

In re Lawrence: Preserving the Possibility of Parole for California Prisoners

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The California Supreme Court recently took a key step toward protecting the due process rights of prisoners. The court required the governor or Board of Parole Hearings (the “Board”) to present “some evidence” indicating that an inmate is currently dangerous to withstand judicial review of a decision denying parole.¹ This outcome affects approximately twenty-three thousand California prisoners serving life sentences with the possibility of parole.² After a suitability hearing, the Board may grant parole to these “lifers.” However, it rarely does so.³ The governor can then affirm, modify, or reverse the Board’s decision.⁴ California governors have overwhelmingly chosen to reverse. For example, from 1999 to 2003, Governor Davis reviewed 371 parole grants and approved only nine.⁵ The California Supreme Court, in 2002, held that these

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1. *In re Lawrence*, 190 P.3d 535, 539 (Cal. 2008).

2. See CAL. DEP’T OF CORRS., FACTS AND FIGURES, THIRD QUARTER 2008, http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/Facts_and_Figures.html.

3. The Board grants parole for less than 1 percent of the four thousand cases it hears each year. Harriet Chiang, *Governor Paroles Killer—Apparent New Policy: Schwarzenegger, Unlike Davis, Heeds Judgment of Board*, S.F. CHRON., Nov. 22, 2003, at A1.

4. Proposition 89, passed in November 1988, grants the governor this authority. See CAL. CONST. art. V, § 8(b). The governor has thirty days after a parole decision to exercise this right. *Id.*; see CAL. PENAL CODE § 3041.2 (Deering 2008) (setting forth statutory procedures governing the governor’s review of parole decisions).

5. Michael Rothfeld, *Is This Paroled Killer Still a Threat?*, L.A. TIMES, July 13, 2008, at A1. Governor Schwarzenegger has been slightly more generous. As of July 2008, he had reviewed 830 parole grants and approved 191. *Id.* Since 2005, the courts have overturned gubernatorial denials more than twenty-five times. *Id.*

denials are subject to judicial review, but only to determine that the governor based his decision on “some evidence” related to the statutory factors.⁶ In response, the governor regularly presented the egregiousness of the crime, by itself, which the courts found to suffice as “some evidence” of unsuitability.⁷ Because almost all lifers, by definition, are guilty of criminal acts that may be considered egregious, this open-ended standard failed to effectively provide them with a remedy for violations of due process.⁸ *In re Lawrence* corrected this by holding that the evidence for denial must be rationally related to a finding of “current dangerousness.”⁹ By requiring courts to focus on current dangerousness, *Lawrence* increased the judiciary’s ability to reject the evidence presented to deny parole. This new discretion has finally permitted the judiciary to assert itself in the parole process, leading to better safeguarding of the due process rights of inmates.

With *Lawrence*, the court faced an inmate seeking parole who, despite a heat of passion killing, served more than two decades in jail without incident. In 1971, twenty-four-year-old Sandra Lawrence murdered her lover’s wife.¹⁰ Lawrence had been working as a receptionist at her brother’s dental office in Los Angeles.¹¹ In 1970, she began an affair with Robert Williams, a dentist in the office.¹² Williams repeatedly told her that he planned to divorce his wife, who knew about the affair.¹³ But on February 13, 1971, Williams told Lawrence that he could not follow through with the divorce.¹⁴ Lawrence became enraged.¹⁵ She grabbed a potato peeler from her kitchen and a pistol

6. *In re Rosenkrantz*, 59 P.3d 174, 182 (Cal. 2002).

