

PAROLE SUITABILITY DETERMINATIONS IN CALIFORNIA: AMBIGUOUS, ARBITRARY AND ILLUSORY

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I. INTRODUCTION

In 1980, Jeffrey David Elkins was convicted of first-degree murder and robbery and sentenced to a prison term of twenty-five years to life.¹ Like many other state inmates before him, he has struggled to convince California's Board of Parole Hearings that he would not be a public-safety risk if released.² In October of 2006, the California Court of Appeal granted Mr. Elkins's petition and released him.³ His journey through California's parole system exemplifies the arbitrary decisions that result from the interpretation and application of the ambiguous standards governing suitability determinations and highlights the need for reform.

Jeffrey Elkins and Larry Ecklund were nineteen-year-old classmates at Foothill High School in Pleasanton, California.⁴ Both were drug dealers;

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¹ *In re Elkins*, 50 Cal. Rptr. 3d 503, 504 (Ct. App. 2006), *cert. denied*, Elkins (Jeffrey D.) on H.C., 2006 Cal. LEXIS 14654 (Cal. Nov. 8, 2006).

² The Board of Parole Hearings "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual . . ." CAL. PENAL CODE § 3041(b) (West 2008).

³ *Elkins*, 50 Cal. Rptr. 3d at 523.

⁴ Josh Richman, *Governor's Denial of Parole for Killer Rejected by Court*, CONTRA COSTA TIMES, Nov. 1, 2006, at F4.

Elkins owed Ecklund money for drugs and was having difficulty paying.⁵ On June 16, 1979, the two were drinking alcohol and using cocaine at the home of a mutual friend, Robert Lambrecht.⁶ When Ecklund fell asleep, Elkins led him upstairs to a bedroom and went back downstairs to continue partying.⁷ At some point, Elkins decided to rob Ecklund.⁸ Once others at the party left, Elkins, armed with a baseball bat, went back upstairs to the room where Ecklund was asleep.⁹ Elkins described what followed:

My first intent was to knock him out with the bat, take his money and his drugs, and get out of town. I hit him with the bat once to knock him out but he moved around and I thought if I knocked him out, he wouldn't move. But when I did, I hit him again. I can't remember how many time I hit him. I had been drinking a lot, smoking pot, and doing coke all day so all I can really remember is hitting him twice.¹⁰

After hitting Ecklund, Elkins went to Lambrecht and told him what had happened.¹¹ Elkins moved Ecklund's body¹² into the trunk of his car, and then he and Lambrecht cleaned up the bedroom.¹³ The next morning, Elkins drove to a remote area near Truckee, California and dumped the body over the side of a cliff.¹⁴ Over the next couple of days, Elkins stole some of Ecklund's possessions from his storage area and his girlfriend's house, and left the state.¹⁵ His car was discovered abandoned in Montana, and Elkins was later arrested in Washington.¹⁶

In 1993, Elkins began yearly appearances before California's Board of Parole Hearings (BPH).¹⁷ In October of 2003, a BPH panel¹⁸ found Elkins

⁵ *Elkins*, 50 Cal. Rptr. 3d at 505.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Elkins v. Brown*, No. C 05-1722 MHP (pr), 2006 U.S. Dist. LEXIS 94461, at *15 (N.D. Cal. Dec. 21, 2006).

¹¹ *Elkins*, 50 Cal. Rptr. 3d at 505.

¹² *Id.* There was conflicting information in the record as to whether Ecklund was killed by Elkins's initial assault, or whether he died after being placed into Elkins's car. *See id.* at 519 n.10.

¹³ *Id.* at 505.

¹⁴ *Id.*

¹⁵ *Elkins v. Brown*, 2006 U.S. Dist. LEXIS 94461, at *16.

¹⁶ *Id.*

¹⁷ *Elkins*, 50 Cal. Rptr. 3d at 505.

