No. _____

THE SUPREME COURT OF THE UNITED STATES

SIRHAN B. SIRHAN,

PETITIONER *IN FORMA PAUPERIS*,

V.

STATE OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

California Constitution Article V, Section 8(b), grants a California Governor the authority to reverse parole decisions of the Board of Parole Commissioners. It is a de novo review, with the limitation that the Governor must consider the same statutory factors and record of the Board below.

1. DOES CALIFORNIA CONSTITUTION ARTICLE V, SECTION 8(b) VIOLATE THE U.S. CONSTITUTION'S DUE PROCESS CLAUSE BECAUSE OF THE INTOLERABLE RISK THAT PUBLICLY ELECTED GOVERNORS LACK NECESSARY NEUTRALITY?
2. WAS PETITIONER'S FUNDAMENTAL RIGHT TO A FAIR AND NEUTRAL ARBITER VIOLATED WHEN THE GOVERNOR WHO REVIEWED THE PAROLE BOARD DECISION HAD A WELL-PUBLISHED AFFINITY AND PERSONAL CONNECTION TO THE VICTIM?
3. DOES CALIFORNIA CONSTITUTION ARTICLE V, SECTION 8(b) IMPROPERLY IMPACT YOUTH OFFENDERS BECAUSE OF THEIR UNIQUE CONSTITUTIONAL PENOLOGICAL PROTECTIONS AND THEREBY VIOLATE THE EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT?
4. DOES CALIFORNIA CONSTITUTION ARTICLE V, SECTION 8(b) VIOLATE THE U.S. CONSTITUTION'S DUE PROCESS CLAUSE BECAUSE DUE PROCESS SAFEGUARDS, SUCH AS THE RIGHT TO BE HEARD, RIGHT TO REVIEW THE RECORD, AND TO HAVE COUNSEL ATTEND THE HEARING, ARE NOT AVAILABLE DURING THE GOVERNOR'S REVIEW PROCESS, EVEN WHEN NEW EVIDENCE IS IMPROPERLY CONSIDERED BY THE GOVERNOR?

PARTIES TO THE PROCEEDINGS AND RELATED CASES

In re Sirhan B. Sirhan, Petitioner; CA Attorney General, Los Angeles County District Attorney, Respondents. Superior Ct. No. BH014184 / Underlying Case No. A233421, Superior Court of California, County of Los Angeles. Memorandum of Decision on Petition for Writ of Habeas Corpus entered October 2, 2023

In re Sirhan B. Sirhan, *Petition for Writ of Habeas Corpus*, Appeal No. B338429 California Court of Appeal, Second Appellate District, Div. 5. Decision denying Petition entered July 22, 2024. This filing invoked the Appellate Court's original jurisdiction. See *Robinson v. Lewis*, 9 Cal. 5th 883, 895; 469 P.3d 414, 419 (2020).

In re Sirhan B. Sirhan on Habeas Corpus, Supreme Court of California, No. S286234. Decision denying Petition entered September 25, 2024.

28 U.S.C. Section 2403(b) may apply. (Pursuant to Rule 29(c) of the Rules of the Supreme Court of the United States, the Attorney General has been served.)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue reviewing the decision of the Supreme Court of California.

OPINIONS BELOW

None of the previous rulings or decisions of the courts below resulted in published opinions. Opinions and / or Decisions below:

Unpublished: *In re Sirhan B. Sirhan, Petitioner; CA Attorney General, Los Angeles County District Attorney,* Respondents. Superior Ct. No. BH014184, Appendix A.

Unpublished*: In re Sirhan B. Sirhan*, *Petition for Writ of Habeas Corpus*, Appeal No. B338429 California Court of Appeal, Second Appellate District, Div. 5, Appendix B.

Unpublished*: In re Sirhan B. Sirhan on Habeas Corpus, Supreme Court of California,* No. S286234. Appendix C.

BASIS OF JURISDICTION

The date on which the Supreme Court of California issued its decision was September 25, 2024.

Jurisdiction of this Court is established under the following:

28 U.S. Code, Section 1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Rules of the Supreme Court of the United States, Rule 10(c):

[A] state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

CONSTITUTIONAL, STATUTORY AND CASE LAW INVOLVED

U.S. Constitution, Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. Constitution, Fourteenth Amendment

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitution, Article V, Section 8

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

Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action."

California Penal Code Section 3041.2

"(a) During the 30 days following the granting, denial, revocation, or suspension by the board of the parole of an inmate sentenced to an indeterminate prison term based upon a conviction of murder, the Governor, when reviewing the board's decision pursuant to subdivision (b) of Section 8 of Article V of the Constitution, shall review materials provided by the board.

(b) If the Governor decides to reverse or modify a parole decision of the board pursuant to subdivision (b) of Section 8 of Article V of the Constitution, he or she shall send a written statement to the inmate specifying the reasons for his or her decision."

***Swarthout v. Cooke*, 562 U.S. 216, 219 (2011):** A State's procedure is subject to due process review by the U.S. Supreme Court if the State has created a liberty interest in the subject matter.

***In re Rosenkrantz*, 29 Cal. 4th 616, 661 (2002):** California has created a due process liberty interest in parole for California prisoners.

STATEMENT OF THE CASE

A. Procedural

Mr. Sirhan is currently serving a life sentence for first degree murder. Mr. Sirhan has been eligible for parole since May 30, 1975. Petitioner was found suitable for release on August 27, 2021. On January 13, 2022, Governor Newsom reversed the decision of the Board of Parole Commissioners under the authority of California Const. Art. V, Sec. 8(b) (see also Penal Code 3041.2). Petitioner challenged the Governor's reversal in the California Superior Court through habeas corpus proceeding. (In re Sirhan B. Sirhan, Case No. BH014184, Appendix D; Bates Number, hereinafter "BN", BN0043). After the superior court issued an order to show cause, the Los Angeles County District Attorney's Office and the California Attorney General's Office filed Returns. On October 2, 2023, the Los Angeles County Superior Court denied Petitioner's Petition for Writ of Habeas Corpus. (Appendix A; BN0005). Petitioner filed a writ of habeas corpus in the appellate court. Therein, he challenged the constitutionality of the law. On July 22, 2024, the Court of Appeals denied the petition. (Appendix B; BN0038) Petitioner timely sought review of the California Supreme Court, which denied his request for review after briefing on September 25, 2024. (Appendix C; BN0041).