7. See *In re Lawrence*, 190 P.3d at 552–53; CAL. CODE REGS. tit. 15, § 2281(c)(1) (2009). For cases where the governor cited the egregiousness of the crime to show “substantial evidence,” see *In re Barker*, 59 Cal. Rptr. 3d 746, 757 (Ct. App. 2007); *In re Burns*, 40 Cal. Rptr. 3d 1, 3 (Ct. App. 2006); *In re Andrade*, 46 Cal. Rptr. 3d 317, 322 (Ct. App. 2006); *In re Lee*, 49 Cal. Rptr. 3d 931, 934 (Ct. App. 2006); *In re Weider*, 52 Cal. Rptr. 3d 147, 155 (Ct. App. 2006); *In re DeLuna*, 24 Cal. Rptr. 2d 643, 647 (Ct. App. 2005); *In re Fuentes*, 37 Cal. Rptr. 3d 426, 430 (Ct. App. 2005); *In re Honesto*, 29 Cal. Rptr. 3d 653, 658 (Ct. App. 2005); and *In re Lowe*, 31 Cal. Rptr. 3d 1, 6 (Ct. App. 2005).

8. See Blaire Russell, Note, *In re Lawrence and Hayward v. Marshall: Reexamining the Due Process Protections of Lifers Facing Parole*, 14 BERKELEY J. CRIM. L. (forthcoming 2009). (arguing that *Lawrence* although useful may have limited effect because it applies to near-model prisoners and the court maintained a deferential standard); Christopher R. Mock, Note, *Parole Suitability Determinations in California: Ambiguous, Arbitrary and Illusory*, 17 S. CAL. REV. L. & SOC. JUST. 889, 907 (2008) (arguing that because of this loophole the commitment crime factor should be removed from parole determinations); Daniel Weiss, Note, *California’s Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1593 (2005) (explaining that the severity of the crime factor is inherently vague and unnecessarily overlaps with the statutory crime distinctions, such as first or second-degree murder).

9. *In re Lawrence*, 190 P.3d at 552–53.

10. *In re Lawrence*, 59 Cal. Rptr. 3d 537, 540 (Ct. App. 2007), *aff’d*, 190 P.3d 535.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

from her sister's home, and confronted the wife at the office.¹⁶ The two women fought until Lawrence shot the pistol wildly, hitting the wife four times.¹⁷ Lawrence then stabbed her repeatedly with the potato peeler, until Mrs. Williams died.¹⁸

Lawrence immediately fled the state and was a fugitive for more than eleven years before she surrendered in 1982.¹⁹ She pled not guilty, and a jury convicted her of first-degree murder.²⁰ Lawrence had no prior record.²¹ The trial judge gave her the standard statutory penalty for murders committed prior to 1978—seven years to life.²² She was first eligible for parole in 1990 and would need to secure both the Board and governor's approval to be released.²³

In making parole determinations, the Board has significant discretion, but the statute requires that it evaluate all available information that is relevant and reliable while balancing factors indicating suitability or unsuitability.²⁴ One stated source of information is “the base and other commitment offenses, including behavior before, during and after the crime.”²⁵ Factors that indicate parole suitability include whether the crime resulted from significant stress, lack of a juvenile record, stable social relationships, remorse, lack of criminal history, advancing age, realistic future plans, and positive prison conduct.²⁶ In contrast, factors that indicate unsuitability include the crime for which the inmate was incarcerated, a previous record of violence, unstable social relationships, sadistic sexual offenses, severe mental problems, and serious prison misconduct.²⁷ In particular, the commitment crime is a factor if it was committed in an “especially heinous, atrocious or cruel manner.”²⁸ The Board must deny parole if “the prisoner will pose an unreasonable risk of danger to society if released from prison.”²⁹

16. *Id.*

17. *Id.*

18. *Id.* at 541.

19. *Id.*

20. *Id.* at 538. Before pleading, she rejected a plea deal for a two-year sentence. *Id.*

21. *Id.* at 540.

22. *Id.* at 541.

23. *In re Lawrence*, 190 P.3d 535, 541 (Cal. 2008).

24. CAL. CODE REGS. tit. 15, § 2281(b) (2009).

25. *Id.* In addition, the Board must look at the prisoner's “social history; past and present mental state; past criminal history, . . . past and present attitude toward the crime; and any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community. . . .” *Id.*

26. § 2281(d).

27. § 2281(c).

28. § 2281(c)(1). Statutory factors used to determine this egregiousness are whether the crime(s) resulted in multiple victims, was carried out in a dispassionate and calculated manner; resulted in the victim being abused, defiled or mutilated, demonstrated an exceptionally callous disregard for human suffering, or had an inexplicable or trivial motive. *Id.*

29. § 2281(a).