¹⁸ The hearing panel has three members, two of whom must be board members, who are appointees of the governor. The third panel member is usually a deputy commissioner with prior experience in corrections. ROWAN K. KLEIN, FREE BATTERED WOMEN, AN OVERVIEW OF PAROLE AND THE BOARD OF PRISON TERMS IN CALIFORNIA 28, <http://www.freebatteredwomen.org/pdfs/parole.pdf>; *see generally* CAL. PENAL CODE §§ 3041(a), 5075.1 (West 2008).

unsuitable for parole.¹⁹ The BPH gave several factors in support of its determination, and declared that Elkins “would pose an unreasonable risk of danger to society or a threat to public safety” if released.²⁰ These factors consisted of “the circumstances of the offense, Elkins’ unstable pre-offense history, and a psychologist report that was ‘not totally supportive’ in that it indicated a risk of return to drug abuse.”²¹

Following the denial of parole, Elkins petitioned for a writ of habeas corpus²² in the Marin County Superior Court.²³ The Superior Court denied his petition in 2004; the California Court of Appeal did the same.²⁴ The California Supreme Court refused to review the lower courts’ decisions and affirmed the BPH’s denial of parole.²⁵

At his eleventh parole hearing in 2006, the BPH finally found Elkins suitable for parole.²⁶ The panel concluded that he “would not pose an unreasonable risk of danger to society or public safety if released from prison.”²⁷ The panel described the crime as “vicious” but went on to say that “in reviewing all the suitability factors, it appears that [he has] made a concerted effort to enhance his suitability factors and after weighing all of that, we [find] that [Elkins] is suitable for parole.”²⁸ Elkins had participated in numerous self-help groups, vocational programs, and college classes that “enhanced his ability to function within the law upon release”²⁹ His maturation, growth, understanding of his commitment offense, and advanced age all “reduced his probability of recidivism.”³⁰

Governor Arnold Schwarzenegger reviewed the BPH’s decision,³¹ and on July 29, 2005, he reversed it.³² The Governor cited multiple factors in

¹⁹ *Elkins v. Brown*, 2006 U.S. Dist. LEXIS 94461, at *1.

²⁰ *Id.* at *1–2.

²¹ *Id.* at *2.

²² In California, superior courts, courts of appeal, and the Supreme Court all have original habeas corpus jurisdiction. CAL. CONST. art. VI, § 10.

²³ *Elkins v. Brown*, 2006 U.S. Dist. LEXIS 94461, at *2.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Elkins*, 50 Cal. Rptr. 3d at 505, 507.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* Throughout this article, I will be referring to an inmate’s “commitment offense.” The term “commitment offense” refers to the crime for which the inmate was convicted and sentenced to prison.

³¹ In California, the Governor has 30 days from the date of the final decision of the Board of Parole Hearings to affirm, modify, or reverse the Board’s decision to grant parole. “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.” See CAL. CONST. art. V, § 8.

³² *Elkins*, 50 Cal. Rptr. 3d at 505.

his written statement³³ denying Elkins parole, but the paramount concern was the facts of Elkins's commitment offense:

Mr. Elkins took advantage of the victim's vulnerability and repeatedly beat Mr. Ecklund in the head with a baseball bat, killing him Not only was the killing itself especially brutal, but the cold and calculated manner in which he disposed of the body is chilling. The gravity of it alone is sufficient for me to conclude that Mr. Elkins would pose an unreasonable risk to the public's safety if released from prison at this time.³⁴

Elkins subsequently challenged the Governor's reversal by filing another petition for a writ of habeas corpus.³⁵

The California Court of Appeal ruled on Elkins's habeas petition challenging the Governor's reversal on October 31, 2006.³⁶ The court first noted that "[t]he key question is whether 'some evidence' supports the Governor's decision"³⁷ After disposing of the Governor's other reasons for denying parole,³⁸ the court declared that the Governor's decision rested on "a conclusion that the '*gravity*' of the offense, described as an 'atrocious' or 'especially brutal' murder, outweighed the 'positive factors supporting' Elkins's release."³⁹

An inmate's "commitment offense can negate suitability only if circumstances of the crime reliably established by evidence in the record rationally indicate that the offender will present an unreasonable public safety risk if released from prison."⁴⁰ One way of determining whether the circumstances of the inmate's commitment offense indicate that the inmate will present a danger to public safety if released is by determining whether any circumstances of that offense reasonably could be considered more ag-

³³ "If the Governor decides to reverse or modify a parole decision of a parole authority 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." CAL. PENAL CODE § 3041.2(b) (West 2008).

