, quoting *Rosenkrantz, supra*, 29 Cal.4th at p. 662.)

We acknowledge that parole determinations, including the length of a parole term, fall within the exclusive power of the executive branch. However, the exercise of that power must still comply with the law. Under section 2900, "*all* time served in an institution designated by the Director of Corrections *shall* be credited as service of the term of imprisonment" (§ 2900, subd. (c), italics added), and " 'term of imprisonment' " is defined to include "any period of imprisonment *and parole*." (§ 2900.5, subd. (c), italics added.) Thus, under section 2900, an inmate is entitled to have *all* time served in an institution credited against his or her period of imprisonment and parole.

Here, the Board exercised its authority to impose a three-year term of parole. If under applicable statutes and judicial precedent, Lira was entitled to have time spent in prison credited against his "term of imprisonment," then an order requiring that he receive such credit is simply an order directing the Board to comply with the law. Such orders are not novel, and courts have routinely granted habeas relief and ordered that credit be given to inmates and parolees. (E.g., *In re Ballard* (1981) 115 Cal.App.3d 647, 650 [directing Board to grant conduct credit against parole term]; *In re Anderson* (1982) 136 Cal.App.3d 472, 476 [same]; *In re Randolph* (1989) 215 Cal.App.3d 790, 795 [same]; see *In re Carter* (1988) 199 Cal.App.3d 271, 273 [conduct credit that is not applied to period of incarceration may be applied to reduce parole period].)[5]

Consequently, a judicial determination that an inmate or parolee is entitled to credit against a "term of imprisonment" and an order directing the Board to grant it do not, in our view, impermissibly intrude into the realm of exclusive executive power or

[5] We recognize that these cases involved inmates sentenced to determinate terms. However, if the law entitles an inmate or parolee to credit, then it is irrelevant that he or she was sentenced to a determinate or indeterminate term. Either way, a court has authority to ensure compliance with section 2900 by directing the Board to grant credit.

defeat or materially impair the Board's statutory parole authority. Accordingly, we conclude that the superior court's order did not violate the doctrine of separation of powers.

We also do not find that such an order impermissibly abrogates a statutorily mandated consequence of a conviction or otherwise frustrates the purpose and intent of section 3000.

Section 3000, subdivision (a)(1) provides: "The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the effective supervision of and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge. A sentence pursuant to Section 1168 or 1170 shall include a period of parole, unless waived, or as otherwise provided in this article."

Section 3000, subdivision (b)(1) provides, in relevant part: "In the case of any inmate sentenced under Section 1168, the period of parole shall not exceed five years in the case of an inmate imprisoned for any offense other than first or second degree murder for which the inmate has received a life sentence, and shall not exceed three years in the case of any other inmate, unless in either case the parole authority for good cause waives parole and discharges the inmate from custody of the department."

Under these sections, the Board may waive parole. If parole can be waived, then, contrary to the CDCR's position, a period of parole supervision is not an unavoidable and inexorable consequence of a conviction. Moreover, given the specific provisions of section 2900 mandating credit against a "term of imprisonment," which includes the term of parole, an order directing the Board to give credit against a parolee's term is not inconsistent with the general but qualified requirement of parole in section 3000.

Noting that section 3000 states that a parole term is the period "between imprisonment and discharge," the CDCR argues that the statute "indicates that an inmate's parole term should not be served while he remains in prison," which, presumably, would bar crediting a period of incarceration against a parole term. We are not persuaded.

When read in context, the phrase from section 3000 quoted by the CDCR does not suggest that time spent in prison cannot be credited against a period of parole. Indeed, such a reading is incompatible with section 2900, which provides for all prison time to be credited against the "term of imprisonment," which, as noted, includes a term of parole.

The CDCR's reliance on *In re Chaudhary* (2009) 172 Cal.App.4th 32 (*Chaudhary*) to support its claim is misplaced. There, the Governor vetoed the Board's decision to grant parole. This court vacated the veto and reinstated the Board's decision. Chaudhary was released on parole and then sought credit for the period of incarceration extended by the Governor's erroneous veto. (*Id*. at pp. 35-36.) We noted that because Chaudhary's commitment offence occurred in 1986, he was subject to section 3000.1, which "provides that a person convicted of a second degree murder that occurred after January 1, 1983 is subject to lifetime parole and becomes eligible for discharge from parole 'when [such] a person . . . has been released on parole from the state prison, and has been on parole continuously for five years.' (Stats.1982, ch. 1406, § 4.)" (*Chaudhary, supra*, 172 Cal.App.4th at p. 34, quoting § 3000.1, subd. (b).) We pointed out that the Legislature expressly limited the discharge eligibility requirement to the period *after* the parolee "has been released on parole" and required that he or she serve five continuous years on parole after being released from prison. (§ 3000.1, subd. (a)(1).) We concluded that these provisions unambiguously reflected a legislative intent to make eligibility for discharge from parole contingent upon five continuous years of parole *after*

being released. Thus, the statute precluded crediting any time spent in prison against the discharge eligibility requirement. (*Chaudhary, supra*, 172 Cal.App.4th at p. 37.)

Chaudhary and section 3000.1 are inapplicable here because Lira committed his offense in 1980. Thus, he is not subject to lifetime parole and a five-year parole eligibility requirement. He is subject to a three-year term of parole against which he sought credit.

We also reject the CDCR's argument that the order must be reversed because it is inconsistent with "the rehabilitative goals of the parole system and concerns of public safety." Although section 3000 reflects legislative findings that the period after incarceration along with supervision and surveillance are critical to a parolee's successful reintegration and to the protection of the public (§ 3000, subd. (a)(1), quoted *ante*, p. 10), these findings do not suggest that a court may deny credit that a parolee would otherwise be legally entitled because granting credit and thereby reducing a parole term is inconsistent with the rehabilitative and protective goals of parole. Nor does the CDCR provide convincing authority for such a proposition. Its reliance on *In re Jantz* (1985) 162 Cal.App.3d 412 (*Jantz*) and *In re Chambliss* (1981) 119 Cal.App.3d 199 (*Chambliss*) is misplaced.

In *Jantz*, Jantz earned 1,626 days of presentence custody credit, which exceeded the three-year term imposed for his offense. However, the Board placed him on parole for three years. Jantz sought habeas relief, claiming that his presentence custody credit entitled him to release without parole. The superior court struck the parole term, but the appellate court reversed. (*Jantz, supra*, 162 Cal.App.3d at pp. 414-415.)

The case required an interpretation of former section 1170, subdivision (a)(2), which provided, in relevant part, "In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence, including any period of

parole under Section 3000, shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the Director of Corrections. . . ." (Stats. 1984, ch. 1432, § 9, p. 5028.) The court focused on the meaning of "sentence" in the initial phrase "any sentence imposed pursuant to this chapter." (*Ibid*.) Jantz claimed "sentence" referred only to the actual term imposed for the offense and did not include the period of parole. (*In re Jantz*, *supra*, 162 Cal.App.3d at p. 416.) Thus, since his credit exceeded the three-year term for the offense, his "entire sentence, including any period of parole" must be deemed to have been served.