After the Board makes a determination, the governor has the authority to affirm, modify, or reverse the decision.³⁰ California voters granted this power to the executive in 1988 through an amendment to the state's constitution.³¹ Prior to this, the governor only had the right to reprieve, pardon, or commute sentences.³² The governor can only exercise this new authority "on the basis of the same factors which the parole authority is required to consider."³³ However, governors have overwhelmingly relied on only one statutory factor when denying the Board's grant of parole: the circumstances of the crime.³⁴

In the case of Sandra Lawrence, the Board recommended her for parole four times between 1993 and 2005. Each governor presented with this recommendation reversed it citing the severity of the original murder.³⁵ In 1993, the Board unanimously decided to grant parole to Lawrence, citing a psychologist's report that she was no longer a significant danger to public safety.³⁶ Then-Governor Pete Wilson reversed the decision, explaining that the interest of "public safety" may require more incarceration and that the Board gave inadequate consideration to the "public interest in a punishment proportionate to the seriousness of the crime."³⁷

Nearly a decade later, in 2002, the Board granted parole for the second time, for reasons similar to her prior favorable recommendation.³⁸ The Board cited even more favorable evidence demonstrating Lawrence's remorse and reduced danger to public safety.³⁹ At the end of her hearing, the panel chair congratulated Lawrence, telling her "You've earned it."⁴⁰ In April 2003, then-governor Gray Davis reversed the Board's unanimous recommendation.⁴¹ The

30. See CAL. CONST. art. V, § 8(b). The provision in full reads:
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.

Id.

31. John McLaren, *California Voters OK \$3.3 Billion in Bonds, Revitalize Cal-OSHA*, SAN DIEGO UNION-TRIB., Nov. 9, 1988, at A21. The measure, Proposition 89, passed with 55 percent of the vote. *Id.* It was placed on the ballot by the state legislature in response to a case where the governor was unable to block the parole of a rapist-murderer after a state appellate court overruled the governor's order. *Id.*

32. See CAL. CONST. art. V, § 8(a).

33. See *id.* § 8(b).

34. See *In re Lawrence*, 190 P.3d 535, 553–54 (Cal. 2008).

35. *Id.* at 538.

36. *In re Lawrence*, 59 Cal. Rptr. 3d 537, 542 (Ct. App. 2007), *aff'd*, 190 P.3d 535.

37. *Id.* at 543.

38. *In re Lawrence*, 190 P.3d at 542–43.

39. *Id.* In addition, Lawrence was about to complete a Master of Business Administration degree and had gained admittance into a plumbers' union. *Id.*

40. *In re Lawrence*, 59 Cal. Rptr. 3d at 544.

41. *Id.*

following year, in 2004, the Board again recommended parole.⁴² But Governor Arnold Schwarzenegger again denied parole, explaining that Lawrence posed an unreasonable risk to public safety because she committed a vicious crime for an “incredibly petty” reason.⁴³

For the fourth time, in August 2005, the Board recommended Lawrence for parole.⁴⁴ The Board again concluded that Lawrence was unlikely to commit additional crimes because of her maturation, advancing age, and the absence of a history of significant violent crime.⁴⁵ Based on these factors, the Board determined that Lawrence should have had a thirteen-year prison sentence—just over half of the twenty-four years Lawrence had served by that time.⁴⁶

In January 2006, the governor reversed the Board’s decision explaining that “the gravity alone of this murder is a sufficient basis on which to conclude presently that [petitioner’s] release from prison would pose an unreasonable public-safety risk.”⁴⁷ The underlying crime, in his words, was “a cold, premeditated murder carried out in an especially cruel manner and committed for an incredibly petty reason.”⁴⁸