³⁴ *Elkins*, 50 Cal. Rptr. 3d at 509–10.

³⁵ *Id.* at 505.

³⁶ *Id.* at 503.

³⁷ *Id.* at 515; *see also In re Rosenkrantz*, 59 P.3d 174, 201 (Cal. 2002) (holding that under California law the factual basis for a Board decision granting or denying parole is subject to limited judicial review under the "some evidence" standard of review).

³⁸ *Elkins*, 50 Cal. Rptr. 3d at 515–18. The other factors the Governor cited as reasons for reversing Elkins's parole date included his initial unwillingness to accept responsibility for the crime and institutional rules violations. For a description of the circumstances the Governor is allowed to use in reversing an inmate's parole date, *see* CAL. CODE REGS. tit. 15, § 2402(a)–(d) (2008), and *infra* notes 75, 80 and accompanying texts.

³⁹ *Elkins*, 50 Cal. Rptr. 3d at 518 (emphasis added).

⁴⁰ *Id.*; *see also In re Scott*, 34 Cal. Rptr. 3d 905, 920 (Ct. App. 2005).

gravated or violent than the minimum necessary to sustain a conviction for that offense.⁴¹ If there are no circumstances beyond the minimum necessary to sustain a conviction for that offense, a denial of parole based solely on those circumstances may violate due process.⁴²

The court concluded that no circumstances of Elkins's offense "could be considered more aggravated or violent than the minimum necessary to sustain" his first-degree murder conviction.⁴³ As the court stated, "The facts of the offense here are older than in any of [three similar cases] and less or only equally aggravating, and the rehabilitation successes of this inmate are superior."⁴⁴ In granting Elkins's writ of habeas corpus, the court declared that "[g]iven the lapse of 26 years and the exemplary rehabilitative gains made by Elkins over that time, continued reliance on these aggravating facts of the crime no longer amount to 'some evidence' supporting denial of parole."⁴⁵

On December 21, 2006, a United States District Court for the Northern District of California reviewed Elkins's first habeas petition challenging the BPH's 2003 denial of parole.⁴⁶ Curiously, the District Court reached the opposite conclusion—that "[t]here *was* some evidence to support the finding that the commitment offense tended to show unsuitability."⁴⁷ In reviewing Elkins's commitment offense, the court opined that:

Killing a sleeping person by beating him to death with a baseball bat certainly qualifies as a killing done in [a] dispassionate and calculated manner Additionally, Elkins' behavior at the time of the killing—robbing the victim and stealing his belongings over several days, as well as stuffing the victim's body in the trunk of the car and dumping it in a remote location the day after killing him—takes his case *well beyond the minimum elements of first degree murder*.⁴⁸

Therefore, "it was not irrational or arbitrary to view the first degree murder here as showing Elkins' current dangerousness 23 years after he

⁴¹ See e.g., *Rosenkrantz*, 59 P.3d at 219 (holding that because habeas corpus petitioner was convicted of second-degree murder, and because his crime contained elements of first-degree murder, the Governor could properly rely on these elements to deny parole based on the nature of petitioner's crime); see also *infra* pp.18–19.

⁴² *Elkins*, 50 Cal. Rptr. 3d at 519 (citing *Scott*, 34 Cal. Rptr. 3d at 922); see also *Biggs v. Terhune*, 334 F.3d 910, 916–17 (9th Cir. 2003).

⁴³ *Elkins*, 50 Cal. Rptr. 3d at 519.

