



Parole Denial Habeas Corpus Petitions: Why the California Supreme Court Needs to Provide More Clarity on the Scope of Judicial Review

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ABSTRACT

The California Penal Code makes clear that parole is supposed to be the norm, not the exception, for inmates sentenced to life in prison. But these inmates, convicted for murder, rape, and kidnapping and commonly known as lifers, never had greater than a 7 percent estimated likelihood of release from 1991 to 2010. California is unique in that if the Board of Parole Hearings (BPH) approves parole, then the governor has the power to reverse the decision and deny parole. A combination of a low BPH grant rate and an inconsistent-but-often-high governor reversal rate has contributed to a low likelihood of parole for lifers in California. When lifers appeal a parole denial to the state courts, they face the difficult hurdle of the highly deferential some evidence standard.

Until the California Supreme Court decided *In re Lawrence* in 2008, many lower courts found that the BPH's or governor's denials of parole met the some evidence standard simply because the inmate's murder was heinous. *Lawrence* set a higher bar, requiring these executive branch entities to provide evidence that the inmate was currently dangerous. It also seemed to advance a less deferential model and give courts more leeway in scrutinizing the evidence relied on by the BPH and governor. But another California Supreme Court case in 2012, *In re Shaputis (Shaputis II)*, appeared to retract from that model and adopt a more deferential model.

Without further clarification, lower courts struggle to apply the some evidence standard consistently. A brief empirical review of California appellate court decisions reveals that over one-third of these decisions continue to apply the less deferential model, despite *Shaputis II*. Because this inconsistent application of the some evidence standard deprives lifers of due process in a recognized constitutional liberty interest, the California Supreme Court must choose between the two models. To ensure due process for lifers and maintain a proper checks and balances system, the court should adopt the less deferential model.

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TABLE OF CONTENTS

INTRODUCTION.....	1136
I. BACKGROUND: THE STRUCTURE OF THE CALIFORNIA PAROLE SYSTEM FOR LIFERS.....	1140
A. The Lifer Inmate Population and Indeterminate Sentencing	1141
B. The Initial Executive Branch Decisionmaker: The Board of Parole Hearings	1142
C. The Final Executive Branch Decisionmaker: The Governor.....	1145
D. The Judicial Check and Possible Remedies	1148
II. THE EMERGENCE OF THE SOME EVIDENCE STANDARD.....	1150
A. Origination and Affirmation: <i>In re Rosenkrantz</i> and <i>In re Dannenberg</i>	1150
B. Two Meanings Emerge: Confusion in the California Appellate Courts.....	1153
III. ONE SOME EVIDENCE ISSUE RESOLVED, ANOTHER ISSUE REMAINS.....	1155
A. Resolving the First Some Evidence Issue: <i>In re Lawrence</i>	1156
B. Reigniting the Second Some Evidence Issue: <i>Shaputis II</i>	1160
C. Two Models of Judicial Review Remain: Examining Post- <i>Shaputis II</i> Appellate Court Opinions	1164
IV. THE CALIFORNIA SUPREME COURT NEEDS TO CHOOSE A MODEL OF JUDICIAL REVIEW AND IT SHOULD CHOOSE THE LESS DEFERENTIAL MODEL	1170
A. The California Supreme Court Must Choose a Model	1170
B. The Court Should Choose the Less Deferential Model	1172
1. The Less Deferential Model Ensures a Consistent Judicial Check on Executive Branch Discretion	1173
a. The Rubber Stamp Justification Danger	1174
b. The Political Pressure Danger	1177
2. The Less Deferential Model Survived <i>Shaputis II</i>	1182
CONCLUSION	1184
APPENDIX.....	1185

INTRODUCTION

The California Penal Code explicitly states that parole release for inmates sentenced to life in prison, which includes those convicted for murder, is the norm, not the exception.¹ But parole release for such inmates has long been far from the norm.² From 1991 to 2010, the estimated likelihood of parole release for an inmate serving a life sentence was never greater than 7 percent.³

This Comment will focus on the parole decisionmaking process for those inmates convicted for murder or attempted murder because they constitute the overwhelming majority of inmates serving term-to-life sentences, otherwise known as term-to-life lifers, or simply just lifers.⁴ Parole release for lifers is contingent on three players: the governor-appointed Board of Parole Hearings (BPH), the governor, and the California courts. The BPH must first grant a lifer inmate parole.⁵ If the BPH grants an inmate parole, California is one of only five states that allow the governor to then affirm the parole grant or reverse the board's decision and deny parole.⁶ When denied parole by the BPH or the gov-

1. CAL. PENAL CODE § 3041(b) (West 2012) provides:

The panel or the board, sitting en banc, *shall* set a 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.

Id. (emphasis added); see also *In re Rosenkrantz*, 59 P.3d 174, 203 (Cal. 2002) (“[P]arole applicants in this state have an expectation that they will be granted parole unless the Board [of Parole Hearings] finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.”).

2. See Rachel F. Cotton, Comment, *Time to Move on: The California Parole Board's Fixation With the Original Crime*, 27 YALE L. & POLY REV. 239, 239 (2008) (“In theory, parole is a possibility for tens of thousands of California inmates; in practice, it has been an illusion.”).
3. ROBERT WEISBERG ET AL., STANFORD CRIMINAL JUSTICE CTR., LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 15 (2011) (“Estimated likelihood was calculated using the BPH's [Board of Parole Hearing] parole grant rate for all life-term sentences and the Governor's non-reversal rate for murder cases.”).
4. *Id.* at 6 (“Although numerous crimes can lead to life sentences under the California Penal Code, the great majority of current lifers were convicted of first- or second-degree murder or attempted murder; the other two crimes with substantial numbers of lifers are rape and kidnapping.” (footnote omitted)). The California Department of Corrections and Rehabilitation generally refers to inmates serving term-to-life sentences with the possibility of parole as lifers. *Id.* For the remainder of this Comment, I will refer to term-to-life lifer inmates as lifers or lifer inmates.
5. CAL. PENAL CODE § 3041(a).
6. This power is established in both the California Constitution and in the California Penal Code: 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, dur-

error, a lifer inmate can appeal the denial by filing a writ of habeas corpus petition in a California state court.⁷

Over the past two decades, the BPH has been a strict yet consistent gatekeeper for parole releases. The BPH grant rate remained at or below 5 percent from 1991 until 2003 and did not rise above 10 percent until after 2008.⁸ Governors, on the other hand, have varied widely in their parole reversal rates. During the same period, from 1991 to 2010, three governors reversed the BPH parole grants at rates ranging from 27 percent to 98 percent.⁹ California's current governor, Governor Jerry Brown, has about a 20 percent reversal rate.¹⁰ The BPH's low parole grant rate and the governor's high parole grant reversal rates in the last two decades have heightened the importance of having a stable outlet for inmates to appeal their parole denials.¹¹

Under this system, the courts act as a check on the discretionary decisions made by the two executive branch entities. But in reviewing inmate appeals in the form of habeas corpus petitions, courts must abide by the very deferential

ing which the Governor may review the decision subject to procedures provided by statute.

CAL. CONST. art. V, § 8(b); CAL. PENAL CODE § 3041.2 (West 2012). Hawaii, Maryland, Louisiana, and Oklahoma are the other four states that have bestowed their governors with a similar power. Jack Dolan, *Tug-of-War Over Parole for Convicted Killers Arises From Twist in California Law*, L.A. TIMES, Jan. 20, 2011, <http://articles.latimes.com/2011/jan/20/local/la-me-0120-parole-20110120>.

7. Until 2011, inmates could also file a habeas corpus petition in federal courts to review the decision to deny parole, but the U.S. Supreme Court essentially closed the federal courts to review of these petitions in *Swarthout v. Cooke*. 131 S. Ct. 859, 863 (2011) (“[T]he responsibility for assuring that the constitutionally adequate procedures governing California’s parole system are properly applied rests with California courts . . .”).
8. WEISBERG ET AL., *supra* note 3, at 12 (illustrating in Chart 3 that the BPH parole grant rate was at or below 5 percent from 1991 to 2001, and steadily increased to nearly 20 percent from 2002 to 2010).
9. In particular, “Governor Pete Wilson (1991–1999) . . . rejected only 27 percent of grants, although he only considered a handful of cases. Governor Gray Davis (1999–2003)—who claimed he would not parole a single convicted murderer—reversed virtually all the grants during his term. Governor Arnold Schwarzenegger (2003–2011) reversed about 60 percent of grants.” *Id.* at 13; Bob Egelko, *Brown Paroles More Lifers Than Did Predecessors*, S.F. GATE (Apr. 28, 2011, 4:00 AM), <http://www.sfgate.com/crime/article/Brown-paroles-more-lifers-than-did-predecessors-2373800.php> (noting that Governor Gray Davis vetoed 98 percent of BPH’s parole grants).
10. David Siders, *Jerry Brown Lets Most Parole Releases Stand*, SACRAMENTO BEE, Feb. 15, 2013, available at <http://www.newscaller.com/jerry-brown-lets-most-parole-releases-stand> (noting that Governor Brown had roughly an 18 percent reversal rate in 2011 and roughly a 20 percent reversal rate in 2012).
11. See WEISBERG ET AL., *supra* note 3, at 12, 14 (showing in Chart 3 that from 1982 to 2008 the BPH grant rate did not rise above 10 percent, and showing in Chart 6 that the governor parole grant reversal rate was never lower than 60 percent between two governor administrations from 1999 to 2010).

“some evidence” standard.¹² If the BPH or governor’s parole denial meets the some evidence standard, then a court must deny the habeas petition and an inmate must wait for her next BPH hearing.¹³ This standard has posed two difficult issues resulting in tension between the executive and judicial branches as well as disagreement among the California appellate courts.

The first issue is the threshold of the some evidence standard. In other words, when reviewing a BPH or governor’s parole denial, what does a court need to look for when determining whether the decision met the some evidence standard?¹⁴ Until 2008, several California appellate courts adopted a “nature of the offense” model by concluding the decision met the threshold if the BPH or governor had evidence that the underlying offense was heinous.¹⁵ In 2008, however, the California Supreme Court rejected this model. Under *In re Lawrence*, the court adopted the “current dangerousness model,” which requires that the BPH or governor’s denial establish a rational nexus between the evidence and a conclusion that the inmate was currently dangerous.¹⁶ *Lawrence* settled the debate on the some evidence standard’s threshold issue.¹⁷

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12. See *In re Aguirre*, No. F056029, 2009 WL 1699670, at *1, *9 (Cal. Ct. App. June 17, 2009) (“We must be vigilant to ensure that our judicial review of a parole decision is carefully exercised so that it does not violate the separation of powers by intruding upon the executive branch’s broad discretion in parole-related matters.”).
 13. See, e.g., *In re Mims*, 137 Cal. Rptr. 3d 682, 693 (Ct. App. 2012) (“At a minimum, there was ‘some evidence’ to support the Board’s decision, compelling a denial of the petition for writ of habeas corpus.”).
 14. For the remainder of this Comment, this question will be more simply referred to as the “threshold issue.”
 15. See, e.g., Jack Dolan, *Schwarzenegger Was Inconsistent on Clemency*, L.A. TIMES, Jan. 16, 2011, <http://articles.latimes.com/2011/jan/16/local/la-me-nunez-20110116> (explaining that Governor Schwarzenegger often reversed the BPH’s grant of parole because the inmate committed murder for a “trivial” reason or had demonstrated a “callous disregard for human suffering”). For the remainder of this Comment, the practice of accepting reliance on the heinousness of the offense as sufficient justification for the some evidence standard will be more simply referred to as the “nature of the offense model.” State regulations outline factors to determine whether an offense is carried out in an “especially heinous, atrocious or cruel manner,” but these factors do not set a high bar for what can be considered as a heinous offense. See CAL. CODE REGS. tit. 15, § 2402(c) (2013). There is no indication as to how to balance these factors or whether only one of them is required, and the last two of the five factors are written in general terms that can be easily manipulated to justify calling the offense heinous. Moreover, most murders would be considered heinous by a reasonable person.
 16. See *In re Lawrence*, 190 P.3d 535, 553 (Cal. 2008).
 17. Many saw this change on the threshold issue as a victory for inmates. See, e.g., Carrie L. Hempel, *Lawrence and Shaputis and Their Impact on Parole Decisions in California*, 22 FED. SENT’G REP. 176, 179 (2010) (noting that *Lawrence* was significant in confirming that rehabilitation was the “standard for granting parole,” but concluding that it was “only a small step” in the direction of creating a better parole system in California).

The second issue is the scope of judicial review when courts assess whether the parole denial meets the some evidence standard's threshold.¹⁸ *Lawrence* acknowledged that the standard is deferential but seemed to adopt a less deferential model when it concluded that the judicial review is "not toothless" and must be "sufficiently robust."¹⁹ In 2011, however, the California Supreme Court's ruling in *Shaputis II* reignited the debate on the strength of judicial review under the some evidence standard.²⁰ Although the court affirmed *Lawrence's* adoption of the current dangerousness model for the threshold issue, the court seemed to stray from *Lawrence* and adopted a "more deferential" model for the judicial review issue by explicitly prohibiting courts from reweighing the evidence.²¹ In a concurring opinion, Justice Liu outlined a rationality analysis that parallels *Lawrence's* less deferential model as opposed to the *Shaputis II* majority's more deferential model.²² As a result, the court appeared to remain in disagreement over the proper scope of judicial review under the some evidence standard.

Fifty-nine state appellate opinions after *Shaputis II* demonstrate that case's failure to settle the judicial review issue. Although most opinions quote from *Shaputis II* and claim not to be reweighing the evidence, these cases illustrate that the state appellate courts inconsistently review the lower courts, applying either the less deferential model or the more deferential model under the some evidence standard.

Because the judicial review model for the some evidence standard remains unsettled, this Comment urges the California Supreme Court to choose one of the two models and end the remaining confusion in the lower courts. This

18. For the remainder of this Comment, this will be simply referred to as the "judicial review issue."

19. *In re Lawrence*, 190 P.3d at 552–53. Many saw the case as an expansion of the judiciary's role in reviewing decisions made by the BPH and the governor. See, e.g., Hempel, *supra* note 17, at 176 ("The Court's ultimate ruling marked a significant expansion in the authority of state courts to reverse parole denials."). For the remainder of this Comment, the model of judicial review outlined in *Lawrence* will be more simply referred to as the less deferential judicial review model. See Part III for a more detailed explanation of what that model entails.

20. *In re Shaputis (Shaputis II)*, 265 P.3d 253 (Cal. 2011). The case's short name is *Shaputis II* because this is the second case in which the petitioner filed a habeas petition. His first petition was denied by the Supreme Court of California in a decision issued the same day as *Lawrence*. *In re Shaputis*, 190 P.3d 573, 585 (Cal. 2008).

21. *Shaputis II*, 265 P.3d at 264, 268, 272 ("The court is not empowered to reweigh the evidence."). For the remainder of this Comment, the model of judicial review outlined in the *Shaputis II* majority opinion will be more simply referred to as the "more deferential judicial review model." See Part III for a more detailed explanation of what that model entails.

22. *Id.* at 274 (Liu, J., concurring) ("[T]he focus of judicial review is on the rationality of the Board's or the Governor's decision—not only the ultimate conclusion of current dangerousness but also *the evidence and reasoning on which the Board or Governor actually relied* to reach that conclusion."). *But see id.* at 265 (majority opinion) ("[I]t is not for the reviewing court to decide *which* evidence in the record is convincing.").

Comment further argues that the court should adopt the less deferential model of judicial review for two reasons. First, the less deferential model secures a stronger judicial check that provides the stable decisionmaking that has been lacking in the executive branch. This stronger judicial check helps to protect against two inherent dangers in this discretionary process: (1) the tendency of the executive branch to base parole denials on rubber stamp justifications that lack individual consideration of the lifer's case; and (2) the tendency of the executive branch to succumb to popular biases against lifers, who are politically unpopular but not part of the recidivism problem. Second, the *Shaputis II* majority opinion's manipulation of language from *Lawrence* only demonstrates a superficial and unconvincing preference for the more deferential model.

Part I provides a background overview of California's parole system, including an explanation of the decisionmakers in the process and how inmates appeal parole denials to the state courts. Part II examines the origins of the some evidence standard in the California Supreme Court and how two meanings of the standard emerged in the appellate courts. Part III illustrates how *Lawrence* resolved the some evidence standard's threshold issue, but also how *Shaputis II* and its concurring opinion created confusion over the judicial review issue. Because of this confusion, Part IV first argues that the California Supreme Court must explicitly choose a judicial review model and then recommends that the court select the less deferential model. Lower California courts know what the some evidence standard requires, but until the state Supreme Court weighs in again, they will continue to lack guidance on how stringently to assess whether the some evidence standard's threshold is met.

I. BACKGROUND: THE STRUCTURE OF THE CALIFORNIA PAROLE SYSTEM FOR LIFERS

Although the U.S. Constitution does not require states to offer parole to their prisoners,²³ California chose to do so in 1893.²⁴ The liberty interest in parole is thus a state interest created and substantively protected by California law.²⁵ Under this state parole system, the state courts act as a check on the executive

23. *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners.").

24. Kathleen Noone, Note, *Keeping the Commitment: Why California Should Maintain Consideration of the Commitment Offense in Determining Parole for Life Inmates*, 37 HASTINGS CONST. L.Q. 789, 792 (2010).

25. *Swarthout*, 131 S. Ct. at 862 ("Whatever liberty interest exists is, of course, a *state* interest created by California law.").

branch's power to decide if an inmate who committed murder is ready for parole release. This Part will describe the growing population of lifer inmates who are eligible for parole, the process for how California's executive branch actors decide whether to grant parole, and the role of state courts in evaluating parole denials.²⁶

A. The Lifer Inmate Population and Indeterminate Sentencing

According to the California Department of Corrections and Rehabilitation (CDCR), lifer inmates are those who are serving life sentences with the possibility of parole.²⁷ As of April 2013, about 25 percent of California's inmate population, or about 33,600 inmates, are lifers.²⁸ This is twice the number of lifers that California had in 1990 and is the highest of any state.²⁹ Of that number, about 75 percent are serving term-to-life sentences for murder, attempted murder, rape, and kidnapping, with the remaining 25 percent serving three-strike sentences.³⁰

A majority of California inmates serves determinate sentences, but the state continues to impose indeterminate sentences for those who commit murder or

26. See WEISBERG ET AL., *supra* note 3, at 8, for a flow chart that illustrates the California parole system for lifer inmates.

