

CERTIFIED FOR PUBLICATION

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JOHN L. BATIE

on

Habeas Corpus.

D059794

(Super. Ct. No. 16068)

Petition for writ of habeas corpus. Petition dismissed.

Michael Satris, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Phillip Lindsay, Kim Aarons, and Greg Marcot, Deputy Attorneys General, for Respondent.

From 1982 until October 7, 2011, John Batie was incarcerated for his commitment offense, the 1981 second degree murder of James Simmons. Batie was granted parole in 2011 by the Board of Parole Hearings (Board), and Governor Edmund G. Brown, Jr. took no contrary action, allowing the Board's 2011 grant of parole to become effective, while

this habeas proceeding was pending. (Pen. Code, § 3040 et seq.; all further statutory references are to the Penal Code unless noted.) In his petition and supplemental petition, Batie continues to challenge a portion of his previous confinement in prison as unlawful, based upon an allegedly wrongful 2010 reversal by the previous Governor (Arnold Schwarzenegger) of an earlier grant of parole by the Board.

In response to Batie's petition, we issued an order to show cause, the People filed a return, and Batie filed a traverse. The facts are undisputed about the renewed grant of parole and the current Governor's lack of action to reverse it, as shown in the exhibits attached to Batie's supplemental petition and in the People's return. We required and considered supplemental briefing about the mootness, or lack thereof, of any or all of the issues presented.

Batie contends that the matter is not entirely moot, because issues of law remain about whether he is entitled to credit against his parole period for the 366 days that elapsed between the allegedly wrongful Governor's reversal in 2010, and his eventual release date. He continues to argue his request for such credit is premised on our examination of the record, to make his requested determination there was not "some evidence" to support the 2010 Governor's finding that Batie posed an unreasonable risk of current dangerousness if released into the community. (*In re Shaputis* (2011) 53 Cal.4th 192, 220-221 (*Shaputis II*)). If the Governor's reversal is deemed unjustified, Batie claims he has already experienced a denial of due process, in the form of unlawful parole custody. Both as a procedural matter and on the merits, the People disagree that any "wrongful confinement" occurred or that any credit issues remain for resolution.

On this record, we decline to engage in an academic exercise of whether "some evidence" supported the 2010 Governor's finding, and instead conclude that Batie's 2011 release has mooted all issues in the petition that concern release on parole. However, for purposes of analysis of the arguments regarding any available, appropriate credits toward the parole period, we will assume, without deciding, that the 2010 Governor's finding was unsupported by the evidence, and then determine as a matter of law whether any judicial remedy can be created to control the Board's administrative and discretionary processes in setting the term and conditions of parole.

"The phrase 'in accordance with due process of law' is somewhat ambiguous and susceptible of various interpretations." (*In re Prather* (2010) 50 Cal.4th 238, 252.) Batie cannot justifiably argue his period of continued custody, pending the Governor's exercise of his constitutional power to conduct an independent, de novo review of an inmate's suitability for parole, was such a due process violation. (*Id.* at p. 257, fn. 12.) As we will show, based on well-established principles regarding separation of powers between the executive, legislative and judicial branches, and the established scope of due process review that is appropriate, Batie has received all of the relief to which he is entitled, and this does not include any judicially determined award of additional credits. (*Shaputis II, supra*, 53 Cal.4th 192, 220-221; *In re Prather, supra*, at p. 259 (conc. opn. of Moreno, J.); *In re Bush* (2008) 161 Cal.App.4th 133, 139.) We therefore dismiss the petition.

# I

## *HISTORY OF PROCEEDINGS*

### A. Introduction; Governing Law

On February 13, 1981, Batie shot and killed Simmons. A jury convicted Batie of second degree murder, and the conviction was affirmed. He was sentenced to 15 years to life in prison, with a two-year sentence for personal use of a firearm. Batie was eligible to be considered for a five-year period of parole, pursuant to then-effective section 3000, subdivision (b), providing that for "any inmate sentenced under Section 1168, the period of parole shall not exceed five years in the case of an inmate imprisoned under a life sentence . . . unless . . . the [former Board/parole authority] for good cause waives parole and discharges the inmate from custody of the department. . . ."

However, as explained in the legislative history of section 3000, that subdivision (b) was amended in 1982, "to exclude inmates under life sentence for first or second degree murder from the three-year or five-year period of parole under this section."<sup>1</sup>

As applied to Batie, the version of section 3000, subdivision (a), effective in 1981 contained the basic legislative declaration "that the period immediately following

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<sup>1</sup> By comparison, a leading case in this area, *In re Chaudhary* (2009) 172 Cal.App.4th 32, dealt with parole credit issues in the context of a sentence of lifetime parole under current section 3000.1, stating, "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.'" (*In re Chaudhary, supra*, at p. 34; see *In re Carabes* (1983) 144 Cal.App.3d 927, 930, fn. 1 [this statutory change was not retroactive].)

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 . . . . A sentence pursuant to Section 1168 or 1170 shall include a period of parole, unless waived, as provided in this section . . . ." (Stats. 1979, ch. 255, § 17, pp. 557-558.) This principle is also restated in the current version of section 3000, subdivision (a)(1).

As explained in *In re Prather, supra*, 50 Cal.4th 238, "the statutes and governing regulations establish that the decision to grant or deny parole is committed entirely to the judgment and discretion of the Board, with a constitutionally based veto power over the Board's decision vested in the Governor." (*Id.* at p. 251, Cal. Const., art. V, § 8, subd. (b).) Due process requirements place limits upon the broad discretionary authority of the parole authorities, which include the Board and its related agencies. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658-660.) Within those limits, the parole authorities may impose conditions upon the grant of parole and determine when and whether discharge from parole is appropriate. (49 Cal. Jur.3d, Pen. & Correctional Institutions, § 299, p. 387; § 304, p. 395.)