⁴⁴ *Id.* at 523.

⁴⁵ *Id.* at 520.

⁴⁶ *Elkins v. Brown*, 2006 U.S. Dist. LEXIS 94461, at *1.

⁴⁷ *Id.* at *17 (emphasis added).

⁴⁸ *Id.* (emphasis added).

beat his victim to death.”⁴⁹ Ultimately, the court denied Elkins habeas relief.⁵⁰

The completely different conclusions drawn by two reviewing courts over a span of just two months illustrate the arbitrary decisions that result from interpreting and applying the ambiguous standards governing parole suitability determinations. This Note dissects cases that discuss a particular suitability factor set forth in Title 15, Section 2402(c)(1) of the California Code of Regulations, and advocates reasons for eliminating this factor. Part II introduces the standards governing parole suitability determinations and describes the judicial standard of review that was created as a result of the use of Section 2402(c)(1) to deny parole. Part III explains how, as a result of this ambiguous standard of review, Section 2402(c)(1) denies inmates meaningful minimum eligible parole dates and accumulated post-conviction credit. Part IV argues that the circumstances of an inmate’s commitment offense have no demonstrated relationship to the inmate’s future risk of danger to public safety. Part V discusses how Section 2402(c)(1) denials create collateral effects arising from plea bargains. These collateral effects of plea bargaining undermine the primary reasons defendants enter into plea agreements and are antithetical to fairness in our justice system. Finally, Part VI summarizes these findings and concludes that Section 2402(c)(1) should be eliminated from parole suitability determinations.

II. STANDARDS GOVERNING PAROLE SUITABILITY DETERMINATIONS

A. BOARD OF PAROLE HEARINGS

The BPH combines the Board of Prison Terms (BPT), the Youth Authority Board, and the Narcotic Addict Evaluation Authority into one governing entity.⁵¹ “BPH considers parole release and establishes the terms and conditions of parole for all persons sentenced in California under the Indeterminate Sentencing Law”⁵²

In California, individuals convicted of first or second-degree murder are sentenced to indeterminate terms.⁵³ Inmates sentenced to indeterminate

⁴⁹ *Id.* at *18.

⁵⁰ *Id.* at *25.

⁵¹ California Department of Corrections and Rehabilitation, The Board of Parole Hearings, <http://www.cdcr.ca.gov/DivisionsBoards/BOPH/index.html> (last visited Feb. 28, 2008).

⁵² *Id.*

⁵³ See KLEIN, *supra* note 18, at 22.

terms are entitled to their first parole hearing one year before their minimum eligible parole date, or “MEPD.”⁵⁴ Inmates who committed life crimes prior to November 8, 1978 have an MEPD of seven years.⁵⁵ Those convicted of first-degree murder for crimes committed on or after November 8, 1978 face a penalty of twenty-five years to life, and those convicted of second-degree murder face a penalty of fifteen years to life.⁵⁶ Thus, for inmates convicted of first-degree murder, the MEPD is twenty-five years; for those convicted of second-degree murder, the MEPD is fifteen years.⁵⁷

If an inmate is found suitable for parole, the BPH calculates a release date using a matrix.⁵⁸ The relationship between the victim and the inmate is on one axis of the grid.⁵⁹ Circumstances of the crime are on the other axis.⁶⁰ For each category, there is a range of three numbers, often called the upper, middle, and lower base terms.⁶¹ The BPH uses the upper and lower base terms “when the panel finds factors in aggravation or in mitigation of the crime.”⁶²

Starting from the date the life term begins, life prisoners can earn postconviction credit for every year spent in state prison.⁶³ Prior to the initial parole consideration hearing, the inmate has a documentation hearing.⁶⁴ At the documentation hearing, the BPH documents criteria such as work performance, participation in self-help and rehabilitative programs, and behavior while incarcerated.⁶⁵ This documentation is used by the BPH to determine how much credit should be granted for the years served prior to the establishment of the parole date.⁶⁶ Once a parole date is established, postconviction credit for time served is considered at each consecutive parole hearing.⁶⁷

⁵⁴ See also *id.* at 24; CAL. PENAL CODE § 3041(a) (West 2008).