27. *Id.* at 6. This Comment focuses on lifers because they receive little attention in light of the many other legal problems that have plagued California prisons over the past decade, such as severe overcrowding and unconstitutional medical services. *Id.* at 3.

28. See Judith Romero, *Stanford Law School Students Present Key Research Findings on Realignment and on Lifer Parole to California Governor Jerry Brown*, STANFORD L. SCH. NEWS (Mar. 20, 2013), <http://blogs.law.stanford.edu/newsfeed/2013/03/20/stanford-law-school-students-present-key-research-findings-on-realignment-and-on-lifer-parole-to-california-governor-jerry-brown>, for the finding that 25 percent of California's inmate population are lifers. See CAL. DEP'T OF CORR & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT JANUARY 31, 2014 (Feb. 1, 2014), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1401.pdf, for California's total inmate population number. The 33,600 lifer estimate was calculated by multiplying 25 percent times the total inmate population of 134,383, and then rounding up from 33,595.75 to 33,600. Since 2010, the percentage of lifers in California's inmate population has increased by 5 percent and the number of lifers has increased by about one thousand. WEISBERG ET AL., *supra* note 3, at 6.

29. WEISBERG ET AL., *supra* note 3, at 6. "[L]ifers . . . comprise nearly three percent of the federal prison population, four percent of the Florida prison population, nearly five percent of the Texas prison population, 10 percent of the Ohio prison population, and nearly 15 percent of the New York prison population." *Id.* at 26 n.2.

30. *Id.* at 6. A term-to-life sentence is a sentence with an established minimum term, such as fifteen years, that has no set maximum term. The maximum term is life, but in theory the inmate should be granted parole before the end of her life. A three-strikes sentence is a twenty-five years to life sentence that results from violating California's three strikes law, which requires a life sentence for an offender who commits a serious or violent felony after already having two felonies on her record. CAL. PENAL CODE § 667(e)(2) (West 2012). Because three-strike lifer inmates are not first eligible for parole until 2019, this Comment will only discuss term-to-life inmates who were incarcerated for murder, attempted murder, rape, and kidnapping. The great majority of lifers were incarcerated for murder. WEISBERG ET AL., *supra* note 3, at 6.

attempted murder.³¹ Indeterminate sentences for individuals convicted of murder are twenty-five years to life for first-degree murder or fifteen years to life for second-degree murder.³² Courts also impose indeterminate sentences for offenders who commit rape, kidnapping, and some other serious felonies.³³ An indeterminate sentence ends at the discretion of the state executive branch. As a result, lifer inmates serve various lengths of sentences.

B. The Initial Executive Branch Decisionmaker: The Board of Parole Hearings

California's discretionary parole process for lifer inmates begins with the BPH, an executive branch agency within CDCR.³⁴ Appointed by the governor, the BPH has twelve commissioners who hold staggered three-year terms and multiple deputy commissioners who are civil service appointees.³⁵

The BPH schedules and conducts parole suitability hearings with lifer inmates, with usually one commissioner and one deputy commissioner acting as a panel that presides over each meeting.³⁶ An inmate's first parole suitability hear-

31. W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 909, 911 (2009) ("California's sentencing system is largely determinative, but it contains a hodgepodge of indeterminate practices left over from an earlier era."). Determinate sentences are "sentences of a specific, fixed amount of time after which prisoners are automatically released on parole." Noone, *supra* note 24, at 791. Indeterminate sentences are open-ended "sentences terminating in discretionary parole release." Ball, *supra*, at 906. The Determinate Sentencing Act is codified under section 1170 of the California Penal Code and immediately states the retributive purpose of California's sentencing laws: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." CAL. PENAL CODE § 1170(a)(1) (West 2012).

32. CAL. PENAL CODE § 190(a) (West 2012). Those who receive the death penalty or life without the possibility of parole are not included in the lifer population, which is the focus of this Comment.

33. *See* Ball, *supra* note 31, at 911. This Comment will primarily discuss lifer inmates who committed murder because about 81 percent of lifer inmates are incarcerated for murder. WEISBERG ET AL., *supra* note 3, at 15 (demonstrating in Chart 8 that 81 percent of lifers are incarcerated for first-degree murder, second-degree murder, or attempted murder, but only 6 percent are incarcerated for rape and only 4 percent are incarcerated for kidnapping).

34. CAL. PENAL CODE § 3041(a) (West 2012) (authorizing the BPH the power to grant parole and determine the date of release for inmates).

35. *Commissioners*, CAL. DEPT OF CORRECTIONS & REHABILITATION, <http://www.cdcr.ca.gov/BOPH/commissioners.html> (last visited Mar. 7, 2014). The twelve commissioners are also confirmed by the Senate. WEISBERG ET AL., *supra* note 3, at 7.

36. WEISBERG ET AL., *supra* note 3, at 7. These hearings are held in person at the CDCR facility in which the inmate is housed. *Id.* From this point forward, the use of "BPH panel" is in reference to the BPH representatives, often one commissioner and one deputy commissioner, who conduct the suitability hearing.

ing occurs about one year before her minimum eligible parole release date.³⁷ At this initial hearing, and at subsequent hearings if necessary, the BPH panel's primary purpose is to determine if the "prisoner will pose an unreasonable risk of danger to society if released from prison."³⁸ If answered in the negative, then the BPH panel must grant the inmate parole.

The BPH panel has several resources available to help make this determination. Before the hearing, the BPH panel will review the inmate's central file, which contains psychological evaluations, risk assessments, disciplinary reports, gang affiliation records, vocational and educational certificates, self-help programming certificates, support and opposition letters, and statements from the victims or victim's relatives.³⁹ At the hearing itself, the BPH panel can ask the inmate questions regarding events before, during, and after the offense.⁴⁰ It can also hear statements from victims or the victim's relatives, as well as the district attorney from the county where the inmate committed the offense.⁴¹

The BPH panel is required to consider all the relevant information presented to it before and during the hearing.⁴² In considering this information to determine whether the inmate is not currently dangerous and thus suitable for parole, nine suitability factors and six unsuitability factors guide the panel.⁴³ As

37. Ball, *supra* note 31, at 912 n.97 ("The MPRD [minimum parole release date] is calculated by taking the minimum term of the sentence and subtracting credits for 'good behavior and participation.'" (quoting CAL. PENAL CODE §§ 2930–2935 (West 2011))).

38. CAL. CODE REGS. tit. 15, § 2402(a) (2013).

39. WEISBERG ET AL., *supra* note 3, at 7.

40. The inmate is entitled to representation by state-appointed or private counsel at the hearing. *Id.* at 8. The inmate is also entitled to "ask questions, receive all non-confidential hearing documents at least ten days in advance of the hearing, have his/her case individually considered, receive an explanation of the reasons for parole denial, and receive a transcript of the hearing proceedings." *Id.*

41. *Id.*

42. In particular, the regulations provide:

All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release.

CAL. CODE REGS. tit. 15, § 2402(b).

43. WEISBERG ET AL., *supra* note 3, at 9. The nine suitability factors are circumstances that tend to show an inmate's suitability for release and include: "(1) no juvenile record; (2) stable social history; (3) signs of remorse; (4) motivation for crime [resulted from stress]; (5) Battered Woman Syndrome; (6) lack of a significant violent criminal history; (7) [older] age; (8) understanding and plans for the future; and (9) institutional activities that indicate an ability to function within the law upon release." *Id.*; CAL. CODE REGS. tit. 15, § 2402(d). The six unsuitability factors are

discussed in more detail in Part II, the BPH panel must grant parole unless there is some evidence based on the information provided as well as the suitability and unsuitability factors that shows the inmate currently poses a threat to public safety.⁴⁴ Although the state Supreme Court defined the some evidence standard as a standard of judicial review, its 2008 adoption of the current dangerousness model has become a standard of proof for the BPH so that it can avoid having the courts overturn its parole decisions.⁴⁵

If the BPH panel denies the inmate parole, then it schedules a subsequent parole suitability hearing anywhere from three to fifteen years later.⁴⁶ If the BPH panel grants the inmate parole, then it calculates a release date by establishing a base term of incarceration based on a codified matrix.⁴⁷

circumstances that tend to show an inmate's lack of suitability for release and include: "(1) the commitment offense [was committed in a heinous, atrocious, or cruel manner]; (2) previous record of violence; (3) unstable social history; (4) sexual offense background; (5) severe mental problems; and (6) serious misconduct in prison." WEISBERG ET AL., *supra* note 3, at 9; CAL. CODE REGS. tit. 15, § 2402(c).

44. WEISBERG ET AL., *supra* note 3, at 10.

45. See Joey Hipolito, Case Note, In re Lawrence: *Preserving the Possibility of Parole for California Prisoners*, 97 CALIF. L. REV. 1887, 1896–97 (2009).

46. WEISBERG ET AL., *supra* note 3, at 11. The time between hearings used to be much shorter and would often be only one year, but that trend changed with the passage of Proposition 9, commonly known as Marsy's Law. *Id.* This required that inmates wait for periods of three, five, seven, ten, or fifteen years before their next hearing. *Id.* The number of scheduled hearings per year increased from an average of about 1600 hearings in the early 1990s to a peak of over 7000 in 2008. *Id.* at 12 (showing the number of scheduled and conducted hearings from 1978 to 2010 in Chart 2). But because of the required increase in time length between hearings under Marsy's Law, the number of hearings is quickly decreasing. *Id.* at 11. Further, the gap between scheduled hearings and conducted hearings has been increasing since 2001 because an increasing number of inmates are using one of three procedural mechanisms to cancel their hearings. *Id.* Rather than receive a formal denial and have to wait at least three years for another hearing, more inmates are stipulating to their own unsuitability, waiving their right to a hearing at the time, or postponing the hearing. *Id.* In February 2014, however, Judge Lawrence Karlton of the Eastern District of California held that Marsy's Law violated the ex post facto rights of lifers who committed their offenses before the initiative passed on November 4, 2008. *Gilman v. Brown*, No. 2:05-CV-0830-LKK, 1, 2-3 (E.D. Cal. Feb. 27, 2014), available at <http://edca.typepad.com/files/lkk-order-verdict-gilman-00317651.pdf>. He concluded that the mandatory longer waiting periods between BPH hearings "created a significant risk of imposing a longer incarceration on the class than was the case when their crimes were committed." *Id.* at 13. Although Judge Karlton ordered the BPH to reinstitute annual hearings for lifers who committed their offenses before November 2008, inmates may continue to behave as if Marsy's Law was still in effect and cancel their hearings until the Ninth Circuit Court of Appeals upholds the order.

47. CAL. CODE REGS. tit. 15, § 2282(a) (2013) provides:

The panel shall set a base term for each life prisoner who is found suitable for parole.

The base term shall be established solely on the gravity of the base offense, taking into account all of the circumstances of that crime. The base offense is the most serious of all life offenses for which the prisoner has been committed to prison.

There are three base terms for each offense and the BPH must select one based on the circumstances of the offense, such as "how the crime was committed, the relationship between the

Given that the BPH grant rate remained under 10 percent from 1980 until 2008 and remained less than 20 percent in 2010,⁴⁸ a lifer inmate who receives a grant of parole from a BPH panel has passed a significant threshold. But it is only the first step of executive branch review of the inmate's parole suitability. After the BPH panel grants parole, the commissioners from the entire BPH may review the panel's decision over the next 120 days and reverse it if the BPH determines that the panel made an error in fact or an error in law or that new information should be presented that has a high probability of causing a different decision after a rehearing.⁴⁹ More importantly, the governor has an additional thirty days to review the BPH's grant of parole.⁵⁰ As a result, the inmate must wait a total of 150 additional days after her BPH hearing before finding out if she has secured parole release or not.

Withstanding the BPH's scrutiny is and has been historically difficult, but because the BPH is politically insulated, it has maintained a steady grant rate over the past three decades.⁵¹ Consisting of political and civil service appointees, the BPH has been a stable, though not necessarily effective, discretionary parole-release entity. Such stability, however, has been nonexistent across the four governors who have exercised their discretionary parole release power.⁵²

C. The Final Executive Branch Decisionmaker: The Governor

California is one of five states that grant its governor the power to review decisions made by the state's parole authority.⁵³ In 1988, California voters approved a constitutional amendment initiative that vested the governor with the power to affirm, reverse, or modify any parole decision made by the BPH for in-

offender and the victim, and the injury to the victim." Ball, *supra* note 31, at 914. See CAL. CODE REGS. tit. 15, § 2403 (2013) for the codified matrices for first-degree murder, second-degree murder, and attempted murder.

48. WEISBERG ET AL., *supra* note 3, at 12 (displaying the BPH grant rate from 1978 to 2010 in Chart 3). The grant rate increased by about 8 percent from 2008 to 2009, but that sudden increase likely resulted from *Lawrence's* changing of the some evidence standard in August 2008. This sudden increase was an isolated incident in comparison to the nearly three decades of stable BPH grant rates and thus does not demonstrate that the BPH grant rates were unstable.

49. CAL. PENAL CODE § 3041(b) (West 2012).

50. *Id.* § 3041.2(a).

51. See WEISBERG ET AL., *supra* note 3, at 12 (displaying in Chart 3 a grant rate that remained under 10 percent until 2008).

52. See *id.* at 14 (displaying in Chart 6 the parole grant reversal rate for the three prior governors, with the rate ranging from less than 10 percent in 1997 under Governor Wilson to 100 percent in 1999 and 2001 under Governor Davis).

53. Dolan, *supra* note 6.

determinately sentenced inmates who committed murder.⁵⁴ The initiative granted the governor the power to review any decision by the BPH pertaining to indeterminately sentenced inmates who committed murder, but governors have only exercised this power to review, and often reverse, parole grants but not parole denials.⁵⁵ With this power, the governor has de novo review of the BPH's decision to grant parole, but the governor is subject to the same limits as those set on the BPH.⁵⁶ Thus, the governor must have some evidence that the inmate is currently

54. *Id.* Specifically, the California Constitution now provides:

No decision of the parole authority of this state with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority

CAL. CONST. art. V, § 8(b); *see also* CAL. PENAL CODE § 3041.2(a) (“During the 30 days following the granting, denial, revocation, or suspension by a parole authority of the parole of a person sentenced to an indeterminate prison term based upon a conviction of murder, the Governor . . . shall review materials provided by the parole authority.”). The constitutional amendment initiative, Proposition 89, passed with a 55 percent majority. John McLaren, *California Voters OK \$3.3 Billion in Bonds, Revitalize Cal-OSHA*, SAN DIEGO UNION TRIB., Nov. 9, 1988, at A21. The Legislature put the initiative on the ballot after a state appellate court prevented the governor from blocking a 1983 parole of a rapist-murderer named William Fain. *See id.*

55. CAL. CONST. art. V, § 8(b). From 1991 through 2011, however, governors have only used their power under Proposition 89 to review three BPH parole denials and affirmed all three. *Gilman v. Brown*, No. 2:05-CV-0830-LKK, 1, 52 (E.D. Cal. Feb. 27, 2014), *available at* <http://edca.typepad.com/files/lkk-order-verdict-gilman-00317651.pdf>. Because governors have primarily have used their parole review power to “withdraw the possibility of parole from most” lifers, in February 2014 Judge Karlton of the Eastern District of California held that “Proposition 89, as implemented by the governors of California, violates the ex post facto rights of” California lifers who committed their offenses before the proposition was passed on November 8, 1988. *Id.* at 2, 57. Judge Karlton concluded that in practice, Proposition 89 was not a neutral transfer of “final decision-making authority from one decision-maker to another. . . . [T]he governors have used it to tip the scales against parole.” *Id.* at 55–56. This practice created a “significant risk” of longer incarceration than the lifers would have received “under the law in effect when their crimes were committed,” and thus Proposition 89 violated the ex post facto clause of the U.S. Constitution. *Id.* at 3, 57. While Judge Karlton’s order is a significant decision for the California parole system and the governor’s ability to review BPH parole denials, the order does not apply to lifers who committed their offenses after November 1988. *See id.* at 2 (describing the class challenging Proposition 89 as only lifers sentenced to a life term for an offense committed before November 8, 1988). Moreover, the order will likely be appealed to the Ninth Circuit Court of Appeals, which has already rejected a facial challenge to Proposition 89. *See Johnson v. Gomez*, 92 F.3d 964, 967–68 (9th Cir. 1996). Even if the Ninth Circuit upholds Judge Karlton’s order, the discussion of this Comment remains vital for any lifer who committed an offense after November 8, 1988. Proposition 89 also granted the governor the power to review BPH parole grants for inmates who did not commit murder but other serious felonies such as kidnapping or rape. *See WEISBERG ET AL.*, *supra* note 3, at 10. For such nonmurder cases, however, the governor could only remand the decision for an en banc BPH review and not reverse the decision independently. *See id.*

56. *Shaputis II*, 265 P.3d 253, 268 (Cal. 2011) (“The Governor is granted de novo review of the Board’s decision, and is free to make his or her own determination, based on the same factors the

dangerous based on the available evidence, as well as the nine suitability and six unsuitability factors, in order to reverse the BPH's grant of parole.⁵⁷

Despite this requirement, the four governors who have exercised such power have not used it consistently. Of the parole grants made by the BPH during their term, Republican Governor Pete Wilson reversed about 27 percent, Democratic Governor Gray Davis reversed about 98 percent, Republican Governor Arnold Schwarzenegger reversed about 60 percent, and current Democratic Governor Jerry Brown has reversed about 20 percent.⁵⁸ The high reversal rates by Governor Davis and Governor Schwarzenegger resulted from their repeated reliance on the severity or heinousness of crime as justification for the reversal.⁵⁹ Even after the California Supreme Court clarified the some evidence standard in 2008,⁶⁰ Governor Schwarzenegger continued to reverse paroles at about the same rate.⁶¹ Similar to what happened with the BPH, the current dangerousness threshold for the some evidence standard that the court adopted has also become a standard of proof for governor's parole denials.⁶²

Board must consider.”); WEISBERG ET AL., *supra* note 3, at 10 (“The Governor must apply the same legal standards as did the BPH itself when reviewing decisions.”). *But see In re Lawrence*, 190 P.3d 535, 548 (Cal. 2008) (“[T]he Governor has discretion to be ‘more stringent or cautious’ in determining whether a defendant poses an unreasonable risk to public safety.” (quoting *In re Rosenkrantz*, 59 P.3d 174, 224 (2002))).

57. *In re Lawrence*, 190 P.3d at 553.

[T]he significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public.

Accordingly . . . the relevant inquiry is whether some evidence supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.