After this fourth reversal, Lawrence filed a petition for a writ of habeas corpus. In May 2007, the Second District Court of Appeal granted the writ and ordered that Lawrence be released.⁴⁹ In analyzing the petition, the Court of Appeal applied a “some evidence” review standard that was first introduced in *In re Rosenkrantz*.⁵⁰ There, the California Supreme Court held that judges could review the facts of a denial, but only to determine whether the decision was supported by “some evidence” related to the ads statutory factors.⁵¹ The *Lawrence* Court of Appeal held that the governor had failed to provide “some evidence” that Lawrence would unreasonably endanger public safety upon release.⁵² The court rejected the use of the crime committed thirty-five years ago as evidence of dangerousness: the crime did not indicate clear heinousness and Lawrence’s exemplary rehabilitation mitigated its predictive value.⁵³

42. *In re Lawrence*, 190 P.3d at 543. The only condition of the parole was that Lawrence undergo drug counseling for a year. *Id.*

43. *Id.*

44. *Id.* at 544.

45. *Id.* For her Board application, Lawrence received many laudatory letters, and no one—even the victim’s family—opposed her grant of parole—with the sole exception of the district attorney who filed a pro forma letter. *Id.* at 543–544.

46. *Id.* at 544.

47. *In re Lawrence*, 59 Cal. Rptr. 3d 537, 548 (Ct. App. 2007), *aff’d*, 190 P.3d 535.

48. *Id.*

49. *Id.* at 539, 576.

50. *Id.* at 550–52 (citing *In re Rosenkrantz*, 59 P.3d 174, 205 (Cal. 2002)).

51. *In re Rosenkrantz*, 59 P.3d at 183.

52. *In re Lawrence*, 59 Cal. Rptr. 3d at 558–59.

53. *Id.* at 574–75. Other Courts of Appeal have also reversed gubernatorial denials on the same grounds. See *In re Gray*, 59 Cal. Rptr. 3d 724, 745 (Ct. App. 2007); *In re Roderick*, 65 Cal. Rptr. 3d 16, 31 (Ct. App. 2007); *In re Tripp*, 58 Cal. Rptr. 3d 64, 68 (Ct. App. 2007); *In re Elkins*, 50 Cal. Rptr. 3d 503, 523 (Ct. App. 2006); *In re Lee*, 49 Cal. Rptr. 3d 931, 936 (Ct. App. 2006);

The attorney general appealed to the California Supreme Court, arguing that the Court of Appeal had overstepped its authority because *Rosenkrantz* permitted judges only to ensure that the governor or Board had “some evidence” supporting the decision to deny parole, which could be the egregiousness of the crime itself.⁵⁴ The California Supreme Court granted certiorari and affirmed, holding that the proper standard of review for parole suitability decisions is “whether ‘some evidence’ supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous.”⁵⁵ The court found that this standard properly focused the review on whether the inmate remains a threat to public safety, which is consistent with the language and purpose of the parole statutes.⁵⁶ The court held that the commitment offense by itself will not always prove current dangerousness, particularly if there is strong evidence of suitability.⁵⁷ For example, the governor’s reliance on the circumstances of the original murder failed to outweigh Lawrence’s progress in prison.⁵⁸ Ultimately, the court explained that the focus on current dangerousness was implied in the *Rosenkrantz* “some evidence” standard and therefore consistent with precedent.⁵⁹

But rather than imitating *Rosenkrantz*, *Lawrence* sharpened the “some evidence” analysis into a new “current dangerousness” inquiry, which exhibits less deference and greatly expands the power of the judiciary to overrule the Board and governor while better protecting the due process rights of prisoners. In *Rosenkrantz*, to reverse the grant of parole, the governor argued that the crime was egregious—the inmate had murdered an acquaintance who revealed his homosexuality to the inmate’s father.⁶⁰ *Rosenkrantz* held that the governor successfully provided “some evidence” that the egregiousness of the murder and the inmate’s conduct immediately prior outweighed his exemplary prison

In re Scott, 34 Cal. Rptr. 3d 905, 919–20 (Ct. App. 2005).