B. Facts

Prior to Petitioner's grant of parole on August 27, 2021, he was denied parole many times, since the mid-1980's, despite receiving consistent standardized risk

assessments placing him in the lowest category for risk. Subsequent to the Board's grant of parole, the Governor made statements indicating a preference towards reversing his Board's decision.[1] (Appendix E; BN0098.) Moreover, Governor Newsom received a 361-page *ex-parte* packet of materials from the victim's family, including an inflammatory hearsay statement from a former prison guard and an opinion letter from a former District Attorney.[2] (Appendix F; BN0151.) The hearsay statement from the ex-guard alleged that he caused to be created a confidential "chrono"[3] alleging Petitioner made a highly inflammatory statement that was tantamount to a tacit admission. This inflammatory hearsay was improperly before Governor Newsom because none of the large packet of *ex-parte* items were before the Board below, were never served on Petitioner, and were items which Art. V, Sec. 8(b) does not permit the

[1] In an October 24, 2021 interview on NBC's Meet the Press, the Governor acknowledged that Petitioner's case had not yet been brought to him. Yet, on September 14, 2021, he stated he was "resolved in the spirit of [his] political hero Robert Kennedy" (9/14/2021, KTUV, www.youtube.com/watch?v=Ia-ZOTZLz3A). In the Meet the Press Interview he reiterates "Robert Kennedy is my political hero. You look at my house, it's like a shrine to the Kennedy family and Bobby in particular". (www.nbcnews.com/meet-the-press/video/gov-newsom 10/21/2021). Appendix E 4; BN0137).

[2] It is unclear exactly how many *ex-parte* communications were served on the Governor, as the cover letter for the packet references other anticipated to be sent to him.

[3] A CDCR incident report, Ca Code of Regs, Title 15, §3321.

parolee to rebut.[4] After receipt of the *ex-parte* packet, Governor Newsom reversed his Board's decision on January 13, 2022.

Petitioner seeks certiorari on the issue of the constitutionality of California Constitution Article V, Section 8(b) because it does not allow parolees an opportunity to rebut improperly received information, which in his case was received, and because it allows a biased arbiter to determine liberty interests. In this case, the bias was clear and distinct.

[4] At a subsequent Board Hearing, where Petitioner does enjoy the right to rebut hearsay allegations, the ex-guard was proven to have lied about the existence of "chrono" at all.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

In briefest form, pursuant to Supreme Ct. Rule 10(c), certiorari should be granted because the Supreme Court of California has decided an important question of Federal Law that has not been, but should be, settled by this Court, in that:

1. Art. V, Sec. 8(b) subjects every inmate granted parole to review by an arbiter subject to political influence, which flies in the face of fundamental concepts of due process before a neutral arbiter.
2. Art. V, Sec. 8(b) fails to provide fundamental due process to every inmate when, as occurred here, they are denied notice of the record and right to be heard, when the arbiter violates the statute implementing the law, by receiving and considering outside prejudicial evidence and information. It is unrealistic to presume that any given Governor will not receive outside information provided by constituents that was not part of the record reviewed by the Board, which is contrary to California case law interpreting the statute. *In re Rosenkrantz* 29 Cal. 4th 616, 638 (2002) and *In re Mc Donald* 189 Cal. App. 4th 1008, 1024 (2010). See also *Morrissey v. Brewer* 408 U.S. 471, (1972) holding a due process right to notice of the record and to rebut in the parole context.
3. Art. V, Sec. 8(b) subjects juvenile and youthful offenders to a lack of reasonable opportunity for release in violation of the Eighth Amendment to the U.S. Constitution, in that it undermines the laws mandating specific consideration of the "distinctive attributes of youth" designed to recognize the hallmark features

of youth and the "possibility of rehabilitation" (*Miller v. Alabama*, 567 U.S. 460, 472, 477 (2010)). By allowing a political figure to reverse a finding of suitability by the Parole Board, a young offender may never have a real chance of release despite rehabilitation and appropriate suitability for release. For those inmates committed before age 18, and never sentenced to life without the possibility of parole ("LWOP"), Art. V, Sec. 8(b) if used to reverse parole grants, is essentially an LWOP sentence in violation of mandates of *Miller v. Alabama, id.*

4. Art. V, Sec. 8(b) does not articulate any mechanism for recusal by a Governor who actually harbors bias towards the particular inmate being reviewed. The lack of appropriate recusal procedure for the arbiter creates fertile ground for a Governor to proceed with review despite having actual bias. Here, Governor Newsom's long-standing, demonstrable affinity for the victim, and personal family association with the victim, would have required any other arbiter to step aside. Certiorari should be granted to determine whether a violation of due process occurs when a Governor publicly favoring the particular victim in a case sits in judgment of the inmate's parole review, pursuant Art. V, Sec. 8(b), and there is no recusal mechanism applicable under the law to address such bias.
5. The constitutionality of California Constitution, Art. V, Sec. 8(b) has not been decided by this Court.

I.

CAL. CONST., ART. V SEC. 8, SUBD. (b) IS AN OUTLIER AMONG THE STATES, IS STRUCTURALLY FLAWED AS IT LACKS NEUTRALITY, AND THE BIAS CANNOT BE CURED; IT IS THEREFORE UNCONSTITUTIONAL

A. History of Passage of Art. V, Sec 8(b)

In 1988, California voters approved Proposition 89, adding Section 8(b) to Article V, granting the Governor the power to review parole decisions specifically for those serving indeterminate sentences for murder of up to life in prison with the possibility of parole. California is one of only two states[5] in the country where the governor has the right to review and reverse grants of parole to inmates in the class. As a balance to unfettered decision-making by the Governor, Art. V, section 8(b) requires that the Governor's decision be based upon the same factors the California Department of Corrections and Rehabilitation's Board of Parole Hearings is required to consider. Pen. Code, sec. 3041.2(b), *In re Lawrence* 44 Cal. 4th 1181, 1204 (2008) ; *In re Van Houten,* 92 Cal.App.5th 1, 32 (2023). Further, the Governor may not review materials that were not before the Board. (*In re McDonald,* 189 Cal.App.4th 1008, 1024 (2010): "Unlike the Board, which has the obligation and ability to take evidence,

[5] Oklahoma is the only other state with a similar law, See OK Constitution Art. VI, Sec. 10. In 2021, Maryland passed SB 202 returning the ultimate authority on parole decisions to parole officials, and divesting the governor of such power due to the perception of bias. (Appendix I; BN0193)

consistent with due process protections, the Governor cannot create an evidentiary record"; See also *In re Copley,* 196 Cal. App. 4th 427, 433 (2011): *"Governor's constitutional authority is limited to a review of the materials presented by the Board."* See also *In re Arafiles,* 6 Cal.App.4th 1467, 1477, 1478 (1992) *In re Rosenkrantz*, 29 Cal.4th 616, 660-661 (2002); *In re Smith* 109 Cal.App.4 489, 507 (2003) .

