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CERITIFIED 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

In this case we conclude that when a prison inmate remains incarcerated after the Governor has erroneously vetoed a decision to grant parole by the Board of Parole Hearings (Board), the period of continued incarceration is not lawfully served, and the inmate is entitled to custody credit against his term of imprisonment, which includes the prison term and term of parole. We further conclude that if the inmate has been released on parole prior to a determination that the Governor's veto was erroneous, the inmate, now parolee, is entitled to have that custody credit applied to reduce the term of 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 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.

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

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

III. PROCEDURAL HISTORY

In 1981, after being convicted of second-degree murder for shooting his wife, Lira was sentenced to an indeterminate term in prison of 15 years to life with a two-year firearm enhancement. His minimum eligible parole date was April 7, 1992.

In December 2005, the Board denied Lira parole for the ninth time. He challenged the denial in a petition for a writ of habeas corpus claiming that the decision was not supported by any evidence and therefore violated his right to procedural due process. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658, 664 (*Rosenkrantz*).) The superior court agreed, granted the writ, and ordered a new parole hearing. On appeal, this court upheld the order. (*Lira on Habeas Corpus* (July 30, 2008, H031227) [nonpub. opn.].)

In November 2008, after a new hearing, the Board found Lira suitable for parole. However, in April 2009, former Governor Schwarzenegger vetoed that decision. In November 2009, the Board held Lira's next regularly scheduled parole hearing and again found him suitable for parole. In December 2009, before that decision became final and effective, Lira filed a writ petition challenging the Governor's 2009 veto on the ground that it was not supported by any evidence and seeking to have the Board's 2008 decision reinstated. In April 2010, while the petition was still pending, Governor Brown declined to review the Board's 2009 decision to grant parole, and Lira was released on parole effective April 8, 2010.

On April 22, 2010, Lira filed a supplemental habeas petition. He continued to claim that Governor Schwarzenegger's veto was erroneous, but having been released on parole, he sought different relief. Given the Board's erroneous denial of parole in 2005 and the Governor's allegedy erroneous veto in 2009, Lira sought an immediate discharge

from parole. He claimed that because his continued incarceration after 2005 was unlawful, he was entitled custody credit that exceeded the length of his parole term. The superior court agreed that he was entitled to credit, granted the supplemental petition, and ordered the Board to give Lira "custody credits against his parole period from what should have been the effective date of a parole grant at his 2005 hearing . . . ."[2]

IV. MOOTNESS AND PROPRIETY OF THE REMEDY

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

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.)

[2] In his supplemental petition, Lira primarily argued that he was entitled to 10 years of credit because his 29 years in prison exceeded the 19-year base term set by the Board when it granted parole in 2009. Briefly, as an alternative theory, he claimed that he was entitled to nearly four years of custody credit from the date he would have been released but for the Board's erroneous denial of parole in 2005. The court rejected his primary theory but agreed with the alternative theory.

In his initial habeas petition, Lira challenged the Governor's veto and sought to have the Board's 2008 decision to grant parole reinstated. Clearly, Lira's subsequent release on parole rendered that relief moot and ostensibly 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 had been 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 reducing his parole term, then he is entitled to get it.

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

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 reviewing 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 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,

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[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.

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. (*Ibid.*)

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 did not formally seek 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. (See *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["[l]anguage used in any opinion is of course to be understood in the light of the facts and the issue then before the court"].) *Prather* addressed only the proper scope of a remand order when a court has grants 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.

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.

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 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, subdivision (c), "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 of the time that he or she has actually "served"—i.e., custody time—credited against the period of imprisonment and parole.

If under applicable statutes and judicial precedent, Lira was entitled to have a certain amount of the time that he "served" in actual custody 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.)

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 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 term of parole. Indeed, such a reading is incompatible with section 2900. It 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*) is misplaced. That case involved parole for an offense committed in 1986, which subjected the defendant to the provisions of section 3000.1. That statutue "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).) Lira committed his offense in 1980. Thus, he is not subject to mandatory lifetime parole and a five-year parole eligibility requirement.

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 continued supervision and surveillance are critical to a parolee's successful reintegration and to the protection of the public (§ 3000, subd. (a)(1), quoted *ante*, pp. 9-10), these findings do not suggest that a court may deny credit that a parolee is legally entitled to 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 prison 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 would create an exception to the 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*

strongly 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 has been no mention of parole during the 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 doing so 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 custody credit, we turn our attention to the amount of credit granted by the court.