In rejecting this view, the court observed that under section 2900.5, subdivisions (a) and (c), a "term of imprisonment" included the period of confinement and parole. The court also noted the Legislature's declaration in section 3000 that sentences "shall include a period of parole, unless waived." The court opined that Jantz's interpretation created an exception to this general requirement of parole without any apparent supportive rationale. Rather, reading the phrases of section 1170, subdivision (a)(2) together in light of section 2900.5 and the legislative findings in section 3000 concerning the importance of parole, the court concluded that " 'sentence' as used in section 1170, subdivision (a)(2), includes any applicable period of parole." (*In re Jantz*, *supra*, 162 Cal.App.3d at pp. 416-417; see *In re Sosa* (1980) 102 Cal.App.3d 1002, 1005 ["Section 1170 explicitly declares that presentence credit applies against both the imprisonment and the parole portion of the sentence."].) Thus, the court held that section 1170, subdivision (a)(2) does not permit a release from parole "*unless the in-custody credits equal the total sentence, including both confinement time and the period of parole*." (*In re Jantz*, *supra*, 162 Cal.App.3d at p. 415, italics added; accord, *In re Welch* (1987) 190 Cal.App.3d 407, 412.) Since Jantz's credit did not exceed the separate three-year terms for his offense *and parole*, he was not entitled to release without parole.

Far from supporting the CDCR's position, *Jantz* supports the view that an inmate is statutorily entitled to have credit applied against a term of parole. Indeed, *Jantz* unequivocally implies that where credit exceeds the period of imprisonment and the term of parole, the inmate is entitled to release *without parole*.

Chambliss, supra, 119 Cal.App.3d 199 is inapposite. Chambliss pleaded guilty as part of a plea bargain but was not told about the possibility of parole upon his release. In a habeas petition, he sought release without parole after expiration of his prison sentence. In denying relief, the court noted that there was no mention of parole during plea hearing or evidence of a promise or understanding that he would be released without parole. From this silence, the court concluded that parole-free release was not a part of the plea bargain. (*Id*. at p. 202.) Moreover, given the importance the Legislature attaches to parole as reflected in section 3000, the court opined that Chambliss's alleged ignorance of the possibility of parole was not a reasonable basis to permit him to avoid parole upon his release. (*Id*. at p. 203.)

Chambliss does not support the CDCR's view that a court may not grant credit against a parole term because reducing a parole term is inconsistent with the broad language of section 3000. That broad statutory language concerning the purpose of parole and the general requirement of parole must be read in light of and harmonized with the specific credit mandate of section 2900. (See *Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 119 [specific provisions take precedence over conflicting general provision]; *City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302, 306 [in ascertaining legislative intent, court considers entire scheme of law so that whole may be harmonized to retain effectiveness].) The CDCR's position would, in effect, negate the provisions of section 2900, and for that reason we reject it.

Having concluded that Lira's supplemental habeas petition was not rendered moot by his release on parole and that the superior court had the authority to direct the Board to grant credit, we turn our attention to the amount of credit the court found Lira entitled to.

V. AMOUNT OF CREDIT

The court granted Lira credit for the period of incarceration between May 2006 and April 2010. This period had two segments. One segment ran from the Board's erroneous denial of parole in 2005 to its grant of parole in 2008; the other ran from the Governor's allegedly erroneous reversal until Lira's release in April 2010. We first discuss the legal basis for finding that a parolee is entitled to credit against a term of parole and then separately analyze each segment to determine whether Lira was entitled to credit for it.

A. Legal Basis for Granting Credit

The superior court granted credit under the authority of *Bush*, *supra*, 161 Cal.App.4th 133. Thus, we review that case.

After Bush had served 19 years under an indeterminate life term, the Board found him suitable for parole and set his base term at 150 months. After the suitability finding became final, the Governor sought en banc review. Bush challenged that request as untimely. The superior court agreed, and Bush was released under a five-year parole period. He filed a habeas petition seeking immediate discharge from parole because his 20 years (240 months) of actual custody exceeded the sum of his 150-month base term plus the 60-month parole term. The superior court granted credit for the period of continued incarceration after Bush was found suitable presumably because Bush was forced to remain in prison because of the Governor's untimely and thus legally unjustified request for en banc review. However, the superior court denied credit for the period of incarceration that exceeded the base term set by the Board. Bush then

challenged that denial of credit in the appellate court.[6] (*Bush, supra,* 161 Cal.App.4th at pp. 138-139.)

The appellate court agreed that Bush was not entitled to credit for the prison time that exceeded his base term. The court explained that the California Code of Regulations provided for excess *preprison* custody credit to be deducted from a parole period and for the immediate release of an inmate incarcerated for longer than his or her base term. The regulations did not provide for excess *prison* credit to be deducted from a parole period. (*Bush, supra,* 161 Cal.App.4th at pp. 142-143; Cal. Code Regs., tit. 15, § 2345, 2289.)

The court then turned to section 2900, which provides credit for "*all* time spent in an institution" against the inmate's "term of imprisonment." (§ 2900, italics added.) Bush argued that "term of imprisonment" was the base term set by the Board after it found him suitable for parole, and therefore, he was entitled to have the excess prison time credited against his parole term. (*Bush, supra,* 161 Cal.App.4th at p. 143.) The court was not persuaded. It noted that " 'term of imprisonment' " as defined in section 2900.5, subdivision (c) "is not limited to the base term ultimately set by the Board but includes '*any* period of imprisonment prior to release on parole . . . .' [Citation.] We construe section 2900.5, subdivision (c) to mean 'any period of imprisonment *lawfully served.*' Thus, the 'term of imprisonment' includes the time a life prisoner lawfully spends in prison custody awaiting a determination of suitability for parole, a construction of the statute that is consistent with the statutory scheme and promotes public policy." (*Ibid*., italics in *Bush*.) Accordingly, the court found that Bush had properly received credit for all time *lawfully* spent in prison before he was found suitable for parole and was not entitled to any more credit against his parole term than the superior court had already granted. (*Ibid*.)

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[6] The Attorney General did not challenge the grant of credit for time spent after the Governor's untimely request for review, and thus the propriety of that credit was not before the court of appeal. (*Bush, supra,* 161 Cal.App.4th at p. 143, fn. 4.)