54. Opening Brief on the Merits at *3, *In re Lawrence*, No. S154018, 2007 WL 4632435 (Cal. Nov. 8, 2007) (“This Court has held [in *In re Rosenkrantz*] that judicial review of a Governor’s parole decision is limited to whether the factual basis of the decision is supported by some evidence.”). For courts that agreed with this interpretation of a more limited review, see *In re Bettencourt*, 67 Cal. Rptr. 3d 497, 510 (Ct. App. 2007), *In re Andrade*, 46 Cal. Rptr. 3d 317, 326–27 (Ct. App. 2006); *In re Burns*, 40 Cal. Rptr. 3d 1, 6–7 (Ct. App. 2006); *In re DeLuna*, 24 Cal. Rptr. 3d 643, 649 (Ct. App. 2005); *In re Fuentes*, 37 Cal. Rptr. 3d 426, 433–34 (Ct. App. 2005); *In re Honesto*, 29 Cal. Rptr. 3d 653, 663 (Ct. App. 2005); *In re Lowe*, 31 Cal. Rptr. 3d 1, 16–17 (Ct. App. 2005).

55. *In re Lawrence*, 190 P.3d at 539.

56. *Id.* at 547. The court cited to title 15, sections 2281 and 2402 of the California Code of Regulations, which provide the parole suitability guidelines. *Id.* at 546–47.

57. *Id.* at 549, 553–54.

58. *Id.* at 563–65.

59. *Id.* at 538–39. The court also found the “current dangerousness” standard to be consistent with *In re Dannenberg*, 104 P.3d 783, 786 (2005), where the court upheld a denial on the basis that the Board does not need to do a comparative analysis when denying parole, so long as it points to factors beyond the minimum elements of the crime. *Id.* at 552–53.

60. *In re Rosenkrantz*, 59 P.3d 174, 184–86 (Cal. 2002).

conduct for the following fifteen years.⁶¹ In so holding, the court balanced the due process rights of lifers with the Board and the governor's broad discretion to make parole decisions.⁶²

In contrast to the holding in *Lawrence*, *Rosenkrantz* emphasized the governor's prerogative to evaluate facts.⁶³ The court noted that lifers have a due process liberty interest because the parole statute gives them an expectation of release unless the Board or governor finds them unsuitable.⁶⁴ But the Board and governor have "great" and "almost unlimited" discretion, because they are predicting the dangerousness of criminals—a highly subjective analysis.⁶⁵ The Board and governor must consider all relevant factors and provide an explanation for denying parole, because a parole denial without any factual basis would be arbitrary and thus violate a lifer's right to due process.⁶⁶ To respect the separation of powers between the executive and judiciary, *Rosenkrantz* stated that courts should only determine whether some evidence supports the decision to deny parole; courts must neither assess facts independently nor require substantial evidence.⁶⁷ Although deferential, this review is necessary because anything less strict would permit officials to deny parole without any factual basis, which would offend due process.⁶⁸

This open-ended "some evidence" standard was ill suited for parole decisions because governors would simply point to the facts of the crime as some evidence that the inmate was a threat to future public safety.⁶⁹ The California courts were applying the "some evidence" standard in a more subjective manner than the standard was intended for. The U.S. Supreme Court first applied the standard in *Superintendent v. Hill* to determine whether an agency presented evidence connecting an inmate to past prison misbehavior, rather than to predict an inmate's future conduct.⁷⁰ In *Hill*, a guard saw two inmate-plaintiffs jogging away from a beaten prisoner immediately after hearing the

61. *Id.* at 221–22.

62. *Id.* at 203–04.

63. *Id.* at 202–04, 209–11 (citing *In re Powell*, 755 P.2d 881, 888 (Cal. 1988)) ("Resolution of any conflicts in the evidence and the weight to be given the evidence are within the authority of the Board.").

64. *Id.* at 202.

65. *Id.* at 203 (quoting *In re Powell*, 755 P.2d at 886).

66. *Id.* at 202–07. The Board follows the regulations while the governor, according to the constitution, must also consider the same factors as the Board. *Id.* at 206.

67. *Id.* at 206–07.

68. *See id.* at 204–06.

69. *See In re Lawrence*, 190 P.3d 535, 554 (Cal. 2008) (recognizing that the post-*Rosenkrantz* application of the some evidence standard "proved in practice to be unworkable").