#### B. Board's Parole Grants; Governor's Reversals through 2010

Batie first became eligible for parole in 1990. At five hearings between 2002 and 2010, the Board granted Batie parole, but all those decisions were reversed by the Governor. Batie has filed several earlier appeals or habeas petitions in this court, which

have not been successful.<sup>2</sup> Most recently, May 3, 2011, the Board granted Batie parole, to become effective on September 30, 2011, if not reversed by the Governor.

C. Current and Supplemental Habeas Petitions; Order for Supplemental Briefing

On May 26, 2011, Batie filed an original petition in pro per, counsel was appointed, and the supplemental petition with supporting exhibits was filed. We issued an order to show cause June 15, 2011. Since the Governor took no action, and Batie was released on parole October 7, 2011, the People's return filed on October 14, 2011 contended that all issues in the petition had been mooted, as shown by the exhibits concerning release in the return.

In his traverse and in the supplemental petition, Batie contended that the People had not effectively shown the 2010 Governor's reversal was proper, and therefore, on due process and statutory grounds, Batie should be "entitled to a reduction in his parole period equal to the number of days he spent unlawfully incarcerated pursuant to [the Governor's] errant reversal of the 2010 parole grant."

Regarding the merits of the reversal, Batie continues to contend the Governor's 2010 determination was made pursuant to a bias against parole for life-sentenced prisoners and an arbitrary disregard of the parole release provisions of section 3040 et seq. He argues this reversal was a violation of due process and ex post facto principles. (*In re Rosenkrantz*, *supra*, 29 Cal.4th 616, 636-640; *In re Lawrence* (2008) 44 Cal.4th 1181.)

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<sup>2</sup> *In re Batie* (D049411, Jan. 4, 2007; D051850, Feb. 7, 2008; D055167, Mar. 9, 2010; D057801, Apr. 13, 2011) [nonpub. opns.]

Consequently, on the credits issue, Batie contends he has adequately shown he has been wrongfully confined since the date of the "unsupported" decision by the then-Governor on October 6, 2010, and he is entitled to a remedy in the form of credits that we should order to be granted by the parole authorities, entitling him to "discharge based upon when he should rightfully have been paroled." Batie also submitted supplemental authority, a citation to *In re Lira* (Dec. 6, 2011, H036162). Rehearing was granted, and a new opinion has been filed (*In re Lira* (June 29, 2012, H036162) \_\_ Cal.App.4th \_\_ [2012 Cal.App. LEXIS 768]), which we will discuss in part III.B, *post*.

In response to these developments, this court required the parties to submit supplemental briefing addressing whether the principles discussed by the court in *In re Lira* (Dec. 6, 2111, H036162), were correctly applied to allow a grant of credits against a parole period, and to discuss the implications of those principles in this case. We requested a discussion of *In re Bush, supra*, 161 Cal.App.4th 133, 139 and other relevant authorities, and sought the views of the parties on whether this court must now examine the propriety of the Governor's 2010 reversal of the Board's grant of parole, despite any mootness issues. We further required counsel for the People to comment on the propriety of that denial on the current record presented.

The parties complied with the order by submitting supplemental briefing, appropriately addressing the issues raised in *In re Lira, supra* (Dec. 6, 2011, H036162), but without citing it as authority. (Cal. Rules of Court, rule 8.115.) Before oral argument was held, the new opinion in *Lira* was filed. (*In re Lira, supra*, \_\_ Cal.App.4th \_\_ [2012 Cal App. LEXIS 768].)

## II

### *PEOPLE'S REQUEST TO DISMISS APPEAL; REVIEW OF CREDITS ISSUES*

In their return and again in their supplemental briefing, the People argue this petition should be dismissed as entirely moot, because Batie has already received relief from the Board, releasing him as of October 7, 2011, since the current Governor did not oppose the release decision. Batie disagrees, arguing that the Board should not have selected that date to begin his parole, and that the term should now be deemed to have begun to run earlier (or to end earlier), based on the timing of the Governor's 2010 reversal, which he continues to argue was wrongful.<sup>3</sup>

A question may be deemed moot when, although it initially amounted to an existing controversy, the passage of time, the acts of the parties, or a court decision have deprived the controversy of viability. (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 868-869, fn. 8; *Boccatto v. City of Hermosa Beach* (1984) 158 Cal.App.3d 804, 808.) To the extent this petition presents habeas issues concerning Batie's release on parole, we agree with the People that it is no longer necessary for this court to reach the merits of the petition on release entitlement.

We agree with Batie that theoretically, if the Governor's 2010 reversal were wrongful, a viable issue in his petition would remain, whether he may be entitled to a judicially imposed credit against his parole term for the time he spent in prison after the

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<sup>3</sup> We disagree with Batie that the People's arguments have effectively waived or forfeited any claim that the Governor's 2010 reversal decision was appropriate. However, we need not decide that issue on the merits, as already explained.

effective date of the Board's 2010 parole grant, due to "unlawful" delay in release caused by that reversal. (Former § 3000, subd. (b).) All the key facts of Batie's release by the Board, during the pendency of this effort to obtain appellate relief on the Governor's 2010 reversal, are undisputed, and therefore the matter may be decided as a question of law. (*In re Bush, supra*, 161 Cal.App.4th 133, 139.)