⁵⁵ KLEIN, *supra* note 18, at 24; see also CAL. PENAL CODE § 3046(a)(1).

⁵⁶ KLEIN, *supra* note 18, at 24; see also CAL. PENAL CODE §§ 3046(a)(2), 190(a).

⁵⁷ See KLEIN, *supra* note 18, at 24.

⁵⁸ *Id.* at 33. The applicable matrix for first and second-degree murders committed after November 8, 1978, is contained in CAL. CODE REGS. tit. 15, § 2403(b) (2008) (first-degree murder) and § 2403(c) (second-degree murder). The applicable matrix for first-degree murder committed prior to November 8, 1978, is contained in § 2282(b).

⁵⁹ Daniel Weiss, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV 1573, 1588 (2005).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ CAL. CODE REGS. tit. 15, § 2410(a) (2008).

⁶⁴ *Id.* (citing CAL. CODE REGS. tit. 15, § 2269.1).

⁶⁵ *Id.* § 2410(a), (c).

⁶⁶ *Id.* § 2410(a).

⁶⁷ *Id.*

The inmate's total period of confinement (including the base term established by the administrative matrix) is reduced by any postconviction credit granted under this provision.⁶⁸ The BPH will generally grant zero to four months for each year served since the life term started but may grant more than four months credit if the prisoner demonstrates exemplary conduct.⁶⁹ Generally, the MEPD for inmates convicted of first or second-degree murder can be reduced by one-third for good behavior.⁷⁰ Therefore, for first-degree murder, the first parole hearing would be after 15 $\frac{2}{3}$ years, and for second-degree murder, the first parole hearing would be after nine years.⁷¹

At an inmate's parole hearing, the BPH panel "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that *consideration of the public safety* requires a more lengthy period of incarceration for [the inmate]."⁷² "Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to public safety if released from prison."⁷³

Thus, the overarching consideration is public safety.⁷⁴ In order to determine whether the inmate will present a risk of danger to public safety if released, the BPH bases its suitability findings on a multi-factorial checklist contained within Title 15 of the California Code of Regulations.⁷⁵

According to Title 15, "[a]ll relevant, reliable information available to the panel shall be considered in determining suitability for parole."⁷⁶ This often includes:

[C]ircumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during, and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may

⁶⁸ *Id.* § 2411(a).

⁶⁹ *Id.* § 2410(b).

⁷⁰ KLEIN, *supra* note 18, at 24.

⁷¹ *Id.*

⁷² CAL. PENAL CODE § 3041(b) (West 2008) (emphasis added).

⁷³ CAL. CODE REGS. tit. 15, § 2402(a) (2008).

⁷⁴ *In re Scott*, 34 Cal. Rptr. 3d 905, 917 (Ct. App. 2005).

⁷⁵ See CAL. CODE REGS. tit. 15, § 2402(c), (d); see also *id.* § 2281 (for murders committed prior to Nov. 8, 1978).

⁷⁶ *Id.* § 2402(b).

safely be released to the community; and any other information which bears on the prisoner's suitability for release.⁷⁷

The BPH may also take into consideration "circumstances which taken alone may not firmly establish unsuitability for parole" but when regarded as a whole "may contribute to a pattern which results in a finding of unsuitability."⁷⁸

Title 15 also establishes a list of circumstances "tending" to show unsuitability.⁷⁹ There are six factors total, but only one is of paramount concern to this Note.⁸⁰ This factor is California Code of Regulations Title 15, Section 2402(c)(1), which states that a circumstance tending to show unsuitability is whether the inmate's offense was committed in a particularly "heinous, atrocious or cruel manner."⁸¹

The statute further guides the BPH in determining whether an inmate's offense was committed in a particularly "heinous, atrocious, or cruel manner."⁸²

The factors to be considered include:

- (A) Multiple victims were attacked, injured or killed in the same or separate incidents.
- (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.
- (C) The victim was abused, defiled or mutilated during or after the offense.
- (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.
- (E) The motive for the crime is inexplicable or very trivial in relation to the offense.⁸³

The BPH, as well as the Governor, often uses Section 2402(c)(1) to characterize an inmate's commitment offense as particularly "heinous, atrocious, or cruel" in order to deny parole.⁸⁴ But what exactly makes one

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* § 2402(c).