70. *See Superintendent v. Hill*, 472 U.S. 445, 455–57 (1985); *see also In re Powell*, 755 P.2d 881, 888 (Cal. 1988). *Rosenkrantz* adopted the "some evidence" standard from *Powell*, *In re Rosenkrantz*, 59 P.3d 174, 183–84, which held that it was appropriate for reviewing a Board's decision to rescind parole after a rehearing, even after an initial release date was set. *Powell*, 755 P.2d at 887. Note that this application of *Hill* also suffers in that it similarly applies the standard to evidence of future behavior. *See id.*

altercation, which supported the direct inference that the inmates were involved in the beating and thus should be denied good-time credits.⁷¹ *Hill* explained that in these instances, courts had to merely determine whether “there is any evidence in the record that could support the conclusion reached by the disciplinary board.”⁷² In contrast, because any inference linking past behavior to possible future behavior is more speculative than one linking some evidence of guilt to a conclusion of guilt, courts reviewing parole determinations should ensure that the evidence is directly related to public safety.

Thus *Lawrence* requires courts to ensure that the Board and the governor provide reasoning that establishes a rational nexus between evidence of statutory factors and an inmate’s “current dangerousness.”⁷³ Although this review standard seems self-evident, this explicit clarification is critical to protect the due process rights of lifers.⁷⁴ *Rosenkrantz* explains that a lifer’s right to due process exists only because there is a judicial remedy; if courts are unable to review Board decisions, lifers essentially have no right to due process.⁷⁵ *Rosenkrantz* required the Board to provide a written explanation of its decision, because without it, courts have nothing to review.⁷⁶ Correspondingly, if the Board or governor can almost always point to the circumstances of the crime in order to satisfy the “some evidence” requirement, then the judiciary would effectively have nothing further to review, and would always uphold the denial.⁷⁷ In effect, a lifer’s right to due process would be abrogated with no recourse.⁷⁸ The key question for courts after *Lawrence*, therefore, is not whether there is some evidence in the record, but whether there is some evidence of current dangerousness.⁷⁹

Lawrence significantly expanded judicial review by highlighting that an inmate’s right to due process includes “individualized treatment and due consideration.”⁸⁰ The governor may continue to overturn Board decisions by connecting evidence of statutory factors to the inmate’s current dangerousness.⁸¹ Courts must determine if the governor or Board articulated

71. *Hill*, 472 U.S. at 447–48.

72. *See id.* at 455–57 (“Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.”).

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

74. *Id.* at 549 (“These [parole suitability] factors are designed to guide an assessment of the inmate’s threat to society, if released, and hence could not logically relate to anything but the threat currently posed by the inmate.”).

75. *In re Rosenkrantz*, 59 P.3d at 203 (“[T]he existence of such [due process] rights could not exist in any practical sense without a remedy against their abrogation . . .”).

76. *Id.*

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

78. *See In re Rosenkrantz*, 59 P.3d at 203.

79. *See In re Lawrence*, 190 P.3d at 553–54.

80. *Id.* at 552.

81. For example, courts will still uphold decisions that show evidence of current dangerousness. *In re Shaputis*, 190 P.3d 473 (Cal. 2008) accompanied the *In re Lawrence* decision. The Court applied the *Lawrence* “current dangerousness” test to an inmate who

this rational nexus between the factual evidence and current dangerousness. By focusing on the nexus and not just the existence of evidence, *Lawrence* gave courts greater discretion to conclude that the Board or governor failed to show some evidence of current dangerousness. Courts, post-*Lawrence*, can now closely scrutinize the quality of the evidence to determine if it substantively relates to current dangerousness.⁸² For example, in *In re Gaul*, the court overruled the governor's denial of parole, which he based not only on the circumstances of the crime, but also on the inmate's unstable social history and psychological evaluations. The appellate court rejected the evidence of unstable social history from seventeen years prior as being scant and no longer relevant.⁸³ The court further held that the governor relied on outdated psychological evaluations rather than more recent favorable ones.⁸⁴ Without evidence to corroborate current dangerousness, the governor improperly relied on the circumstances of the crime to deny parole.⁸⁵