Solely for purposes of analysis of this important parole credit question, we will assume that the 2010 Governor's reversal decision was unsupported by the evidence, and in that light, we will determine whether Batie's petition continues to raise an active controversy upon which relief could properly be granted, in the form of a judicially imposed remedy for any alleged wrongful confinement. (See *In re Miranda* (2011) 191 Cal.App.4th 757, 762 ["Miranda's petition for writ of habeas corpus is moot because the only remedy he requests (immediate release) and the only remedy we have authority to give (a new parole-suitability hearing) are no remedy at all to one who has already been released from prison."].)<sup>4</sup>

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<sup>4</sup> We are aware that the opinion after rehearing (*In re Lira, supra*, \_\_ Cal.App.4th \_\_ [2012 Cal App. LEXIS 768]) on these same issues is not yet final, but will discuss it to a limited extent, *post*. In another notice of additional authorities filed June 22, 2012, Batie relies on several recent cases that involve challenges to a Governor's reversal, but that do not expressly address credit issues; we need not discuss them. (E.g., *In re Pugh* (2012) 205 Cal.App.4th 260, 266; *In re Young* (2012) 204 Cal.App.4th 288, 293.) We also note that a case discussed in the supplemental briefing, *In re Bratton* (Jan. 24, 2012, H036619), concerning the exhaustion of administrative remedies, has been depublished.

### III

#### *REQUESTS FOR OR RIGHTS TO CREDITS AGAINST PAROLE TERMS*

Batie seeks habeas relief against unlawful restraint, apparently as the equivalent of a declaratory judgment determining what valid parole term must be served. (See 6 Witkin, Cal. Criminal Law (3d ed. 2000) Criminal Writs, §§ 49-50, pp. 581-583; *In re McVickers* (1946) 29 Cal.2d 264.) He claims that if his parole period and sentence were potentially excessive and unlawful, the portion of them attributable to the Governor's 2010 reversal can now be credited to him, pursuant to the power of this court to fashion a remedy under general habeas principles, allowing a court to dispose of a habeas petitioner "as the justice of the case may require," by performing "all other acts and things necessary to a full and fair hearing and determination of the case." (§§ 1473, 1484.)

Habeas corpus does not lie to review mere procedural irregularities or legal error, if the subject body had jurisdiction to act, but " 'the writ may be granted under exceptional circumstances to review a matter that cannot otherwise be reached and to present a question of law that is sufficiently important to justify this extraordinary remedy.' " (6 Witkin, Cal. Criminal Law, *supra*, Criminal Writs, § 34, p. 562, citing *In re Jackson* (1964) 61 Cal.2d 500, 504.) In *In re Prather*, *supra*, 50 Cal.4th 238, 251, the high court observed that "a petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right 'cannot exist in any practical sense without a remedy against its abrogation.' " (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 664; see also *In re Lawrence*, *supra*, 44 Cal.4th at p. 1211.) The question now is whether this court can properly direct the parole authorities

how to fix his term and conditions of parole, by designating a period of confinement as "unlawful" and then setting forth "a correct view of the prisoner's status and his rights thereunder." (6 Witkin, Cal. Criminal Law, *supra*, Criminal Writs, § 52, p. 584, citing *In re Drake* (1951) 38 Cal.2d 198 (dis. opn. of Schauer, J.)

To address Batie's arguments about "unlawful" confinement, we first summarize the roles of the various governmental authorities in determining parole eligibility and obligations. We then outline the views of the parties on the case authority that has arisen under analogous circumstances, such as applications for credit against a life term of parole (*In re Chaudhary*, *supra*, 172 Cal.App.4th 32, 38-39 [interpreting § 3000.1]), and with respect to five-year parole, such as Batie must serve under former section 3000, subdivision (b). (See *In re Bush*, *supra*, 161 Cal.App.4th 133, 139-140.) Finally, in light of overarching separation of powers principles, we resolve the credit issue.

#### A. The Parole Suitability Framework; Judicial Review

For an overview, we take a page from the most recent of our prior opinions that denied Batie's earlier challenges to the Governor's reversal of a Board grant of parole. (*In re Batie*, *supra*, (D057801, Apr. 13, 2011) [nonpub. opn.].) There, we relied on *In Re Vasquez* (2009) 170 Cal.App.4th 370 (*Vasquez*), for its summary statement that "[t]he granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals *as soon as possible* and alleviate the cost of maintaining them in custodial facilities [(citations), and] the Board is required to set a release date unless it determines that 'the gravity of the current convicted offense . . . is such that consideration of the public safety

requires a more lengthy period of incarceration . . . . ' [Citation.]" (*Id.* at pp. 379-380.)

We acknowledged the Governor's power under the California Constitution and statute to independently review the Board's parole decision of an inmate like Batie, who was convicted of murder and sentenced to an indeterminate prison term. (Cal. Const., art. V, § 8, subd. (b); § 3041.2.)

We next observed in the prior opinion that a decision whether to grant parole is an inherently subjective determination (*In re Rosenkrantz, supra*, 29 Cal.4th 616, 655) that is guided by a number of factors, some objective, as identified in section 3041 and the Board's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) The Governor's decision to affirm, modify, or reverse the decision of the Board rests on the same factors that guide the Board's decision (Cal. Const., art. V, § 8, subd. (b)), and is based on "materials provided by the parole authority." (§ 3041.2, subd. (a).) "Although these provisions contemplate that the Governor will undertake an independent, de novo review of the prisoner's suitability for parole, the Governor's review is limited to the same considerations that inform the Board's decision." (*In re Rosenkrantz, supra*, at pp. 660-661.)

In that prior opinion, we also noted that when a Governor's reversal is challenged in a habeas petition, the applicable standards of judicial review are deferential, but not "toothless." (*In re Lawrence, supra*, 44 Cal.4th at p. 1210.) Consideration of public safety is the primary statutory issue to be determined in deciding whether an inmate should be granted parole (§ 3041, subd. (b); *In re Lawrence, supra*, at p. 1205), "[t]his inquiry is, by necessity and by statutory mandate, an individualized one." (*In re Shaputis*

(2008) 44 Cal.4th 1241, 1255.) It requires a court to consider the circumstances surrounding the commitment offense, along with the other facts in the record, to determine whether an inmate poses a current danger to public safety. (*Id.* at pp. 1254-1255.)