Finally, there is judicial review, albeit limited review, of a Governor's decision to ensure that certain factors be considered and that parole decisions are supported by at least "some evidence of current dangerousness" and are not arbitrary or capricious. *In re Rosenkrantz*, *supra*, 29 Cal.4th at 625-626; *In re Powell,* 45 Cal.3d 894, 904 (1988). Thus, the law provides that a Governor shall have, in one person, the power otherwise vested in many experienced Board members.

Generally, Parole Boards consist of former prosecutors, sheriffs, police officers and probation officers. Together they comprise a body of hundreds of years of experience in public safety and law enforcement. Their primary function is to protect the public. (Cal. Pen. Code section 3044(b).) A decision in favor of parole is based upon a decision of the panel and review of the entire Board. (Cal. Pen. Code section 3041(b)(2)). The competency of the Board cannot be doubted based on their collective experience. Parole is a right unless there is evidence of current dangerousness. (*In re Lawrence, supra*, 44 Cal.4th at 1210.) The challenged constitutional provision essentially added another "parole board", in the Governor. He wields the same power, but with none of the collective experience of the Board, and through the Governor's

review, the prospective parolee has fewer procedural rights[6]. Under this law, a Governor's decision is deemed "better than" that of the experienced Board. Because the Governor historically lacks the law enforcement experience of the Board and is, in theory, deciding on the same material and factors before the Board below, the only plausible reason for Gubernatorial veto power is to override a politically unpopular decision.

The impetus for the law was the "widespread and unprecedented public outcry" after the parole of Archie Fain, convicted of multiple rapes and murders *(In re Fain,* 139 Cal.App.3d 295 (1983)). Then Governor Deukmejian attempted to block Fain's release but failed in court. He then launched a "tough on crime" ballot initiative, Proposition 89, which passed. Underscoring the political nature of the measure, Petitioner was specifically named in the official California Ballot Pamphlet, General Election (1988) issued by the California Secretary of State. (See Appendix G; BN0179), from "Arguments in Favor of Proposition 89" and "Rebuttal to Argument Against Proposition 89", signed by then Governor George Deukmejian.) Naming notorious murderers in the public materials is a nod to the fact that unpopular or notorious persons will be denied parole, as a Governor sacrifices justice for votes or other politicized reasons.

Thus, from its inception, the goal of the Art, V, sec, 8(b) parole reversal power

[6] Such as the right to be heard before the decision maker and the right to be represented by counsel in a case of parole rescission.

has been to provide an outlet for political sentiment against grants of parole which were otherwise deemed appropriate by the Board. (*See Gilman v. Brown* 110 F.Supp.3d 989, 1016 (E.D. Cal. 2014), wherein the Court stated [Proposition 89] sent "an instruction that the Governor should put his finger on the scale" against release.) (*Gilman*, *id*, reversed on other grounds at *Gilman v. Brown* 814 F.3d 1007 (2016)).

B. A Neutral Arbiter is a Fundamental Right, and a Law that Infringes Upon that Right is Structurally Defective under Constitutional Standards.

1. Parolee Applicants have a Liberty Interest in Parole and The Fundamental Right to an Impartial Decision-Making Body.

In the criminal proceeding context, the Due Process Clause requires States to adopt laws that are fundamental to liberty and justice. *Williams v. Pennsylvania*, 579 U.S. 1, 20 (2016). In California, this liberty interest extends to parole applicants where they have been deemed to " 'have a due process liberty interest in parole (*In re Rosenkrantz*, *supra,* 29 Cal.4th at 664) and "'an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation'. [Citation.]" (*In re Lawrence, supra*, 44 Cal. 4th at 1203, quoting *Rosenkrantz*, *supra*, 29 Cal.4th at 654; see also *People v. Ramirez,* 25 Cal.3d 260 (1979).) In *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011), this Court acknowledged California's granting of a due process liberty interest in the parole process. Once a due process liberty interest is established and an individual alleges a violation of it, due process analysis looks at

whether the procedures followed by the State were constitutionally sufficient. *Swarthout v. Cooke*, *supra,* 562 U.S. at 219.

Basic fundamental rights include, among others, the right to a fair hearing in front of an impartial arbiter. *Lisenba* v. *California*, 314 U. S. 219, 236 (1941); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 825 (1986); *Gideon v. Wainright* 372 U.S. 335, 344 (1963); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).

This Court has also determined that administrative agencies, not just judges, must likewise be impartial. In *Withrow v. Larkin*, 421 U.S. 35 (1975), this Court stated "'a fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison,* 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts." (*Withrow v. Larkin*, *supra*, at 46-47, citing *Gibson* v. *Berryhill,* 411 U.S. 564, 579 (1973). See also *Morrissey v. Brewer*, *supra,* 408 U.S. at 489 (due process requires "neutral and detached" hearing body for parole revocation hearing).

Art. V, Sec. 8(b) is constitutionally flawed in that it creates an inherent bias on the part of a decision maker, thereby violating the due process right of the parolee. Additionally, there exists no State law to cure such bias.

2. Most Matters of Bias are Left to the States Unless the Bias Rises to a Constitutional Level, and Here, State Laws Fail to Address the Bias.

Most cases of bias do not rise to a constitutional level. Normally, a State enacts codes of judicial conduct and legislation addressing bias. Further, most states have strict laws addressing bias and recusal of judicial officers upon the "appearance of"

bias. "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances." (*Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 890 (2009).)

In California, for example, Cal. Code of Civil Procedure 170.1(a)[7] unambiguously requires disqualification of a judge where only the *appearance* of impartiality exists. C.C.P. 170.1 (a)(6) reads: "(a) A judge shall be disqualified if. . . [a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." In October 2024, the California Supreme Court stated the statutory disqualification laws should be broadly construed to instill public confidence

[7] In lock-step alignment with the Federal and State Constitutional guarantees of impartial decision making, the American Bar Association Model Code of Judicial Conduct (Canon 2, Rule 2.2) and the Supreme Court of California via the California Code of Judicial Ethics (Canon 3) have promulgated rules and law to ensure impartiality. ABA Model Code of Judicial Conduct, Canon Rule 2.2 states: "A judge shall perform the duties of judicial office impartially, competently and diligently. Cal. Code of Judicial Ethics, Canon 2(B)(1) states "…a judge shall not allow nor shall a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge.". CCJE, Canon 2. CCJE Canon 3(B)(2) states: "(2) A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law." (CCJE Canon 3.)

in the judiciary. *North American Title Co., Inc. v. Superior Court,* 17 Cal. 5th 155, 186 (2024).