The *Bush* court distinguished *McQuillion v. Duncan* (9th Cir. 2003) 342 F.3d 1012 (*McQuillion II*). (*Bush, supra*, 161 Cal.App.4th at pp. 144-145.) There, McQuillion was found suitable for parole and given a parole date. Just before that date arrived, the Board rescinded its suitability finding and the parole date, and McQuillion remained incarcerated for over nine years while he sought habeas relief first unsuccessfully in state court and then successfully in the federal court. The Ninth Circuit Court of Appeals found that the Board's rescission was not supported by some evidence and therefore violated McQuillion's right to due process. It directed McQuillion's immediate release. (*McQuillion v. Duncan* (9th Cir. 2002) 306 F.3d 895, 912 (*McQuillion I*).) In *McQuillion II*, the state claimed that if McQuillion was entitled to release, he should be released with a three-year parole period. In rejecting this claim, the Ninth Circuit observed that but for the erroneous rescission, McQuillion would have been released nine years earlier and any parole period would have long since expired. Accordingly, it was proper and appropriate to release him immediately *without* parole. (*McQuillion II*, *supra*, 342 F.3d. at p. 1015.)[7]

In distinguishing *McQuillion II*, the *Bush* court opined that "in effect, the *McQuillion* court determined that [McQuillion] was not *lawfully* in custody during the nine years following his original parole date because the rescission of that date was not supported by 'some evidence.' [Citation.] [McQuillion] was therefore entitled to a credit of this unlawful custody time against his three-year parole period. [Citation.] Bush, by contrast, was *lawfully* in custody pending a determination that he could be safely paroled, and he was not entitled to be released until the Board's suitability determination became

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[7] We note that California inmates may no longer seek federal habeas relief on the ground that a decision by the Board or Governor was not supported by some evidence and thus violated due process. The federal habeas inquiry concerning an alleged violation of due process is now limited to determination of whether the inmate was allowed an opportunity to be heard and was provided a statement of the reasons parole was denied. (*Swarthout v. Cooke* (Jan. 24, 2011) ___ U.S. ___, 131 S.Ct. 859, 178 L.Ed.2d 732, 2011 U.S. LEXIS 1067.)

final on November 16, 2004. Although he was held for several months beyond that date while the Governor's untimely request for en banc review was pending (from November 16, 2004 to March 19, 2005), the superior court has already granted him credit of this excess time against his parole period. Unlike [McQuillion], Bush is not entitled to additional credits based on unlawful prison custody." (*Bush, supra,* 161 Cal.App.4th at pp. 144-145, italics added.)

In sum, *Bush* (including its analysis of *McQuillion*) establishes that the "term of imprisonment" for an inmate serving an indeterminate life term includes only those periods of confinement that are "lawful" or justified because they were served before the inmate was found suitable for parole. However, a period of imprisonment that is not "lawful" or so justified is not part of the "term of imprisonment." Accordingly, an inmate who has already been released on parole would be entitled to credit for such a period.

With this understanding of *Bush* in mind, we turn to the two periods of incarceration for which the court found Lira entitled to credit.

B. Credit for Incarceration between 2006 and 2008

The superior court granted credit for the period of incarceration commencing on May 11, 2006. Although the Board erroneously denied parole in December 2005, the court apparently reasoned that the Board should have granted parole in December, and that decision would not have become final and effective until five months later on May 11, 2006. (See § 3041, subd. (b) [Board's grant of parole not final for 120 days]); (Cal. Const., art. V, § 8, subd. (b) [Board's decision not effective for 30 days to permit gubernatorial review].) Thus, the court granted credit for the period of imprisonment from May 11, 2006, to November 2008, when the Board, on remand, found Lira suitable and set his base term. In doing so, the court implicitly found that under *Bush*, *supra*, 161

Cal.App.4th 133, that period of continued imprisonment was unlawful and not part of Lira's "term of imprisonment." We disagree.

When a court reviews the Board's finding of unsuitability, it is only determining whether it is supported by some evidence. The court is not determining whether the inmate is suitable for parole. Indeed, as the Supreme Court in *Prather, supra,* 50 Cal.4th 238 explained, the determination of suitability is within the exclusive powers of the executive branch. Thus, a judicial determination that the Board erred in finding an inmate unsuitable does not, and cannot, constitute a finding that the inmate is suitable for parole or that the Board should have found him or her to be suitable. Nor is it an implicit direction to the Board to find the inmate suitable. If it were, then the judicial reversal of the Board's decision would entitle an inmate to immediate release on parole. However, in *Prather,* the court found that an order directing an inmate's immediate release violated the doctrine of separation of powers. (*Id*. at pp. 244, 248, 255-257.) Rather, as *Prather* instructs, when a court reverses the Board's unsuitability finding, it should remand the matter for a new determination of suitability that comports with due process. (*Id*. at p. 244.) In other words, a judicial reversal returns the inmate and Board to the status quo ante and puts the issue of suitability at large before the Board. Under such circumstances, incarceration after the Board has erroneously found an inmate to be unsuitable for parole and until the inmate is found suitable simply constitutes continued service of the underlying indeterminate sentence. Such incarceration is clearly "lawful" and thus part of the "term of imprisonment" under section 2900. Accordingly, an inmate who has already been released on parole is not entitled to credit for such a period of continued incarceration against a fixed parole term.

Given our analysis, we conclude that the superior court erred in finding Lira entitled to credit for the period of incarceration before the Board finally found him suitable for parole in November 2008, Until that time, his incarceration was "lawful."

C. Credit for Incarceration between 2008 and 2010

We reach a different conclusion concerning the period of continued incarceration after the Governor vetoed the Board's 2008 finding of suitability.

The Governor is authorized to independently review parole decisions by the Board based on the same factors and materials which the Board considered and may affirm, modify, or reverse the Board's decision. (Cal. Const., art. V, § 8, subd. (b); *In re Lawrence* (2008) 44 Cal.4th 1181, 1204 (*Lawrence*); *Rosenkrantz, supra*, 29 Cal.4th at p. 676; see § 3041.2, subd. (a).)[8]

The Governor's decision to veto the a decision to grant parole is subject to judicial review to determine whether it is supported by some evidence. (*Rosenkrantz, supra,* 29 Cal.4th at pp. 658, 664.) Where a court finds that it is not so supported, the appropriate remedy is to vacate the Governor's veto and reinstate that Board's decision. (*In re McDonald* (2010) 189 Cal.App.4th 1008, 1023; *In re Masoner* (2009) 179 Cal.App.4th 1531, 1534, 1539; see *Lawrence, supra*, 44 Cal.4th at p. 1229 [upholding order reinstating Board's decision]; e.g., *In re Loresch* (2010) 183 Cal.App.4th 150, 162–163; *In re Moses* (2010) 182 Cal.App.4th 1279, 1313; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 257; *In re Vasquez* (2009) 170 Cal.App.4th 370, 387; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491-1492.)