The Board exercises broad discretion in determining a release date for a life prisoner, considering public safety issues in "each discrete case," to establish eligibility, suitability, and a base term. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1071, 1096; see fn. 7, *post.*) In determining suitability for parole, the Board must provide procedural fairness, apply the relevant legal standards, and render a decision supported by " 'some evidence;' " the inmate has then received all constitutional process due. (*In re Dannenberg, supra*, at pp. 1071, 1096.) "Of course, no inmate may be imprisoned beyond a period that is constitutionally proportionate to the commitment offense or offenses. But that limitation will rarely apply to those serious offenses and offenders currently subject by statute to life-maximum imprisonment." (*Id.* at p. 1071, italics omitted.)<sup>5</sup>

In *Shaputis II*, the court updated the relevant considerations in parole suitability determinations for both the Board and the Governor, again stating that the essential

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<sup>5</sup> The authority of *In re Dannenberg, supra*, 34 Cal.4th 1061, 1098 has been abrogated in part with respect to its discussion of "circumstances beyond the minimum elements of his conviction" for making a parole unsuitability determination. (*In re Lawrence, supra*, 44 Cal.4th at pp. 1228-1229; see *In re Lazor* (2009) 172 Cal.App.4th 1185, 1196-1198, and subsequent opn., *In re Dannenberg* (2009) 173 Cal.App.4th 237 [holding that the Governor's determination of unsuitability was not supported by some evidence, and the Board's decision should be reinstated].)

question to be resolved is whether the inmate currently poses a threat to public safety. (*Shaputis II, supra*, 53 Cal.4th at pp. 220-221.) "That question is posed first to the Board and then to the Governor, who draw their answers from the entire record, including the facts of the offense, the inmate's progress during incarceration, and the insight he or she has achieved into past behavior. [¶] . . . [¶] Judicial review is conducted under the highly deferential 'some evidence' standard. The executive decision of the Board or the Governor is upheld unless it is arbitrary or procedurally flawed. The court reviews the entire record to determine whether a modicum of evidence supports the parole suitability decision." (*Id.* at p. 221.)

In explaining the limitations upon the judicial branch in this endeavor, the Supreme Court in *Shaputis II* said, "The reviewing court does not ask whether the inmate is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness. The court is not empowered to reweigh the evidence." (*Shaputis II, supra*, 53 Cal.4th 192, 221.)

Following those basic principles, the court in *In re Prather, supra*, 50 Cal.4th 238, 255, set aside lower court orders that materially restricted or infringed upon the Board's discretion to make parole decisions "on the basis of all relevant information," based on the high court's interpretation of the statutory duties specifically imposed on the Board. Those lower court rulings were not proper because they precluded the Board's required consideration of the full record, or they allowed new evidence to be " 'evaluated in a vacuum.' " (*Ibid.*)

All of these analyses are based upon a fundamental understanding of separation of powers principles. The California Constitution establishes a separation of powers among the legislative, executive, and judicial branches, and requires that "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." [Cal. Const., art. III, § 3.] (*In re Prather, supra*, 50 Cal.4th 238, 254, citing *In re Lugo* (2008) 164 Cal.App.4th 1522.) This doctrine is violated when the actions of one branch "defeat or materially impair the inherent functions of another branch." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 661.) "Intrusions by the judiciary into the executive branch's realm of parole matters may violate the separation of powers." (*In re Prather, supra*, at p. 254.)

We next examine into the permissible scope of judicial control of the executive branch's realm of parole matters, with regard to implementing and interpreting legislative enactments.

#### B. Arguments and Authority on Applications for Credit Against Parole Terms

Batie first relies on sections 2900 and 2900.5, subdivision (c) for a definition of the lawful term of imprisonment he must serve, and to support his request that this court adjust that term, which began to run when he was delivered to custody. This "term of imprisonment" includes imprisonment prior to release on parole, as well as the period of parole, prior to his discharge. (*In re Bush, supra*, 161 Cal.App.4th 133, 143 [construing definition of term of imprisonment in § 2900.5, subd. (c) as any period of imprisonment "lawfully" served].)

As shown in the exhibits submitted with the traverse, when making its release decision in May 2011, the Board calculated Batie's base time in prison as 252 months (subject to time credits since 1982, when he was incarcerated). Unlike the petitioner in *In re Bush, supra*, 161 Cal.App.4th 133, Batie does not directly challenge this base term calculation, instead focusing upon the interval between the Governor's 2010 reversal and his own October 2011 release as creating the "unlawfulness" for which he seeks relief, in the form of a shortened parole period.

In 1981, former section 3001, subdivision (b) provided for discharge from parole after the required term was served, after release from confinement, unless the Board made a good cause determination that continued parole was necessary. (Stats. 1978, Ch. 582, § 2, p. 2004.) Current section 3001 continues to provide that a person otherwise subject to parole discharge may be retained on parole by the Board, for good cause shown. There is also an outside limit of seven years of parole, pursuant to former section 3000, subdivision (d), setting a maximum period of parole and requiring discharge from custody upon its successful completion. (Stats. 1979, Ch. 255, § 17, p. 558; also see current § 3000, subd. (b)(6)(B), for seven-year maximum.)

Both old and new sections 3000 and 3001 allowed the Board to waive a period of parole only for good cause. In 1981, former section 3000, subdivision (b) said, "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 under a life sentence, and shall not exceed three years in the case of an inmate whose prison sentence does not consist of imprisonment under a life sentence, *unless in either case the parole authority for good*

*cause waives parole and discharges the inmate from custody of the department. . . ."*

(Stats. 1979, Ch. 255, § 17, pp. 557-558; italics added.)<sup>6</sup> These sections, taken together, confirm that it is the Board that has the power and discretion to regulate the length of parole terms. (*Shaputis II, supra*, 53 Cal.4th 192, 220-221.)