Because a Governor is not a judge, a "tribunal", or an administrative agency, Art. V, Sec. 8(b) has, in essence, slipped through the cracks of the basic due process requirement for neutrality and a concurrent mandate to recuse oneself.

However, when a state's laws infringe upon a fundamental interest, such as the right to a neutral arbiter when adjudicating a liberty interest, as here, and where there is no mechanism in that state law to remove a non-impartial arbiter, federal due process is implicated as the law "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Aetna Life Ins. Co. v. Lavoie*, *supra,* 475 U.S. at 820-821 quoting *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

In this case, this Court cannot rely upon the existence of California's strong recusal statutes to cure any bias that may exist when a Governor reviews parole decisions because none of the existing laws addressing bias apply to a Governor. Nor does Article V, Sec. 8(b) (or the statute implementing it, Penal Code Sec. 3041.2) address biased behaviors and actions of a Governor. This dearth of legislation leaves inmates with no recourse to challenge the Governor's bias. Because of the uniqueness of this law, a Governor is outside of state statutes that address the fundamental fairness of a neutral arbiter.

As carefully as the *Caperton* Court was to warn that the facts of constitutional disqualifications are rare and limited to extreme cases, explaining that States have

enacted "standards more rigorous than due process requires" (*Caperton*, *supra,* 556 U.S. at 889), *Caperton* did not account for the rare circumstance where the state's neutrality statutes do not cover the judicial-like (or tribunal-like) decisions of a Governor affecting a prospective parolee's fundamental right to a neutral arbiter in deciding a liberty interest.

The outlier law embodied in California Constitution, Article V, Sec. 8(b), which exists only in two jurisdictions, empowers an arbiter who is not a judge, tribunal nor administrative agency to make decisions of no less significance than those made by a Judge, tribunal, Parole Board, or administrative agency, all of which are subject to a mandate of neutrality. A Governor, for lack of being defined in the aforementioned categories, must not be allowed to skirt the rules of neutrality to which all other arbiters are held.

3. Federal Due Process Claims Of Bias Cannot Be Easily Defined, Involve Determination of Whether an Arbiter is "Likely to Be Neutral" or Whether There is "Potential For Bias", and Actual Bias Need Not Be Found.

Indeed, the failure of California to account for a violation of a Governor's lack of impartiality in their laws raises a due process question. The standard to determine if a due process violation exists at the federal constitutional level is more stringent than the "appearance of" bias required by California Statute[8]. This Court has previously articulated a formula to determine constitutional bias. In *Aetna Life, supra,* 475 U.S., this Court stated: "[A] reasonable formulation of the issue is whether the situation is

[8] Ca. Code of Civil Procedure Section 170.1 et seq.

one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" (*Id.*, at 822, quoting *Ward* v. *Village of Monroeville,* 409 U.S. 57, 60 (1972).) The *Aetna Life* Court noted: "what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.'" (*Aetna Life*, at p. 822, quoting Justice Black *In re Murchison*, 349 U.S. 133 (1955). Then, in *Williams v. Pennsylvania,* 579 U.S. 1 (2016), this Court further defined constitutional bias:

> "Due process guarantees 'an absence of actual bias on the part of a judge. *In re Murchison*, 349 U. S. 133, 136, [alt. citations omitted]. Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. **The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional 'potential for bias.**' *Caperton*, 556 U. S., at 881, [citations omitted]."

Williams v. Pennsylvania, 579 U.S. at 8. (emphasis added)

In *Caperton v. A.T. Massey*, *supra*, 556 U.S. 868, this Court has required a showing of risk of actual bias or prejudgment. In *Caperton,* this Court reviewed whether a recently elected appellate judge could be impartial when the case before him involved a significant donor to his campaign. His loyalties of "gratitude" to the donor were at issue in reference to his ability to judge impartially. While the judge in question undertook a careful self-assessment of his biases and concluded he was not biased, the *Caperton* Court found he must nonetheless be disqualified, and it reversed the lower Court's ruling. The *Caperton* Court stated that actual bias need not be shown, stating:

> "…this Court does not question Justice Benjamin's subjective findings of impartiality and propriety **and need not determine whether there was actual bias**. Rather, the question is whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.' *Withrow v. Larkin* 421 U.S. 35 at 47. 95 S. Ct. 1456, 43 L. Ed. 2d 712."

Caperton, Id., at 869-870. (emphasis added).

In the case of *Taylor v. Hayes*, 418 U.S. 488 (1974) a judge held an attorney in contempt during a contentious criminal trial and sentenced him to four years of confinement. On reversal and remand, this Court determined the trial judge should not hear any retrial of the contempt charges, stating the "inquiry must not be only whether there was actual bias on Respondent's [the Judge's] part, but also whether there was 'such likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused. *Ungar v. Sarafite*, 376 U.S. 575, 588 (1964).' " (*Taylor, supra* at 501.) " 'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less. *In re Murchison*, 349 U.S. 133, 136 (1995)". (*Taylor, Id.,* 418 U.S. at 501).

In each of the cases above, this Court identified circumstances where the probability of actual bias on the part of a decision-maker was too high to be constitutionally tolerable, including when the arbiter has a financial interest in the dispute, or has been the target of abuse by a party before him or her. *Withrow v. Larkin, supra,* 421 U.S. 35, 47.

Here, the alleged genesis for the bias is not similar to previous cases due to the uniqueness of the law. Can an elected official, who normally is presumed to be executing his duties neutrally, hold the balance "nice, clear and true" (*Tumey v. Ohio,* 273 U.S. 510, 532 (1927)) when he is faced with the conflict of releasing a murderer, despite rehabilitation and the lowest risk assessments for danger, knowing full well that his constituents will not likely approve, thus risking his own personal political popularity? The conflict presented is that of the inmates' rights versus the decision-maker's own personal political aspirations.

The conflict is more pronounced and nuanced in the case at bar, where not only was the Governor faced with freeing an unpopular inmate, but also the man convicted of killing his "personal hero" and the colleague of his own father. Such a conflict is beyond what can be expected of any person, taking into account human weakness and psychological tendencies.

