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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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. But parole release for such inmates has long been far from the norm. From 1991 to 2010, the estimated likelihood of parole release for an inmate serving a life sentence was never greater than 7 percent.

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. 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. 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. 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. & POL’Y 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-
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...rector, 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


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. See 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).


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. 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. 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? 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. 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. Lawrence settled the debate on the some evidence standard’s threshold issue.

12. See In re Aguire, 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

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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.”).


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.  

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. As of April 2013, about 25 percent of California’s inmate population, or about 33,600 inmates, are lifers. This is twice the number of lifers that California had in 1990 and is the highest of any state. 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.

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


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).


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. 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." 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. At the hearing itself, the BPH panel can ask the inmate questions regarding events before, during, and after the offense. 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.

The BPH panel is required to consider all the relevant information presented to it before and during the hearing. 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. 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).
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.
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, 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.59 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-
determinately sentenced inmates who committed murder. The initiative granted the governor the power to review any decision by the BPH pertaining to determinately sentenced inmates who committed murder, but governors have only exercised this power to review, and often reverse, parole grants but not parole denials. 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. 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. 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.\(^{62}\)

\(^{57}\) *In re Lawrence*, 190 P.3d at 553.

\(^{58}\) *In re Lawrence*, 190 P.3d at 553.

\(^{59}\) *In re Lawrence*, 190 P.3d at 553.

\(^{60}\) *In re Lawrence*, 190 P.3d at 553.

\(^{61}\) *In re Lawrence*, 190 P.3d at 553.

\(^{62}\) *In re Lawrence*, 190 P.3d at 553.
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. Governor Brown’s approach is believed to be “long overdue” by inmates and prisoner advocates, but political pressure from victims’ rights groups remain. Because of Governor Brown’s age and lack of interest in pursuing further political office, 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.

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. 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. The Court held that no right existed under the U.S. Constitution “to be conditionally released before the expiration of a valid sentence.” 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 Spector, executive director of the Prison Law Office, which represents many inmates, said Brown’s perspective is long overdue.”).
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.
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. When presented with the question of whether the governor’s parole decisions were subject to judicial review in *In re Rosenkrantz*, the court first established the judicial review standard for BPH parole decisions.

After acknowledging the need for some limitation on the BPH’s discretionary authority, the court sought guidance from *In re Powell*, which set the standard of review for BPH decisions that rescinded parole. Rather than adopt a stricter judicial review standard, *Powell* settled on the some evidence standard. 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. The court viewed anything more stringent than some evidence as too intrusive on the BPH’s discretionary authority.

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.” Thus, to ensure due process for inmates appearing before the BPH and to maintain the balance with public safety, *Rosenkrantz* adopted the some evi-
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Evidence 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 stat-
   ute 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-

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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*

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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.”).


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-
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.
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, 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." 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." 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. Consideration of these suitability factors can help determine whether an inmate “is rehabilitated and no longer poses a danger to public safety.” Moreover, both Rosenkrantz and Dannenberg 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.”

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 safety.”

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 Rosenkrants, 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.” 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. 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. 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. Lawrence, however, rejected the practice of comparing the heinousness of different offenses and found that the nature of the offense fails to demonstrate in every case that a lifer is currently dangerous. 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. 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, 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” and the governor’s discretion as more “stringent or cautious” than that of BPH. Thus, judicial review under the some evidence standard was “unquestionably deferential.” But the court made clear that the judicial review was also “not toothless” and “must be sufficiently robust.” 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.” Thus, the scope of judicial review was not limited to ensuring protection from procedural violations.

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. 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

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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. 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.

**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, Shaputis’s fate again depended on the court after the BPH denied him parole in 2009. The court of appeals found that the BPH failed to meet the some evidence standard, 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. 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. 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 causal 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.
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.\textsuperscript{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.\textsuperscript{160} Although explicit in its affirmation of the some evidence standard, the court’s adoption of a degree of deference different from that applied in \textit{Lawrence} muddled the meaning of the some evidence standard.

\textit{Lawrence} explained that judicial review under the some evidence standard was “not toothless” and must be “sufficiently robust.”\textsuperscript{161} \textit{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.”\textsuperscript{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.\textsuperscript{163} It instructed that a denial failed the some evidence standard only if it “lacks any rational basis” and is “arbitrary.”\textsuperscript{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.\textsuperscript{165}

\textsuperscript{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).