Batie is seeking adjustment of the length of his parole term to delete, from the presumptive five-year parole discharge eligibility requirement in former section 3000, subdivision (b), his "unlawful confinement time." We inquire into the nature of the relief sought, as well as this court's power to award it in a habeas proceeding. This requires us to identify the source of the alleged "unlawfulness" of the confinement, to determine whether a remedy is available.

*In re Miranda, supra*, 191 Cal.App.4th 757, 759-760, was a petition for habeas relief arising out of complicated facts involving a Governor's reversal of the grant of parole, where the Governor's reversal was then set aside by the superior court, but then on appeal, the Governor's denial of parole was held to be proper. Pursuant to the original grant, Miranda had already been released and he remained out of custody until 2007, when a new hearing found him unsuitable for parole. He was accordingly reincarcerated in 2008, and filed his petition for writ of habeas corpus challenging the result of the 2007

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<sup>6</sup> Current section 3000, subdivision (b)(1) likewise says: "In the case of any inmate sentenced under Section 1168, the period of parole shall not exceed five years [in certain cases], 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. . . .*" (Italics added.)

hearing, claiming it set back his parole discharge date. While the appellate petition was pending, he was again released.

In resolving Miranda's appellate petition, the court determined it to be entirely moot, over his allegations that the Board had violated his due process rights in 2007 by finding him unsuitable for parole, and then causing him to be returned to prison from 2008-2009. Miranda's request for credits from "the time he should have been released toward his parole period" was rejected. The court explained that the only available "remedy for a violation of due process at a parole-suitability hearing is a new hearing comporting with due process. [Citing *In re Prather*, *supra*, 50 Cal.4th 238.] Because Miranda has been released, a new hearing is unnecessary. Therefore, even assuming the Board violated Miranda's due process rights at the 2007 parole-suitability hearing, the petition is moot." (*In re Miranda*, *supra*, 191 Cal.App.4th 757, 759-760.) The court supported this conclusion by stating, "the only remedy he requests (immediate release) and the only remedy we have authority to give (a new parole-suitability hearing) are no remedy at all to one who has already been released from prison." (*Id.* at p. 762.)

The court in *In re Miranda*, *supra*, 191 Cal.App.4th 757, 763, relied on *In re Prather*, *supra*, 50 Cal.4th 238, as follows:

" ' "The power to grant and revoke parole is vested in the Department of Corrections, not the courts. [Citations.] The proper function of the courts in respect to parole and revocation of parole is simply to ensure that the prisoner is accorded due process. . . . Thus, where the Department of Corrections has failed to accord a prisoner due process of law in revoking his parole, the relief to which the prisoner is entitled on habeas corpus is not an order forever barring the Department of Corrections from proceeding further, but, rather, an order directing the Department of Corrections to vacate its order

of revocation and thereafter to proceed in accordance with due process of law." [Citation.]' [Citation.]"

The court explained, "In other words, a determination in a habeas corpus proceeding that the Board violated an inmate's due process rights in finding that there was some evidence of the inmate's continued dangerousness 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. Miranda's petition for writ of habeas corpus is moot." (*In re Miranda, supra*, 191 Cal.App.4th 757, 763.)

Unlike in *In re Miranda*, 191 Cal.App.4th 757, we are not treating Batie's parole credits issue as necessarily mooted by his eventual release on parole. However, *Miranda* is instructive because it focuses on the proper remedy for the alleged "violation." In Batie's case, he is alleging that the violation occurred when the Governor reversed the parole grant, so that his release was delayed pending that litigation. Batie, while a life prisoner, was not subject to lifetime parole, due to the version of section 3000 under

which he was sentenced. Different types of delay in release have given rise to several cases in this area, as we next discuss.

The discussion of parole credit issues in *In re Chaudhary, supra*, 172 Cal.App.4th 32, in the context of a lifetime parole under current section 3000.1 is factually distinguishable, but instructive. A person subject to a parole period of life as a result of a second degree murder conviction is eligible for discharge from parole "when [he] has been released on parole from the state prison, and has been on parole continuously for . . . five years . . . since release from confinement . . . ." (*Id.* at p. 34, § 3000.1, subd. (b).) In *In re Chaudhary, supra*, 172 Cal.App.4th 32, there was delay in releasing the defendant on parole for almost three years while a Governor's reversal of the parole grant was being litigated, and the reversal was eventually set aside on appeal, so that the parole release was finally implemented. The court rejected the claim by the parolee that his five-year parole discharge eligibility requirement should "be satisfied in whole or in part by time spent in prison prior to release from confinement on parole." (*Id.* at p. 37.) Instead, the court hinged its decision on the language in section 3000.1 referring to "release from confinement," to hold that a prisoner's time spent in prison prior to such "release from confinement" could not be used to satisfy any part of section 3000.1's five-year parole discharge eligibility requirement. (*In re Chaudhary, supra*, at p. 38.) The court said it was illogical to try to apply "credits" to a lifetime parole period. (*Ibid.*)

*In re Gomez, supra*, 190 Cal.App.4th 1291, dealt with the unavailability of credits in the context of delay caused by the appellate court's reinstatement of a Board grant of parole, after the court set aside as unsupported a Governor's reversal of the Board's grant.