Because a Governor does not neatly fall into the category of "judge" or "tribunal", the judicial and administrative laws regarding disqualification for bias have failed to address the Governor-as-arbiter scenario created by Article V, Sec. 8(b). A constitutional violation exists because a Governor in the executive branch is the *only adjudicating branch in our system of tribunals* to escape the promise of an impartial arbiter. This is an incurable structural defect rendering it impossible to remedy the Gubernatorial parole review process from politics and inherent bias.

4. Art. V., Sec. 8(b) Impermissibly Creates a Lack of Neutrality in That A Governor is Answerable to His Constituents, Political Factors and His/Her Own Career Goals, Thereby Rendering the Law Structurally Flawed.

Applying the standards articulated above, politicians are biased in a manner that cannot be cured. By the nature inherent in popular elections, politicians are beholden to their constituents and have a vested interest in their own electability. This Court has articulated the obvious truth that politicians are beholden to votes and popularity. "Unlike politicians, judges are not 'expected to be responsive to [the] concerns' of constituents." (*Williams-Yulee v. Fla. Bar* 575 U.S. 433, 459 (2015) (conc. Opn), quoting *McCutcheon v. FEC* 572 U.S. 185 (2014), (plurality opinion). "Instead, 'it is the business of judges to be indifferent to popularity.' " (*Williams-Yulee*, *Ibid.*, quoting *Chisom* v. *Roemer*, 501 U. S. 380, 401, n. 29 (1991)). Notwithstanding the checks to ward against unfettered power, (for example judicial review of the Governor's decision) Art. V, sec. 8(b) cannot be cured of its inherent bias because it cannot be separated from political factors that a Governor necessarily faces. Additionally, the California law is silent on addressing Gubernatorial bias. Inmates are deprived due process when popular sentiment or generalized fear of crime, to which a Governor necessarily responds, overrides the laws of the State regarding a fair and deliberative analysis of a particular inmate's parole release factors performed by neutral decision makers. If pressure subverts the proper application of the state's parole laws, the inmates' due process rights are violated.

The historical application of Art. V, Sec. 8(b) demonstrates decisions are tied to the political agenda of the particular Governor's office. In 1982, when John Van De Kamp campaigned for Attorney General, while still District Attorney for Los Angeles County, he led a *campaign* to keep Petitioner Sirhan Sirhan in prison. In 1990, Van de Kamp ran for Governor, but lost.[9] When Governor Deukmejian put the law on the ballot, his public campaign pitch was to put the power to "block the parole of convicted murderers" in the hands of the Governor for the first time. (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 691 (dis. Opn. of Chin, J.) [quoting Ballot Pamp., Gen. Elec., at 46 (Nov. 8, 1988)]).[10] Further underscoring the inseparability of politics from the reversal power, are the extremely divergent reversal rates across different Governors' administrations: Pete Wilson reversed approximately 27% of parole grants[11]; Gray Davis reversed 98%; Arnold Schwarzenegger reversed 60%; and Jerry Brown reversed 20%[12]. This lack of consistency strongly hints at an empirical showing that non-

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[9] Had he been seated, the inherent bias with exclusive executive power to reverse parole would have come into stark relief.

[10] Hurst, J., "Prop. 89, Plan to Give Governor Parole Veto Power", LA Times, October 28, 1988, https://www.latimes.com/archives/la-xpm-1988-10-28-mn-340-story.html (Appendix J; BN0197).

[11] Though Wilson reversed a relatively small percentage of cases, the Board only granted parole in "a handful of cases" over his tenure. (Weisberg et al., *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California* (2011) Stanford Criminal Justice Ctr., 13 (Appendix K; BN0205) at PA_0285, pp. 11-15.)

[12] Gov. Newsom has reversed 190 parole grants between 2019 and 2022. Executive Report on Parole, issued by the Governor's office for 2019-2023.

statutory factors are driving parole reversals, rather than the uniformly applied parole factors mandated under the law.

5. Art. V, Sec. 8(b) Impermissibly Creates a Lack of Neutrality in That a Governor is The Head of All Law Enforcement in The State.

Beyond political factors, as the head of all California law enforcement agencies, a Governor is on the prosecution "side" of the case from inception to incarceration. It can be reasonably asserted that the Governor is no less an "interested party" than the prosecuting agency[13] In *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court held that Florida's procedure for determining post-trial claims of insanity had a "striking defect" because it vested the sanity determination – the *factfinding* decision – entirely within the executive branch.

> "Perhaps the most striking defect in the procedures of Fla. Stat. § 922.07 (1985 and Supp. 1986), as noted earlier, is the State's placement of the decision wholly within the executive branch. *Under this procedure, the person who appoints the experts and ultimately decides whether the State will be able to carry out the sentence that it has long sought is the Governor, whose subordinates have been responsible for initiating every stage of the prosecution of the condemned from arrest through sentencing.* ***The commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding.***"

Ford v. Wainwright, *Id*, at 416 (emphasis added).

[13] While the Board of Parole is part of the Executive Branch, the substantive protections governing their mandate serve to minimize any potential bias issues, in that they are a multiple-person panel, comprised of experts in law enforcement and rehabilitation, are mandated to be a neutral panel, and the procedural guarantees to the inmate of P.C. 3041.5 apply. None of which apply to the Governor.

The Florida law in *Ford*, *supra*, had eerily parallel characteristics as are presented here. Like here, the Florida law allowed an *in camera* review by the Governor. The Florida law handed power to the Governor to make the ultimate factual determination (sanity), as does Art. V, Sec. 8(b) (current dangerousness). Both laws have "experts" providing information to the Governor, however, the Governor ultimately has power to reject that expert opinion and make a unilateral decision affecting liberty (CA) or death (FL).

In this particular case, as in *Ford*, *supra*, the "striking defect" of incurable bias in Art. V, Sec. 8(b) is put to the test. Here, the Petitioner was a youthful offender[14] (aged 24), has a nearly pristine record in prison, with no prior or subsequent convictions. He was granted parole and was repeatedly found to be at the lowest risk in California's Risk Assessment evaluation by experts employed by the prison system over a period of decades. The Board therefore granted parole. However, the Governor lacked neutrality, both as the head of the law enforcement agencies and due to the conflict inherent in a politician's need to be answerable to his constituents and to his own career ambitions. Article V, Sec. 8(b) permits an executive who lacks impartiality to be the sole factfinder on the ultimate issue of suitability for release on parole or continued incarceration. This presents an incurable conflict of interest resulting in a

[14] In California, a "youth offender" is anyone committing his life crime when aged 25 years or younger. California has extended the U.S. Supreme Court's laws that treat juveniles differently for purposes of sentencing. See Ca. Penal Code Sections 3051 and 4801(c); *People v. Franklin,* 63 Cal. 4th 261 (2016); *People v. Contrera*s, 4 Cal. 5th 349 (2018)

lack of neutrality, which is a due process violation.