The question here is how to characterize the continued incarceration of an inmate after the Governor has erroneously vetoed the Board's grant of parole: Should it be

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[8] "No decision of the parole authority of this state with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. . . ." (Cal. Const., art. V, § 8, subd. (b).)

considered part of the inmate's "term of imprisonment"; or should it be considered "unlawful" for the purpose of determining credit under section 2900.

As the *Bush* court explained, an inmate's " 'term of imprisonment' " for purposes of credit includes any period of imprisonment " '*lawfully* served,' " that is, "the time a life prisoner lawfully spends in prison custody awaiting a determination of suitability for parole . . . ." (*Bush, supra*, 133 Cal.App.4th at p. 143.) Thus, until an inmate is found suitable for parole, the inmate is subject to his or her underlying sentence, and the inmate's continued incarceration is "lawful" and part of the "term of imprisonment." As we explained above, this analysis applies even to a period of incarceration extended by the Board's erroneous finding of unsuitability.

This analysis would also apply where the Governor has *properly* exercised the right to veto the Board's finding of suitability. In that situation, the inmate is, in effect, retrospectively rendered unsuitable for parole—i.e., the inmate stands as if the Board had not found him or her to be suitable. Accordingly, the inmate's continued incarceration constitutes a period of imprisonment lawfully spent in custody awaiting a valid determination of suitability (*Bush, supra*, 133 Cal.App.4th at p. 143) and thus becomes part of the inmate's "term of imprisonment" under section 2900.

However, if a gubernatorial veto is not supported by some evidence, it is unlawful: it violates the inmate's right to procedural due process concerning a constitutionally protected expectation of parole. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1094 [recognizing protected expectation]; *Rosenkrantz, supra,* 29 Cal.4th at pp. 676-677 ["Due process of law requires that [a parole decision] be supported by some evidence in the record."]; see *In re Johnson* (2009) 176 Cal.App.4th 290 [erroneous denial of conduct credit implicates right to due process because it affects vested liberty interest].) Thus, when a court vacates an unlawful veto and reinstates the Board's suitability finding, the interim period of incarceration—between the Board's finding of suitability and its

reinstatement by the court—cannot be characterized as time "lawfully" spent awaiting a determination of suitability. (*Bush, supra*, 133 Cal.App.4th at p. 143.)

We acknowledge that during such an interim period, an inmate's incarceration is technically lawful because a gubernatorial veto of a grant of parole is presumptively valid, and under it, the inmate lawfully remains in custody. However, we do not read the *Bush* court's use of the word "lawfully" and its interpretation of "term of imprisonment" as any period of imprisonment " '*lawfully* served' " (*Bush, supra*, 133 Cal.App.4th at p. 143) to mean a period of interim incarceration whose justification, although initially lawful, is later found to be unlawful and a violation of due process. Such incarceration is distinguishable from the period of incarceration analyzed in *Bush* that exceeded the base term set by the Board after a finding of suitability. It is also distinguishable from the period of incarceration that follows an erroneous finding of unsuitability by the Board. Both such periods are at all times lawful and justified by the fact that the inmate has not yet been found suitable for parole. Until that time, the inmate is lawfully serving his or her indeterminate sentence.

Such a justification is lacking, however, when the Board has properly found an inmate to be suitable, but the inmate is forced to remain incarcerated because the Governor erroneously vetoed the Board's finding. The invalidity of the veto and reinstatement of the Board's finding establishes that the inmate should not have had to remain incarcerated beyond the Board's suitability finding in the first place. Such an extension of imprisonment is akin to erroneous extension analyzed in *McQuillion I and II* due to the unlawful rescission of McQuillion's parole date.

In our view, a later determination that a veto was unlawful and violated due process retrospectively negates the legal justification for having held an inmate after he or she has been found suitable for parole. For this reason, we believe the later determination of unlawfulness and not the interim technical legality of incarceration

pending that determination should control the characterization of a period of incarceration extended by the unlawful veto. Stated more simply, the unlawfulness of a veto renders "unlawful" the extension of incarceration it caused. As such, that period of incarceration does not become part of the inmate's "term of imprisonment," and, under section 2900, an inmate is entitled to credit for that period against that "term of imprisonment." If the inmate has already been released on parole, then under the definition of "term of imprisonment" (§ 2900.5, subd. (c)), the inmate is entitled to credit against his or her parole term.

Thus here, whether Liraias entitled to credit for the period after the Governor vetoed the Board's suitability finding depends on whether that veto is supported by some evidence and therefore lawful.

D. Propriety of the Governor's Veto

The CDCR contends there is some evidence to support the veto.

Because the Governor's review must be based on the same factors and materials which the Board considered (Cal. Const., art. V, § 8, subd. (b); § 3041.2, subd. (a)), we summarize the record that was before the Board when it found Lira suitable and the Board's findings before reviewing to the Governor's veto. However, we first outline the principles governing parole decisions by the Board and Governor and the standard of judicial review.

1. Legal Framework for Parole Decisions and Standard of Judicial Review

Section 3041 and title 15 of the California Code of Regulations govern the Board's parole decisions.[9] Under the statute, the Board is required to set a parole release date one year before an inmate's minimum eligible parole release date unless it "determines that the gravity of the current convicted offense or offenses, or the timing

[9] All further unspecified references to the Regulations (or Regs.) are to title 15 of the California Code of Regulations.

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, and that a parole date, therefore, cannot be fixed at this meeting." (§ 3041, subd. (b), italics added.) Thus, "the fundamental consideration in parole decisions is public safety," and "the core determination of 'public safety' . . . involves an assessment of an inmate's *current* dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1205.)

A decision by the Board concerning whether to grant parole is inherently subjective (*Rosenkrantz, supra*, 29 Cal.4th at p. 655), but the Board is guided by a number of factors identified in section 3041 and the Board's regulations. (Regs., §§ 2281, 2402.) The Governor independently determines suitability for parole based on the record that was before the Board and guided by the same factors. (Cal Const., art. V, § 8, subd. (b); *Rosenkrantz, supra*, 29 Cal.4th at pp. 660-661.)

In determining suitability, both the Board and the Governor must consider "[a]ll relevant, reliable information" concerning suitability for parole, such as the nature of the commitment offense including behavior before, during, and after the crime; the inmate's social history; mental state; criminal record; attitude towards the crime; and parole plans. (Regs., § 2402, subd. (b).) The Regulations enumerate factors that show suitability and unsuitability. (Regs., 2402, subds. (c) & (d).)

Unsuitability factors include that the inmate (1) committed the offense in a particularly heinous, atrocious, or cruel manner[10]; (2) has a previous record of violence;

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[10] Factors that support a finding the that crime was committed "in an especially heinous, atrocious or cruel manner" (Regs., § 2402, subd. (c)(1)), include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an 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 that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.

(3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (Regs., § 2402, subd. (c).) Suitability factors include that the inmate (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (Regs., § 2402, subd. (d).)