This was an interpretation of 1989 sentencing statutes that allowed Gomez, although convicted of second degree murder and sentenced to 15 years to life in prison, to become presumptively eligible for release on parole (lifetime parole). (*Id.* at pp. 1297, 1309-1311.) Gomez had requested credit against his parole term for the time after the Governor's reversal (which was set aside), until the time of the current opinion that granted his habeas petition. The appellate court denied any credit that would allow an early discharge from parole, using the same reasoning as in *In re Chaudhary, supra*, 172 Cal.App.4th 32, i.e., a parolee cannot begin to serve the full prescribed term after "release" to parole, until that "release" to parole has occurred. This prevents credits from an imprisonment period from being awarded retroactively, even where the court had found the Governor's 2010 reversal to be unsupported (but nevertheless causing delay in release before the Board's 2009 grant of parole could be implemented). It was not proper to apply the time spent in custody, prior to release, to satisfy any part of the five-year parole discharge eligibility requirement, for a life parole prisoner. (*In re Gomez, supra*, 190 Cal.App.4th 1291, 1309-1311.)

In reaching its interpretation of the five-year parole discharge eligibility requirement in section 3000.1, the court in *In re Chaudhary, supra*, 172 Cal.App.4th 32, distinguished cases such as *In re Bush, supra*, 161 Cal.App.4th 133, 138. *Bush* "involved whether time spent in prison, prior to the release date set by the Board, which exceeded the term set by the Board could be credited against the parolee's parole period. [Citation.] Unlike Chaudhary, Bush, who had not been convicted of murder, was subject to a maximum five-year parole period, not lifetime parole. [Citation.] The court in *Bush* did

not consider whether in-prison custody time could be applied to section 3000.1's parole discharge eligibility requirement, because that requirement only applies to those parolees on lifetime parole." (*In re Chaudhary, supra*, at p. 38; italics omitted.)

The *Bush* case is particularly relevant here, because like Bush, Batie is subject to a life sentence, but he became eligible for a set parole period after serving a minimum term of confinement. (*In re Bush, supra*, 161 Cal.App.4th 133, 141; see *In re Dannenberg, supra*, 34 Cal.4th 1061, 1078.) Like Bush, Batie is claiming unlawful confinement, for a particular period attributable to the Governor's efforts to reverse a grant of parole. However, in *Bush*, the Governor had failed to act in a timely manner in seeking an en banc review of the suitability determination. The Governor's request was thrown out, and Bush was released according to the Board's order. The appellate court decided that the superior court had already appropriately granted him credit against his parole for the time he spent in prison custody after the Board's decision became final, because the Governor did not make any effective challenge to the Board's decision. (*In re Bush, supra*, at pp. 143-145, fn. 4.)

Therefore, Bush obtained some credits due to the untimely action of the Governor, but his request for additional habeas corpus relief was denied, insofar as it was based on claims that his base term was far shorter than the custody credits he had accrued, such that he wanted additional credits against the parole period. That type of credit was denied, based on the court's interpretation of how the base term was ultimately, properly

set by the Board. (*In re Bush, supra*, 161 Cal.App.4th at p. 143.)<sup>7</sup> The court denied any additional credits for any "unlawful" custody time, because:

"The 'term of imprisonment' under section 2900.5 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. Bush received credits for all the time he lawfully spent in prison custody pending the suitability determination in his case, and he is entitled to no further reduction of his parole period." (*In re Bush, supra*, 161 Cal.App.4th 133, 143; italics added.)

In *In re Bush, supra*, 161 Cal.App.4th 133, the legislative purpose of requiring a parole period, to promote public safety (§3000, subd. (a) (1)), supported this result, because Bush 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 final. (*In re Bush, supra*, at p. 145.) "This purpose would be thwarted if the parole periods of life prisoners could be reduced or eliminated by credits for time spent lawfully in prison custody awaiting a determination of parole suitability." (*Ibid.*) Also, "[w]hen considering parole suitability, the Board must consider all relevant information, including 'any conditions of treatment or control, including the use of special conditions under which the prisoner may be safely released to the community. . . .' [Citation.]" (*Ibid.*)

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<sup>7</sup> Unlike in *In re Bush, supra*, 161 Cal.App.4th 133, Batie does not claim his parole period should be shortened because any calculation of his base term was unlawful, and he only relies on the facts about the last Governor's reversal.

In both *In re Bush, supra*, 161 Cal.App.4th 133 and *In re Chaudhary, supra*, 172 Cal.App.4th 32, the courts distinguished another case relied on by Batie, *McQuillion v. Duncan* (9th Cir. 2003) 342 F.3d 1012. "McQuillion was unlawfully held beyond his parole release date. The Ninth Circuit concluded that the period during which McQuillion was unlawfully incarcerated should be credited against his three-year parole period. [Citation.]" (*In re Chaudhary, supra*, 172 Cal.App.4th 32, 37-38.) The reason he was deemed to be unlawfully incarcerated, and entitled to credit against his three-year parole period, was the federal court's determination that the Board had erroneously rescinded his 1994 parole date, holding him for nine extra years, so that the prisoner was not lawfully in custody during those nine years. (*McQuillion, supra*, at p. 1015.) Unlike the prisoner in *McQuillion*, Bush was not entitled to additional credits against parole based on any "unlawful" prison custody. (*In re Bush, supra*, at p. 145.)

Before oral argument was held in Batie's case, the opinion after rehearing in *In re Lira, supra*, \_\_ Cal.App.4th \_\_ [2012 Cal.App. Lexis 768] was filed on June 29, 2012. Like Batie, Lira was subject to the 1981 statutory scheme, and Lira was sentenced to life imprisonment and a five-year period of parole (not lifetime parole). Lira sought a judicial grant of credits against his parole period, which he had already begun to serve in 2010. Like Batie's case, Lira's previous grant of parole had been reversed by the Governor, but the Board had again granted him parole and the next Governor did not oppose it, allowing him to be released. Like Batie, Lira argued that the recent Governor's reversal had been wrongful, so that he was "unlawfully" confined for the 2008-2010 period (from the allegedly erroneous reversal until his release on the next grant of

parole). (Lira made another argument for credits that is not presented by Batie, about Lira's allegedly wrongful confinement for another time period [2005-2008] and on a different basis, when he was previously denied parole in 2005 but in 2008, the appellate court ordered a new parole hearing for him, resulting in the 2009 grant of parole that was later set aside by the Governor.) The new opinion allows him custody credit for alleged "wrongful confinement" attributable to the time between the finalized 2008 parole grant (albeit set aside by the Governor's reversal in 2009), and the release on parole in 2010.