\textsuperscript{160} But cf. Steve Disharoon, Comment, \textit{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. \textit{Id.} But \textit{Shaputis II} rejected Disharoon’s proposal and made clear that the some evidence standard will remain as the judicial review standard.

\textsuperscript{161} \textit{In re Lawrence}, 190 P.3d 535, 552–53 (Cal. 2008).

\textsuperscript{162} \textit{Shaputis II}, 265 P.3d at 268.

\textsuperscript{163} \textit{Id.} at 267–68.

\textsuperscript{164} \textit{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.”).

\textsuperscript{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, 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,” “not arbitrary,” and “not empowered to reweigh the evidence” was a shift from Lawrence’s instruction that courts may review the merits of parole denials. 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. 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.”

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.” Lawrence interpreted “due consideration” as requiring review of the merits of the parole denial. The Shaputis II majority, however, interpreted “due consideration” as only ensuring that the parole denial is not arbitrary. 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.
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.
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. 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.” 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.” 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. 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. As a result, Justice Liu’s analysis and interpretation of the “due consideration” instruction parallels the less deferential model outlined in Lawrence. 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 governed 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, 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.

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.” 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. 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

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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 install 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,” 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.

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. 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.

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. In these materials, the court found evidence or a

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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.
193. *Id.*
lack of evidence to rebut the conclusions made by the BPH. 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. 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. The court disregarded this relationship and instead looked to the letters of support that the inmate had from family and friends.

This analysis defied Shaputis II’s explicit prohibition against reviewing courts “decid[ing] which evidence in the record is convincing.” The dissenting opinion recognized that this analysis ignored Shaputis II’s outlined “standard of review” because the majority reweighed the evidence. 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. As a result, courts would follow Lawrence’s less deferential model and review the merits of the decision. 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. 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.’”).
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. 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.” 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. 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. 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. 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.” 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 examining 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.
owed the guidance from the *Shaputis II* majority opinion. They emphasized the
d 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
collection 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 prac-
tice 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 stand-
ard.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 appel-
late courts. Those cases that overturned superior court decisions because they be-
lieved the courts had reweighed the evidence also demonstrate confusion in the
superior courts.215 Within this early group of post–*Shaputis II* appellate cases,
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 coexist 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

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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. 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. Perhaps because of a unique fact pattern 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. 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. But when courts applied the less deferential model under Lawrence, they granted the habeas petition in 90 percent of the cases. 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.

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 \textit{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.  

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 \textit{Shaputis II} majority opinion’s manipulation of language from \textit{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, \textit{Rosenkrantz} made clear that this judicial review power did not violate the California Constitution’s requirement for the separation of powers. After reviewing multiple other separation of powers-related cases, \textit{Rosenkrantz} concluded that the judicial branch can “exercise a function that only incidentally affects a power vested primarily in another branch of government.” 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 separation of powers requirement.”

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231. See, e.g., \textit{In re Lawrence}, 190 P.3d at 553 (noting the “statutory and regulatory mandate” that lifer inmates be granted parole).

232. \textit{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.”

ration of powers doctrine. 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. Moreover, Rosenkrantz recognized this judicial check as the only remedy available to protect inmates’ constitutional liberty interest in the granting of parole. But this check is effective as a potential remedy only if the reviewing court uses the same evidence standard to ensure that the parole denial “reflects due consideration of the specified factors as applied to the individual prisoner.”

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, but its companion

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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).


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.*

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.”

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. 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. 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.

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

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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. \textit{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,\footnote{Commissioners, supra note 35. Further demonstrating the connection is the fact that of the fifty-nine post–\textit{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.} 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,\footnote{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).} 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.\footnote{\textit{Weisberg et al.}, supra note 3, at 12 (displaying the BPH grant rate from 1978 to 2010 in Chart 3).} The BPH grant rate did not rise above