As the head of the State's law enforcement apparatus, one would be hard pressed to say that a Governor is not unduly influenced by his role as chief law enforcer of the state when adjudicating release of notorious or unpopular prisoners.

6. A Structural Defect of Lack of Neutrality Is a Constitutional Violation and Therefore a Harmless-Error Analysis Does Not Apply.

The inherent bias built-in to the constitutional amendment, which allows bias or the likelihood and potential thereof, creates a structural defect making it unconstitutional. A structural defect exists when a violation affects the entire conduct of the proceedings from beginning to end (*Arizona v. Fulminante*, 499 U.S. 279, 309, 310 (1991)), such as when a judge is not impartial, as in *Tumey v. Ohio*, 273 U.S. 510 (1927), or when a litigant is deprived the right to counsel as in *Gideon v. Wainright*, 372 U.S. 335 (1963). Drawing a distinction from a "trial error", the *Fulminante* Court described structural defects as errors in the "mechanism" of the proceedings as opposed to just a bad ruling within an otherwise fair proceeding. *Fulminante* stated such errors "defy analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial." (*Fulminante, Id.,* at 309-310.)

Here, Cal. Art. V, Sec. 8(b) presents a structural flaw that affects the entire review process by the Governor. An analysis of Art. V, Sec. 8(b) under the case law

reveals that "psychological tendencies and human weaknesses" (*Withrow v. Larkin, supra,* 421 U.S. 35, 47) of the Governor, who is a politician not bound by neutrality as judges are (*Williams-Yulee v. Fla. Bar, supra,* 575 U.S. 433, 459 Con. Op.), with a personal and/or political agenda necessarily in conflict with an inmate's right to release, leads to a conclusion that the mechanism of Governor-as-Arbiter presents a serious risk of bias, even if inadvertent. This is especially true given that it is impossible to ascertain what improper or inadvertent motive forms the Governor's decision (*Williams v. Pennsylvania*, 579 U.S. 1, 11 (2016)), because only a "modicum of evidence" is needed to uphold their decision. (*In re Shaputis*, 53 Cal. 4th 192, 214 (2011), stating that only a modicum of evidence is required to uphold a Governor's reversal).

Due to the structural flaw, the harmless-error analysis is not appropriate here. The deprivation of a neutral arbiter affects the framework within which the review proceeds, and is thus not simply a trial error. "'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair'". *(Fulminante*, *supra,* 499 U.S. at 309-310, quoting *Rose v. Clark*, 478 U.S. 570, 577-578 (1986).

While parole review is not a trial, it is clear from prior rulings that prospective parolees and current parolees have a fundamental liberty interest warranting due process when those rights are infringed. *Swarthout v. Cooke, supra,* 562 U.S. 216; *Morrissey v. Brewer*, *supra,* 408 U.S. at 489. This due process includes the right to a

neutral and detached hearing body at revocation hearings. (*Morrissey*, *supra*, at 489). The same should be provided to a new parolee, who is at risk of being denied the parole he was recently granted, by a one-person arbiter who is subject to political pressures.

C. Youth Offenders Are Particularly Impacted by Art. V., Sec. 8(b), Because Of Their Unique Constitutional Penological Protections, in Violation of the 8th Amendment to the U.S. Constitution

This Court, as well as the California Supreme Court and the California legislature have established limitations on the punishment of young people. (*Miller v. Alabama,* 567 U.S. U.S 460 (2010): prohibition on imposition of automatic life-without-the-possibility-of-parole sentence (LWOP) for juvenile offenders upon special circumstance findings; *Graham v. Florida*, 56 U.S. 48 (2010): prohibition of LWOP for non-homicide juvenile offenders; *Roper v. Simmons*, 543 U.S. 551 (2005): prohibition of death sentence on juveniles; Calif. Penal Code §§4801(c) and 3051; *People v. Franklin,* 63 Cal.4th 261 (2016); *People v. Contreras,* 4 Cal.5th 349 (2018)).

These limitations are grounded in scientific consensus that children are "constitutionally different from adults" due to "distinctive attributes of youth" that "diminish the penological justifications for imposing the harshest sentences on [them]." (*Miller v. Alabama, supra,* 567 U.S. at 472.) The "hallmark features" of youth include "immaturity, impetuosity, and failure to appreciate risks and

consequences," as well as the "possibility of rehabilitation". (*Miller, Id.,* at p. 477; 8th Amendment.)

Given this scientific evidence, this Court held that the Eighth Amendment guarantees juveniles—those under 18 at the time of their offense—a "meaningful opportunity" to be released if they demonstrate rehabilitation. (*Graham*, *supra*, 560 U.S. at p. 75; see also *Miller*, *supra*, 567 U.S. at pp. 472–73.) An opportunity for parole can satisfy this standard only if it "*ensures* that juveniles whose crimes reflected only transient immaturity—and who have since matured—will [be released.]" (*Montgomery v. Louisiana,* 577 U.S. 190, 212 (2016), italics added.)

Because release must be "realistic" to be meaningful, this Court has held that executive clemency is too "remote" to provide a meaningful opportunity. (*Graham*, *supra*, 560 U.S. at pp. 70, 82.)

California extended the same "meaningful opportunity" guaranteed by the Eighth Amendment to all "young people"—those aged 25 and younger at the time of their offense. (Pen. Code, § 3051: Parole Board must conduct "youth offender parole hearing[s]" that "provide for a meaningful opportunity to obtain release . . . consistent with relevant case law."]; See also Calif. Penal Code §4801, subd. (c).) In enacting the law, the Legislature's rationale was "that research shows that cognitive brain development continues into the early 20s or later". Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1308 (2017-2018 Reg. Sess.) as amended Mar. 30, 2017, pp. 4-5; see also *People v. Powell* (2024) 24 Cal. LEXIS 3149. Pp. 4-5.)

Since the Governor's veto power created by Art. V, Sec. 8(b) is subject to outside influences and perceived political whims, as discussed herein above at Section I, B, 4 and 5, the Governor's minimally restrained power can hinder the unique constitutional guarantees young offenders enjoy. This then leads to gubernatorial vetoes that are derived not after giving "great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth and any subsequent growth and increased maturity of the prisoner", but on improper considerations such as reelection, constituent pressure, or political career advancement. Hence, Art. V, Sec. 8(b) is fundamentally incompatible with young people's rights to be a meaningful opportunity for release upon demonstration of rehabilitation. As such, it should be found unconstitutional.