These factors are general guidelines and illustrative rather than exclusive. " '[T]he importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [Board or Governor].' " (*Rosenkrantz, supra*, 29 Cal.4th at p. 654; Regs., § 2402, subds. (c), (d).) However, in exercising their discretion, the Board and the Governor *must* give an individualized consideration of the specified criteria as applied to a particular inmate. (*Rosenkrantz, supra*, at pp. 676-677.) Moreover, "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence, supra,* 44 Cal.4th at p. 1212.) Thus, " '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*, 44 Cal.4th at p. 1210.) Accordingly, where parole is denied, not only must there be some

evidence to support factual findings, but also there must be a rational connection between the findings and the ultimate conclusion that the inmate is currently dangerous.

Courts are authorized to review the factual basis for a decision by the Board or the Governor in order to ensure that it comported with procedural due process. However, judicial review is deferential and limited to the question of whether there is "some evidence" in the record before the Board or Governor that supports the decision to deny parole and the necessary finding of current dangerousness. (*Rosenkrantz, supra,* 29 Cal.4th at pp. 658, 664.)

In applying the "some evidence" standard, courts may not independently resolve conflicts in the evidence, determine the weight to be given the evidence, or decide the manner in which the specified factors relevant to parole suitability are to be considered and balanced; those are matters exclusively within the discretion of the Board and Governor. (*In re Scott* (2004) 119 Cal.App.4th 871, 899 (*Scott*).) Indeed, "[i]t is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Rosenkrantz, supra,* 29 Cal.4th at p. 677.) Nevertheless, the evidence underlying a decision must exhibit some indicia of reliability. (*In re Moses, supra,* 182 Cal.App.4th at p. 1300; *Scott I, supra,* 119 Cal.App.4th at p. 899) and " 'suitability determinations must have some rational basis in fact.' " (*In re Elkins* (2006) 144 Cal.App.4th 475, 489.)

2. Relevant Background and the Board's 2008 Determination of Suitability

a. The Commitment Offense[11]

The underlying offense occurred in September 1980. At that time, Lira was 23 and had long been abusing alcohol and drugs. He and his wife Allison were separated and had been embroiled in significant marital problems and custody issues over their two daughters, Juanita and Joanna. As a result, Lira had become increasingly violent and

[11] We reiterate the summary of the offense in our previous opinion.

threatening toward Allison and her family. Moreover, during this time, Lira learned that he was not Juanita's biological father.

On the day of the murder, Lira dropped the girls off at Allison's mother's house, and he and Allison started to talk out front. He had by then consumed approximately nine cans of beer and used cocaine. His discussion with Allison turned into a heated argument, during which Allison told Lira she had resumed sexual relations with Juanita's biological father. Lira became enraged. Unable to control his anger, he got a gun from his car and shot Allison multiple times. He fled but turned himself in a few days later. He fully confessed and expressed remorse. However, in court after his conviction, Lira saw Allison's brother, laughed loudly, and said, "I didn't lose, I got the last laugh, she's dead and I'm alive."

b. Personal History and Prior Criminal Record

Lira was born in 1957, the sixth of nine children and the youngest of three boys. His parents spoiled him. He started using drugs at age 13, marijuana, then alcohol, LSD, and barbiturates. After dropping out of high school in 1974, he joined the Marine Corps for three years but continued to abuse drugs. He was honorably discharged and then started using cocaine.

Lira married Allison, and they had two daughters. However, he continued using drugs during the marriage.

Lira's criminal record reveals an arrest in 1977 for failure to pay a fine and misdemeanor drunk driving, but the arrest did not result in a conviction for any offense. He also has a prior conviction for vandalism.

c. Prison Disciplinary Record

After arriving in prison in 1981, Lira joined the Northern Structure prison gang, which was affiliated with the Nuestra Familia gang, and over time, he rose to a position

of leadership. However, in 1989, he decided to quit the gang. He passed polygraph examinations concerning his decision and was formally classified as a gang dropout.

During his incarceration, Lira received numerous disciplinary and counseling citations for unlawful and violent conduct, which included stabbing someone; throwing liquid on staff, possessing illegal drugs, alcohol, and a weapon; and destroying state property. His last citation was in 1990.

d. Prison Programming

Lira, dropped out of high school in the 11th grade but received his GED in prison, and as of 2008 he was taking college level bible study classes. Before his commitment offense, he worked as a heavy equipment operator. In prison, he completed vocational training in mechanics, business education, paralegal work, and laundry. He also worked in the prison yard and in the C-quad Office as a clerk.

Around 1990, Lira embraced substance abuse treatment and philosophy. He maintained continuous participation in AA and NA groups through 2008, achieving a leadership position in the Square One narcotics anonymous program. Afer 1997, he completed numerous self-help programs, including courses in personal growth, anger management, victim awareness, stress management, non-violent communications, understanding the needs of others, and domestic violence. He was also religiously active and regularly participated in bible study groups.

e. 2008 Psychological Evaluation

Richard Starrett, Ph.D., conducted a psychological evaluation and prepared a report for Lira's 2008 parole hearing that focused on Lira's potential for violence in the community; the significance of Lira's substance abuse in committing the underlying offense and an assessment of his ability to refrain from it upon release; and Lira's insight into offense and its causes.

i. Potential for Violence

Doctor Starrett administered two empirical tests for risk of future violence—the Psychopathy Check List Revised (PCL-R) and the History-Clinical-Risk Management-20 (HCR-20)—and one empirical test for risk of recidivism—the Level of Service/Case Management Inventory (LS/CMI). On the PCL-R test, Lira scored in the low range for risk of future violence. On the HCR-20 test, Lira scored in the "low to low moderate range." That test looked at three categories of risk factors, and Lira's slightly higher overall score on this test was attributable to one of the risk categories—"Historical"—which focuses on the person's past, including unstable relationships, substance abuse, anti-social character traits, prior acts of violence, early maladjustment, age when violent actions began, lack of career, and performance on probation. Doctor Starrett noted that Lira's history reflected many of these problems. However, he also noted that the other two risk categories—"Clinical/Insight" and "Risk Management" did not warrant elevation of defendant's risk assessment. Doctor Starrett observed that although Lira's placement score or custody level of 84 was "rather high," it was again due to the programming problems during Lira's initial period of incarceration.

Doctor Sharrett noted that Lira was not diagnosed as psychopathic, he did not have any personality disorder or mental illness, and he did not have a significant record of juvenile delinquency. He found that Lira had an appropriate level of insight into his past behavior, he accepted responsibility for his crime, he had expressed sincere remorse, he had responded well to all treatment, he did not have negative attitudes or mental health problems, and he was no longer an impulsive person. Concerning the Risk Management category, Doctor Starrett noted that Lira had feasible and appropriate parole plans, he had handled destabilizing and stressful situations in prison well. He opined that Lira's risk of parole violation was "low to low moderate."