V. AMOUNT OF CREDIT

The court granted Lira custody credit for the period of actual incarceration that Lira served 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 veto 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 *In re Bush* (2008) 161 Cal.App.4th 133 (*Bush*).

Bush had served 19 years in prison when the Board found him suitable for parole and set his base term at 150 months. After that decision became final, the Governor sought en banc review. Bush challenged that request as untimely. The superior court agreed, and Bush was released on parole for five years. He then 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 and the 60-month parole term. The superior court granted credit for the period after Bush was found suitable for parole because, presumably, 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 150-month base term set by the Board. Bush challenged that denial of credit.[4] (*Bush, supra,* 161 Cal.App.4th at pp. 138-139.)

[4] The CDCR 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 appellate court agreed that Bush was not entitled to credit for the period of custody 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, as noted, provides credit for "*all* time spent in an institution" against the inmate's "term of imprisonment." (§ 2900, italics added.) Bush argued that his"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 disagreed. 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 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*.)

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. 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.)

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 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 includes only those periods of confinement that were

"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," and an inmate who has been released on parole is 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 granted credit.

B. Credit for Incarceration between 2006 and 2008

Although the Board erroneously denied parole in December 2005, the court granted credit for the time served after May 11, 2006. Apparently, the court reasoned that the Board should have granted parole in December 2005, 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 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 violates 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 later 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 been released on parole is not entitled to credit for such continued incarceration against a fixed parole term.

Given our analysis, we conclude that the superior court erred in finding Lira entitled to credit for his continued incarceration up to November 2008, Until that time, his incarceration was "lawful."

C. Credit for Incarceration between 2008 and 2010

We reach a different conclusion concerning the time Lira served after November 2008 due to the Governor's veto.

The Governor is authorized to 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).)[5]

[5] "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

The Governor's decision to veto 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 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 under this analysis, a period of incarceration extended by the Board's erroneous finding of unsuitability is "lawful" and part of the "term of imprisonment.".

This analysis would also apply when the Governor has properly exercised the right to veto the Board's finding of suitability. In that situation, the inmate is, in effect,

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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).)

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."

However, if a gubernatorial veto is not supported by some evidence, it is unlawful because it violates the inmate's right to procedural due process. (*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 sentence.

However, such a justification is lacking the Board has properly found an inmate to be suitable, but the inmate is forced to remain incarcerated because later 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 the 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 had 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 an 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, Lira is entitled to credit for the period after the Governor vetoed the Board's suitability finding of that veto is unlawful, that is, not supported by some evidence.

D. Lawfulness of the Governor's Veto

The Governor's review of the Board's decision to grant parole must be based on the same factors and materials which the Board considered. (Cal. Const., art. V, § 8, subd. (b); § 3041.2, subd. (a).) Thus, before reviewing the Governor's veto, we summarize the record before the Board and its findings. 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.[6] 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 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.)[7] The Governor independently determines suitability for parole based on

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

[7] Section 2402 of the Regulations provides parole consideration criteria and guidelines for murders committed on or after November 8, 1978. For murders committed before that date, section 2281 of the Regulations applies. However, the sections are

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[8]; (2) has a previous record of violence; (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

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identical. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1256, fn. 13 (*Shaputis I*).) Because Lira committed his murder after 1978, we cite to section 2402 in referring to the regulatory criteria and guidelines.

[8] 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.

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, "[i]t 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.)

Under the "some evidence" standard, only a modicum of evidence is required to uphold a finding of unsuitability for parole. (*In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*); *Rosenkrantz, supra*, 29 Cal.4th at p. 677.) It is not for the reviewing court to decide which evidence in the record is convincing. (*Shaputis II, supra*, 53 Cal.4th at p. 211.) Thus, the court 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 because those are matters exclusively within the discretion of the Board Governor. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260 (*Shaputis I*); *Rosenkrantz, supra*, 29 Cal.4th at p. 677; *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*, at p. 677.)

While the standard of review is not " 'toothless' " and " 'must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights' [citation], it must not operate so as to 'impermissibly shift the ultimate discretionary decision of parole suitability from the executive branch to the judicial branch' [citation]." (*Shaputis II, supra*, 53 Cal.4th at p. 215.) On the other hand, when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion, a court may overturn a contrary decision by the Board or the Governor. "In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process." (*Id*. at p. 211.)