The stronger ability of courts to reject evidence used to deny parole increases the possibility of parole for inmates, because upon exercising their wider discretion to determine that an inmate is not currently dangerous, courts refuse the request from the governor or Board to re-review the evidence. After determining that a governor failed to provide some evidence of current dangerousness when denying parole, like the California Supreme Court in *Lawrence*, lower courts have reinstated the Board's original parole order rather than remanding the case to the governor to reweigh the evidence in the record.⁸⁶ Similarly, after determining that the Board failed to provide some

murdered his wife and affirmed the governor's denial of parole because it found "some evidence" of current dangerousness supporting the decision. Shaputis, who for years abused his family, failed to take responsibility for the murder and to gain insight into his previous violent behavior. *Id.* at 575. See also the following post-*Lawrence* cases: *In re Smith*, 90 Cal. Rptr. 3d 400, 405 (Ct. App. 2009) (upholding the governor's denial of parole because the crime was egregious and the inmate failed to express sufficient responsibility for her crime); *In re Rozzo*, 91 Cal. Rptr. 3d 85, 101 (Ct. App. 2009) (upholding the governor's denial of parole even if the inmate had a positive prison record because the inmate had a long criminal record, violated prison rules, and continued to claim that he was not involved in the murder).

82. See *In re Gaul*, 87 Cal. Rptr. 3d 736, 738 (Ct. App. 2009) (holding that the governor failed to present any evidence of current dangerousness.); *In re Rico*, 89 Cal. Rptr. 3d 866, 889 (Ct. App. 2009) (holding that the Board's decision was not based on "some evidence"); *In re Vasquez*, 87 Cal. Rptr. 3d 853, 863 (Ct. App. 2009) (ordering parole because the governor failed to provide evidence); *In re Burdan*, 86 Cal. Rptr. 3d 549, 564 (Ct. App. 2008) (holding that circumstances of crime were insufficient for denying parole); *In re Singler*, 87 Cal. Rptr. 3d 319, 333 (Ct. App. 2008) (ordering parole after finding no evidence of current dangerousness).

83. *In re Gaul*, 87 Cal. Rptr. 3d at 748. The court held that evidence of the inmate moving around frequently and failing to pay child support was not enough to show an unstable social history. *Id.*

84. *Id.* The governor cited a 1997 psychological report when 2001 and 2005 reports existed. *Id.* at 749.

85. *Id.*

86. See the following post-*Lawrence* cases: *In re Vasquez*, 87 Cal. Rptr. 3d at 863 (vacating governor's denial and immediately reinstating parole release); *In re Burdan*, 86 Cal. Rptr. 3d at 564 (holding that the proper procedure is to provide parole after finding no evidence of

evidence of current dangerousness when denying parole, courts have rejected the Board's requests to reweigh the evidence in the record.⁸⁷ Instead courts have ordered the Board to grant parole, pending a suitability hearing limited only to evidence of conduct after the denial in question.⁸⁸

This judicial focus on a rational nexus permits greater judicial discretion, which leads to more substantial protection of the due process rights of inmates. For example, in *In re Ross*, the court held that the governor gave due consideration and presented some evidence that the inmate was currently unsuitable, such as threatening the prison staff.⁸⁹ Under *Rosenkrantz*, this showing likely would have sufficed for the demands of judicial review, which could only determine whether some evidence supported the denial.⁹⁰ Instead, the court remanded the case back to the governor, holding that he failed to provide "an explicit articulation of a rational nexus between those facts and current dangerousness" as required by *Lawrence*.⁹¹

Although *Lawrence* intended for the "current dangerousness" standard to be used by courts, it has effectively become the standard of proof for gubernatorial parole denials.⁹² The governor is a nonjudicial entity that unilaterally reviews the decisions of administrative bodies.⁹³ When faced with a Board

unsuitability); *In re Singler*, 87 Cal. Rptr. 3d at 333 (holding that a remand to the governor after finding no evidence would be an idle act).

87. See *In re Gaul*, 87 Cal. Rptr. 3d at 749–51 (rejecting the Board's request to re-weigh evidence but permitting a limited suitability hearing for updated evidence); *In re Rico*, 89 Cal. Rptr. 3d 866, 889 (Ct. App. 2009) (holding that remand to the Board for another articulation was unnecessary after the court found no evidence of unsuitability).