Id. If the governor reverses or modifies a parole grant by the BPH, the governor must provide the inmate with a written statement explaining the decision and must report the decision to the state legislature. CAL. CONST. art. V, § 8 (b); CAL. PENAL CODE § 3041.2 (b).

58. WEISBERG ET AL., *supra* note 3, at 13; *see also* Siders, *supra* note 10. Note, however, that Governor Wilson considered far fewer cases than the other three governors have. WEISBERG ET AL., *supra* note 3, at 13.

59. Both governors essentially relied only on the first unsuitability factor, which looks at whether the murder was committed in an “especially heinous, atrocious or cruel manner,” when making their determinations. CAL. CODE REGS. tit. 15, § 2402(c) (2013); Dolan, *supra* note 15 (describing Governor Schwarzenegger’s tendency to reverse paroles because of the trivial reasons for the murder or because the inmate displayed a “callous disregard for human suffering”).

60. *In re Lawrence*, 190 P.3d at 553. *See infra* Part III.C for a more detailed explanation of the importance of the new standard developed in *Lawrence*.

61. *See* WEISBERG ET AL., *supra* note 3, at 14 (displaying on Chart 6 that Governor Schwarzenegger’s reversal rate actually increased from 59 percent in 2008 to 70 percent in 2009 and 65 percent in 2010).

62. Hipolito, *supra* note 45, at 1896–97 (“Although *Lawrence* intended for the ‘current dangerousness’ standard to be used by courts, it has effectively become the standard of proof for gubernatorial parole denials.”).

In explaining his low reversal rate, Governor Brown claims that he is following the “proper legal standards for reviewing paroles,” which his two immediate predecessors, Davis and Schwarzenegger, failed to do.⁶³ Governor Brown’s approach is believed to be “long overdue” by inmates and prisoner advocates,⁶⁴ but political pressure from victims’ rights groups remain.⁶⁵ Because of Governor Brown’s age and lack of interest in pursuing further political office,⁶⁶ political pressure suggesting that he is not tough on crime will likely fail to affect his approach to reviewing paroles. But Governor Brown’s quasi-immunity to political pressure on this power is unique and is unlikely to continue with the next governor. Moreover, the governor’s political goals are not the only factor affecting how the governor exercises discretion when making parole decisions. The political climate and governor’s political party likely also play an unpredictable role.

As a result, the expansive range in reversal rates, as well as inconsistencies among governors from the same political party, has and will continue to be disconcerting for inmates, critics, and the courts.⁶⁷

D. The Judicial Check and Possible Remedies

If the BPH panel or the governor denies a lifer parole, she has only one path of appeal: filing a writ of habeas corpus petition.⁶⁸ Until 2011, lifers could file the habeas petitions in state or federal courts to seek review of a parole denial by the BPH or the governor, but the U.S. Supreme Court closed off the federal courts to such habeas petitions in *Swarthout v. Cooke*.⁶⁹ The Court held that no right existed under the U.S. Constitution “to be conditionally released before the expiration of a valid sentence.”⁷⁰ Thus, the Court refused to “convert[] California’s ‘some

63. Egelko, *supra* note 9. Governor Brown also believes that his low reversal rate reflects “shifts in sentencing practices, judicial rulings and public attitudes on crime.” *Id.*

64. *E.g., id.* (“Donald Specter, executive director of the Prison Law Office, which represents many inmates, said Brown’s perspective is long overdue.”).

65. Nannette Miranda, *Brown Allows Parole for Murderers at Greater Rate*, ABC7 NEWS (Feb. 9, 2012), <http://abclocal.go.com/kgo/story?section=news/politics&cid=8538476> (quoting a representative from the Crime Victims Action Alliance as stating that Governor Brown has opened the “flood gates” by reversing less parole grants).

66. Egelko, *supra* note 9.

67. Dolan, *supra* note 6 (“Critics of California’s parole system have called for the fate of inmates to be taken out of politicians’ hands and left up to professionals. And courts have been taking issue with the way successive governors have used their authority.”).

68. Ball, *supra* note 31, at 916.

69. 131 S. Ct. 859, 863 (2011).

70. *Id.* at 862 (“Whatever liberty interest exists is, of course, a state interest created by California law.”).

evidence' rule into a substantive federal requirement."⁷¹ States are not required to offer parole to their prisoners, but if they decide to do so, the Constitution requires only a low threshold of procedural fairness.⁷² As a result, lifers could file habeas petitions in federal court to challenge only procedural issues, not the substance of the parole denial. Therefore, *Swarthout* essentially ended lifers' ability to appeal their denials in federal courts.⁷³ Without a federal court path of appeal, lifers are restricted to appealing their parole denials by the BPH or governor in state courts.

If a lifer successfully appeals her denial in state court, then the remedy for the lifer depends on which executive branch entity denied her parole. When the court grants a habeas petition after a BPH denial, then the court is limited to ordering a new parole suitability hearing.⁷⁴ But when the court grants a habeas petition after a governor denial, then the court vacates the governor's decision and reinstates the BPH's finding of parole suitability, thereby leading to the inmate's release.⁷⁵

Successfully appealing a parole denial in state court to obtain one of these remedies is not an easy feat. No matter which executive branch entity denied the parole, the court must apply the same vague standard—the some evidence standard.

71. *Id.* at 862–63 (“The short of the matter is that the responsibility for assuring that the constitutionally adequate procedures governing California’s parole system are properly applied rests with California courts, and is no part of the Ninth Circuit’s business.”).

72. *See id.*

73. A possible unstated explanation for the decision reached in *Swarthout* is the overwhelming number of habeas petitions submitted to federal courts each year by state inmates who appeal their convictions, their death sentences, and their parole denials. *See generally* Nancy J. King, *Non-capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT’G REP. 308 (2012) (analyzing habeas appeals data).

74. *In re Prather*, 234 P.3d 541, 544 (Cal. 2010) (holding that a court that grants a habeas petition cannot order the BPH to find the inmate suitable for parole or order the BPH to consider only new evidence because such an order would violate the separation of powers).

75. For example, see *In re Lee*:

As the record allows only one conclusion about Lee’s lack of dangerousness to the public, it serves no purpose to remand this matter to the Governor to permit him to reconsider his decision. Accordingly, the petition for the writ of habeas corpus is granted. The Governor’s decision to reverse the board’s order granting parole to Wen Lee is vacated, and the board’s parole release order is reinstated.

49 Cal. Rptr. 3d 931, 941 (Ct. App. 2006) (citations omitted).

II. THE EMERGENCE OF THE SOME EVIDENCE STANDARD

A. Origination and Affirmation: *In re Rosenkrantz* and *In re Dannenberg*

The California Supreme Court did not establish a judicial review standard for parole denials by the BPH or the governor until 2002.⁷⁶ When presented with the question of whether the governor's parole decisions were subject to judicial review in *In re Rosenkrantz*,⁷⁷ the court first established the judicial review standard for BPH parole decisions.⁷⁸

After acknowledging the need for some limitation on the BPH's discretionary authority,⁷⁹ the court sought guidance from *In re Powell*, which set the standard of review for BPH decisions that rescinded parole.⁸⁰ Rather than adopt a stricter judicial review standard, *Powell* settled on the some evidence standard.⁸¹ By allowing courts to ensure that the BPH had some basis in fact for its decisions, the court in *Powell* believed that it had struck the appropriate balance between the public interest and the inmate's interest.⁸² The court viewed anything more stringent than some evidence as too intrusive on the BPH's discretionary authority.⁸³

But because the some evidence standard still granted significant discretion to the BPH, the court in *Rosenkrantz* understood that adopting something lower than the some evidence standard would allow for "decision[s] without any basis in fact."⁸⁴ Thus, to ensure due process for inmates appearing before the BPH and to maintain the balance with public safety, *Rosenkrantz* adopted the some evi-

76. *In re Rosenkrantz*, 59 P.3d 174, 183, 201 (Cal. 2002).

77. *Id.* at 183.

78. *Id.* at 201 ("In analyzing the Governor's contention that the judiciary is not authorized to review the merits of a Governor's decision affirming, reversing, or modifying a parole decision of the Board, we believe that it is helpful first to consider the proper extent of judicial review of the Board's decisions granting or denying parole.").

79. *Id.* at 203 ("[T]he requirement of procedural due process embodied in the California Constitution places some limitations upon the broad discretionary authority of the Board." (citation omitted)).

80. *In re Powell*, 755 P.2d 881, 887 (Cal. 1988).

81. *See id.* *Powell* adopted the some evidence standard from a U.S. Supreme Court decision that held that the federal Due Process Clause was satisfied if there was "some evidence" to support the revocation of good time credits by a prison disciplinary board. *Superintendent v. Hill*, 472 U.S. 445, 456 (1985). *Powell* analogized a parole date to the good time credits at issue in *Hill* to find that both were prospective benefits subject to the discretionary authority of the appropriate executive agency. *In re Powell*, 755 P.2d at 887.

82. *See id.* ("While the board cannot rescind a parole date arbitrarily or capriciously, it does not abuse its discretion when it has some basis in fact for its decision. As stated above, the [BPH] must strike 'a balance between the interests of the inmate and of the public.'" (quoting *In re Fain*, 135 Cal. Rptr. 543, 550 (Ct. App. 1976))).

83. *See id.* ("If [the BPH] is to accomplish this delicate [balancing] task, it must operate with broad discretion and not be 'subject to second-guessing upon review.'" (quoting *Hill*, 472 U.S. at 454-55)).

84. *In re Rosenkrantz*, 59 P.3d at 204.

dence standard from *Powell*. As a result, *Rosenkrantz* authorized courts to assess if some evidence supported the BPH's parole denial.⁸⁵

Although neither the California Constitution nor any statute authorized judicial review of the governor's parole decisions, *Rosenkrantz* also subjected the governor's decisions to the some evidence standard.⁸⁶ Because the governor's decision "must be based upon the same factors that restrict the [BPH] in rendering its parole decision[s],"⁸⁷ the inmate's liberty interest in the parole decision was the same whether the BPH or the governor made the decision.⁸⁸ When the governor conducted his "independent, de novo review of the prisoner's suitability for parole,"⁸⁹ the court concluded that the judiciary had to protect the inmate's liberty interest and ensure due process of law through the some evidence standard.⁹⁰

Once the court established that state courts had the power to review the factual basis of parole denials made by the BPH and by the governor, *Rosenkrantz* tried to definitively address two primary issues regarding the contours of the some evidence standard. The first issue concerned the threshold of the some evidence standard, or what level of evidence the BPH or governor needed to show in order to meet the standard's scrutiny. In other words, what qualifies as "some" in the some evidence standard? *Rosenkrantz* explicitly stated that the nature of the inmate's offense constituted enough evidence to justify a parole denial.⁹¹ Thus, *Rosenkrantz* approved what this Comment refers to as the nature of the offense model, in which the severity of the inmate's crime can constitute some evidence that is sufficient to justify that inmate's parole denial. The court, however, acknowledged that some instances might exist where the nature of the offense would not constitute some evidence.⁹²

85. *Id.* at 205. The court stated:

Accordingly, we conclude that the judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation.

Id.

86. *See id.* at 206–07, 211.

87. *Id.* at 207; *see also* CAL. CONST. art. V, § 8(b) ("The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider.").

88. *In re Rosenkrantz*, 59 P.3d at 207.

89. *Id.*

90. *Id.* at 209.

91. *Id.* at 222.

92. *Id.* ("In some circumstances, a denial of parole based upon the nature of the offense alone might rise to the level of a due process violation . . .").

The second issue regarded the scope of judicial review when determining if the standard's threshold of some evidence was met. *Rosenkrantz* stated only that the some evidence standard is "extremely deferential" and not an independent assessment of the merits.⁹³ Thus, it appeared that the scope of judicial review under the some evidence standard lied somewhere between no review and substantial evidence review. But *Rosenkrantz* did not specify to which end of that scale the some evidence standard was closer, but its emphasis on deferential review indicated that the scope was closer to the no review side of the scale.

Although *Rosenkrantz* failed to provide definitive clarity on these two issues, the some evidence standard remained and was affirmed three years later by the court under *In re Dannenberg*.⁹⁴ *Dannenberg* affirmed, yet failed to give further guidance on, the answers that *Rosenkrantz* provided to the two issues regarding the some evidence standard.

Concerning the standard's threshold, *Dannenberg* confirmed that the heinous nature of the offense could independently qualify as some evidence to justify the parole denial.⁹⁵ Thus, the court again approved the nature of the offense model, under which the BPH or the governor's denial had to contain proof only that the inmate's crime was heinous in order to qualify as containing some evidence. But again, the court left open the possibility that the nature of the offense could be an independently insufficient justification to deny parole if the offense was not "particularly egregious" or not "especially callous and cruel."⁹⁶

Further, and similar to *Rosenkrantz*, *Dannenberg* failed to specify the precise scope of judicial review under the some evidence standard. Besides acknowledging the broad discretion of the BPH,⁹⁷ the court did not further explain how stringently courts should review parole denials when trying to determine whether some evidence existed to justify the denial.

As a result, *Dannenberg* was just as ambiguous on these two issues as was *Rosenkrantz*. These two cases were vital to establishing the some evidence standard, but their failure to elucidate the essential boundaries of the standard led to confusion in California's appellate courts. Without clear guidance on the stand-

93. *Id.* at 210.

94. *In re Dannenberg*, 104 P.3d 783, 786 (Cal. 2005) ("The [BPH] acts properly in determining unsuitability, and the inmate receives all constitutional process due, if the Board . . . renders a decision supported by 'some evidence.'").

95. *Id.* at 786–87 (finding that the inmate's murder of his wife during a domestic dispute, by hitting her head multiple times with a pipe wrench and possibly drowning her, was a heinous offense that constituted some evidence for a parole denial).

96. *Id.* at 802–03 (citing *In re Rosenkrantz*, 59 P.3d at 222).

97. *Id.* at 786 ("Accordingly, we conclude that the Board, exercising its traditional broad discretion, may protect public safety . . . by considering the dangerous implications of a life-maximum prisoner's crime individually.").

ard's threshold and the scope of judicial review allowed under that standard, the appellate courts began moving along two divergent paths.

B. Two Meanings Emerge: Confusion in the California Appellate Courts

In the years following *Rosenkrantz* and *Dannenberg*, both the BPH and the governor continued to deny paroles based solely on the nature of the offense.⁹⁸ Because the court approved of this practice in both cases but failed to define precisely its limitations or the scope of judicial review, the appellate courts did not uniformly respond to the practice.⁹⁹ Rather, the appellate courts magnified the ambiguities in the some evidence standard that *Rosenkrantz* and *Dannenberg* failed to resolve.

The First District California Court of Appeals acknowledged in 2007 that “two lines of authority” had emerged.¹⁰⁰ In one line of authority, courts followed the nature of the offense model.¹⁰¹ This model required proof in the record only for one of the unsuitability factors that the BPH or governor relied on to deny parole, which was often the heinousness of the offense.¹⁰² But in the other line of authority, courts required “some evidence upon which the Governor or the Board could conclude release of the prisoner to parole would endanger public safety.”¹⁰³ This line of authority focused on the inmate's current dangerousness as opposed to the nature of her original offense.¹⁰⁴ This model went beyond what *Rosenkrantz*

98. See, e.g., *In re Abraham*, No. D050029, 2008 WL 162964, at *1, *3 (Cal. Ct. App. Jan. 18, 2008) (“The BPH cited only the circumstances of the crime to support its conclusion he posed an unreasonable risk to society.”); *In re Tripp*, 58 Cal. Rptr. 3d 64, 69 (Ct. App. 2007) (“The Governor's decision was not based on prison misconduct by the [inmate], her lack of rehabilitation, or any prior criminal history. . . . The Governor's parole denial is based entirely on the commitment offense.”).

99. See Roger S. Hanson, *The Convolutions, Evolutions, Resolutions, and Revolutions of the California State Parole Process*, 32 WHITTIER L. REV. 273, 284 (2011) (“Ambiguity reigned after *Dannenberg*. . . . Several Courts of Appeal decisions illustrated this key ambiguity. . . .”).

100. *In re Lee*, No. A117288, 2007 WL 4158036, at *3 (Cal. Ct. App. Nov. 26, 2007); see also Hanson, *supra* note 99, at 274 (“A clear dichotomy existed in the decisions of the California Courts of Appeal in the four-year period from 2004–2008. . . .”).

101. See *In re Lee*, 2007 WL 4158036, at *4 (“Other courts apply the some evidence standard more deferentially, and, without reaching whether the petitioner is a continuing threat to public safety, simply consider whether the record discloses some evidence in support of a factor relied upon by the Board or the Governor to deny parole.”).

102. See *id.* (citing seven cases that adopted this model of the some evidence standard).

103. *Id.* (citing five cases that adopted this model of the some evidence standard).

104. See, e.g., *In re Lee*, 49 Cal. Rptr. 3d 931, 936 (Ct. App. 2006) (“The test is not whether some evidence supports the reasons the Governor cites for denying parole, but whether some evidence indicates a parolee's release *unreasonably endangers public safety*.”).

and *Dannenberg* explicitly suggested and instead relied on language in the state regulations governing parole suitability determinations.¹⁰⁵

These different lines of authority reflected a disagreement among the courts over the threshold of the some evidence standard. One line accepted that the nature of the offense could be the only factor on which parole was denied while the other line did not.¹⁰⁶ Tensions resulting from the disagreement were seen not only between different appellate court opinions but within such opinions as well. For example, the majority in *In re Roderick* concluded that the current dangerousness model of the some evidence standard was the proper formulation.¹⁰⁷ The dissent, conversely, rejected this model.¹⁰⁸ The dissent argued that because the BPH has more training and experience than that of judges, courts should respect the BPH's sole reliance on the nature of the offense to justify a parole denial.¹⁰⁹

The majority and dissenting opinions in *Roderick* also illustrate the disagreement over the scope of judicial review under the some evidence standard. Like other courts that adopted the current dangerousness model, the majority also concluded that "meaningful judicial review" was possible only if courts were allowed to assess the evidence and rationality for the parole denial.¹¹⁰ The majority also humorously noted that the other model would relegate the court to the "status of potted plants."¹¹¹ The dissent, however, emphasized that judicial review of parole denials is "highly deferential" and "extremely limited."¹¹² Under this limited form of review, the dissent argued that courts were not allowed to evaluate the BPH's or governor's weighing of various suitability and unsuitability factors.¹¹³ The dissent further admitted that even if the court "believe[d] that the evidence support-

105. *See id.*; *see also* CAL. CODE REGS. tit. 15, § 2402(c) (2013) ("[A] life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.").