II.

THE RISK OF ACTUAL BIAS CAME TO FRUITION IN PETITIONER'S CASE DUE TO THE GOVERNOR'S STATED AFFINITY AND PERSONAL CONNECTION WITH THE VICTIM AND HIS FAILURE TO RECUSE HIMSELF

Article V, Sec. 8(b)as applied to this particular Petitioner and this particular Governor resulted in a due process violation requiring vacatur of the Governor's decision and the reinstatement of the parole decision. *Fulminante, supra*, 499 U.S. at 309-310; *Tumey, supra,* 273 U.S. 510.

Petitioner asserts that the Governor demonstrated personal bias in favor of

the victim (See Appendix E; BN0098) and was obligated to recuse himself, notwithstanding the fact that there is no mechanism to do so in the law -another of the law's flaws. The Governor openly avowed reverence for the victim, had publicly invited comment from the victim's widow (Appendix E, items 1 (BN0105, 0112), 2.a (BN0131), 3.a-b (BN0133), 4.a, 4.c, 4.f (BN0137), 5.a (BN0141), has accepted *ex-parte* communications from the next of kin, and failed to provide those communications to Petitioner's counsel, who only learned of them **after** the Governor's decision and during habeas proceedings in the lower court. (See Appendix H, BN0187) The Governor made statements indicating his prejudgment about his impending decision before even receiving the Parole Hearing transcript. (Appendix E 3.b BN0133)

The Governor-decision-maker has a photo displayed in his home of his own father with the victim and signed to his own mother, naming it "the most valuable thing he owns in his life" (Appendix E 1.b (BN0112), 4.a (BN0138), 4.f BN0140); quoted the victim after his recall victory (Appendix E 2.a, BN0132); and choked up when he spoke of his "political hero" in September of 2021, just months before making his reversal decision. (Appendix E 2.a BN1032) He professes to have more photos of the victim at his office; in 2021 he stated the victim is his "political hero" and he has a "shrine" to him in his home. (Appendix E 4.a, 4.f (BN0138,139).

Additionally, the Governor perused the California State Archive records[15]. The archives contain such highly prejudicial items as the autopsy photos of Senator

[15] See Governor's Op Ed to Los Angeles Times, Dated January 13, 2022, (See Appendix E 6 BN0146)).

Kennedy, the gun allegedly used in the crime, and thousands of untested, hearsay statements from witnesses which were never part of the trial record. Such a viewing is not only outside of the procedures articulated by the statute (P.C. 3041.2; *In re Rosenkrantz*, *supra*, 29 Cal.4th 616; *In re McDonald, supra*, 189 Cal.App.4th at 1024), but the potential to taint the Governor's opinion is overwhelming given his publicly avowed and long-time affection for the victim.

Any objective reading of the facts above would lead a reasonable person to conclude there was a *distinct potential for bias, even if inadvertent, by this Governor against this Petitioner* which likely influenced his decision. Likewise, the Governor's partiality *toward the victim* is palpable from his conduct as evidenced by his public statements. (See Appendix E, BN0098). Despite any denial of bias by the Governor, or assertions he gave an impartial assessment, this Court must apply a more focused lens to consider the circumstances and relationships and the "psychological tendencies and human weaknesses" (*Withrow*, *supra*, at 47) and find that the Governor had a bias against Petitioner and/or "for" the victim. As such, the Governor's decision should be vacated because the review process was affected by his bias from start to finish. (See *Fulminante, supra,* 499 U.S. at 309-310.)

III.

PAROLE APPLICANTS ARE DENIED DUE PROCESS AT THE GUBERNATORIAL REVIEW, THUS RENDERING MOOT THE PREVIOUS PROTECTIONS PROVIDED DURING THE PAROLE PROCESS

A. Penal Code section 3041 et. seq. Provides Multiple Procedural Safeguards That Do Not Exist at the Governor's Review Level.

In the most simple terms, procedural protections provided throughout the Board Hearing process, such as the right to have counsel present at Board hearings (Cal. Penal Code §3041.5 (a)(2)), the right to review the material the Board will consider at the hearing (P.C. 3041.5(a)(1); Cal. Code of Regs., Tit. 15, §2247), and the opportunity to be heard and rebut (P.C. 3041.5 (a)(2)), are rendered useless if at the last instance parole can be reversed with no semblance of due process provided at the Governor's review level. By doing so, the statute implementing Article V, Sec. 8(b), Penal Code 3041.2, unreasonably infringes upon inmates' rights to liberty without due process of law, and in doing so, renders the statutory protections meaningless.

This Court acknowledged that, although limited, parolees have a liberty interest protected by due process. (*Morrissey v. Brewer*, *supra,* 408 U.S. at 482.) California's parole procedures are governed by Penal Code Section 3040, et. seq, which provide that parole "shall be granted" "unless [the Board] 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 lengthier period of incarceration for this individual." (Cal. Pen. Code §3041(b)(1).) A two to three-member panel makes a preliminary finding. The panel's decision becomes final after 120 days, unless it is reversed by the full Board due to an error of law, error of fact or if new information arises that has a "substantial likelihood of resulting in a substantially different decision upon a rehearing." (Cal.

Pen. Code §3041(b)(2).)

The due process safeguards at a Parole Hearing include the right to review Board materials prior to the hearing (P.C. §3041.5(a)(1)), an opportunity to enter a written response to any material contained in the file (P.C. §3041.5(a)(1), the right to be present, to ask and answer questions, and to speak on his or her own behalf (P.C. §3041.5(a)(2)), the right to a record of the proceedings (P.C. §3041.5(a)(4), allowance of counsel at the hearing (P.C. §3041.5 (a)(2)[16], and the right to counsel at hearings "for the purpose of setting, postponing, or rescinding a parole release date of an inmate under a life sentence". (Pen. Code §3041.7).

Pertinent here, Section 3041.2(a) permits the governor to affirm, modify or reverse a Board's parole decision for "an inmate sentenced to an indeterminate prison term based upon a conviction of murder". This right derives from Article V, Sec. 8 (b) of the California Constitution. The Governor conducts a *de novo* review (*In re Lawrence*, *supra,* 44 Cal. 4th at 1204) and may only "review materials provided by the Board". (§3041.2 (a)) and *In re McDonald, supra,* 189 Cal.App.4th at 1024.) The California Supreme Court has ruled that it will uphold a Governor's decision if there exists "some evidence," the lowest bar possible, of current dangerousness. (*In re Lawrence*, *supra,* at 1210; *In re Rosenkrantz*, *supra*, 29 Cal. 4th at 677.)