The opinion in *In re Lira, supra*, \_\_ Cal.App.4th \_\_ [2012 Cal.App. Lexis 768] is not yet final. We agree with its position that where a parolee remains under the constructive custody of parole, his release does not necessarily render all claims for additional credit moot. However, we disagree with the analysis of the appellate court in *Lira* and the result it reached, because it disregards important separation of powers principles and it does not closely read and interpret former sections 3000 and 3001 in a proper manner, in our view.

First, the court in *In re Lira, supra*, \_\_ Cal.App.4th \_\_ [2012 Cal.App. Lexis 768] initially discussed the availability of relief in habeas in terms of whether the credit request was moot, due to the recent grant of parole. We disagree with its reading of *In re Prather, supra*, 50 Cal.4th 238, as not indicating that judicial remedies are impliedly restricted by separation of powers concerns, when the Board's core functions are concerned. (*In re Lira, supra*, at p. \_\_\_\_ [2012 Cal.App. Lexis 768 at pp. 11-12].) We also disagree with the court in *Lira* that *In re Chaudhary, supra*, 172 Cal.App.4th 32, is not an analogous case, merely because the sentencing statutes have later been amended.

It is a key concept in our case and in *Chaudhary* that parole credits do not accrue until the inmate has actually been released on parole, as we will explain. (Former §3001, subd. (b); *In re Lira, supra*, at p. \_\_\_ [2012 Cal.App. Lexis 768 at pp. 17-18].)

Next, the court in *In re Lira, supra*, \_\_\_ Cal.App.4th at p. \_\_\_ [2012 Cal.App. Lexis 768 at p. 36], erroneously concludes that section 2900 should be interpreted to allow free-form hindsight determinations of whether an inmate's incarceration was technically lawful or not, while a Governor's reversal remains in effect. Official duties are presumed to be correctly carried out unless otherwise demonstrated in an appropriate form of review, and the period of judicial review of a Governor's reversal does not automatically remove that presumption. (Evid. Code, § 664.)

The pleadings in a habeas matter define the issues to be addressed. In Batie's case, although he cites to his supplemental exhibit X, the Board's life prisoner hearing decision face sheet and attachments, he does not effectively make arguments that his parole period should appropriately be adjusted due to the base time in prison shown on those documents. Instead, Batie's arguments appear to be confined to "unlawfulness" of his confinement attributable to the process of the Governor's independent review, pursuant to section 3041.2 and the Constitution. *In re Lira, supra*, \_\_\_ Cal.App.4th \_\_\_ [2012 Cal.App. Lexis 768] is not persuasive on those points.

### C. Analysis

To examine whether Batie was "unlawfully" held in custody for the year between the Governor's 2010 reversal, and the eventual release on parole, we take into account the following factors. Under *Shaputis II, supra*, 53 Cal.4th 192, the essential question to be

resolved is whether the inmate currently poses a threat to public safety. (*Id.* at pp. 220-221.) "[T]he statutes and governing regulations establish that the decision to grant or deny parole is committed entirely to the judgment and discretion of the Board, with a constitutionally based veto power over the Board's decision vested in the Governor." (*In re Prather, supra*, 50 Cal. 4th at p. 251.)

Next, "[j]udicial review is conducted under the highly deferential 'some evidence' standard. The executive decision of the Board or the Governor is upheld unless it is arbitrary or procedurally flawed. The court reviews the entire record to determine whether a modicum of evidence supports the parole suitability decision." (*Shaputis II, supra*, 53 Cal.4th 192, 221.) "The reviewing court does not ask whether the inmate is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness. The court is not empowered to reweigh the evidence." (*Id.* at p. 221.)

Here, Batie's due process rights with which we are concerned included his participation in periodic Board hearings, which were also subject to the Governor's independent review power, which took time. It also took time for the habeas proceedings to run their course. As explained in *In re Bush, supra*, 161 Cal.App.4th 133, section 2900.5, subdivision (c) sets the term of imprisonment as the lawfully served period of custody. (*In re Bush, supra*, at p. 143.) Batie claims unlawfulness of a portion of his future parole custody, due to the Governor's "errant" 2010 reversal. Although relief in habeas proceedings can be prospective or declaratory in nature, it remains to be seen how

the parole authorities will determine the length of his parole term, up to the statutory maximum. To the extent he is seeking to have this court order that his parole period be deemed to have started earlier than October 7, 2011, that would be contrary to the language of the 1981 version of section 3001, subdivision (b), which provided for discharge from parole after the parolee had served the required term "since release from confinement," unless the Board made a good cause determination that continued parole was necessary. (Stats. 1978, ch. 582, § 2, p. 2004.) Here, as in *In re Chaudhary, supra*, 172 Cal.App.4th 32, and *In re Gomez, supra*, 190 Cal.App.4th 1291, Batie cannot properly obtain a judicial order based on this statute that would start his parole period running before the date of his October 7, 2011 "release from confinement," whether in the form of a credit or otherwise.