106. *See In re Lee*, 2007 WL 4158036, at *3 (noting that the BPH and governor's continued reliance on the inmate's offense has become the "bugaboo" in courts' application of the some evidence standard).

107. *In re Roderick*, 65 Cal. Rptr. 3d 16, 31 (Ct. App. 2007) ("Thus, it is not enough that there is some evidence to support the factors cited for denial; that evidence must also rationally support the core determination required by the statute before parole can be denied, i.e., that a prisoner's release will unreasonably endanger public safety.").

108. *See id.* at 45–48 (Sepulveda, J., dissenting).

109. *See id.* at 73 ("The [BPH]'s experience and training in evaluating these circumstances far exceed that of most, if not all, judges.").

110. *Id.* at 32 (majority opinion) (arguing that if the dissent's view on judicial review was adopted, that "affirmance [of the parole denial] would be guaranteed in every case").

111. *Id.* at 31.

112. *Id.* at 45 (Sepulveda, J., dissenting).

113. *Id.* at 48 ("We should not scour the entire record looking for evidence contrary to the Board's decision, independently assess the credibility of witnesses, or reweigh the evidence . . .").

ing suitability [was] overwhelming,”¹¹⁴ the court cannot overturn a parole denial “unless the record is absolutely devoid of even the slightest evidence.”¹¹⁵ Similar to the some evidence standard’s threshold issue, the standard’s judicial review issue had two divergent models percolating in the state appellate courts.

The appellate court opinions post-*Rosenkrantz* clearly marked two sides of the debate, but choosing a side required providing definitive answers for two issues regarding the some evidence standard: (1) the threshold of the standard and (2) the scope of judicial review under that standard. When appellate courts chose a side, the current dangerousness model aligned with the less deferential judicial review model, while the nature of the offense model aligned with the more deferential judicial review model.¹¹⁶ Without guidance from the state Supreme Court, the BPH and the governor would have continued to rely on the nature of the offense to deny parole and hope that a reviewing court follows the nature of the offense model when determining the some evidence standard’s threshold and the more deferential model when determining the standard’s scope of judicial review. Because of the two lines of authority, a lifer’s due process and chance for parole release would have continued to be arbitrarily dependent on the court and judge(s) reviewing the habeas petitions.

But after six years of confusion and tension in the appellate courts, the California Supreme Court finally decided to review a case that would try to “sort out the tension between these two lines of authority.”¹¹⁷ *In re Lawrence* sought to end the debate on the some evidence standard, but another state Supreme Court decision three years after *Lawrence* left the debate on the scope of judicial review without a conclusive answer.¹¹⁸

III. ONE SOME EVIDENCE ISSUE RESOLVED, ANOTHER ISSUE REMAINS

By 2008 the California Supreme Court recognized the growing split in interpretations of the some evidence standard among the state Courts of Appeal¹¹⁹ and sought in *Lawrence* to settle the tension and establish a clear some evidence standard. Unfortunately, *Lawrence* resolved only the split concerning the thresh-

114. *Id.* at 44.

115. *Id.*

116. See Figure 1 in the Appendix for a diagram illustrating the two issues and the two models within each issue regarding the some evidence standard.

117. *In re Lee*, No. A117288, 2007 WL 4158036, at *3 (Cal. Ct. App. Nov. 26, 2007).

118. *Shaputis II*, 265 P.3d 253 (Cal. 2011); *In re Lawrence*, 190 P.3d 535, 549 (Cal. 2008).

119. *In re Lawrence*, 190 P.3d at 549.

old of the some evidence standard by adopting the current dangerous model.¹²⁰ Concerning the scope of judicial review, the court appeared to adopt the less deferential judicial review model,¹²¹ but three years later in *Shaputis II* the court appeared to adopt the more deferential judicial review model.¹²² Although *Shaputis II* confirmed that the threshold issue was resolved,¹²³ it reinitiated uncertainty regarding the scope of judicial review issue. Fifty-nine post-*Shaputis II* state appellate court opinions illustrate the remaining ambiguity with the some evidence standard as different courts applied different levels of judicial review. These cases reveal that the scope of judicial review issue remains unresolved.

A. Resolving the First Some Evidence Issue: *In re Lawrence*

Lawrence represented a culmination of the state judiciary's frustration with the BPH and the governor for consistently relying solely on the nature of a lifer's offense to justify a parole denial.¹²⁴ Similar to other lifers,¹²⁵ the governor reversed the parole of the inmate petitioner in *Lawrence* solely because of the nature of the murder that she committed.¹²⁶ Governor Arnold Schwarzenegger reversed Sandra Lawrence's parole even though she was considered a "model prisoner," granted parole four times by the BPH, and declared not a "significant danger to public safety" by five psychologists.¹²⁷ Lawrence's postconviction history did not suggest

120. *See id.* at 553.

121. *See id.*

122. *See Shaputis II*, 265 P.3d at 272 ("[I]t is not a judicial function to weigh conflicting views in the social or psychological sciences for the purpose of developing rules binding on the executive branch.").

123. *See id.* at 264.

124. *See In re Lawrence*, 190 P.3d at 549. The court noted:

A growing tension has emerged in the decisions regarding the precise contours of the 'some evidence' standard of review. This conflict is rooted in the practical reality that in every published judicial opinion addressing the issue, the decision of the Board or the Governor to deny or reverse a grant of parole has been founded in part or in whole upon a finding that the inmate committed the offense in an 'especially heinous, atrocious or cruel manner,' and in the growing recognition that in some instances, the circumstances of the underlying offense . . . bear little relationship to the determination we recognized in *Rosenkrantz* and *Dannenberg* as critical—whether the inmate *remains* a threat to public safety.

Id.

125. *See, e.g., In re Tripp*, 58 Cal. Rptr. 3d 64, 69 (Ct. App. 2007) (describing that the governor's parole reversal was based solely on the inmate petitioner's role in the commitment offense, which was helping to strangle a ten-year-old child).

126. *See In re Lawrence*, 190 P.3d at 540, 544–45 (explaining that Sandra Lawrence shot and stabbed her victim multiple times, and that the governor justified his parole reversal because of the "shockingly vicious use of lethality and an exceptionally callous disregard for human suffering" in the murder).

127. Hempel, *supra* note 17, at 177–78.

that she was currently dangerous, and because the governor reversed her parole based solely on the offense, deciding the case required the court to choose between the current dangerousness model and the nature of the offense model.

Recognizing the tension between the two threshold issue's models,¹²⁸ the court looked to the relevant statutes and regulations, to *Rosenkrantz*, and to *Dannenberg* to determine what should be the "fundamental consideration in parole decisions."¹²⁹ The court noted that the state Penal Code required the BPH to grant parole unless "consideration of the public safety requires a more lengthy period of incarceration."¹³⁰ Further, the governing regulations provided both suitability and unsuitability factors to guide the BPH and governor's parole decisions, with the suitability factors focusing on the inmate's postconviction conduct such as her rehabilitative activities and signs of remorse.¹³¹ Consideration of these suitability factors can help determine whether an inmate "is rehabilitated and no longer poses a danger to public safety."¹³² Moreover, both *Rosenkrantz*¹³³ and *Dannenberg*¹³⁴ explicitly concluded that a parole decision required determining the inmate's public safety risk upon release. Therefore, the court concluded that the "fundamental consideration in parole decisions is public safety."¹³⁵ The court further concluded from these sources that determining the inmate's risk to public safety required an "assessment of an inmate's *current* dangerousness."¹³⁶

With this in mind, the court set out to address the first issue with the some evidence standard—its threshold. The court reasoned that because the BPH and governor must base their parole denials on the inmate's current dangerousness, a reviewing court must assess "whether some evidence supports the *decision* of the [BPH] or the Governor that the inmate constitutes a current threat to public

128. See *In re Lawrence*, 190 P.3d at 549 ("[A] conflict has emerged concerning the extent to which a determination of current dangerousness should guide a reviewing court's inquiry into the Governor's (or the Board's) decision . . .").

129. *Id.* at 546–49.

130. CAL. PENAL CODE § 3041(b) (West 2012); *In re Lawrence*, 190 P.3d at 546.

131. *In re Lawrence*, 190 P.3d at 546–47; see CAL. CODE REGS. tit. 15, § 2402 (2013). See note 43 for an exact listing of the regulation's nine suitability factors and six unsuitability factors. Examples of suitability factors concerning post-conviction conduct focus on the inmate's expression of remorse, future plans, and rehabilitation activities completed while incarcerated. *Supra* note 43.

132. *In re Lawrence*, 190 P.3d at 564.

133. *In re Rosenkrantz*, 59 P.3d 174, 202 (Cal. 2002) ("[T]he governing statute provides that the [BPH] must grant parole unless it determines that public safety requires a lengthier period of incarceration . . .").

134. *In re Dannenberg*, 104 P.3d 783, 795 (Cal. 2005) ("[T]he determination of suitability for parole involves a paramount assessment of the public safety risk posed by the particular offender . . .").

135. *In re Lawrence*, 190 P.3d at 549.

136. *Id.*

safety.”¹³⁷ To determine if some evidence supports the BPH or governor’s decision, a reviewing court must find a “rational nexus” between the unsuitability factors or the nature of the offense and the conclusion that the inmate is currently dangerous.¹³⁸ Finding some evidence regarding the “existence or nonexistence of suitability or unsuitability factors” or regarding the heinous nature of the offense was insufficient, on its own, to demonstrate that an inmate was currently dangerous.¹³⁹ Rather, a parole denial needed to establish a connection between the nature of the offense, as well as other factors, and the conclusion that the inmate was currently dangerous. Thus, the court adopted the current dangerousness model and rejected the nature of the offense model.

Although *Rosenkrantz* and *Dannenberg* held that the nature of the offense could independently constitute some evidence, both opinions admitted that sometimes the nature of the offense would be insufficient if the offense failed to meet a certain level of heinousness in comparison to other similar offenses.¹⁴⁰ *Lawrence*, however, rejected the practice of comparing the heinousness of different offenses¹⁴¹ and found that the nature of the offense fails to demonstrate in every case that a lifer is currently dangerous.¹⁴² The heinous nature of the offense may provide an “implication” that the lifer is currently dangerous, but the BPH or governor must confirm that implication with other evidence.¹⁴³ Thus, *Lawrence* adopted a threshold of the some evidence standard that allowed for consideration of the nature of the offense, but required more than the brutal facts of the crime

137. *Id.* at 553.

138. *Id.* at 552, 554, 564; *see also* Hempel, *supra* note 17, at 176 (“The circumstances of the commitment offense may be relevant, but a decision relying on those circumstances as the basis for denial will only survive due process scrutiny if the decision articulates a rational nexus between the past offense and current dangerousness.”). Hempel also argued that adopting the current dangerousness model reflected a change in the focus of parole suitability determinations from retribution to rehabilitation. *Id.*

139. *In re Lawrence*, 190 P.3d at 553 (“[T]he circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative of the determination that a prisoner remains a danger to the public.”).

140. *See supra* Part II.A.

141. *In re Lawrence*, 190 P.3d at 557 (noting that comparing the heinousness of an inmate’s crime to another fails to provide the statutorily required individualized assessment of parole suitability and that such comparison also fails to provide some evidence that an inmate is currently dangerous).

142. *Id.* at 554–55.

143. *Id.* at 555. The other evidence that can confirm the implication of current dangerousness based on the heinous nature of the offense includes the lifer’s “pre- or post-incarceration history, or his or her current demeanor and mental state.” *Id.* Some argue that considering the nature of the offense “is necessary to gauge the scope of rehabilitative work and gauge a full understanding of the prisoner.” Noone, *supra* note 24, at 807. Noone advocates against looking only at postconviction factors because doing so will prevent gaining a complete understanding of the inmate’s current dangerousness. *Id.* But she approves of the some evidence standard set in *Lawrence* because it still allows for consideration of the nature of the offense. *Id.* at 808.

in order to establish a rational nexus between the offense and the conclusion that the lifer was currently dangerous.

Once the court resolved the some evidence standard's threshold issue by adopting the current dangerousness model,¹⁴⁴ the court also addressed the standard's second issue—the scope of judicial review. The court admitted that *Rosenkrantz* described the BPH's discretion as “almost unlimited”¹⁴⁵ and the governor's discretion as more “stringent or cautious” than that of BPH.¹⁴⁶ Thus, judicial review under the some evidence standard was “unquestionably deferential.”¹⁴⁷ But the court made clear that the judicial review was also “not toothless” and “must be sufficiently robust.”¹⁴⁸ The court emphasized that both *Rosenkrantz* and *Dannenberg* granted courts the power, in order to ensure due process and to protect the inmate's liberty interest, to review the “merits of the [BPH's] or the Governor's decision.”¹⁴⁹ Thus, the scope of judicial review was not limited to ensuring protection from procedural violations.¹⁵⁰

By defining the scope of judicial review to include a review of the merits of parole decisions, as well as adopting the current dangerousness threshold model with a rational nexus requirement, the court chose the less deferential judicial review model.¹⁵¹ *Lawrence* followed the example of pre-*Lawrence* appellate court decisions that matched the current dangerousness threshold model with the less deferential judicial review model.

Once the court adopted these two models, it applied its newly clarified some evidence standard to Sandra Lawrence's parole reversal. The court concluded that the governor's reliance only on the nature of the offense failed to qualify as

144. *But see* Cotton, *supra* note 2, at 245 (arguing that *Lawrence's* definition of the some evidence standard still fails to provide specific guidance to the BPH and governor, whom Cotton believes will find ways to maneuver around the arguably ambiguous language of the standard's definition).

145. *In re Lawrence*, 190 P.3d at 547–48 (citing *In re Rosenkrantz*, 59 P.3d 174, 203 (Cal. 2002)).

146. *Id.* at 548 (citing *In re Rosenkrantz*, 59 P.3d at 224).

147. *Id.* at 552.

148. *Id.* at 552, 553. The Court further emphasized that judicial review requires ensuring that the BPH or the governor made an individualized parole decision based on due consideration of the suitability and unsuitability factors. *Id.* at 552.

149. *Id.* at 552 (emphasis added). *But see id.* at 568 (Chin, J., dissenting) (emphasizing that courts cannot evaluate the manner in which the BPH or governor weighs the unsuitability and suitability factors).

150. *See id.* at 548 (majority opinion).

151. *See* Hipolito, *supra* note 45, at 1895 (“By focusing on the nexus . . . *Lawrence* gave courts greater discretion to conclude that the [BPH] or governor failed to show some evidence of current dangerousness. Courts . . . can now closely scrutinize the quality of the evidence to determine if it substantively relates to current dangerousness.”). *But see* Hempel, *supra* note 17, at 179 (“[T]he executive branch retains a vast amount of discretion in deciding which individuals are rehabilitated, as well as a great deal of power over the creation of the parole record itself.”).

some evidence, and thus overturned his parole reversal.¹⁵² But more importantly, *Lawrence* adopted a framework that addressed both issues with the some evidence standard. Unfortunately, the court reopened Pandora's box three years later when it failed to affirm *Lawrence's* apparent choice of the less deferential judicial review model.¹⁵³

B. Reigniting the Second Some Evidence Issue: *Shaputis II*

After the California Supreme Court upheld the governor's parole reversal for Richard Shaputis in 2008 because of his lack of insight,¹⁵⁴ Shaputis's fate again depended on the court after the BPH denied him parole in 2009.¹⁵⁵ The court of appeals found that the BPH failed to meet the some evidence standard,¹⁵⁶ but the supreme court was dissatisfied with the lower court's application of the standard and believed that further clarification of *Lawrence* was necessary. Rather than leave undisturbed *Lawrence's* adoption of a clear some evidence framework, the court affirmed the current dangerousness threshold model while reopening the debate on the scope of judicial review.

Before discussing the scope of judicial review, the court avoided disturbing the threshold issue and affirmed *Lawrence's* adoption of the current dangerousness model.¹⁵⁷ It confirmed that when applying the some evidence standard, courts must assess whether a rational nexus exists between the evidence and the conclusion that the inmate remains currently dangerous.¹⁵⁸ Thus, *Shaputis II*

152. *In re Lawrence*, 190 P.3d at 564.

153. Arguably, the California Supreme Court may have opened Pandora's box on the same day it issued the *Lawrence* opinion in a companion case to *Lawrence* commonly referred to as *Shaputis I*. *In re Shaputis (Shaputis I)*, 190 P.3d 573 (Cal. 2008). In *Shaputis I*, the court held that the governor's finding that the inmate "lacked insight" into the causative factors for his offense indicated current dangerousness and thus met the some evidence standard. *Id.* at 573, 584, 585. Once approved by the supreme court, the BPH and governor began relying on the lack of insight justification instead of the egregious nature of the offense. Hempel, *supra* note 17, at 179. Hempel argues that this justification "may simply replace the executive's post-*Rosenkrantz* uniform reliance on the aggravated nature of the offense as its standard reason for denying parole." *Id.* By approving the lack of insight justification in addition to choosing the current dangerousness model for the some evidence standard's definition, the court essentially gave the lower courts another way to maneuver around the some evidence standard and thus left open opportunities for further tension.

154. *Shaputis I*, 190 P.3d at 584–85.

155. *Shaputis II*, 265 P.3d 253, 261–63 (Cal. 2011) (describing how the BPH denied Shaputis parole because of his lack of insight into the murder of his wife and his history of domestic abuse).

156. *Id.* at 263.

157. *Id.* at 264 ("[T]he proper articulation . . . is whether there exists 'some evidence' demonstrating that an inmate poses a current threat to public safety, rather than merely some evidence suggesting the existence of a statutory factor of unsuitability.")

158. *Id.* at 272 ("[T]he court considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness.")

clearly adopted the current dangerousness model and rejected the nature of the offense model.

For the scope of the judicial review issue, however, the court failed to provide the same level of finality. The court first rejected the court of appeal's apparent effort to adopt a less deferential standard, such as a demonstrable reality review standard or a substantial evidence review standard.¹⁵⁹ This explicit rejection of a demonstrable reality review or substantial evidence standard foreclosed any possibility that the court will stray away from the some evidence standard.¹⁶⁰ Although explicit in its affirmance of the some evidence standard, the court's adoption of a degree of deference different from that applied in *Lawrence* muddled the meaning of the some evidence standard.