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

a. The Commitment Offense

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 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 several 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 and 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 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 does have 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. However, 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. 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 service. 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 and rose to a leadership position in the Square One narcotics anonymous program. After 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. It 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 his 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 soley 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 Lira's risk assessment. Doctor Starrett observed that although Lira's placement score or custody level of 84 was "rather high," it was due to early programming problems during Lira's initial period of incarceration.

Doctor Sharrett noted that Lira was not diagnosed as psychopathic, did not have any personality disorder or mental illness, and did not have a significant record of juvenile delinquency. He found that Lira had an appropriate level of insight into his past behavior, had accepted responsibility for his crime, had expressed sincere remorse, had

responded well to all treatment, did not have negative attitudes or mental health problems, and was no longer an impulsive person. Concerning the Risk Management category, Doctor Starrett noted that Lira had feasible and appropriate parole plans and 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 his religious beliefs.

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 in treatment 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. Moreover, Lira did not believe that his drug problem excused his behavior and offense. Finally, Lira had spent much time assessing that offense and his other past behavioral problems and

conduct and had worked to remediate them and accept full responsibility for his past behavior.

f. The 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 his relationship with Allison. He explained 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 in 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 having done 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 after 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 to 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.

After considering all of this information, the Board concluded that Lira did not pose an unreasonable risk of danger if released and 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. The Governor's Veto

The Governor acknowledged Lira's "creditable gains in prison." However, in vetoing parole, 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." He cited Doctor Starrett's opinion that Lira posed a "low to low-moderate" risk of future violence and view that Lira's initial 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 said that he had participated in substance abuse treatment only 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 the 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. The Governor did not explain, and we fail to see, how evidence of Lira's escalating anger and violence prior to the murder made the *manner* of its commission especially heinous or aggravated. Simply put, the evidence has no tendency to reveal the manner in which the crime was committed and thus was not relevant to show that the murder was 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. The undisputed evidence reveals that 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, anger over serious marital and domestic issues far too often drives people to murder.

Last, the Governor found the crime especially heinous because Lira had taunted Allison's brother in the courtroom. Lira's comment about getting the "last laugh" was certainly callous and revealed that even months after the crime, he was still angry at Allison. However, his comment reveals nothing about the commission of the offense and has no tendency to show that it was committed in an aggravated manner or was heinous.

In sum, there is 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 initial placement score of 84 was "rather high."

Lira's risk assessment of "low to low-moderate" is simply quantitative shorthand for the risk factors and evidence upon which it is based. 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" and the evidence supporting that assessment 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 like Lira's will invariably elevate an assessment score above a simple low regardless the inmate's post-conviction record of rehabilitation. For that reason, such an elevated assessment theoretically could be used to deny parole forever. Using a risk assessment elevated only by pre-conviction historical factors in this way is the same as using the aggravated nature of a commitment offense to deny parole year after year. However, it is settled that even an especially heinous offense does not indefinitely support the denial of parole.

The Supreme Court has explained that because the circumstances of an offense are immutable, a particularly heinous offense supports the denial of parole only if it continues over time to have 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 relianceon a risk assessment that is elevated above low *only* because of immutable historical facts. Although such facts are relevant and necessary input for tests designed to assess future risk of dangerousness, a test score elevated above low *only* by historical facts is, in our view, 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, without more, lack any tendency *by themselves* to show that over 28 years later, Lira posed a unreasonable risk of danger to others. In other words, just as there must be a rational nexus between the circumstances of a commitment offense and a finding of current dangerousness (*Lawrence*, *supra*, 44 Cal.4th at p. 1227), there must be a rational nexus between historical factors *predating* the offense and a finding of current dangerousness. The Governor did not articulate a rational nexus, there is no evidence to support one, and the remaining reasons that the Governor cited to deny parole do not establish such a nexus.