⁸⁰ *Id.* § 2402(c)(1)–(6). The factors are: (1) commitment offense, (2) previous record of violence, (3) unstable social history, (4) sadistic sexual offenses, (5) psychological problems, and (6) institutional behavior.

⁸¹ *Id.* § 2402(c)(1).

⁸² *Id.*

⁸³ *Id.* § 2402(c)(1)(a)–(e).

⁸⁴ See e.g., *In re Rosenkrantz*, 59 P.3d 174 (Cal. 2002); *In re Weider*, 52 Cal. Rptr. 3d 147 (Ct. App. 2006); *In re McClendon*, 6 Cal. Rptr. 3d 278 (Ct. App. 2003); *In re Burns*, 40 Cal. Rptr. 3d 1 (Ct.

inmate's crime more heinous than another's, when they were convicted of the same offense? This justification is used to deny parole so frequently that California courts have developed a standard of review to deal specifically with such denials.

B. "VIOLENCE BEYOND THE MINIMUM NECESSARY"

The California Supreme Court, in *In re Rosenkrantz*, first articulated the idea that denials of parole based on the circumstances of the commitment offense alone warrant especially close scrutiny.⁸⁵ Like Jeffrey Elkins, Robert Rosenkrantz was a troubled teenage student. From an early age, Rosenkrantz knew that he was homosexual, but he also knew that this was unacceptable to his family, especially to his father, whom he idolized.⁸⁶ His younger brother Joey, then sixteen, suspected that Rosenkrantz was gay and shared this suspicion with Steven Redman, Joey's seventeen-year-old friend.⁸⁷ "By eavesdropping on [Rosenkrantz's] telephone conversations, Joey learned that [Rosenkrantz] planned to meet another young male at the family's beach house on the evening [Rosenkrantz] graduated from high school—June 21, 1985."⁸⁸ Joey and Redman confronted Rosenkrantz that night at the beach house; a physical confrontation followed in which Joey burned Rosenkrantz with a stun gun and Redman beat him with a flashlight.⁸⁹

Rosenkrantz, humiliated by the events, decided to teach Redman a lesson.⁹⁰ On Monday, June 24, he went to a sporting goods store and arranged to purchase an Uzi.⁹¹ On Wednesday, June 26, he picked up the Uzi he had ordered and bought 250 rounds of ammunition.⁹² Rosenkrantz called Redman several times and unsuccessfully tried to get Redman to recant his statements regarding Rosenkrantz's homosexuality.⁹³ Thursday night, Rosenkrantz went to Redman's condominium complex and unsuccessfully attempted to find Redman's vehicle.⁹⁴ Rosenkrantz spent the

App. 2006); *In re DeLuna*, 24 Cal. Rptr. 3d 643 (Ct. App. 2005); *In re Lowe*, 31 Cal. Rptr. 3d 1 (Ct. App. 2005); *In re Morall*, 125 Cal. Rptr. 2d 391 (Ct. App. 2002).

⁸⁵ *Rosenkrantz*, 59 P.3d at 222; see also *In re Scott*, 34 Cal. Rptr. 3d 905, 920 (Ct. App. 2005).