Lawrence explained that judicial review under the some evidence standard was "not toothless" and must be "sufficiently robust."¹⁶¹ *Shaputis II*, however, retreated from this less deferential model and noted that the standard allows only for "limited" judicial review that is "narrower in scope than appellate review of a lower court's judgment."¹⁶² Moreover, the court added that a reviewing court "must consider the whole record in the light most favorable to the determination before it" and must find only a "modicum of evidence" supporting the conclusion that the inmate is currently dangerous.¹⁶³ It instructed that a denial failed the some evidence standard only if it "lacks any rational basis" and is "arbitrary."¹⁶⁴ When deciding if the denial was arbitrary, the reviewing court cannot reweigh the evidence or assess the inmate's current dangerousness, but only determine the existence of a rational nexus.¹⁶⁵

159. *See id.* at 264 (explaining that the court has never adopted anything other than the some evidence standard, which is more deferential than both the demonstrable reality standard and the substantial evidence standard).

160. *But cf.* Steve Disharoon, Comment, *California's Broken Parole System: Flawed Standards and Insufficient Oversight Threaten the Rights of Prisoners*, 44 U.S.F. L. REV. 177, 204–06 (2009) (arguing that California should adopt a different kind of judicial review standard because he believes the some evidence standard was "essentially meaningless" and allowed "politics and prejudice [to] pervade the entire process"). Disharoon proposes that California look to Alaska and New Jersey as examples to adopt a reasonable person standard, a substantial evidence standard, or a weighing test standard. *Id.* But *Shaputis II* rejected Disharoon's proposal and made clear that the some evidence standard will remain as the judicial review standard.

161. *In re Lawrence*, 190 P.3d 535, 552–53 (Cal. 2008).

162. *Shaputis II*, 265 P.3d at 268.

163. *Id.* at 267–68.

164. *Id.* at 265, 268 ("Only when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board or the Governor.").

165. *See id.* at 272 (listing these limitations in dicta at the end of the opinion in a section entitled "Summary of Principles Governing Review of Parole Decisions").

This limited scope of judicial review indicated a divergence from the scope of judicial review described in *Lawrence*. *Lawrence* adopted the less deferential judicial review model,¹⁶⁶ but the language in *Shaputis II* suggested a shift to the more deferential judicial review model. *Shaputis II*'s emphasis on language such as “modicum of evidence,”¹⁶⁷ “not arbitrary,”¹⁶⁸ and “not empowered to reweigh the evidence”¹⁶⁹ was a shift from *Lawrence*'s instruction that courts may review the merits of parole denials.¹⁷⁰ The *Shaputis II* majority opinion never explicitly stated that courts cannot review the merits of parole denials, but it implied such a restriction when it prohibited courts from deciding which evidence is convincing.¹⁷¹ It further claimed that it is the duty of the BPH and the governor, not the courts, to “conduct an individualized inquiry into the inmate’s suitability for parole.”¹⁷²

This more deferential model differs significantly in the degree of deference from the judicial review model outlined in *Lawrence*. This difference in judicial review models arises from the two cases’ divergent interpretations of an instruction in *Rosenkrantz* that courts must ensure that a parole denial “reflects due consideration of the specified factors as applied to the individual prisoner.”¹⁷³ *Lawrence* interpreted “due consideration” as requiring review of the merits of the parole denial.¹⁷⁴ The *Shaputis II* majority, however, interpreted “due consideration” as only ensuring that the parole denial is not arbitrary.¹⁷⁵ The differing interpretations of this “due consideration” language resulted in two different judicial review models and a reopening of the debate on the scope of judicial review.

But *Shaputis II* failed to establish conclusively the more deferential model as the preferred model of judicial review. Justice Liu’s concurring opinion in *Shaputis II* exacerbated the uncertainties regarding the scope of judicial review under the some evidence standard. Justice Liu stated that he did “not understand

166. See *supra* Part III.A.

167. *Shaputis II*, 265 P.3d at 267.

168. *Id.* at 266.

169. *Id.* at 272.

170. See *In re Lawrence*, 190 P.3d 535, 552 (Cal. 2008). This difference in language is very similar to the difference seen between the majority and dissenting opinions in *Lawrence*. The majority allowed for the review of the merits of the parole denial, but in his dissent, Justice Chin countered that courts cannot reweigh the evidence or assess the manner in which the BPH or governor weighs the evidence. *Id.* at 552, 569 (Chin, J., dissenting).

171. *Shaputis II*, 265 P.3d at 265.

172. *Id.* at 271.

173. *In re Rosenkrantz*, 59 P.3d 174, 677 (Cal. 2002) (emphasis added).

174. *In re Lawrence*, 190 P.3d at 552.

175. *Shaputis II*, 265 P.3d at 266.

[the] opinion to contravene the principle that the reviewing court's primary focus is on the 'facts' and 'reasoning' relied on" by the BPH or the governor.¹⁷⁶ The some evidence standard's scope of judicial review allowed for examination of the "rationality" of the parole decision and "not only the ultimate conclusion of current dangerousness."¹⁷⁷ To examine the rationality of the parole decision, Justice Liu reasoned that reviewing courts must evaluate the "evidence and reasoning on which the [BPH] or Governor actually relied upon."¹⁷⁸ Although the *Shaputis II* majority implied that courts cannot review the merits of a parole denial, Justice Liu emphasized that courts must be able to analyze the decisionmaking process by the BPH or the governor.¹⁷⁹ His emphasis that reviewing courts should analyze the rationality of the parole decision was similar to *Lawrence's* instruction for courts to look at the merits of a parole decision.¹⁸⁰ As a result, Justice Liu's analysis and interpretation of the "due consideration" instruction parallels the less deferential model outlined in *Lawrence*.¹⁸¹ Although other justices did not sign on to Justice Liu's concurring opinion, his opinion reflects a continued disagreement in the state supreme court regarding which judicial review model is preferred for the

176. *Id.* at 274 (Liu, J., concurring). In addition to Justice Liu, two other judges wrote concurrences. Justice Werdegar's concurrence simply expressed her lack of agreement with a particular footnote because the "issue addressed there is not before the court." *Id.* at 272 (Werdegar, J., concurring). Justice Chin's concurrence, however, is slightly more interesting. Justice Chin had written the dissenting opinion in *In re Lawrence*, 190 P.3d at 566 (Chin, J., dissenting), and he reiterated in his *Shaputis II* concurrence that *Lawrence* was "ill-considered" and added that "*Lawrence* is largely responsible for the confusion in the Courts of Appeal that today's opinion seeks to ameliorate." *Shaputis II*, 265 P.3d at 272 (Chin, J., concurring). The fact that Justice Chin disagreed so strongly with *Lawrence*, but "accept[ed] the majority view" in *Shaputis II* demonstrates that a difference exists between the approach outlined in *Lawrence*—the less deferential judicial review model—and the approach outlined in *Shaputis II*—the more deferential judicial review model. *Id.* at 273. Justice Chin's acknowledgement of this distinction between *Lawrence* and *Shaputis II*, combined with a concurrence by Justice Liu in *Shaputis II* that seems more similar to the approach in *Lawrence*, may obfuscate the clarity that *Shaputis II* seeks to provide on the scope of judicial review issue.

177. *Shaputis II*, 265 P.3d at 274 (Liu, J., concurring).

178. *Id.* (emphasis omitted).

179. *Id.* ("For how can a court determine whether a parole 'decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards' unless judicial review focuses on the Board's or the Governor's actual decisionmaking?" (citation omitted)).

180. *In re Lawrence*, 190 P.3d at 552 ("[U]nder the some evidence standard, a reviewing court reviews the merits of the Board's or Governor's decision . . .").

181. One caveat in this similarity between Justice Liu's concurrence and *Lawrence* is that Justice Liu's concurrence limits a court's review to the evidence that the BPH or governor actually used to make its decision rather than allowing for review of the entire record. See *Shaputis II*, 265 P.3d at 274–75 (Liu, J., concurring). *Lawrence*, on the other hand, did not impose such a limit. The *Shaputis II* majority, however, countered Justice Liu's argument in footnote 11. *Id.* at 268 n.11 (majority opinion). The majority argued that review extends to the entire record and not only what evidence the BPH or governor relied on. *Id.*

some evidence standard. Moreover, as a concurring opinion rather than a dissenting opinion, Justice Liu's concurrence provides support for continued application of the less deferential model.

Therefore, even after *Shaputis II*, neither model regarding the scope of judicial review has taken a dominant hold over the other in the state supreme court. Both *Lawrence* and Justice Liu's concurring opinion in *Shaputis II* favored the less deferential model, while the *Shaputis II* majority opinion favored the more deferential model. Without Justice Liu's concurring opinion, it could be reasonable to assume that the court had fully shifted to the more deferential model. But even though *Shaputis II* has a binding majority opinion, Justice Liu's concurrence suggested that the scope of judicial review issue remains unsettled. A review in the next Subpart of multiple state appellate court opinions post-*Shaputis II* confirms this suspicion.

In the end, the California Supreme Court upheld the BPH's denial of Shaputis's parole,¹⁸² but more importantly, it reopened the debate on the scope of judicial review issue and instigated a new round of confusion among California's appellate courts.¹⁸³

C. Two Models of Judicial Review Remain: Examining Post-*Shaputis II* Appellate Court Opinions

At the end of *Shaputis II*'s majority opinion, the California Supreme Court acknowledged that appellate courts were experiencing "confusion about the proper scope of review."¹⁸⁴ In an effort to end the confusion, the court set out a list of principles to guide appellate courts on how to apply the some evidence standard.¹⁸⁵ This summary of principles, however, was not necessary to resolving the facts at issue in the case and thus could be construed as dicta. Moreover, the principles carry less weight because they outline a judicial review model that conflicts

182. *Id.* at 267 (finding that the reviewing court must defer to the BPH when it relies on evidence of the inmate's current dangerousness that it believes to be more trustworthy).

183. *But see id.* at 272-73 (Chin, J., concurring) (arguing that confusion in the appellate courts resulted from *Lawrence* and that the *Shaputis II* majority opinion was seeking to resolve that confusion).

184. *Id.* at 272.

185. *Id.* (summarizing the main considerations of the some evidence analysis into five bullet points: (1) the primary inquiry is whether the inmate is currently dangerous; (2) both the BPH and the governor can use the inmate's entire record to answer this inquiry; (3) an inmate can decide to not participate in a psychological evaluation or the parole hearing, but such lack of participation may not limit evidence which the BPH or governor can consider; (4) the some evidence standard is "highly deferential" and is met unless the parole decision is "arbitrary or procedurally flawed;" and (5) the court cannot reweigh the evidence but only assesses if a rational nexus between the evidence and the conclusion of current dangerousness existed in the parole decision).

with the model set out in Liu's concurrence and the majority opinion in *Lawrence*. The series of appellate cases that followed *Shaputis II* demonstrate the failure of *Shaputis II* and these principles to instill a uniform some evidence standard.¹⁸⁶

As of February 2014, there are fifty-nine published and unpublished post-*Shaputis II* appellate court opinions regarding habeas petitions filed by inmates to appeal their parole denials.¹⁸⁷ Of those fifty-nine opinions, only thirty-six, or 61 percent, primarily relied on the more deferential model outlined in *Shaputis II* when they described or applied the scope of judicial review under the some evidence standard.¹⁸⁸ The remaining opinions primarily relied on the less deferential model based on guidance from *Lawrence* or on guidance from Justice Liu's concurring opinion in *Shaputis II*. Table 1 in the Appendix displays the findings from the fifty-nine cases, but the remainder of this Subpart will take a closer look at certain opinions to demonstrate the appellate courts' varying judicial review approaches when applying the some evidence standard. The estimate that only

186. The set of cases in this Subpart includes opinions issued in 2012 and 2013, which is after *Shaputis II* was decided on December 29, 2011.

187. These fifty-nine cases were found through WestlawNext. First, I looked at the citing references for *Shaputis II*, then I limited the search to only California Courts of Appeals cases. This resulted in the dropping of one California Supreme Court case and one federal district court case. Another ten cases were dropped because they were not about habeas petitions appealing the denial of parole. The first fifty-three cases were analyzed and coded in May 2013. The last six cases were analyzed and coded in February 2014, at which time all the tables in this Comment were also updated. Thus, the tables in this Comment are up-to-date as of February 4, 2014. This data set does not include superior court cases because WestlawNext does not have access to such cases. The number of superior court cases is likely larger than the appellate court cases, and should be looked at for further review.

188. See *infra* Appendix, Table 3. As established in Part III of this Comment, a case that relies more heavily on *Lawrence* or Justice Liu's concurring opinion in *Shaputis II* is applying the less deferential judicial review model, while a case that relies more heavily on *Shaputis II* is applying the more deferential judicial review model. To determine which case or opinion was relied on more for the judicial review standard in each case, I applied the following methodology in each case. While this methodology requires subjective judgments at certain steps, the overall approach is an objective way to analyze the judicial review standard chosen for each case. First, I reviewed the identified section in each case that discussed the case law regarding the judicial review standard for these types of habeas petitions. I then assessed which case (*Lawrence* or *Shaputis II*) was more often cited or quoted, and I looked to see what language was being quoted from each case. If only one case was primarily cited, then that case was chosen as the standard for the case. If both cases were about equally cited, then I assessed if one case was cited in a way that limited the guidance from the other, or I looked to see how the cited language was applied to the facts of the case to determine if the court was reweighing the evidence or reviewing the merits of the parole denial. If the court appeared to reweigh the evidence or review the merits of the parole denial, then I chose *Lawrence* as the standard. If the court cited Justice Liu's concurring opinion from *Shaputis II* and appeared to apply his rationality analysis, then I chose his concurring opinion as the standard. If the court appeared to not reweigh the evidence and weightily deferred to the BPH or governor, then I chose *Shaputis II* as the standard.

61 percent of post-*Shaputis II* appellate cases are abiding by the more deferential model demonstrates that the two judicial review models continue to coexist. A closer look at certain cases will illustrate the depth of confusion that results from this coexistence of two judicial review approaches post-*Shaputis II*.

There were twenty-one opinions that applied the less deferential judicial review model based on guidance from *Lawrence* or on guidance from Justice Liu's concurring opinion in *Shaputis II*. Although the opinions often quote from *Shaputis II* and claim that they are not reweighing the evidence, some decisions do in fact reweigh the evidence, rely more heavily on guidance from *Lawrence* than from *Shaputis II*, or analyze the rationality of the decision in accordance with Justice Liu's opinion.

Even though the fifth guiding principle listed at the end of *Shaputis II*'s majority opinion explicitly states that reviewing courts "are not empowered to reweigh the evidence,"¹⁸⁹ this principle may be seen as dicta and some courts continue to engage in this practice. For example, in *In re Young*, the court determined that the BPH's parole denial failed to meet the some evidence standard because it did not consider all the statutory suitability and unsuitability factors.¹⁹⁰ In reviewing the BPH's decisionmaking process, the court noted that the BPH focused only on the unsuitability factors without thoroughly considering the suitability factors that would help indicate the inmate was not currently dangerous.¹⁹¹ The court then addressed the three specific reasons for the BPH's parole denial and rejected each one as being arbitrary and lacking a modicum of evidence.¹⁹² Although the court used the "arbitrary" and "modicum of evidence" language from *Shaputis II*, it was, in fact, reweighing the evidence itself. When scrutinizing each justification for a parole denial, the court reviewed the inmate's and commissioners' statements from the parole hearing, the inmate's past psychological evaluations, the findings of low risk in those evaluations, and the inmate's rehabilitation programming.¹⁹³ In these materials, the court found evidence or a

189. *Shaputis II*, 265 P.3d at 272.

190. *In re Young*, 138 Cal. Rptr. 3d 788, 803 (Ct. App. 2012) ("The [BPH] violated due process in this case because it considered only some of the relevant statutory factors in making its decision."). The court also developed its own two part test for its analysis. It concluded that from *Shaputis II* and the other some evidence standard cases decided by the state supreme court that it was the court's responsibility to assess if the parole decision met "two due process imperatives." *Id.* These two imperatives were: (1) "whether the . . . decision reflects due consideration of all relevant statutory factors"; and (2) "whether [the] analysis is supported by a modicum of evidence in the record . . . that is rationally indicative of current dangerousness." *Id.* The court's adoption of its own test further demonstrates the confusion that remains in the appellate courts after *Shaputis II*.

191. *See id.* at 804.

192. *See id.* at 805-15.

193. *Id.*

lack of evidence to rebut the conclusions made by the BPH.¹⁹⁴ Thus, the court reviewed the evidence that the BPH used and did not use, and then decided which evidence was more persuasive. With each piece of evidence that the BPH claimed it found, the court found another piece of evidence to refute the conclusion that the inmate was currently dangerous. Thus, the court reweighed the evidence that was available to the BPH.

For example, to rebut the BPH's conclusion that the inmate could not recall the murder and refused to take responsibility for it, the court looked to the inmate's statements at the hearing, a prior psychological evaluation, his rehabilitative programming, and his "concrete parole plans" to conclude that the inmate did recall and take responsibility for the murder.¹⁹⁵ The court also reweighed the evidence when it rebutted the BPH's conclusion that the inmate had a history of tumultuous relationships because of his relationship with a girlfriend from two decades prior.¹⁹⁶ The court disregarded this relationship and instead looked to the letters of support that the inmate had from family and friends.¹⁹⁷

This analysis defied *Shaputis II*'s explicit prohibition against reviewing courts "decid[ing] which evidence in the record is convincing."¹⁹⁸ The dissenting opinion recognized that this analysis ignored *Shaputis II*'s outlined "standard of review" because the majority reweighed the evidence.¹⁹⁹ Although other courts may not have reweighed the evidence like the court in *Young*, this case shows one of the multiple ways that appellate courts are continuing to apply the less deferential model in spite of *Shaputis II*'s majority opinion.

Rather than reweigh the evidence, some courts primarily cited *Lawrence* when describing the some evidence standard's scope of judicial review, but failed to cite *Shaputis II* when framing this discussion.²⁰⁰ As a result, courts would follow *Lawrence*'s less deferential model and review the merits of the decision.²⁰¹ For example, in *In re Pugh*, the court analyzed the governor's claim that three inconsistencies existed between the inmate's version of events during the hearing and the official version of events.²⁰² The court looked at the trial testimony, ex-

194. *Id.*

195. *Id.* at 806–07.

196. *Id.* at 813.

197. *Id.* ("Separating from a girlfriend with whom one has had a child is not by itself a 'history of tumultuous relationships.'").

198. *Shaputis II*, 265 P.3d 253, 265 (Cal. 2011) (emphasis omitted).