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\item[250.] Commissioners, supra note 35. Further demonstrating the connection is the fact that of the fifty-nine post–\textit{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.
\item[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).
\item[252.] \textit{Weisberg et al.}, supra note 3, at 12 (displaying the BPH grant rate from 1978 to 2010 in Chart 3).
\end{enumerate}
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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 debilitating 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, 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. 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.
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. But unlike Governor Brown, the next gover-
nor 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 po-
lish 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
dexample 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,
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, 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. Moreover, about 38 percent of lifers are over the age of forty-six. 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. 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.\textsuperscript{267} Actual time served is similar despite the ten-year difference in minimum base terms between first-degree murder and second-degree murder.\textsuperscript{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 \textit{Lawrence}, renders the deferential nature of the some evidence standard a “phantom” because courts would essentially reevaluate an inmate’s parole suitability.\textsuperscript{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.\textsuperscript{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

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\item \textsuperscript{267} \textit{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); \textit{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 . . . .”).
\item \textsuperscript{268} \textit{Id.}
\item \textsuperscript{269} \textit{In re} Lawrence, 190 P.3d 535, 570 (Cal. 2008) (Chin, J., dissenting).
\item \textsuperscript{270} \textit{See id.} at 568 (“The executive branch, not the judicial branch, makes the parole decision . . . .”).
\end{itemize}
system in which parole is the statutory expectation, and not the exception. 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.”

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.” The California Supreme Court had not established any such arbitrariness test in previous cases. Rather, Shaputis II takes the arbitrary lan-

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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 some 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.”).
Parole Denial Habeas Corpus Petitions in California

language 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. Lawrence also uses “arbitrary and capricious” to describe why the courts have judicial review over parole denials.

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. Lawrence, however, used this phrase only when it cited from Rosenkrantz. 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

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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. It is also interesting given that one of the dissenters from Lawrence wrote the Shaputis II majority opinion. 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, 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.
APPENDIX

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

Some Evidence Standard

Issue #1: Threshold (what does a court need to look for when determining whether the some evidence standard is met?)
- Nature of the Offense Model
- Current Dangerousness Model

Issue #2: Scope of Judicial Review (how stringently may courts review to parole denial to assess if the threshold is met?)
- More Deferential Model (Shaputis II)
- Less Deferential Model (Lawrence; Justice Liu conc.)
TABLE 1. Results of and Judicial Review Standards Relying on in Post–Shaputis II Cases in California Courts of Appeals

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

<table>
<thead>
<tr>
<th>Case Name*</th>
<th>Date Opinion Issued</th>
<th>CA Court of Appeals District Number</th>
<th>Executive Branch Entity that Denied Parole (bph = Board of Parole Hearings; gov = Governor)</th>
<th>Habeas Petition Granted? (0 = No, 1 = Yes)</th>
<th>Case or Opinion Most Heavily Relied on for Scope of Judicial Review**</th>
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<tbody>
<tr>
<td>In re Hunter</td>
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<td>Lawrence</td>
</tr>
<tr>
<td>In re Jameison</td>
<td>10/25/12</td>
<td>6</td>
<td>bph</td>
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<td>Shaputis II</td>
</tr>
<tr>
<td>In re Kanuse</td>
<td>8/19/13</td>
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<td>bph</td>
<td>1</td>
<td>Lawrence</td>
</tr>
<tr>
<td>In re Lira</td>
<td>06/29/12</td>
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<td>Shaputis II</td>
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<tr>
<td>In re Lizarraga</td>
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<tr>
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<td>6/24/13</td>
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<td>bph</td>
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<td>Lawrence</td>
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<tr>
<td>In re Mackey</td>
<td>07/31/12</td>
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<td>In re Mims</td>
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<td>In re Montgomery</td>
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<td>bph</td>
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<td>In re Ouellette</td>
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<td>In re Ozerson</td>
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<td>In re Peaslee</td>
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<td>In re Pugh</td>
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<td>In re Renteria</td>
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<td>In re Roberts</td>
<td>03/19/12</td>
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<td>bph</td>
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<td>Shaputis II</td>
</tr>
<tr>
<td>Case Name*</td>
<td>Date Opinion Issued</td>
<td>CA Court of Appeals District Number</td>
<td>Executive Branch Entity that Denied Parole (bph = Board of Parole Hearings; gov = Governor)</td>
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<td>Case or Opinion Most Heavily Relied on for Scope of Judicial Review**</td>
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<td>In re Rodriguez</td>
<td>10/23/13</td>
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<td>bph</td>
<td>0</td>
<td>Shaputis II</td>
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<tr>
<td>In re Rovida</td>
<td>06/29/12</td>
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<td>In re Sanchez</td>
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<td>In re Sanchez</td>
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<td>In re Schomburg</td>
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<td>bph</td>
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<tr>
<td>In re Shigemura</td>
<td>09/27/12</td>
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<td>bph</td>
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<td>Shaputis II</td>
</tr>
<tr>
<td>In re Sousa</td>
<td>03/28/12</td>
<td>6</td>
<td>bph</td>
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<td>In re Stevenson</td>
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<td>In re Stoneroad</td>
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<td>bph</td>
<td>1</td>
<td>Lawrence</td>
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<td>In re Takhar</td>
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<td>3</td>
<td>bph</td>
<td>0</td>
<td>Shaputis II</td>
</tr>
<tr>
<td>In re Tapia</td>
<td>06/25/12</td>
<td>4</td>
<td>bph</td>
<td>0</td>
<td>Shaputis II</td>
</tr>
<tr>
<td>In re Thomas</td>
<td>08/13/12</td>
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<td>bph</td>
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<td>In re Tolentino</td>
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<tr>
<td>In re Villanueva</td>
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<td>bph</td>
<td>0</td>
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<tr>
<td>In re White</td>
<td>09/06/12</td>
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<td>2</td>
<td>bph</td>
<td>0</td>
<td>Shaputis II</td>
</tr>
</tbody>
</table>
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