⁸⁶ *Rosenkrantz*, 59 P.3d at 184.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 185.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

night in his own vehicle near the complex.⁹⁵ The next morning, on June 28, Rosenkrantz observed Redman leave his apartment and enter his vehicle.⁹⁶ Rosenkrantz used his own vehicle to block Redman's.⁹⁷ Heated words were exchanged, and Rosenkrantz began shooting.⁹⁸ Redman was shot at least ten times, including six times in the head, and died from his injuries.⁹⁹

In 1986, Rosenkrantz received a second-degree murder conviction and was sentenced to an indeterminate term of fifteen years to life.¹⁰⁰ In June 2000, the BPH found him suitable for parole and set a parole date.¹⁰¹ The Governor, however, reversed the BPH's decision.¹⁰² Rosenkrantz challenged the Governor's decision denying parole in a petition for a writ of habeas corpus.¹⁰³

The California Supreme Court, in *In re Rosenkrantz*, set a standard that continues to limit the Governor's power to reverse parole decisions based solely on the circumstances of the commitment offense.¹⁰⁴ The court opined, "In some circumstances, a denial of parole based upon the nature of the offense alone might rise to the level of a due process violation—for example where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense."¹⁰⁵

The rationale for this rule was based on the language of the Penal Code.¹⁰⁶ "Denial of parole under these circumstances would be inconsistent with the statutory requirement that a parole date normally shall be set 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public'"¹⁰⁷

The court applied this standard by determining whether Rosenkrantz's crime contained any elements of premeditation and deliberation—what is

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See id.*

⁹⁹ *Id.* at 185–86.

¹⁰⁰ *Id.* at 182–83.

¹⁰¹ *Id.* at 183.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 222.

¹⁰⁵ *Id.* For ease of use, this standard will hereinafter be referred to as the "violence beyond the minimum necessary" standard.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (citing CAL. PENAL CODE § 3041(a) (West 2008)).

minimally required for a first-degree murder conviction.¹⁰⁸ First, the court acknowledged that the Governor had properly relied on evidence of premeditation to deny parole:

The Governor's decision stated that petitioner "brutally murdered" his victim after "a full week of careful preparation, rehearsal and execution." The decision further stated that petitioner fired 10 shots at close range from an assault weapon and fired at least three or four shots into the victim's head as he lay on the pavement Contrary to petitioner's assertions, these circumstances support a finding that the offense was carried out in a dispassionate, calculated manner.¹⁰⁹

Secondly, the court stated that the Governor properly relied on Rosenkrantz's post-offense conduct to demonstrate that his commitment offense was particularly heinous, atrocious, or cruel.¹¹⁰ "The Governor characterized [Rosenkrantz's post-offense] conduct . . . as an affirmation of petitioner's violent act. The conduct also could be viewed as an indication that petitioner did not show signs of remorse during this period."¹¹¹

These two circumstances supported the Governor's determination that Rosenkrantz's commitment offense involved "particularly egregious acts beyond the minimum necessary to sustain a conviction for second degree murder."¹¹² Ultimately, the Court denied Rosenkrantz's petition for a writ of habeas corpus.¹¹³

Justice Moreno, in a concurring opinion, recognized that Rosenkrantz would eventually become eligible for parole under a hypothetical first-degree murder sentence.¹¹⁴ At that point, "it [would be] appropriate to consider whether his offense would still be considered especially egregious for

¹⁰⁸ First-degree murder is defined in CAL. PENAL CODE § 189 as, among other things, a murder that is "willful, deliberate, and premeditated." Extensive time is not required for premeditation and deliberation, as "[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." *People v. Lenart*, 88 P.3d 498, 607 (2004). "[P]remeditation and deliberation may be inferred from a variety of circumstances, such as prior threats or other conduct of the defendant, or the type of weapon used." 1 B.E. WITKIN & NORMAN L. EPSTEIN, CAL. CRIM. LAW § 103 (3d ed. 2000).

¹⁰⁹ *Rosenkrantz*, 59 P.3d at 219.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 222.