199. See *In re Young*, 138 Cal. Rptr. 3d at 816, 820 (Haerle, J., dissenting).

200. See, e.g., *In re Pugh*, 140 Cal. Rptr. 3d 194, 197–98 (Ct. App. 2012) (citing *Lawrence* four times, as well as *Rosenkrantz* and *Shaputis I*, but not *Shaputis II*, when outlining the some evidence standard before applying the standard to the facts of the case).

201. *In re Lawrence*, 190 P.3d 535, 552 (Cal. 2008).

202. *In re Pugh*, 140 Cal. Rptr. 3d at 204.

pert testimony from the trial, and a prior psychological evaluation to conclude that no inconsistencies existed.²⁰³ By looking at other evidence to disprove the governor's conclusion, the *Pugh* court went beyond the *Shaputis II* majority's prescription against deciding "which evidence in the record is convincing."²⁰⁴ Rather, the *Pugh* court strictly scrutinized the evidence used and disregarded by the governor to evaluate whether his inferences properly established a rational nexus between the evidence and the conclusion of current dangerousness. Such a practice indicates the continued use of the less deferential judicial review model.

Two opinions, however, more clearly adhered to Justice Liu's rationality analysis and his emphasis on the less deferential judicial review model. When describing the some evidence standard's scope of judicial review, these opinions quoted excerpts from Justice Liu's concurring opinion in *Shaputis II*.²⁰⁵ They then applied Justice Liu's rationality analysis and evaluated the evidence and reasoning used by the BPH to conclude that the inmate remained currently dangerous. For example, in *In re Morganti*, the court criticized the BPH panel for mischaracterizing the inmate's statements during the parole hearing and the psychologist's statements made in a report.²⁰⁶ Because of these mischaracterizations, the court found the BPH's conclusion that the inmate would rely only on religion to avoid a drug relapse was unpersuasive.²⁰⁷ The court also called the possibility that the BPH panel's deputy commissioner voted to deny parole because of the "deficient" rehabilitative programs in prison "outrageous."²⁰⁸ Such a critical analysis of both the evidence and reasoning used by the BPH in its parole denial illustrates the influence of Justice Liu's concurring opinion, and more importantly, it demonstrates another application of the less deferential judicial review model.

Thirty-six post-*Shaputis II* appellate cases, however, applied the more deferential judicial review model. In many of those cases, the opinions strictly fol-

203. *Id.* at 205 ("[T]he facts are either not inconsistent with Pugh's version of events or not borne out by the record.")

204. *Shaputis II*, 265 P.3d 253, 265 (Cal. 2011) ("[I]t is not for the reviewing court to decide which evidence in the record is convincing." (emphasis omitted)).

205. *See, e.g., In re Morganti*, 139 Cal. Rptr. 3d 430, 442 (Ct. App. 2012) (quoting an excerpt from Justice Liu's concurrence in *Shaputis II* in a section entitled "The Law and the Standard of Review"). These courts, however, do not seem to embrace Justice Liu's instruction that lower courts should review only the evidence on which the BPH or governor relied. Rather, these courts seem to continue to review the entire record that was available to the BPH or governor. *See, e.g., id.* at 441 ("We review not only the evidence specified by the [BPH], but the entire record . . ."). Justice Liu relied on and cited *Lawrence* to justify his rationality analysis and his argument that such an analysis requires "examin[ing] the evidence and reasoning on which the [BPH] or the Governor actually relied." *Shaputis II*, 265 P.3d at 274-75.

206. *See In re Morganti*, 139 Cal. Rptr. 3d at 442.

207. *See id.* at 445.

208. *Id.*

lowed the guidance from the *Shaputis II* majority opinion. They emphasized the deferential nature of some evidence standard, that only “arbitrary” denials could be overturned by the courts, and that the balancing of factors lays solely within the discretion of the BPH or the governor.²⁰⁹

For example, in *In re Mims*, the court determined that the superior court’s conclusion that the BPH failed to consider the inmate’s history as an abuse victim constituted a reweighing of the evidence.²¹⁰ The court recognized this reweighing as “improper.”²¹¹ It also emphasized that *Shaputis II* prevented a reviewing court from considering evidence that the BPH or governor had not considered, unless such an omission was arbitrary.²¹² Unlike *Young*, which engaged in a reweighing of the evidence, *Mims* enforced *Shaputis II*’s prohibition against reweighing to overturn the superior court’s decision. *Mims* is significant not only because of its contrast with *Young* but also because it demonstrated that superior courts are still applying the less deferential judicial review model. Because superior courts continue to do so, some appellate courts like the one in *Mims* try to restrain this practice and impose the more deferential model.

Both *In re Montgomery* and *In re Tapia* also tried to rein in the superior courts’ use of the less deferential model. In both cases the court found that the BPH’s parole denial was not arbitrary and thus met the some evidence standard.²¹³ *Tapia* also cited and listed the five principles that the *Shaputis II* majority opinion outlined.²¹⁴ Both cases represented a strict adherence to the *Shaputis II* majority opinion as well as to the more deferential judicial review model.

Shaputis II was decided less than two years ago, but these fifty-nine appellate court cases provide an early indication of the continuing confusion in the appellate courts. Those cases that overturned superior court decisions because they believed the courts had reweighed the evidence also demonstrate confusion in the superior courts.²¹⁵ Within this early group of post-*Shaputis II* appellate cases,

209. See, e.g., *In re Varelas*, No. B233050, 2012 WL 538935, at *7–*8 (Cal. Ct. App. Feb. 16, 2012).

210. *In re Mims*, 137 Cal. Rptr. 3d 682, 691 (Ct. App. 2012) (“In reaching its conclusion that the [BPH] erred in failing to recognize that abuse was a major causative factor in the murder, the superior court engaged in reweighing the evidence.”).

211. *Id.*

212. See *id.* at 689–90.

213. *In re Montgomery*, 145 Cal. Rptr. 3d 109, 121 (Ct. App. 2012) (“On the record before us, we cannot say that the evidence leads to but one conclusion.” (citation omitted)); *In re Tapia*, 144 Cal. Rptr. 3d 190, 198 (Ct. App. 2012) (“The [BPH’s] decision in this case does not lack any rational basis, and is not merely arbitrary.”).

214. *In re Tapia*, 144 Cal. Rptr. 3d at 194–95.

215. Out of the fifty-nine post-*Shaputis II* appellate cases, the superior court granted the habeas petition in thirty-five cases, the superior court did not grant the petition in nineteen cases, and the appellate court made the original decision in five cases. Of the thirty-five cases in which the superior court granted the habeas petition, the appellate court overturned twenty-five of those grants because the

courts took multiple approaches and applied different scopes of judicial review to decide if the some evidence standard was met. Although over a majority of the cases appeared to have applied the more deferential model of judicial review, these fifty-nine cases demonstrate that the two models of judicial review continue to co-exist in the appellate courts after *Shaputis II*. Similar to the confusion and tension that existed before *Lawrence*, the California Supreme Court must address the unsettled issue regarding the scope of judicial review under the some evidence standard. It must come to the realization that *Shaputis II* has failed to provide the needed clarity for lower courts.

IV. THE CALIFORNIA SUPREME COURT NEEDS TO CHOOSE A MODEL OF JUDICIAL REVIEW AND IT SHOULD CHOOSE THE LESS DEFERENTIAL MODEL

The previous Part demonstrated that *Lawrence* clearly settled the some evidence standard's threshold issue, but that *Shaputis II* failed to resolve the scope of judicial review under the standard. If anything, *Shaputis II* reignited the debate on the scope issue by adopting the more deferential model after *Lawrence* had adopted the less deferential model. As a result, both models continue to coexist at both the superior and appellate court levels. The California Supreme Court must recognize this and settle the debate in a case that is less obfuscated by a seemingly divergent concurring opinion. This Part further argues that, once the court decides to settle the debate, the court should adopt the less deferential judicial review model.

A. The California Supreme Court Must Choose a Model

In 2008, *Lawrence* recognized the growing tension among appellate courts regarding the threshold of the some evidence standard.²¹⁶ It resolved that tension by choosing the current dangerousness model over the nature of the offense model.²¹⁷ In 2011, *Shaputis II* recognized confusion in the appellate courts over the

superior court incorrectly held that the parole denial failed the some evidence standard. This high number of overturned superior court grants, a 71 percent rate, potentially demonstrates continued tension in both the superior and appellate courts over the proper scope of judicial review in the some evidence standard. See *infra* Table 4 in the Appendix.

216. *In re Lawrence*, 190 P.3d 535, 549 (Cal. 2008) (“[C]ourts have struggled to strike an appropriate balance between deference to the [BPH] and the Governor, and meaningful review of parole decisions.”).

217. See *id.* at 552–53.

appropriate scope of judicial review under the some evidence standard.²¹⁸ Just as *Lawrence* resolved the tension among courts over the threshold issue, *Shaputis II* tried to resolve the tension among courts over the scope issue. In what seems like dicta at the end of the majority opinion, it set out five guiding principles.²¹⁹ Perhaps because of a unique fact pattern²²⁰ and a contradictory concurring opinion by Justice Liu, *Shaputis II* and its guiding principles failed to settle the scope issue as conclusively as *Lawrence* seemed to resolve the threshold issue.

As a result, California superior and appellate courts inconsistently apply both the less deferential model and the more deferential model when defining the scope of review under the some evidence standard.²²¹ California lower courts therefore use, without any uniformity, two different models to assess if a rational nexus exists between the evidence cited for the parole denial and the finding of current dangerousness. Without a consistently applied model, an inmate lacks an expectation of how stringently a court will review her parole denial by the BPH or the governor. Moreover, the choice of the model seems to affect whether the habeas petition is granted. In the fifty-nine post-*Shaputis II* appellate cases, when courts applied the more deferential model under *Shaputis II*, they granted the habeas petition in only 11 percent of the cases.²²² But when courts applied the less deferential model under *Lawrence*, they granted the habeas petition in 90 percent of the cases.²²³ Thus, an inmate's chance at having her habeas petition granted seems dependent on the court's unpredictable choice of which scope of judicial review model to apply when reviewing her habeas petition.²²⁴

218. *Shaputis II*, 265 P.3d 253, 272 (Cal. 2011) (“We are well aware that the Court of Appeal below was not alone in its confusion about the proper scope of review.”). This confusion occurred despite *Lawrence*'s apparent adoption of the less deferential model.

219. *Id.*

220. In *Shaputis II*, the inmate refused to discuss the crime in the BPH hearing or submit to examination by a psychologist appointed by the California Department of Corrections and Rehabilitation (CDCR). *Id.* at 261. Rather, the inmate submitted a written statement to the BPH regarding the crime and a report from a privately appointed psychologist. *Id.* But this statement and report differed from older evidence in the record, and as a result, the BPH relied on the older evidence. *Id.* at 263. *Shaputis II* approved of the BPH's reliance on older evidence when the inmate limited the availability of current evidence. *Id.* at 265–66.

221. See *supra* Part III.C for an overview of post-*Shaputis II* state appellate court cases.

222. See *infra* Table 5 in the Appendix.

223. See *infra* Table 5 in the Appendix.

224. Which court of appeal district the habeas petition is litigated in may also affect an inmate's chance of having her habeas petition granted. While the fifty-nine cases studied are not a large enough sample to draw any conclusive patterns, the grant rates across the five districts that have handled these cases since *Shaputis II* range from 21 percent to 86 percent. See *infra* Table 6 in the Appendix.

Applying the some evidence standard with such an unpredictable level of judicial review is inappropriate for something that both *Rosenkrantz* and *Lawrence* have recognized as a “constitutional liberty interest”²²⁵ that is protected by “due process of law.”²²⁶ Both the BPH and the governor have tremendous discretion in making parole decisions,²²⁷ but *Rosenkrantz* empowered courts to use judicial review to “ensure that the [BPH] and the Governor have complied with the statutory mandate and have acted within their constitutional authority.”²²⁸ In essence, courts are supposed to counterbalance the executive branch’s discretion in these decisions with established rules and standards. But because the California Supreme Court has failed to articulate clearly which scope of judicial review model lower courts should apply, courts are counterbalancing executive branch discretion with an unpredictable scope of judicial review. The application of two different judicial review models weakens the courts’ counterbalancing effect on executive discretion. Settled and established standards, not more unpredictability, is what the judiciary must provide to check executive branch discretion adequately. This is especially true given that a habeas petition to a state court is the only remedy available for inmates to challenge their parole denials.²²⁹

The continued use of both judicial review models is debilitating the courts’ ability to protect the constitutional liberty interest at stake in these habeas petition cases. Tensions resulting from *Rosenkrantz* were not resolved for six years until *Lawrence*. The court then took another three-and-a-half years to issue *Shaputis II*. It has now been almost two years since *Shaputis II*. Given the court’s history on the some evidence standard, that may not be a long enough passage of time for the court to realize the continuing confusion. Analyzing the fifty-nine post-*Shaputis II* state courts of appeals cases, however, reveals a conflict among the lower courts that is urgent and needs guidance from the state supreme court immediately.²³⁰

B. The Court Should Choose the Less Deferential Model

More important than the immediate necessity of any clarification from the California Supreme Court is the immediate necessity for the court to choose the less deferential model. Only this judicial review model will effec-

225. *In re Lawrence*, 190 P.3d 535, 553 (Cal. 2008).

226. *In re Rosenkrantz*, 59 P.3d 174, 210 (Cal. 2002).

227. *See In re Lawrence*, 190 P.3d at 547–48.

228. *Id.* at 554.

229. *See supra* Part I.D (explaining that in 2011 the Supreme Court limited habeas petitions for parole denials to state courts because the right to parole was a state, not federal, constitutional liberty interest).

230. *See supra* Part III.C.

tively quell the dangers that can result from a politically influenced branch deciding on the parole of lifer inmates. The less deferential model will not only instill a stable judicial check on executive discretion, but it also still carries weight even after *Shaputis II*. Without choosing the less deferential judicial review model, the Court will once again render parole to be a false hope for lifers, even though parole is by statute supposed to be the norm.²³¹

There are two reasons that the court should adopt the less deferential model. First, the less deferential model secures a stronger judicial check that is needed to provide the stable decisionmaking that has been lacking in the executive branch. This stronger judicial check helps to protect against two inherent dangers in this discretionary process: (1) the tendency of the executive branch to base parole denials on justifications that lack individual consideration of the lifer's case, or rubber stamp justifications; and (2) the tendency of the executive branch to succumb to popular biases against lifers, who are politically unpopular but not part of the recidivism problem. Second, the *Shaputis II* majority opinion's manipulation of language from *Lawrence* demonstrates only a superficial and unconvincing preference for the more deferential model that should not be seen as preventing the court from definitively adopting the less deferential model. Therefore, to establish stability in the application of the some evidence standard and to ensure due process for lifer inmates, the California Supreme Court should adopt the less deferential judicial review model for the some evidence standard.

1. The Less Deferential Model Ensures a Consistent Judicial Check on Executive Branch Discretion

In granting courts the power to review parole denials by the BPH and the governor, *Rosenkrantz* made clear that this judicial review power did not violate the California Constitution's requirement for the separation of powers.²³² After reviewing multiple other separation of powers-related cases, *Rosenkrantz* concluded that the judicial branch can "exercise a function that only incidentally affects a power vested primarily in another branch of government."²³³ For habeas petitions specifically, this meant that judicial review of parole denials was "merely incidental to the exercise of that function and therefore does not violate the sepa-

231. See, e.g., *In re Lawrence*, 190 P.3d at 553 (noting the "statutory and regulatory mandate" that lifer inmates be granted parole).

232. *In re Rosenkrantz*, 59 P.3d 174, 207–12 (Cal. 2002). See CAL. CONST. art. III, § 3 for the separation of powers requirement: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

233. *In re Rosenkrantz*, 59 P.3d at 208.

ration of powers doctrine.”²³⁴ Rather, *Rosenkrantz* authorized and encouraged judicial review of parole denials to be a check on the executive branch, ensuring that it exercised its discretion only within its statutory and constitutional limits.²³⁵ Moreover, *Rosenkrantz* recognized this judicial check as the only remedy available to protect inmates’ constitutional liberty interest in the granting of parole.²³⁶ But this check is effective as a potential remedy only if the reviewing court uses the some evidence standard to ensure that the parole denial “reflects due consideration of the specified factors as applied to the individual prisoner.”²³⁷

Without the ability to evaluate whether the BPH or the governor’s denial reflected this due consideration, courts are unable to prevent the abuse of executive discretion. Even after *Lawrence* adopted the current dangerousness model as the threshold for the some evidence standard, two dangers with executive discretion in parole decisions remain. These dangers will return to their pre-*Lawrence* magnitude if courts lack the ability to assess whether the parole denial constituted a due consideration of the specified factors and whether a rational nexus existed between the evidence and the conclusion of current dangerousness.

a. The Rubber Stamp Justification Danger

The first danger is a return to the pre-*Lawrence* practice of the BPH and the governor mechanically relying on a court-approved justification to deny parole to a vast majority of inmates. Before *Lawrence*, the BPH and the governor relied on *Rosenkrantz* and *Dannenberg* to deny parole based solely on the nature of the offense. *Lawrence* ended that practice,²³⁸ but its companion

234. *Id.* at 211 (“[J]udicial review of [the executive branch’s] parole decisions . . . does not usurp the inherent and primary authority of the executive branch over parole matters, does not materially impair such authority, and does not control [the executive branch’s] exercise of discretion.”).

235. *Id.* at 210–11; see also *In re Lawrence*, 190 P.3d at 554 (“A standard of review focusing upon the existence of some evidence . . . does nothing more than ensure that the [BPH] and the Governor have complied with the statutory mandate and have acted within their constitutional authority.”).

236. See *In re Rosenkrantz*, 59 P.3d at 209 (“[T]he existence of this due process right cannot exist in any practical sense without a remedy against its abrogation.”).

237. *Id.* at 218. Both *Lawrence* and *Shaputis II* cite this language from *Rosenkrantz*. *In re Lawrence*, 190 P.3d at 552; *Shaputis II*, 265 P.3d 253, 265 (Cal. 2011). *Lawrence* relies in part on this language to establish that a court must find a rational nexus between the evidence and the conclusion of current dangerousness. *In re Lawrence*, 190 P.3d at 552 (“[D]ue 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 . . . determination of current dangerousness.”). This language is also the basis for the two-part test created by a California appellate court in *In re Young*. The test asks whether: (1) the parole denial constituted “due consideration of all relevant statutory factors,” and (2) the parole denial was “supported by a modicum of evidence.” *In re Young*, 138 Cal. Rptr. 3d 788, 803 (Ct. App. 2012).