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 observational comment about that score are not themselves evidence of current dangerousness and do not provide a rational nexus between the historical facts underlying that former score and a finding Lira was currently dangerous.[9]

[9] 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 the gang. Thereafter, as the Governor acknowledged, Lira has remained discipline free for over 18

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 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 oneself. He explained that as long as he continued to evaluate his past and his present, he can stay focused on substance abuse issues. Later, the Board asked Lira why he had declined to have a psychological evaluation. He explained that his attorney had advised him to decline because historical factors used to determine future risk would elevate his score regardless of his rehabilitative efforts in prison. Nevertheless, Lira then agreed to a new evaluation. However, he wanted to be sure that the evaluator had all appropriate information and that later he could discuss his current level of insight with the Board and have the Board 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 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 did not explain how or why this comment in 2005 shows that Lira is currently dangerous. Perhaps the Governor inferred that, Lira felt that he had been forced to participate in drug treatment, he would not have voluntarily done so, and therefore he never had a genuine commitment to treatment and lacked insight into the nature of his

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years. Thus, in the absence of additional evidence showing a rational nexus between Lira's record of early discipline and the finding of current dangerousness, that early record is not evidence of current dangerousness; nor is it evidence that the historical facts underlying his risk assessment remain probative.

substance abuse and its relationship to his crime. However, when Lira's comment is viewed in light of the whole record, such an inference is unreasonable, if not disingenuous.

The meaning of Lira's comments is unambiguous. He frankly and candidly admitted that he initially participated in treatment 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. However, in that same comment, Lira explained that as he continued to participate, the message of the program got shoved down his 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.

Lira's assertion that in 2005, the message had sunk in and worked is corroborated fact by undisputed evidence of Lira's long commitment to substance abuse treatment and his rehabilitative progress through 2008, which included becoming a trusted and respected leader in a narcotics anonymous program. It is also corroborated by the Governor's own laudatory comments that Lira had availed himself of AA and NA. Moreover, Doctor Starrett acknowledged Lira's 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 statement does not constitute 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.

The last reason supporting the Governor's determination of unsuitability was his finding that Lira had recently harassed members of Allison's family. We presume this finding was based on confidential 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.[10] 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.[11] More fundamentally, however, the information about alleged harassment is unverified, multiple hearsay from unidentified declarants, 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 these circumstances and viewed in light of the entire record, the brief hearsay reference to

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

[11] 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.

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.[12] (See *In re Moses, supra,* 182 Cal.App.4th at p. 1300 [evidence underlying decision must exhibit s some indicia of reliability].)

In sum, the Governor's rote invocation of Lira's offense, his immutably elevated risk assessment, some unspecified, if not unsubstantiated, lack of insight into his former drug problem, and some vague, unverified, and biased hearsay allegation of harassment does not meet the "some evidence" standard and rationally suggest that in 2008, Lira posed an unreasonable risk of danger to others if released. Lacking even a modicum of evidentiary support, the Governor's veto was arbitrary and violated Lira's right to due process. (*Shaputis II, supra,* 53 Cal.4th at p. 211.)

Given our conclusion that an inmate is entitled to credit for the period of continued incarceration following an erroneous gubernatorial veto of the Board's decision, we further conclude that the trial court properly ordered the Board to grant Lira custody credit for his continued incarceration after the Governor's veto. The next question is how much credit that is.

5. Amount of Credit

The superior court measured custody credit for time he served after May 11, 2006, which was 150 days after the Board erroneously found Lira unsuitable. Apparently, the court figured 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 another 30 days pending review by the Governor (Cal. Const., art. V, § 8, subd. (b)). Thus, the superior court implicitly concluded that Lira's

[12] 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.

incarceration during that 150-day period would have been "lawful" and thus part of his "term of imprisonment." Accordingly, Lira was entitled to custody credit for his incarceration after May 11, 2006. In his petition, Lira adopted this analysis and ultimately did not seek custody credit for the five-month period between December 2005 and May 2006.

We agree with this analysis and find it applicable in calculating custody credit after 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—i.e., 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.

6. Parole Period[13]

In its opening brief, the CDCR asserted that Lira's parole period was five years. In the respondent's brief, Lira countered that his parole period was only three years. He argued that the Board was "attempting to circumvent the Superior Court's order by now improperly and arbitrarily changing [his] parole period from three (3) years to five (5) years, obviously in retaliation for bringing the instant proceedings."[14]

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[13] After filing an opinion in this case, we granted the CDCR's petition for rehearing to address its claim that we had erroneously stated that Lira's parole term was three years. The CDCR asserted that the parole term was five years.

[14] The parties disputed the length of the parole term in their supplemental pleadings before the superior court. Although the superior court did not make a finding concerning the length of parole or otherwise resolve the dispute in its final order, the court did refer to Lira's "five year" term of parole in its Order to Show Cause.