88. See *In re Gaul*, 87 Cal. Rptr. 3d at 51 (directing Board to find inmate suitable for parole unless there is new evidence); *In re Rico*, 89 Cal. Rptr. 3d at 889 (directing Board to find inmate suitable for parole unless there is new evidence).

89. *In re Ross*, 88 Cal. Rptr. 3d 873, 890 (Ct. App. 2009).

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

91. *In re Ross*, 88 Cal. Rptr. 3d at 890–91. The court also faulted the governor for not citing the mental state evidence that he relied upon. *Id.*

92. This distinction is important. *Hill* itself is somewhat ambiguous as to whether the "some evidence" standard is a standard of proof or review, and some courts have interpreted it as only a standard of review. See *Goff v. Dailey*, 991 F.2d 1437, 1442 (8th Cir. 1993) (explaining that prison administration would be unduly burdened if a more exacting evidentiary standard was required). Other courts though have ruled otherwise. See *Carrillo v. Fabian*, 701 N.W.2d 763, 775–76 (Minn. 2005) (holding "some evidence" applies to judicial review); *LaFaso v. Patrissi*, 633 A.2d 695, 697–98 (Vt. 1993) (rejecting "some evidence" as an evidence standard). In 2004, the U.S. Supreme Court clarified *Hill* in *Hamdi v. Rumsfeld*. 542 U.S. 507, 537 (2004) (discussing due process for enemy combatants). The Court stated:

[W]e have utilized the 'some evidence' standard in the past as a standard of review, not as a standard of proof. . . . [I]t primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding. . . . This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker."

Id.

93. Per *Hamdi*, the question arises whether the governor, making a decision by himself, *de facto* inappropriately uses "some evidence" as a factual standard to overrule grants of parole. The

recommendation to grant parole, California governors have overwhelmingly used their authority to reverse.⁹⁴ The frequency of reversals indicates not only wide executive discretion, but also the minimal factual threshold required to deny parole.⁹⁵ The courts remain the only institution that can review the decisions of the governor, but they can only proceed as far as the standard of review allows.⁹⁶ To withstand judicial review, the governor will now have to show evidence of statutory factors and relate that evidence to current dangerousness or else the court will reinstate the Board's original grant of parole.⁹⁷

Because the original "some evidence" standard left courts with little to no authority to overrule parole denials, any greater judicial discretion will lead to an increased likelihood that courts will grant parole. By requiring courts to focus on the nexus between the evidence of statutory factors and current dangerousness, *Lawrence* increased the authority of the judiciary to effectively scrutinize parole denials. Rather than being merely a speed bump on the way to a parole denial, post-*Lawrence* courts can assert themselves in their proper role as a safeguard against arbitrary decisions. In overruling parole denials, these courts have articulated the demands of due process: the Board or the governor can only deny parole if, after an individualized consideration, it finds evidence of statutory factors that rationally indicate current dangerousness. Rather than facing a rubberstamp denial, inmates who have rehabilitated themselves now have a realistic possibility of being granted parole.

standard was developed to protect inmates, rather than to deny grants of parole. *See Hamdi*, 542 U.S. at 537; *Superintendent v. Hill*, 472 U.S. 445, 455–57 (1985).

94. *See In re Lawrence*, 190 P.3d 535, 553–54 (Cal. 2008).

95. *See id.* Once again, a governor refers to the egregiousness of the crime to justify his decision. *Id.* at 543.

96. *See id.* at 553–54.

97. *See In re Vasquez*, 87 Cal. Rptr. 3d 853, 863 (Ct. App. 2009) (vacating governor's denial and immediately reinstating parole release); *In re Burdan*, 86 Cal. Rptr. 3d 549, 564 (Ct. App. 2008) (holding that the governor failed to provide some evidence); *In re Singler*, 87 Cal. Rptr. 3d. 319, 333 (Ct. App. 2008) (rejecting governor's evidence and instead granting parole).