238. *In re Lawrence*, 190 P.3d at 553.

case, *Shaputis I*, allowed for the BPH and the governor to deny parole based on an inmate's lack of insight instead.²³⁹ Some fear that the lack of insight justification will replace the nature of the offense justification as the new "talisman" with which the state denies inmates parole.²⁴⁰ Governor Arnold Schwarzenegger possibly confirmed this fear as his parole reversal rate increased in the two years following *Lawrence*, despite that *Lawrence* forbid the common practice of reversing paroles based solely on the heinousness of the offense.²⁴¹ His actions illustrate the possibility that the lack of insight reasoning can become the new rubber stamp justification for parole denials.²⁴² But because the case that authorized the lack of insight justification was a companion case to *Lawrence*,²⁴³ courts still have to find a rational nexus between the inmate's lack of insight and the conclusion that the inmate was currently dangerousness.²⁴⁴ Thus, the BPH and the governor cannot arbitrarily deny parole because of an inmate's supposed lack of insight and are still held accountable by the current dangerousness threshold model. As a result, courts overturned Governor Schwarzenegger's parole reversals and ordered the release for 106 of the 144 inmates who filed habeas petitions in 2011.²⁴⁵

239. *Shaputis I*, 190 P.3d 573, 584–85 (Cal. 2008); see also Hempel, *supra* note 17, at 179 ("For example, as two appellate decisions illustrate, the [BPH] and the Governor are now denying parole on the basis of the defendant's 'lack of insight' into the commitment offense, the basis that provided some evidence of unsuitability in *Shaputis*.")

240. See *Shaputis II*, 265 P.3d at 278 (Liu, J., concurring) (explaining that a lack of insight analysis must be performed on a case-by-case basis to determine if the lack of insight indicates current dangerousness, otherwise the BPH and the governor will use this as the "new talisman" to deny nearly all inmates parole). Hempel further commented on the lack of insight justification:

A 'lack of insight' finding may simply replace the executive's post-*Rosenkrantz* uniform reliance on the aggravated nature of the offense as its standard reason for denying parole. Such mechanistic reliance would, of course, violate the due process requirement of individualized consideration, but it may again take a long time for the Court to so hold.

Hempel, *supra* note 17, at 179.

241. WEISBERG ET AL., *supra* note 3, at 14 (displaying on Chart 6 that Governor Schwarzenegger's parole reversal rate increased from 60 percent in 2008 to 70 percent in 2009, and then only dropped to 65 percent in 2010).

242. See *In re Eccher*, No. G045503, 2012 WL 1642420, at *7, *10–12 (Cal. Ct. App. May 10, 2012), and *In re Pugh*, 140 Cal. Rptr. 3d 194, 198–99 (Ct. App. 2012), as just two examples of when Governor Schwarzenegger justified a parole reversal by relying on the lack of insight reasoning.

243. *Shaputis I*, 190 P.3d at 580, 584–85.

244. See *Shaputis II*, 265 P.3d at 278 (Liu, J., concurring), for an explanation of why it is essential that courts assess on a case-by-case basis whether lack of insight indicates current dangerousness. Otherwise, "almost all life inmates" will be denied parole because lack of insight is a "readily available diagnosis." *Id.*

245. See Paige St. John, *Brown's Parole Record Sets Him Apart From Recent Predecessors*, L.A. TIMES, Feb. 15, 2013, <http://articles.latimes.com/2013/feb/15/local/la-me-ff-brown-parole-20130215>; Siders, *supra* note 10.

But the number of overturned reversals may have increased if courts had uniformly applied the less deferential judicial review model. In order to assess most effectively if a rational nexus exists between the evidence and the conclusion of current dangerousness, courts must be able to analyze the BPH's or governor's decisionmaking process. They must be able to see how the suitability and unsuitability factors are weighed, whether all the factors were considered, and how those factors collectively indicate current dangerousness. *Lawrence's* adoption of a higher threshold, in the form of the current dangerousness model, requires a corresponding increase in the scope of judicial review. Without a more stringent level of analysis, courts are restricted in their ability to evaluate the existence of a rational nexus between the evidence and the conclusion of current dangerousness. Courts would also be restricted in their ability to determine if there was a "due consideration of the specified factors as applied to the *individual* prisoner."²⁴⁶ Justifications such as the lack of insight become so mechanically relied on because they are easy to apply without regard for the context of the individual inmate's situation. The less deferential model would give courts greater latitude in ensuring that parole denial justifications, such as lack of insight, are used on an individual basis and not mechanically, with no regard for the inmate's particular case. In doing so, it would help courts to prevent the executive branch from maneuvering around the current dangerousness requirement with rubber stamp justifications.

But opponents of the less deferential model view this expanded scope as transforming the some evidence standard into an "independent review" standard.²⁴⁷ They argue that *Rosenkrantz* made clear that the executive branch, and not the courts, is responsible for the "awesome responsibility" of making a parole decision for lifers.²⁴⁸ Allowing the courts to review the merits of the parole denial and decide whether the BPH or governor was using a rubber stamp justification would substitute the executive branch's discretion with the court's discretion. Besides *Lawrence*, California courts have traditionally prohibited explicit judicial speculation that the executive branch is using a rubber stamp justification to deny parole.²⁴⁹

But because parole decisions for lifers are such an "awesome responsibility" and because lifers have a liberty interest in parole, courts must have some flexibility to ensure that the executive branch is not abusing its discretion through rubber

246. *In re Rosenkrantz*, 59 P.3d 174, 218 (Cal. 2002) (emphasis added).

247. *In re Lawrence*, 190 P.3d 535, 570 (Cal. 2008) (Chin, J., dissenting).

248. *Id.* at 566.

249. *See, e.g., In re Stevenson*, 152 Cal. Rptr. 3d 457, 477 (Ct. App. 2013) ("In suggesting that the [BPH] was following 'a script for murder cases' instead of considering petitioner's individual circumstances, the superior court improperly strayed into the area of prohibited speculation.").

stamp justifications. The less deferential model will not allow courts to speculate, but will instead allow courts to review the merits of the decision in order to confirm or dispel any such speculations. Limiting the courts' scope of judicial review would lead to increased speculation because courts would be unable to more thoroughly review the evidence and reasoning on which the BPH or governor based the denial. *Lawrence* sought to prevent future rubber stamp justifications by adopting the current dangerousness model as the threshold for the some evidence standard, but that threshold is a weak one without the less deferential judicial review model. They are a package deal. They are not only the most compatible with each other, but they also reinforce one another.

b. The Political Pressure Danger

The second danger is the political pressure that governors face, and thus the political risks and calculations they make, when appointing BPH commissioners and when deciding on paroles. These may appear to be two separate dangers, but they are connected because with the governor's power to appoint BPH commissioners and deputy commissioners,²⁵⁰ the governor affects the parole decisionmaking process at two stages. In addition to her own decisions, the governor is also ultimately responsible for the BPH's parole decisions as well. Thus, a governor's political risks are twofold. Because lifer inmates are not a politically popular group and governors often do not want to look soft on crime by releasing convicted murderers and kidnappers,²⁵¹ governors are or should be aware of the immense risks involved in releasing a lifer. The historically low rate of BPH parole grants and the historically unstable rate of governor reversal rates reflect the effect of these political risks on prior governors.

Even though the number of conducted BPH hearings from 1980 until 2008 increased from two to a maximum of about 3500, the BPH grant rate remained under 10 percent for that entire period.²⁵² The BPH grant rate did not rise above

250. *Commissioners*, *supra* note 35. Further demonstrating the connection is the fact that of the fifty-nine post-*Shaputis II* appellate cases, forty-eight were based on parole denials by the BPH. See *infra* Table 7 in the Appendix. This high number of cases involving BPH denials demonstrates that concerns about the political effects on the parole decisionmaking process must focus on the impact on the BPH as much as or more than the impact on the governor.

251. See, e.g., Richard Fausset, *Outgoing Gov. Haley Barbour's Pardons Shock Mississippi*, L.A. TIMES, Jan. 12, 2012, <http://articles.latimes.com/2012/jan/12/nation/la-na-barbour-pardons-20120113> (describing the enormously negative political response that former Governor Barbour faced for issuing 215 pardons in his last two days of office, even though only 26 of those pardons were for individuals who were still incarcerated).

252. WEISBERG ET AL., *supra* note 3, at 12 (displaying the BPH grant rate from 1978 to 2010 in Chart 3).

10 percent until after *Lawrence* in 2008.²⁵³ Despite the state supreme court's approval of the lack of insight justification in 2008, *Lawrence* seems to have ignited an increase in the BPH parole grant rate, but that increase may be temporary or it may simply plateau at some point.

This is especially likely given the characteristics of prior and current BPH commissioners. Of the twelve current commissioners, five previously worked in law enforcement, four previously worked for CDCR in another capacity, and two are former prosecutors.²⁵⁴ This strong law enforcement and CDCR representation makes sense given that commissioners are required, by the California Penal Code, to have a "broad background in criminal justice."²⁵⁵ But the Penal Code also requires that the appointed commissioners have experience or education in fields such as sociology, medicine, mental health, or education, and none of the current commissioners seem to have such a background.²⁵⁶ A set of commissioners without experience or education in these fields creates a structural flaw in the parole process because the lack of diversity among the commissioners' perspectives can lead to a law enforcement bias during BPH parole hearings that will debilitate a lifer's chances of parole. The approximately seventy deputy commissioners might temper this lack of diversity among the commissioners.²⁵⁷ Even so, this law enforcement bias amongst the BPH commissioners affects their executive discretion and will likely negatively affect lifer inmates who are seeking parole. Thus, while it is important that courts preserve the BPH's discretion in parole decisions, courts need the less deferential model to scrutinize decisions made by an organization that can have preconceived law enforcement biases.

The BPH parole grant rate may have been low, but it was at least consistent. The parole reversal rate for governors, however, has been very unstable regardless of the governor's political party. Of the parole grants made by the BPH during their term, Republican Governor Pete Wilson reversed about 27 percent, Democratic Governor Gray Davis reversed about 98 percent, Republican Governor Arnold Schwarzenegger reversed about 60 percent, and current Democratic Governor Jerry Brown has reversed about 20 percent.²⁵⁸

253. *Id.*

254. *Commissioners*, *supra* note 35. The last commissioner is Ali Zarrinnam, who worked for the Parole Advocacy Project and was a private attorney before becoming a deputy commissioner and then a commissioner. *Id.*

255. CAL. PENAL CODE § 5075.6(b)(1) (West 2012).

256. *Id.*

257. WEISBERG ET AL., *supra* note 3, at 7.

258. Siders, *supra* note 10. Governor Wilson likely has a small reversal rate because he only considered a small number of cases. WEISBERG ET AL., *supra* note 3, at 13.

These inconsistent rates reflect the effect that political risks can have on how the governor exercises his discretion, particularly how each governor assesses the political risks involved in the parole decisionmaking process. Governor Davis and Governor Schwarzenegger's high reversal rates reflect a strong awareness of and concern for the political risks involved in approving parole grants,²⁵⁹ but Governor Brown's low reversal rate reflects the opposite. Governor Brown has stated that he is following the appropriate legal standards for parole whereas Governors Davis and Schwarzenegger did not.²⁶⁰ Governor Brown's age and lack of interest in pursuing other political offices can potentially help explain his significantly lower reversal rate from his two immediate predecessors; he has less incentive to reverse a parole grant as a way of furthering his own political interests.²⁶¹ Governor Brown's low reversal rate is promising for lifer inmates and their advocates, but no one can predict what the next governor's reversal rate will be. Although only one of several factors affecting Governor Brown's low reversal rate, his quasi-immunity to political pressure on this issue is unique and is not likely to continue with the next governor. Further, the criticism from victims' rights groups that Governor Brown is currently experiencing will remain when the next administration begins.²⁶² But unlike Governor Brown, the next governor may have a political incentive to cave to the pressure from the victims' rights groups rather than follow the requirements of the some evidence standard. The reversal rates of Governor Davis and Governor Schwarzenegger have shown that a politically accountable and high profile official such as the governor can let political risks cloud what is supposed to be an objective analysis governed by due process.

It is possible, of course, that the next governor will follow Governor Brown's example and maintain a low parole reversal rate, but the point remains that the governor's parole reversal rate has been and likely will remain unstable because of the office's susceptibility to political pressure. As a result, courts must be able to act as a stable check on the governor's discretion. An effective judicial check on the executive branch's parole power will help to ensure stability in the reversal

259. A genuine belief in not granting parole to those who committed murder, as opposed to political calculations, may explain Governor Davis's high reversal rate. Shortly after his administration began, Governor Davis made his views on approving parole for lifers quite clear: "If you take someone else's life, forget it, . . . I see no reason to parole people who committed an act of murder." David Siders, *Brown Departs From Predecessors on Parole for Convicted Killers*, SACRAMENTO BEE, Apr. 29, 2011, <http://www.sacbee.com/2011/04/29/3588083/brown-departs-from-precedecessors.html> (internal quotation marks omitted).

260. Egelko, *supra* note 9.

261. *See id.*

262. *See* Miranda, *supra* note 65 (describing the frustration and disappointment expressed by victims' rights groups regarding Governor Brown's low parole reversal rates).

rates across multiple governor administrations. If an inmate is fortunate enough to receive a parole grant from the BPH, she has no clear expectation of whether the governor will reverse that parole. But with a stable judicial check, the inmate has one source of stability in the parole process. As seen with Governor Schwarzenegger, *Lawrence's* clear adoption of the current dangerousness model failed to lower his reversal rate. Thus, courts need more tools to ensure a continuously stable, and hopefully low, parole reversal rate. Adoption of the less deferential judicial review standard will provide courts with the extra teeth they need to inject stability into the governors' parole reversal rates.

Although depriving the governor of this power is likely not politically feasible,²⁶³ the California Supreme Court can recognize the effect that these political liabilities have on the governor's discretionary decisionmaking process. Courts should continue to respect the executive branch's discretion, but they also have a duty to ensure that members of a politically unpopular group are not deprived of their due process rights because of approval ratings. This duty is especially important given that lifer inmates are not part of the prison recidivism problem that has plagued California.

Murderers released from CDCR since 1995 have a less than 1 percent recidivism rate compared to California's overall recidivism rate of nearly 50 percent.²⁶⁴ Moreover, about 38 percent of lifers are over the age of forty-six.²⁶⁵ Studies have shown that most violent crimes are committed by those under the age of thirty and that criminal tendencies drastically reduce after the age of forty.²⁶⁶ These demonstrated low recidivism rates and the increased ages of lifer inmates should rebut the general uneasiness about granting parole release to convicted murderers. But some studies have shown the lack of contrast in the time served by lifers who committed first-degree murder and lifers who committed second-degree murder. For example, the mean average of years served by about 1500 lifer inmates who were released between 1990 and 2010 was 20.14 years for first-degree murderers

263. The governor's power to reverse parole grants by the BPH was granted by popular majority approval of constitutional amendment initiative passed in 1988, meaning that it is inscribed into the state's constitution. See McLaren, *supra* note 54; see CAL. CONST. art. V, § 8(b). Only another majority popular vote can take this power away from the governor, which is unlikely to occur any time soon.

264. WEISBERG ET AL., *supra* note 3, at 17 (explaining that only 5 of the 860 murders released since 1995 have returned to jail or to CDCR since being released, none of which for new life-term crimes); see also Egelko, *supra* note 9 (“[Governor] Brown said, state records show that only a small fraction of the 900 life-sentenced prisoners paroled in the past 15 years have committed new crimes, compared with nearly 70 percent of other parolees.”).

265. WEISBERG ET AL., *supra* note 3, at 16.

266. *Id.* at 17 (suggesting that people “age out of crime”).

and 19.87 years for second-degree murderers.²⁶⁷ Actual time served is similar despite the ten-year difference in minimum base terms between first-degree murder and second-degree murder.²⁶⁸

The system of discretionary release likely has flaws if inmates with different sentences are on average serving the same amount of time in prison. Such a pattern indicates that the preconviction and postconviction characteristics of individual lifers are not being properly considered in the parole decisionmaking process. Applying the less deferential judicial review model will allow courts to ensure that popular biases against lifer inmates, particularly convicted murderers, are not affecting the executive branch's discretionary decisionmaking process.

Some argue, however, that adopting the less deferential judicial review model, as done in *Lawrence*, renders the deferential nature of the some evidence standard a "phantom" because courts would essentially reevaluate an inmate's parole suitability.²⁶⁹ Critics of the less deferential model do not view this increased scope of review as part of a proper checks and balances system. Instead, they view the model as a violation of the separation of powers and a prohibited assertion of power by the judiciary.²⁷⁰ These critics are correct to point out that the less deferential model chips away at the level of deference that the some evidence standard has granted the executive branch in the past. But as demonstrated by the historically low BPH parole grant rate and the unstable governor reversal rate, the past version of the some evidence standard failed to guarantee due process for inmates.

Granted, judicial deference to the executive branch in these decisions should remain because the statutes, the regulations, and the common law all grant the executive branch tremendous discretion in the parole process. But the California Supreme Court must recognize that concerns about public safety are magnified and warped by perception and politics, thereby distorting the accuracy of the executive branch's decisionmaking. Thus, the judiciary must have an appropriate scope of judicial review to temper those inaccuracies and ensure that true concerns about public safety, and not concerns about the next election, are motivating the parole denials. For a discretionary decisionmaking process that is naturally imbued with strong emotions and high political stakes, a neutral and effective judicial check is of utmost importance. This is especially true in a parole

267. *Id.* at 15 (showing the lack of significant difference in time served between those who committed first-degree murder and those who committed second-degree murder); *see also* Ball, *supra* note 31, at 919 ("California data from 2006 show that second degree and first degree murderers served roughly the same time in prison . . .").

268. *Id.*

269. *In re Lawrence*, 190 P.3d 535, 570 (Cal. 2008) (Chin, J., dissenting).

270. *See id.* at 568 ("The executive branch, not the judicial branch, makes the parole decision . . .").

system in which parole is the statutory expectation, and not the exception.²⁷¹ As recognized by the concurring opinion, *Lawrence* struck the balance between public safety and due process for inmates by adopting the less deferential judicial review model: “The majority opinion . . . properly balances the need for judicial deference in reviewing executive decisions with the judicial obligation to ensure the executive complies with statutory and due process mandates.”²⁷²

2. The Less Deferential Model Survived *Shaputis II*

The less deferential model is not only the best choice to ensure an effective judicial check on the executive branch’s discretion, but it also is not simply foreclosed because of the language in *Shaputis II*.