Lira also raised this issue in a motion to enforce the superior court's order, which this court summarily denied.

The record contains a CDCR "Legal Status Summary" dated *March 27, 2005*, which includes pertinent information about Lira's offenses, prison record, sentencing credit, and it lists his future parole period as "5 YRS." The record also contains a post-release "Offender Based Information System" printout of information Lira's "Movement History" that reflects his release on April 8, 2010, and states that his tentative date of discharge from parole is April 8, 2015, i.e., five years later.

In asserting that his parole term was three years, Lira cites a "Notice of Conditions of Parole" that his parole supervisor prepared when Lirawas released. The document lists the terms and conditions of his parole and provides, in pertinent part, "You will be released on parole effective **04/08/10** 3 YEARS."

The length of a parole period is set by the CDCR. (§ 3000.) Given the documentation, we are satisfied that Lira's parole term is five years, not three years, and was never officially set at three years. Rather, before Lira's release, the period had been set at five years. There is no evidence that the CDCR formally recalculated or reduced that period. Moreover, Lira cites no authority for the proposition that a parole supervisor has discretion to reduce the length of the parole period, and we find no such authority and doubt that any exists. Accordingly, we agree with the CDCR's view that in preparing the release document, the parole supervisor mistakenly wrote that the parole term was three years.

Thus, we reject Lira's claim of retaliation.[15]

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[15] The CDCR argues that Lira forfeited his claim by failing to exhaust his administrative remedies under section 3084.1, subdivision (a) of the Regulations, which provides an administrative appeal for any policy, decision, action, condition, or omission having a material adverse effect upon an inmate's health, safety, or welfare.

Lira argues that the CDCR forfeited its claim by failing to assert it in opposition to the supplemental habeas petition.

Given our analysis, we need not address these issues.

7. Conduct Credit

Our initial opinion reflected the same analysis and conclusions set forth above concerning the two periods of incarceration for which Lira claimed, and the superior court granted, custody credit. Accordingly, we upheld only that part of the superior court's order granting Lira custody credit for the time spent in actual unlawful custody after the Governor's veto. We modified the order to reflect this and affirmed it as modified.

We granted Lira's petition for rehearing in which he complained that we failed to find that he was entitled to the *conduct* credit that he earned during that period of unlawful actual custody.

For a number of reasons, we decline to find that Lira is entitled to conduct credit.

In his supplemental habeas petition, Lira opined that in addition to custody credit, he was entitled to conduct that he earned during the period of unlawful incarceration. While not waiving his right to conduct credit, he *expressly* declined to argue and seek any conduct credit and sought credit only for actual custody. Accordingly, the trial court issued an Order to Show Cause (OSC) concerning only Lira's entitlement to the custody credit. In its return, the CDCR denied that Lira had been unlawfully incarcerated for any period of time and denied that he was entitled to any custody credit. Rather, the CDCR alleged that he had been lawfully incarcerated and was not entitled to any custody credit against his parole term. In his traverse, Lira denied these affirmative allegations and asserted that "he was entitled to credit from May 11, 2006 through April 8, 2010, which *with good conduct credits* equals sixty-two months, or five (5) years and two (2) months." (Italics added.) In its final order, the court did not mention conduct credit and directed the Board to grant only "custody credit."

We conclude that the superior court properly declined to award conduct credit because Lira's alleged entitlement to conduct credit was not at issue in the proceedings.

In habeas proceedings, "it is the parties' pleadings that define the issues. In the words of our Supreme Court, 'it is through the return and the traverse that the issues are joined in a habeas corpus proceeding.' [Citation.] 'This process of defining the issues is important *because issues not raised in the pleadings need not be addressed*. [Citation.]' [Citation.] Under this process, the issues to be addressed may not extend beyond the claims alleged in the habeas corpus petition. Thus, respondent may not raise additional issues in its return. [Citation.] [¶] Similarly, a habeas corpus petitioner may not raise additional issues in the traverse. 'While the traverse may allege additional facts in support of the claim on which an order to show cause has issued, *attempts to introduce additional claims* or wholly different factual bases for those claims in a traverse do not expand the scope of the proceeding which is limited to the claims which the court initially determined stated a prima facie case for relief.' [Citations.] To bring additional claims before the court, petitioner must obtain leave to file a supplemental petition for writ of habeas corpus. [Citation.]" (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1235, italics added.)