<table>
<thead>
<tr>
<th>Case or Opinion</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawrence</td>
<td>21</td>
<td>36%</td>
</tr>
<tr>
<td>Shaputis II</td>
<td>36</td>
<td>61%</td>
</tr>
<tr>
<td>Liu concurrence, Shaputis II</td>
<td>2</td>
<td>3%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>59</strong></td>
<td></td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
<th>Percentage</th>
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</thead>
<tbody>
<tr>
<td>Habeas Petitions Denied</td>
<td>19</td>
<td>32%</td>
</tr>
<tr>
<td>Habeas Petitions Granted</td>
<td>35**</td>
<td>59%</td>
</tr>
<tr>
<td>No decision (appellate court made original decision)</td>
<td>5</td>
<td>9%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>59</strong></td>
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</tr>
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</table>

* 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

<table>
<thead>
<tr>
<th>Case or Opinion Most Heavily Relied on for Judicial Review Standard</th>
<th>Lawrence</th>
<th>Liu concurrence, Shaputis II</th>
<th>Shaputis II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Habeas Petitions Denied (Denial Rate)</td>
<td>2 (10%)</td>
<td>0 (0%)</td>
<td>32 (89%)</td>
</tr>
<tr>
<td>Habeas Petitions Granted (Grant Rate)</td>
<td>19 (90%)</td>
<td>2 (100%)</td>
<td>4 (11%)</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>21</strong></td>
<td><strong>2</strong></td>
<td><strong>36</strong></td>
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</table>
### TABLE 6: Grant Rates Across Court of Appeals Districts in Fifty-Nine Post–Shaputis II California Courts of Appeal Cases

<table>
<thead>
<tr>
<th>California Court of Appeals District</th>
<th>1 (14%)</th>
<th>2 (65%)</th>
<th>3 (64%)</th>
<th>4 (40%)</th>
<th>5 (0%)</th>
<th>6 (79%)</th>
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</thead>
<tbody>
<tr>
<td>Habeas Petition Denied (Denial Rate)</td>
<td>11 (11)</td>
<td>7 (7)</td>
<td>4 (4)</td>
<td>0 (0)</td>
<td>11 (11)</td>
<td></td>
</tr>
<tr>
<td>Habeas Petition Granted (Grant Rate)</td>
<td>6 (6)</td>
<td>6 (6)</td>
<td>4 (4)</td>
<td>6 (6)</td>
<td>0 (0)</td>
<td>3 (3)</td>
</tr>
<tr>
<td>Total</td>
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<td>17</td>
<td>11</td>
<td>10</td>
<td>0</td>
<td>14</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Executive Branch Entity that Denied Parole</th>
<th>BPH</th>
<th>Governor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Habeas Petitions Denied</td>
<td>29 (60%)</td>
<td>5 (45%)</td>
</tr>
<tr>
<td>Habeas Petitions Granted</td>
<td>19 (40%)</td>
<td>6 (55%)</td>
</tr>
<tr>
<td>Total</td>
<td>48</td>
<td>11</td>
</tr>
</tbody>
</table>