Overall, Doctor Starrett found that Lira was in the low range of psychopathy, low to low moderate range of risk for violence, and low range for recidivism. He opined that the only factors that elevated Lira's risk assessment were historical—i.e., his past antisocial record and substance abuse. On the other hand, all subsequent relevant factors decreased the risk of future violence, especially Lira's discipline-free record for 18 years, his education and vocational improvements, his continuous commitment to substance abuse treatment, self-help programming, and religion.

ii. Significance of Past Substance Abuse and Potential for Relapse

Doctor Starrett noted that although Lira had a lengthy history of substance abuse, and substance related behavioral problems, including the commitment offense, he had long acknowledged his problem and the role it had played in his offense, and for the last 17 years he had embraced substance abuse philosophy and ongoing treatment. He recommended that continued participation be part of Lira's parole plan.

iii. Insight into Crime and Causes

According to Doctor Starrett, Lira understood his offense and its causes, and therefore further exploration was not necessary or likely to produce significant additional behavioral changes. In particular, Lira acknowledged that his drug and alcohol addiction had affected his judgment and behavior and had played a role in his offense. Lira did not, however, believe that his drug problem excused his offense, and he had spent much time assessing that offense and his other past behavioral problems and conduct, working to remediate them and coming to accept full responsibility for his past.

f. 2008 Parole Hearing and the Board's Decision

The hearing in 2008 was Lira's twelfth. He was 51 years old. At the hearing, Lira said that he had caused all of the problems in the relationship with Allison. He said that he had been governed by his desires, his substance abuse, his need for control, and his hostile reaction to knowledge that he was not Juanita's biological father. He opined that

although these things helped explain what he did, they did not excuse his behavior. For that, he took full responsibility and acknowledged that he chose to act the way he did.

Lira said that all of his disciplinary citations in prison were gang-related, and he explained why he had become so involved with a gang there. Again, however, he accepted personal responsibility for his misbehavior as a gang member. He said that he had chosen to leave the gang and fully accepted the risk of retaliation for doing so.

Lira said that before he decided to leave the gang, he did not have a strategy for dealing with his anger. He explained that since leaving, he could still get angry, but through his extensive self-help programming in the areas of violence, anger management, domestic violence, and personal awareness, he had learned to cope with angry feelings. He credited his programming with helping him address and understand the causes of his offense and become a better listener.

Lira considered his major strength to be his commitment to sobriety and substance abuse treatment. His biggest challenge was continuing his relapse prevention program. Lira said that if released he would stay with his parents or sister, both of whom had offered him a place to live. He had offers of financial support from family members, an employment offer, and a nephew who would be his sponsor and provide transportation to AA and NA meetings, to which Lira felt a lifelong commitment.

The Board concluded that Lira did not pose an unreasonable risk of danger if released and therefore found him suitable for parole. The Board found that during a tumultuous relationship with Allison, Lira had committed a horrible, senseless, and dispassionate crime. However, it further found that at the time, Lira was under considerable stress aggravated by his substance abuse. It found that Lira had accepted full responsibility for his crime. He had explored its causes, expressed a clear understanding of and insight into those causes, and demonstrated that insight as well as growth and maturity through his consistent and continuous self-improvement

programming, substance abuse treatment, vocational training, and receipt of excellent and laudatory job performance and conduct reviews. The Board also found that Lira was genuinely remorseful.

In reaching its conclusion, the Board further noted that Lira was committed to substance abuse treatment, had solid relationships with his family, and enjoyed significant family support and assistance. The Board also agreed with Doctor Starrett's psychological evaluation and risk determination and recognized that Lira's risk score was elevated solely because of his pre-1990 behavior. The Board found that Lira's age further diminished the risk of recidivism.

3. Governor's Reversal

The Governor acknowledged Lira's "creditable gains in prison." However, in reversing the Board, the Governor cited the gravity of his offense. The Governor found that it was "especially heinous because [Lira] threatened the victim and her family multiple times before he murdered her." The Governor considered the motive for the murder—anger that Allison was seeing Juanita's biological father—to be trivial in relation to the magnitude of the offense. Finally, the Governor found that Lira had demonstrated a callous disregard for Allison's life and suffering in that he shot her several times, fled; and then later. after being convicted, told Allison's brother that he had gotten the "last laugh."

In addition to the gravity of the offense, the Governor concluded that Lira posed "an elevated risk of violent recidivism," citing Doctor Starrett's opinion that Lira posed a "low to low-moderate" risk of future violence and view that Lira's placement score of 84 was "rather high." The Governor found that Lira lacked insight into his history of substance abuse and the role it had played in the crime because at his 2005 parole hearing, Lira had said, in essence, that he participated in substance abuse treatment because the Board had forced him to do so. Finally, the Governor cited information from

a confidential file "indicating that Lira recently harassed other family members of the victim" and thus "posed a risk to the safety of the family members if released on parole at this time."

4. Review of Governor's Reversal

The aggravated nature of a commitment offense is among the factors that can show unsuitability for parole when the circumstances reveal that it was committed "in an especially heinous, atrocious or cruel manner." (Regs., § 2402, subd. (c)(1).) Here, the Governor found Lira's crime to be especially heinous.

"Heinous" means "shockingly evil," "grossly bad," and "enormously and flagrantly criminal." (Webster's Third New International Dictionary (1993) p. 1050; *In re Ross* (2011) 170 Cal.App.4th 1490, 1507.) Lira's offense—second degree murder—is defined as the unlawful killing of a human being with malice aforethought. (§§ 187, subd (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) Malice itself involves " 'an element of viciousness—an extreme indifference to the value of human life' " (*People v. Summers* (1983) 147 Cal.App.3d 180, 184) as well as an element of callousness—a lack of emotion or sympathy; emotional insensitivity; indifference to the feelings and suffering of others. (*In re Smith* (2003) 114 Cal.App.4th 343, 366 (*Smith*).) Indeed, except perhaps an execution style shooting of an unsuspecting victim, which is itself an aggravating factor (Regs., § 2402, subd. (c)(1)(B)), there are few murders that would not cause the victim to suffer some physical and emotional pain and terror inflicted with indifference and disregard. Thus, when measured against general notions of common decency and social norms, all second degree murders reasonably can be characterized as heinous, atrocious, vicious, callous, and cruel. (*In re Weider* (2006) 145 Cal.App.4th 570, 587 (*Weider*); *In re Lee* (2006) 143 Cal.App.4th 1400, 1410; *Smith, supra,* 114 Cal.App.4th at p. 366; see *Lawrence, supra*, 44 Cal.4th at p. 1218.) However, since parole is the rule, a conviction for second degree murder does not by itself

automatically render one unsuitable for parole. (*Smith, supra,* 114 Cal.App.4th at p. 366; see *Rosenkrantz, supra,* 29 Cal.4th at p. 683.) Rather, it may do so only if the circumstances show that it was committed in a particularly or especially or exceptionally atrocious or cruel manner. (Regs., § 2402, subd. (c)(1); *Weider, supra,* 145 Cal.App.4th at p. 588.)