A first look at the language in *Shaputis II* suggests that the majority opinion is making a dramatic shift from its support of a less deferential model in *Lawrence*. Up to this point, this Comment has relied on the assumption that such a shift occurred, but taking a different perspective of the language and tests used in the majority opinion reveals that *Shaputis II* may not have made such a dramatic shift in the scope of judicial review.

Shaputis II takes language from *Lawrence* in two instances and then emphasizes that language more than *Lawrence* did. But a greater emphasis on certain language does not mean that *Shaputis II* strayed away from the core principles of *Lawrence*. *Shaputis II* clearly maintained the current dangerousness model that *Lawrence* adopted, but it had to pick and choose language from *Lawrence* to try to stray away from *Lawrence*’s adoption of the less deferential model.

One example in which *Shaputis II* selectively emphasized certain language from *Lawrence* is when it set out an arbitrariness test that seems to reject the less deferential judicial review model. *Shaputis II* defined the scope of judicial review as limited and prevented a reviewing court from overturning an executive branch’s parole denial unless “that determination lacks any rational basis and is merely arbitrary.”²⁷³ The California Supreme Court had not established any such arbitrariness test in previous cases. Rather, *Shaputis II* takes the arbitrary lan-

271. See *id.* at 547 (majority opinion).

272. *Id.* at 566 (Moreno, J., concurring). But see Hempel, *supra* note 17, at 179 (arguing that *Lawrence* was only a “small step” in the right direction and that the scope of judicial review under the same evidence standard is only one small component of a much larger problem with California’s parole system).

273. *Shaputis II*, 265 P.3d 253, 265, 268 (Cal. 2011) (“Only when the evidence reflecting the inmate’s present risk to public safety leads to but one conclusion may a court 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.”).

guage out of context from *Lawrence*. The arbitrary language appeared in *Lawrence* when the court was cautioning against a less stringent scope of judicial review, particularly one that upheld parole denials that appeared reasonable.²⁷⁴ *Lawrence* also uses “arbitrary and capricious” to describe why the courts have judicial review over parole denials.²⁷⁵

But in neither use of this language does *Lawrence* state that the parole denial must be upheld unless the decision is arbitrary. *Lawrence* uses the language to state that a parole denial cannot be arbitrary but leaves open the possibility that other reasons could lead to the overturning of a parole denial if the decision is not arbitrary. *Shaputis II*, however, shifts the meaning of this language by limiting the overturning of parole denials only to instances in which the denial is arbitrary. Thus, *Shaputis II* took language from *Lawrence* intended to describe why a broader scope of judicial review was necessary and then manipulated the language to limit the scope of judicial review.

Similar to its recalibration of the arbitrary language, *Shaputis II* also recalibrated the meaning of the “modicum of evidence” language from *Lawrence*. *Shaputis II* instructed that reviewing courts needed only a “modicum of evidence” to support the conclusion that the inmate was currently dangerous.²⁷⁶ *Lawrence*, however, used this phrase only when it cited from *Rosenkrantz*.²⁷⁷ Again, this phrase was used in the context of describing why a broader scope of judicial review was necessary. Similar to the arbitrary language, *Shaputis II* again took language from a paragraph in *Lawrence* then manipulated that language to accomplish the opposite goal of limiting the scope of judicial review.

This selective emphasis of language from *Lawrence* does not indicate a rejection of the less deferential judicial review model, but rather clever judicial

274. The *Lawrence* court noted:

If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not *arbitrary* . . . a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have no bearing on the paramount statutory inquiry. Such a standard, because it would leave potentially *arbitrary* decisions of the [BPH] or the Governor intact, would be incompatible with our recognition that an inmate's right to due process [requires a sufficient remedy].

In re Lawrence, 190 P.3d at 553 (emphasis added).

275. *Id.* at 548 (noting that the judiciary must ensure that BPH or governor parole denials are based on individualized consideration and not arbitrarily made).

276. *Shaputis II*, 265 P.3d at 267, 272 (“The court reviews the entire record to determine whether a modicum of evidence supports the parole suitability decision.”).

277. See *In re Lawrence*, 190 P.3d at 548 (emphasizing, in the paragraph immediately after the “modicum of evidence” quotation from *Rosenkrantz*, that to protect the inmates’ due process rights, courts must provide a “meaningful review of a parole decision”).

maneuvering and wordplay. The legitimacy of such wordplay especially comes into question given Justice Liu's concurring opinion.²⁷⁸ It is also interesting given that one of the dissenters from *Lawrence* wrote the *Shaputis II* majority opinion.²⁷⁹ This fact creates further skepticism about the perceived negative impact that *Shaputis II*'s majority opinion had on the continued legitimacy of the less deferential judicial review model. Because *Shaputis II*'s apparent rejection of the less deferential model was based on a strategic recalibration of language from *Lawrence*, the less deferential model remains as a competing judicial review model post-*Shaputis II*. Given that *Lawrence* chose the less deferential model in conjunction with the current dangerousness model, *Lawrence* also more accurately reflects how the two models are supposed to work together to create an effective some evidence standard.

CONCLUSION

For habeas petitions to be an actual, not illusory, remedy against the abrogation of the liberty interest in parole,²⁸⁰ the California Supreme Court must choose one of the two existing models defining the scope of judicial review under the some evidence standard. Similar to the pre-*Lawrence* era, California's lower courts are struggling between these two models, thus depriving inmates of due process in a constitutional liberty interest. To help complete *Lawrence*'s work in trying to fix California's parole system, the court should choose the less deferential judicial review model. It will not only ensure due process for inmates but, equally important, it will ensure a proper checks-and-balances system for a decisionmaking process that is naturally imbedded with political calculations and emotional appeals.

278. See *supra* Part III.B for a thorough discussion of Justice Liu's concurrence.

279. Justice Corrigan, who was one of three dissenters in *Lawrence* and who concurred with Justice Chin's dissenting opinion in *Lawrence*, wrote the majority opinion for *Shaputis II*.

280. *In re Rosenkrantz*, 59 P.3d 174, 209 (Cal. 2002).

APPENDIX

FIGURE 1. Diagram of the Issues and Models of the Some Evidence Standard

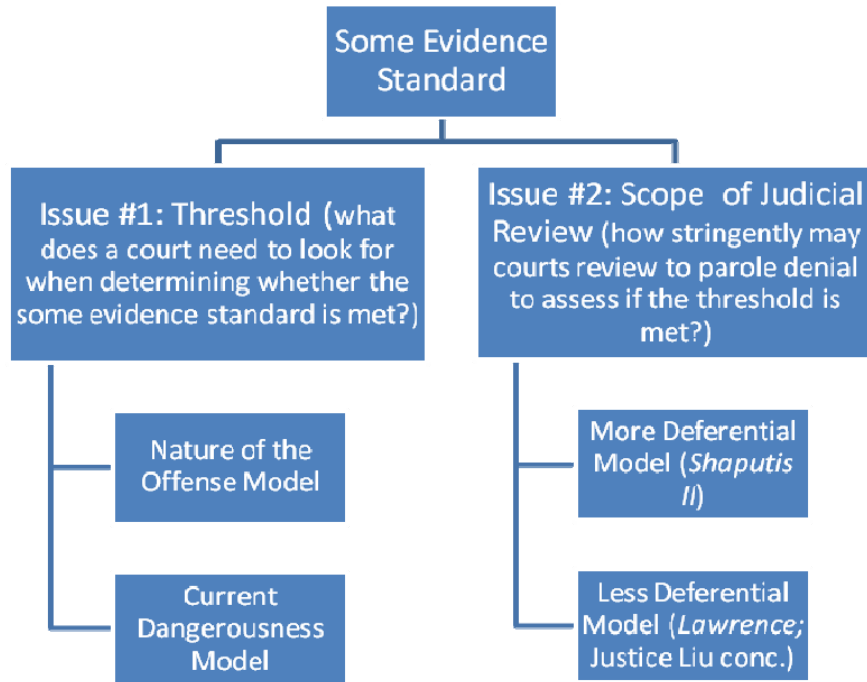


TABLE 1. Results of and Judicial Review Standards Relied on in Post-*Shaputis II*
Cases in California Courts of Appeals

Case Name*	Date Opinion Issued	CA Court of Appeals District Number	Executive Branch Entity that Denied Parole (bph = Board of Parole Hearings; gov = Governor)	Habeas Petition Granted? (0 = No, 1 = Yes)	Case or Opinion Most Heavily Relied on for Scope of Judicial Review**
In re Acuna	08/30/12	6	bph	0	<i>Shaputis II</i>
In re Adamar	07/02/12	2	bph	1	<i>Lawrence</i>
In re Ashby	03/08/12	6	bph	1	<i>Lawrence</i>
In re Bienek	05/16/12	4	gov	1	<i>Lawrence</i>
In re Brown	04/11/12	6	bph	0	<i>Lawrence</i>
In re Coronel	11/06/12	6	bph	1	Liu concurrence, <i>Shaputis II</i>
In re Davidson	07/20/12	2	bph	0	<i>Shaputis II</i>
In re Davis	02/24/12	2	gov	0	<i>Shaputis II</i>
In re Denham	12/05/12	1	bph	1	<i>Shaputis II</i>
In re Eccher	05/10/12	4	gov	1	<i>Lawrence</i>
In re Esteban Varelas	02/16/12	2	bph	0	<i>Shaputis II</i>
In re Estrada	03/09/12	4	gov	1	<i>Lawrence</i>
In re Farrar	03/28/12	2	bph	1	<i>Lawrence</i>
In re Ferguson	12/19/12	4	bph	1	<i>Lawrence</i>
In re Fowler	6/18/13	3	gov	1	<i>Shaputis II</i>
In re Gamez	12/21/12	3	gov	0	<i>Shaputis II</i>
In re Gray	03/28/13	6	gov	0	<i>Shaputis II</i>
In re Grisso	10/23/12	3	bph	0	<i>Shaputis II</i>
In re Hall	11/28/12	2	bph	1	<i>Lawrence</i>
In re Hawks	05/02/12	4	bph	1	<i>Lawrence</i>
In re Hui Kyung Kang	7/16/13	6	bph	0	<i>Shaputis II</i>

Case Name*	Date Opinion Issued	CA Court of Appeals District Number	Executive Branch Entity that Denied Parole (bph = Board of Parole Hearings; gov = Governor)	Habeas Petition Granted? (0 = No, 1 = Yes)	Case or Opinion Most Heavily Relied on for Scope of Judicial Review**
In re Hunter	05/18/12	1	bph	1	<i>Lawrence</i>
In re Jameison	10/25/12	6	bph	0	<i>Shaputis II</i>
In re Kanuse	8/19/13	1	bph	1	<i>Lawrence</i>
In re Lira	06/29/12	6	gov	1	<i>Shaputis II</i>
In re Lizarra	04/23/13	2	bph	0	<i>Shaputis II</i>
In re Lockett	6/24/13	2	bph	1	<i>Lawrence</i>
In re Mackey	07/31/12	3	bph	0	<i>Shaputis II</i>
In re Mims	02/09/12	4	bph	0	<i>Shaputis II</i>
In re Montgomery	08/02/12	3	bph	0	<i>Shaputis II</i>
In re Morales	9/16/13	3	bph	1	<i>Lawrence</i>
In re Morganti	03/28/12	1	bph	1	Liu concurrence, <i>Shaputis II</i>
In re Motley	04/30/12	2	bph	0	<i>Shaputis II</i>
In re Ouellette	07/23/12	2	bph	1	<i>Lawrence</i>
In re Ozerson	03/27/12	2	bph	1	<i>Lawrence</i>
In re Peaslee	06/22/12	3	bph	1	<i>Shaputis II</i>
In re Piltz	02/16/12	2	bph	0	<i>Shaputis II</i>
In re Pugh	03/22/12	3	gov	1	<i>Lawrence</i>
In re Redwood	02/22/12	2	gov	0	<i>Shaputis II</i>
In re Renteria	02/24/12	6	bph	0	<i>Lawrence</i>
In re Roberts	03/19/12	2	bph	0	<i>Shaputis II</i>

Case Name*	Date Opinion Issued	CA Court of Appeals District Number	Executive Branch Entity that Denied Parole (bph = Board of Parole Hearings; gov = Governor)	Habeas Petition Granted? (0 = No, 1 = Yes)	Case or Opinion Most Heavily Relied on for Scope of Judicial Review**
In re Rodriguez	10/23/13	6	bph	0	<i>Shaputis II</i>
In re Rovida	06/29/12	4	bph	0	<i>Shaputis II</i>
In re Sanchez	04/30/12	2	gov	0	<i>Shaputis II</i>
In re Sanchez	08/31/12	4	bph	1	<i>Lawrence</i>
In re Schomberg	10/31/12	3	bph	0	<i>Shaputis II</i>
In re Shigemura	09/27/12	4	bph	0	<i>Shaputis II</i>
In re Sousa	03/28/12	6	bph	0	<i>Shaputis II</i>
In re Stevenson	01/09/13	6	bph	0	<i>Shaputis II</i>
In re Stoneroad	04/18/13	1	bph	1	<i>Lawrence</i>
In re Takhar	08/28/12	3	bph	0	<i>Shaputis II</i>
In re Tapia	06/25/12	4	bph	0	<i>Shaputis II</i>
In re Thomas	08/13/12	3	bph	0	<i>Shaputis II</i>
In re Tolentino	08/06/12	1	bph	0	<i>Shaputis II</i>
In re Villanueva	03/01/12	2	bph	0	<i>Shaputis II</i>
In re White	09/06/12	6	bph	0	<i>Shaputis II</i>
In re Willcoxson	03/19/12	6	bph	0	<i>Shaputis II</i>
In re Young	03/14/12	1	bph	1	<i>Lawrence</i>
People v. Sundberg	10/12/12	2	bph	0	<i>Shaputis II</i>

* These fifty-nine cases were found through WestlawNext and are organized in alphabetical order. First, I looked at the citing references for *Shaputis II*, then I limited the search to only California Courts of Appeal cases. This resulted in the dropping of one California Supreme Court case and one federal district court case. Another ten cases were dropped because they were not about habeas petitions appealing the denial of parole. The first fifty-three cases were analyzed and coded in May 2013. The last six cases were analyzed and coded in February 2014, at which time all the tables in this Comment were also updated. Thus, the tables in this Comment are up-to-date as of February 4, 2014. This data set does not include superior court cases because WestlawNext does not have access to such cases. The number of superior court cases is likely larger than the appellate court cases, and should be looked at for further review.

** As established in Part III of this Comment, a case that relies more heavily on *Lawrence* or Justice Liu's concurring opinion in *Shaputis II* is applying the less deferential judicial review model, while a case that relies more heavily on *Shaputis II* is applying the more deferential judicial review model. To determine which case or opinion was relied on more for the judicial review standard in each case, I applied the following methodology in each case. While this methodology requires subjective judgments at certain steps, the overall approach is an objective way to analyze the judicial review standard chosen for each case. First, I reviewed the identified section in each case that discussed the case law regarding the judicial review standard for these types of habeas petitions. I then assessed which case (*Lawrence* or *Shaputis II*) was more often cited or quoted, and I looked to see what language was being quoted from each case. If only one case was primarily cited, then that case was chosen as the standard for the case. If both cases were about equally cited, then I assessed if one case was cited in a way the limited the guidance from the other, or I looked to see how the cited language was applied to the facts of the case to determine if the court was reweighing the evidence or reviewing the merits of the parole denial. If the court appeared to reweigh the evidence or review the merits of the parole denial, then I chose *Lawrence* as the standard. If the court cited Justice Liu's concurring opinion from *Shaputis II* and appeared to apply his rationality analysis, then I chose his concurring opinion as the standard. If the court appeared to not reweigh the evidence and weightily deferred to the BPH or governor, then I chose *Shaputis II* as the standard.

TABLE 2. Habeas Petition Grant Rate of Fifty-Nine Post-*Shaputis II* California Courts of Appeal Cases

	Number	Percentage
Habeas Petitions Denied	34	58%
Habeas Petitions Granted	25	42%
Total	59	

TABLE 3. Case or Opinion Most Heavily Relied on for Scope of Judicial Review in Fifty-Nine Post-*Shaputis II* California Courts of Appeal Cases

	Number	Percentage
<i>Lawrence</i>	21	36%
<i>Shaputis II</i>	36	61%
Liu concurrence, <i>Shaputis II</i>	2	3%
Total	59	

TABLE 4. Habeas Petition Grant Rate in the Superior Courts for the Fifty-Nine Post-*Shaputis II* California Courts of Appeal Cases*

	Number	Percentage
Habeas Petitions Denied	19	32%
Habeas Petitions Granted	35**	59%
No decision (appellate court made original decision)	5	9%
Total	59	

* This data was gathered from the appellate court opinions, which indicate whether the superior court granted the habeas petition or not before issuing their own decision. The superior court opinions for these cases were not reviewed.

** Of the thirty-five habeas petitions granted by the superior court, the appellate court overturned twenty-five of those grants and denied the habeas petition.

TABLE 5. Connection Between Habeas Petition Grant Rate and the Case or Opinion Most Heavily Relied on for Scope of Judicial Review in Fifty-Nine Post-*Shaputis II* California Courts of Appeal Cases

	Case or Opinion Most Heavily Relied on for Judicial Review Standard		
	<i>Lawrence</i>	Liu concurrence, <i>Shaputis II</i>	<i>Shaputis II</i>
Habeas Petitions Denied (Denial Rate)	2 (10%)	0 (0%)	32 (89%)
Habeas Petitions Granted (Grant Rate)	19 (90%)	2 (100%)	4 (11%)
Total	21	2	36

TABLE 6: Grant Rates Across Court of Appeals Districts in Fifty-Nine Post-*Shaputis II* California Courts of Appeal Cases

	California Court of Appeals District					
	1	2	3	4	5	6
Habeas Petition Denied (Denial Rate)	1 (14%)	11 (65%)	7 (64%)	4 (40%)	0 (0%)	11 (79%)
Habeas Petition Granted (Grant Rate)	6 (86%)	6 (35%)	4 (36%)	6 (60%)	0 (0%)	3 (21%)
Total	7	17	11	10	0	14

TABLE 7. Habeas Petition Grant Rate for BPH Denials and for Governor Denials in Fifty-Nine Post-*Shaputis II* California Courts of Appeal Cases

	Executive Branch Entity that Denied Parole	
	BPH	Governor
Habeas Petitions Denied	29 (60%)	5 (45%)
Habeas Petitions Granted	19 (40%)	6 (55%)
Total	48	11