Lira's supplemental petition sought only custody credit and expressly declined to argue, claim, or seek conduct credit. Although he claimed entitlement to conduct credit in the traverse, he could not raise the issue at that time. Accordingly, the court addressed the only issues properly before it and granted custody credit.

On appeal, Lira argues that the court's order was correct and urges this court to uphold it. However, he also asserts that he was "entitled to credit from May 11, 2006 through April 8, 2010, which *with good conduct credits* equals sixty-two months, or five (5) years and two (2) months." (Italics added.) Insofar as this assertion reflects a request that we *add* good conduct credit to the superior court's order, we decline. We know of no authority to support the proposition that an appellate court can provide relief of a different sort than that sought by a habeas petitioner and granted by the superior court.

Certainly, the CDCR's appeal does not invoke our independent power to provide *Lira* with additional habeas relief. Our function on appeal is simply to review the propriety of the superior court's order. As noted, that order granted only "custody credit" and therefore, we confine our review to the propriety of the custody credit granted by the court.

Finally, even if we could somehow provide a new and different relief in addition to that granted by the superior court, we would not find that Lira was entitled to conduct credit against his parole term that he allegedly earned during the period of unlawful incarceration after the Governor's veto.

As discussed above, section 2900 provides only that an inmate is entitled to have all time "served" in custody credited against his "term of imprisonment." (§ 2900, subd. (c).) Moreover, inmates convicted of murder and sentenced to indeterminate terms are not statutorily eligible to earn post-conviction worktime or conduct credit. (See §§ 2931, 2933; *In re Monigold* (1983) 139 Cal.App.3d 485, 490.)

Lira claims that section 2410 of the Regulations entitles him to conduct credit against his parole term. Not so.

That section provides in pertinent part, "[l]ife prisoners may earn postconviction [good conduct] credit for each year spent in state prison from the date the life term starts. Prior to the initial parole consideration hearing life prisoners shall have documentation hearings . . . . At the documentation hearings, the board shall document the prisoner's performance, participation, behavior and other conduct . . . . Credit shall not be granted or denied at these hearings. The documentation shall be used by the panel which establishes a parole date to determine how much, if any, credit should be granted for the years served prior to the establishment of the parole date."

Although this section provides that an inmate can earn postconviction conduct credit, it does not require or authorize the application of postconviction conduct credit in

excess of the base term against a life inmate's parole period. On the contrary the purpose of such credit is established in section 2400 of the Regulations. That section provides, in relevant part, "[t]he amount of good conduct credit that a prisoner sentenced for first or second degree murder may earn *to reduce the minimum eligible parole date* is established by statute. [Citation.] Life prisoners convicted of attempted murder do not earn these credits. The department will determine the minimum eligible parole date. The length of time a prisoner must serve prior to actual release on parole is determined by the board. The amount of postconviction credit a prisoner may earn *to reduce the length of time prior to release on parole* is determined by the board. This article implements Penal Code section 3041 and concerns only the board's exercise of discretion in determining whether a prisoner is suitable for parole and, if so, when the prisoner should be released on parole." (Italics added.)

Under this section, postconviction conduct credit can only to reduce the length of time a prisoner must serve prior to actual release on parole. In other words, postconviction conduct credit can be applied to advance or accelerate the date upon which an inmate is released on parole. However, there is no statutory or regulatory basis to apply such conduct credit to reduce an inmate's parole term after release or advance or accelerate the inmate's discharge from parole.

VI. DISPOSITION

We modify the order granting Lira's supplemental petition for a writ of habeas corpus. It shall now direct the Board to grant Lira custody 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.

_____
ELIA, J.

In re Lira on Habeas Corpus
H036162

Trial Court:	Santa Clara County Superior Court No.: 76836
Trial Judge:	The Honorable Rise Jones Pichon
Attorneys for Petitioner Johnny Lira:	Steve M. Defilippis under appointment by the Court of Appeal for Appellant
Attorneys for Respondent The People:	Edmund G. Brown, Jr., Kamala D. Harris, Attorney General Julie Garland, Senior Assistant Attorney General Anya M. Binsacca, Supervising Deputy Attorney General Phillip Lindsay, Supervising Deputy Attorney General Brian C. Kinney, Deputy Attorney General

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