The record reveals that Lira and Allison had serious and difficult marital problems, they separated, and they fought about the custody of Juanita and Joanna. Lira learned that he was not Juanita's biological father. On the day of the murder, Lira, who was under the influence of cocaine and alcohol, had a heated and emotional argument with Allison. He became enraged when Allison said she was seeing Juanita's father. Lira lost control, retrieved his gun, shot her several times, and fled. These circumstances do not constitute some evidence that Lira murdered Allison in an *especially* violent, callous, shockingly evil, grossly bad, or flagrantly criminal manner. There is no evidence that he tormented or terrorized or gratuitously beat, maimed, or inflicted unnecessary pain on Allison before shooting her. Moreover, his actions were neither calculated nor premeditated. (Cf. *Smith, supra,* 114 Cal.App.4th 343, 367.) Furthermore, as the Board found, Lira committed the crime as the result of significant stress in his life. That circumstance is a mitigating factor indicating suitability for parole. (Regs., § 2402, subd. (d).)

According to the Governor, however, the offense was especially heinous because in the days or weeks before it, Lira had been violent and threatening toward Allison and her family. We fail to see, and the Governor did not explain, how evidence of Lira's escalating anger and violence prior to the murder made the manner of its commission especially heinous or aggravated.

The Governor also found Lira's motive for killing Allison to be trivial. (See Regs., § 2402, subd. (c)(1)(E).) A motive is trivial and can render an offense especially

aggravated only when the motive is "materially less significant (or more 'trivial') than those which conventionally drive people to commit the offense in question, and therefore more indicative of a risk of danger to society if the [inmate] is released than is ordinarily presented." (*Scott, supra*, 119 Cal.App.4th at p. 893, fn. omitted.) Lira did not kill Allison after an isolated argument about a trivial subject. Lira acted out of rage and anger that had built up over time because of his separation from Allison, their ongoing custody issues, and her statement to the effect that she had replaced him with Juanita's real father. Sadly, common experience reveals that anger over serious marital and domestic issues far too often drives people to murder.

Last, the Governor found the crime especially heinous because Lira taunted Allison's brother in the courtroom after being convicted by saying that he had gotten the "last laugh." Lira's comment was certainly callous and revealed that even months after the crime, he was still so angry at Allison that he would lash out at her brother. However, his comment at trial does not reveal anything about the commission of the offense, let alone render it especially heinous.

In sum, we find no evidence to support a finding that Lira committed the offense in an especially aggravated manner, and therefore, the Governor's reliance on the gravity of the offense to find Lira currently dangerous and unsuitable for parole was unwarranted and misplaced.

Next, we turn to the Governor's finding that Lira posed an "elevated risk of recidivism," which was based on Doctor Starrett's overall assessment that Lira posed a "low to low-moderate" risk of violent conduct and his comment that Lira's placement score of 84 was "rather high."

Lira's risk assessment of "low to low-moderate" is quantitative shorthand for the risk factors upon which it is based, and thus the Governor's reliance on the assessment

implies a finding that the particular risk factors which elevated Lira's assessment above a simple low to "low to low-moderate" showed that Lira was currently dangerous.

In his evaluation, Doctor Starrett explained that Lira's assessment was elevated *only* by historical factors: his age at the time of the offense, his tumultuous relationship with Allison, his substance abuse, his past antisocial personality traits and early maladjustment, his prior violent conduct, his lack of a career, and his performance on parole. Because historical background is a necessary part of a risk assessment, especially the HCR-20 test, a background such as Lira's will invariably elevate an assessment above a simple low. Thus, such an elevated assessment could be used to deny parole year after year. Such a basis for denial would be similar to using the aggravated nature of a commitment offense to deny parole year after year. It is settled, however, that even an especially heinous offense does not automatically support the denial of parole.

Because the circumstances of an offense are immutable, a particularly heinous offense supports the denial of parole only if it has some rational tendency to show that the inmate is *currently* dangerousness. (*Lawrence*, *supra*, 44 Cal.4th at p. 1212.) In *Lawrence, supra,* 44 Cal.4th 1181, the court explained that after an inmate has served the suggested base term and there is strong evidence of rehabilitation and no other evidence of violence, the aggravated nature of an offense no longer supports a finding of current dangerousness unless there is some other, more recent evidence indicating that the commitment offense is still probative. (*Id*. at pp. 1211, 1214, 1218-1219.) For example, where an 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." (*Id*. at p. 1228.) "[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. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude." (*Id.* at p. 1221.)

We consider it appropriate to apply the same analysis to the denial of parole based on a risk assessment that is elevated above low only because of immutable historical facts. Although such facts may be relevant and necessary input for a risk assessment test, a test score elevated above low only by historical facts is probative of current dangerousness only to the extent that those historical facts themselves remain probative of current dangerousness.

Here, the historical facts cited by Doctor Starrett date back to 1980, when Lira was 23. When viewed in light of their age and Lira's current age, his lengthy and undisputed record of rehabilitative programming, and his lack violent behavior or even disciplinary action since 1990, those historical circumstances lack any tendency by themselves to show that over 28 years later, Lira posed a unreasonable risk of danger to others. Moreover, the remaining reasons cited by the Governor to deny parole, which we discuss below, do not suggest that these historical facts remained probative of current dangerousness.

The Governor's reliance on Doctor Starrett's comment that Lira's placement score was "rather high" is also misplaced. First, as Doctor Starrett explained, that score, like the risk assessment, was based on Lira's *past* programming problems, presumably his gang membership and disciplinary problems before 1990. Doctor Starrett further noted that since 1990, Lira had developed appropriate insight, accepted responsibility for his offense, had responded well to treatment, had no bad attitudes, and was no longer impulsive. He also found that Lira had adequately explored his background and other

historical factors related to his offense. Finally, we note that at the 2008 hearing, counsel for Lira advised the Board that Lira had reduced his score to 76. Under the circumstances, Lira's former score of 84 and Doctor Starrett's comment about it have no tendency to show that Lira was currently dangerous, and the Governor does not explain the rationale for finding otherwise.[12]

We turn now to the Governor's reliance on Lira's statements to the Board in 2005 as evidence that he lacked insight into his history of substance abuse and the role it had played in the crime.