In 1981, former section 3001, subdivision (b) further allowed the Board to make a good cause determination that continued parole was necessary, and therefore to delay the discharge from parole after the required term was served (after the release from confinement). (Stats. 1978, ch. 582, § 2, p. 2004.) Current section 3001 is similar, and current section 3000.1 shows legislative intent to maintain some supervision over life prisoners granted lifetime parole. Although Batie was sentenced under previous section 3000, subdivision (b), with a limited parole period, public policy supports continuing to allow the parole authorities to make good cause determinations about calculating the appropriate terms and release dates, including credits or retention on parole. "[T]he Board has always enjoyed broad parole discretion with deferential judicial oversight. But these well-established principles do not deny due process. On the contrary, they define

and limit the expectancy in parole from a life sentence to which due process interests attach." (*In re Dannenberg, supra*, 34 Cal.4th 1061, 1095, fn. 16.)

Language such as that in *In Re Vasquez, supra*, 170 Cal.App.4th 370, 379 and *People v. Vickers* (1972) 8 Cal.3d 451, 458, to the effect that a grant of parole is intended to allow a prisoner to become integrated into society as a constructive individual "*as soon as possible*," must be read with a recognition that the statutory scheme for parole, viewed as a whole, "clearly elevates a life prisoner's individual suitability for parole above the inmate's expectancy in early setting of a fixed and 'uniform' parole date." (*In re Dannenberg, supra*, 34 Cal.4th 1061, 1070-1071.)

Moreover, if the Board has adhered to state law standards in exercising its parole discretion, the inmate cannot assert a denial of federal due process liberty interests in any "uniform" parole release date, since "he has such a liberty interest and expectation only to the extent that state law provides it." (*In re Dannenberg, supra*, 34 Cal.4th 1061, 1098.) Thus, to the extent Batie is seeking to have this court order that his ongoing parole period must be deemed to terminate earlier, that would be contrary to the rules governing our due process review of the Board's and the Governor's respective decision making. This habeas petition is not the correct method or forum to obtain advance review of those decisions committed to the parole authorities. (Former §§ 3000, subds. (b), (d); 3001.) Batie is focusing on the result that the Governor reached, and claiming due process violations from that result, simply because it was "wrong." However, Batie has not shown the interval of time between the Governor's 2010 reversal and the October 2011 release was attributable to any "unlawfulness" in the proceedings, such as untimeliness in

filing or a void action by the Governor. (*In re Bush, supra*, 161 Cal.App.4th at pp. 143-145.) The Governor was entitled to independently review Batie's case, and did not do so in any unlawful procedural manner that has been demonstrated, and we need not decide at the present time whether the reversal was supported by the evidence, for purposes of discussion of these credit arguments.

Batie's arguments are based on a mistaken fundamental premise, that the result of the Governor's independent review (even if unsupported by the evidence) somehow converted a portion of Batie's prison custody under a life sentence into "unlawful" custody. We reject his theory that before his parole release took place on October 7, 2011, the period of his prison custody can be segregated into portions attributable to the Board's grants, and/or the Governor's reversals, and individually evaluated to support the issuance of any judicially awarded credits. Rather, Batie was in lawful continuous custody on his life sentence, and he received parole consideration to determine his suitability. The inevitable delay among the various proceedings did not convert his lawful life imprisonment sentence into unlawful custody, and even though he was able to gain several grants of parole, they had not yet become final, when the events complained of occurred.

Even if we assume that the 2010 Governor's reversal was unsupported by the evidence, this court cannot replace the Board as the decision maker on how long Batie's parole period should be, or when it should begin, or what conditions should be imposed in the interest of protecting public safety. That would be contrary to the rule confirmed in *Shaputis II*, that the question of whether an inmate is currently dangerous is reserved

for the executive branch, and the court reviewing such a determination only "considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness. The court is not empowered to reweigh the evidence."

(*Shaputis II, supra*, 53 Cal.4th 192, 221.)

*In re Twinn* (2010) 190 Cal.App.4th 447, 473-474, addressed this issue about the type of relief available in habeas proceedings, when a court has set aside a Governor's reversal of the Board's suitability determination: The court does not order a release, but instead directs the Board to proceed in accordance with its usual procedures for release of an inmate on parole. (*Ibid.*) That will allow the Board, upon finality of the court's decision, to consider whether any cause for rescission of parole may exist, such as any evidence indicating the petitioner, who still remains in custody, poses any threat to public safety prior to release. (*Ibid.*; see *In re Miranda, supra*, 191 Cal.App.4th 757, 763 [a ruling on a petition for habeas corpus that due process was violated does not amount to a "get-out-of-jail-free" card; remedy is to order further proceedings].)

Here too, this court's proper role is to examine the record of the proceedings to ensure that due process considerations have been met, and to take such corrective action as is appropriate. The sequence of events in Batie's case did not impose any current denial of due process that is subject to correction. Just as "an order generally directing the Board to proceed in accordance with due process of law does not entitle the Board to 'disregard a judicial determination regarding the sufficiency of the evidence [of current dangerousness] and to simply repeat the same decision on the same record' " (*In re Prather, supra*, 50 Cal.4th at p. 258), so too must the court allow the executive branch to

carry out its own functions, as defined by statute and the Constitution. (*Id.* at p. 258 [proper scope of judicial review of a Board decision does not allow the issuance of any court directives that improperly limit its "statutory authority to review and evaluate the *full* record--including evidence previously considered . . . , as well as additional evidence not presented at prior parole hearings."].)

The proper remedy in this case, in light of the recent, unopposed release on parole, is to dismiss the petition, for lack of any pending controversy upon which relief may properly be granted with respect to any award of credits against the parole period. We presume the parole authorities will appropriately carry out their usual proceedings for supervision of parole. Batie will suffer no discernible prejudice if the present proceedings are dismissed, and neither will the People.

#### DISPOSITION

Petition dismissed; the order to show cause is discharged.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.