[16] The right to counsel at a Parole Hearing is not specified in the statute, however the statute references attendance by counsel and the Board of Parole Directive 2014-02, states that prior to "every parole suitability hearing" an inmate will be asked if they need appointed counsel or will waive appointed counsel.

The California Supreme Court described the Art. V, Sec. 8(b) power as simply creating "a new level of review, within the executive branch" amounting to just a "change in identity" of the decider. (*In re Rosenkrantz*, *Id.* at 638). If it is only a change in the *identity* of the decider, then the rules of procedure for each decider ought to be the same.

In Petitioner's case, the Governor created a new body of evidence that was not before the Board below. This is not only disallowed by established law, but it would have necessitated the same procedural rights provided at the Board level.[17]

Here, Petitioner was not given notice that the Governor received materials beyond the Board record below. Petitioner had no notice of hundreds of pages of material received by the Governor from some of the victim's family including hearsay statements and an opinion from a former District Attorney unrelated to the case; nor did he have knowledge that the Governor would view extraneous material at the State Archives, including hundreds of witness statements. Petitioner was certainly not provided information regarding what (and, importantly, from whom) the content of the "emails and texts" the Governor publicly admitted receiving. (Appendix 4.e, BN0137) In most cases any Governor will necessarily always receive information and pressure from constituents that is outside of what the Board reviewed below, which is contrary to California law. (*In re Twinn,* 190 Cal.App.4th 447, 472 (2010); *In re Mc*

[17] In a typical legal case, any review by a higher court, regardless of whether it is a review de novo or another standard of review, a litigant is aware of the materials being considered and given a chance to rebut.

Donald, supra, 189 Cal App. 4th at 1024.)

The rationale behind a parolee's right to review what the decision-makers will have before them is obvious. Fundamental fairness dictates that a person must know what information is being used against him/her and must be allowed to respond. (*Morrissey v. Brewer*, *supra,* 408 U.S. at 489) The parole process in Penal Code §3041.5 provides for such, but Art. V., Sec. 8(b) **does not**. As happened here, Petitioner received a "review" by the Governor which was supplemented with extraneous input, both given to the Governor *and* sought out by him, of which Petitioner was wholly unaware of and had no ability to rebut. It is unknown who called the Governor to influence his decision, although Petitioner is aware that the Governor publicly solicited a call from the late Mrs. Ethel Kennedy before her passing. (Appendix 4.c, d, BN0139).

Thus, this Governor's review was not merely a "change in identity", but rather a change in the evidence and therefore a denial of due process as well. By the absence of these rights at the Governor's review level, the process unreasonably infringes upon inmates' rights to liberty without due process of law, and in doing so renders the statutory protections, so carefully implemented below, meaningless.

B. A Reversal of a Parole Decision By the Governor in California is Not Dissimilar to a Revocation of Parole in Other Jurisdictions Yet Lacks Procedural Safeguards.

The majority of states utilize Parole Boards, or similar bodies, to make parole decisions. Once the Board grants parole, a parolee is released to the community.

Often, if not most times, there are conditions set on parole and, if violated, parole may be revoked. Based upon this Court's ruling in *Morrissey, supra*, revocation of parole must be conducted with a minimum of due process which includes, among other things, the written notice of claimed violations, disclosure of the evidence against him, and right to be heard, and the right to an impartial decision-maker. *Morrissey, supra*, 408 U.S. at 489.

Conversely, in California, due entirely to the fever and fear that fueled Prop. 89 and the passage of Art. V, Sec. 8(b), a parolee can be granted parole yet never get beyond the prison walls due to the almost immediate revocation by the Governor; a revocation, without the due process required by *Morrissey* and Penal Code §§3041.5 and 3041.7. The "grievous loss" (*Morrissey*, *supra* p. 482) of liberty felt by a California parolee whose parole is revoked by the Governor is felt no less acutely than by a parolee of another jurisdiction. But, the California parolee whose parole is "revoked" by the Governor is not afforded similar procedural rights. His long-anticipated hope to return to family and society, to become self-reliant, form attachments and fulfil his promise to live up to conditions of parole are at once taken from him. And they are taken summarily by a procedure blatantly subject to political influence, and by a politician who is placed in the untenable position of making a politically unpopular decision or risking his political career. The California Supreme Court's adoption of extreme deference to Governors in making the decision by using a "some evidence" standard does not balance against the fact that a Governor can pick and choose just "some evidence", from an often voluminous record, to support his/her political aims.

If Art. V, Sec. 8(b) passes constitutional mandates at all, then parolees, who are granted parole by the Board, should have the same due process rights at the Governor's review when that parole is essentially revoked.

C. Fundamental Rights Guaranteed by the U.S. Constitutional are Superior to State Law When a State Law Violates Those Federal Rights.

While this Court has to be cautious in infringing on a State's right to legislate laws as it sees fit, those laws must at least not infringe on the superior guarantees of the U.S. Constitution. In addressing a Fourth Amendment issue not relevant here, this Court did nonetheless comment that the analysis of whether a right is infringed is based on "our societal understanding that certain areas deserve the most scrupulous protection from government invasion". (*California v. Greenwood*, 486 U.S. 35, 43 (1988); *Oliver* v. *United States*, 466 U.S. 170, 178 (1984)). See also, U.S. Const. Amend. XIV.

Here, society understands that anyone who has worked hard enough in prison to gain the support of the Panel of Parole Commissioners, and then the full Board, to be suitable for parole, should not, at the last goal-post have that liberty revoked due to the decision made within a politicized process, by a non-neutral arbiter, and without the minimum due process of law available below in the Board hearing and revocation hearings. (P.C. 3041.5 et seq and *Morrissey, supra.*)

CONCLUSION

Art., V, Sec. 8(b) is structurally defective in all its applications to all and must be invalidated. Petitioner's grant of parole must be reinstated because the bias inherent in Art. V, Sec. 8(b) as applied came to pass in that the Governor was personally biased and lacked neutrality yet still decided his case.

Dated: 1/13/2025

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief was prepared using 12-pt Century Schoolbook and is double-spaced. Further, the petition is 38 pages in compliance with Rules of the Supreme Court of the United States, Rules 33 and 39.

Dated: 1/13/2025

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