At the hearing in 2005, Lira noted that he was in AA and NA. He was working the 12 steps and found the most important step to be number 10, which involved taking a moral inventory of himself. He explained that as long as he continued to evaluate his past and his present, he can stayed focused on substance abuse issues. Later, the Board asked Lira why he had declined a psychological evaluation. He said that his attorney had advised him to decline. He explained that because historical factors are used to determine risk, he has always received a moderate score regardless of his rehabilitative efforts in prison. Nevertheless, the Board asked for a new evaluation. Lira agreed but wanted to make sure that the evaluator had all appropriate information and that later he could discuss his current level of insight with the Board and have it determine his level of insight. He then said, "I mean, I didn't attend all these groups just to go. I mean initially I started going to these groups because you people told me to, and I did it for the Parole Board. But eventually it got stuck in my head to where it got shoved down my throat, to where they started sinking in. And I know the reason for going behind these groups. It

[12] In discussing Lira's background, the Governor mentioned his disciplinary record in prison. As noted, that record involved conduct up to 1990, when Lira quit his gang. Thereafter, as the Governor acknowledged, Lira has remained discipline free for over 18 years. Under the circumstances, Lira's record of early discipline, like other historical facts, lacked probative value concerning whether he was currently dangerous in 2008 and does not constitute some evidence that he was.

sunk [in], and it—and this is the person I've become now because of these groups. You shove it down my throat so much that it worked."

The Governor's reliance on Lira's 2005 comments suggests a finding that Lira did not willingly participated in drug treatment, and because he was forced to do so, he did not have a genuine commitment to treatment or insight into the nature of his substance abuse and its relationship to his crime. In our view, such a reading of Lira's comment is unreasonable, if not disingenuous, given the Governor's laudatory comments elsewhere that Lira had availed himself of AA and NA.

The meaning of Lira's comments is unambiguous. He candidly admitted that at first he attended self-help programs because the Board advised him to do so. Such advice is a standard recommendation when the Board denies parole to a person who has had substance abuse issues. Lira further stated that as he continued to participate in these groups, their message got "shoved down my throat" to the point where it "stuck in my head," "sunk in," and "*worked*." (Italics added.) Finally, Lira credited what he had learned in these groups with helping him improve himself.

The record also contains undisputed evidence of Lira's long commitment to substance abuse treatment and his rehabilitative progress, which included becoming a trusted and respected leader in a narcotics anonymous program. Doctor Starrett acknowledged Lira's embrace and commitment to substance abuse treatment and philosophy. In his statements to the Board, Lira acknowledged his history of substance abuse and the role it had played in his behavior and the crime. He expressed his commitment to continued drug treatment. And he explained his plans to do so upon release, noting that he already had a sponsor. Finally, the record contains no evidence suggesting that Lira might relapse if released. (Cf. *Smith, supra,* 114 Cal.App.4th at p. 371.)

When viewed in light of the entire record, Lira's 2005 comments do not reasonably suggest—and are not some evidence—that in 2008, with three additional years of substance abuse treatment, he so lacked insight into his history of substance abuse that he would pose an unreasonable danger to others if released.

Finally, the Governor found defendant to be currently dangerous because he had recently harassed members of Allison's family. We presume this finding was based on information in a letter written by Allison's niece, who submitted it in opposition to parole, which she had consistently opposed for the last 14 years.[13] She asserted that in March 2008, Lira "had an opportunity to make amends with his only daughter, Joanna. She reached out to him, looking for a father. Instead, he saw her as an opportunity to help him get out of prison. They are now estranged, and she wants nothing to do with him. She wanted understanding in this awful situation and in return, she found a man that is selfish, cold and uncaring and still blaming her mother. He and his family were upset with her for not showing up at the last parole hearing. They harassed her for not going. They hassled her even more about her not wanting to talk to his mother and the worst part, they started to talk negatively about her mother, the victim."

The letter does not explain what conduct constituted the alleged harassment and is ambiguous concerning whether Lira participated in or even knew about it.[14] More fundamentally, however, the information about alleged harassment is unverified, multiple hearsay from declarants, some of whom are unidentified, whose allegations could not be investigated, whose credibility could not be evaluated or determined, and whose bias was obvious. We further note that Lira was not asked about the alleged harassment. Under

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[13] The writer did not attend the hearing, but her letter was read into the record.

[14] As Lira persuasively argues in his brief, if he did harass her while in prison, there would have been monitored phone records or letters as evidence to prove the harassment. However, the record contains no such corroboration.

these circumstances and viewed in light of the entire record, the brief hearsay reference to some unspecified form of harassment which Lira may or may not have known about does not constitute some reliable and credible evidence that Lira was currently dangerous and thus unsuitable for parole.[15]

In sum, the selective bits of evidence and findings by the Governor concerning the nature of Lira's offense, alleged lack of insight, and risk assessment do not individually or collectively constitute "some evidence" that rationally supports his conclusion that in 2008, defendant posed an unreasonable risk of danger to others if released. Accordingly, we conclude that the Governor's veto of the Board's decision to grant parole was erroneous.

Given our discussion concerning an inmate's right to credit for the period of incarceration after an erroneous gubernatorial veto, we further conclude that Lira is entitled to credit for the time he remained in prison after the Governor's vetoed the Board's 2008 decision. The question is how much credit Lira is entitled to.

5. Actual Credit

The superior court granted credit for a period of incarceration caused by the Board's erroneous denial of parole in December 2005. As noted the court measured that period from May 11, 2006, which was 150 days after the Board actually found Lira unsuitable. The court used on the theory that (1) the Board should have found Lira suitable in December 2005, but that decision would not have become final for 120 days, during which the Board could have rescinded that decision (§ 3041, subd. (b)); and (2) the Board's decision would not have become effective for 30 days pending review by the Governor (Cal. Const., art. V, § 8, subd. (b)). Thus, the superior court implicitly concluded that Lira's incarceration during that 150-day period would have been "lawful"

[15] Given our discussion, we need not address Lira's claims concerning the propriety of the Governor's apparent reliance on facts in a letter written in opposition to parole that was placed in his confidential file.

and thus part of his "term of imprisonment." Accordingly, he was entitled to credit for incarceration after May 11, 2006. In his petition, Lira implicitly adopted this analysis and did not seek credit for that five-month period between December and May.

We agree with that analysis and find it applicable to determine the amount of credit Lira is entitled to due to the Governor's erroneous veto. Accordingly, credit should be calculated starting from the date that the Board's 2008 suitability finding would have become final and effective but for the Governor's erroneous veto. That date would have been 150 days after the Board's finding on November 13, 2008: April 12, 2009. Thus since Lira was released on April 8, 2010, he is entitled to credit for the period from April 12, 2009, to April 7, 2010.

VI. DISPOSITION

We modify the order granting Lira's supplemental petition for a writ of habeas corpus. It shall now direct the Board to afford Lira credit against his parole term for the period of his incarceration between April 12, 2009, and April 7, 2010. As modified, the order is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.

Trial Court:	Santa Clara County Superior Court No.: 76836
Trial Judge:	The Honorable Rise Jones Pichon
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