¹¹³ *Id.* The determination that Rosenkrantz's crimes contained elements of premeditation was not dispositive as to his habeas petition. The essential inquiry is whether the BPH's or the Governor's decision granting or denying parole is supported by "some evidence" in the record. *See id.* at 183. A detailed discussion of the "some evidence" standard of review, however, is beyond the scope of this Note. For more information, *see Superintendent Mass.Corr. Inst. v. Hill*, 472 U.S. 445 (1985).

¹¹⁴ *Rosenkrantz*, 59 P.3d at 226 (Moreno, J., concurring).

a *first degree* murder”¹¹⁵ In such a case, “the justification for denying his parole would become less clear, even under the deferential ‘some evidence’ standard. Thus, future denials of petitioner’s parole may warrant judicial reappraisal.”¹¹⁶

In deciding whether an act of first-degree murder contains any elements beyond the minimum necessary to sustain a first-degree murder conviction, the Fourth Appellate District of the California Court of Appeal declared that the offense does if it can be “characterized by the presence of special circumstances justifying punishment by death or life without the possibility of parole”¹¹⁷ These special circumstances are enumerated by statute in the California Penal Code, Sections 190(a) and 190.2(a).¹¹⁸

In *Van Houten*, petitioner Leslie Van Houten was convicted of two counts of first-degree murder and sentenced to a life term for her involvement in the Charles Manson murders.¹¹⁹ On the day of the murders, Charles Manson, Leslie Van Houten, and five others drove around Los Angeles, trying to select a victim.¹²⁰ Once they chose a residence, Manson and an accomplice went inside and tied up two victims, Mr. and Mrs. LaBianca.¹²¹ Van Houten covered Mrs. LaBianca’s head with a pillowcase and wrapped a lamp cord around her neck.¹²² From the living room, Mrs. LaBianca heard “[t]he sound of [her husband] being stabbed and a guttural sound of his breathing.”¹²³ An accomplice plunged a knife down on Mrs. LaBianca’s collarbone with such force that the knife blade bent.¹²⁴ Another then stabbed Mrs. LaBianca with a bayonet.¹²⁵ Van Houten then used the knife another accomplice gave her to stab Mrs. LaBianca.¹²⁶ Mrs. LaBianca was stabbed forty-two times in total.¹²⁷

Relying heavily on the “cruel and callous” nature of the commitment offense, the BPH denied her parole in 2000.¹²⁸ She filed thereafter for a

¹¹⁵ *Id.* (Moreno, J., concurring) (emphasis in original).

¹¹⁶ *Id.* at 227 (Moreno, J., concurring).

¹¹⁷ *In re Van Houten*, 10 Cal. Rptr. 3d 406, 416 (Ct. App. 2004).

¹¹⁸ See generally CAL. PENAL CODE §§ 190(a) (West 2008), 190.2(a).

¹¹⁹ *Van Houten*, 10 Cal. Rptr. 3d at 412.

¹²⁰ *Id.* at 410.

¹²¹ *Id.* at 411.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 412, 414.

petition for a writ of habeas corpus.¹²⁹ The Court of Appeal held that the BPH's conclusion that the commitment offense involved particularly egregious acts beyond the minimum necessary to sustain the conviction was justified because petitioner's offense was characterized by the presence of special circumstances meriting the death penalty or life without the possibility of parole.¹³⁰ The appellate court held that Van Houten's offense was characterized by three special circumstances: multiple murder convictions in the same proceeding, a felony murder conviction, and racial motivation for the murders.¹³¹ Accordingly, Van Houten's petition for a writ of habeas corpus was denied.¹³²

When the California Supreme Court revisited the "violence beyond the minimum necessary" standard in *In re Dannenberg*,¹³³ the majority altered the language slightly. The result was, in the words of Justice Moreno, a standard that is "inconsistent with the pertinent statute and with *Rosenkrantz*, [and the majority's standard] does not articulate a workable standard of judicial review."¹³⁴

Justice Baxter, writing for the majority, stated that the discussion of the "beyond the minimum necessary" standard in *Rosenkrantz* "conveyed only that the violence or viciousness of the inmate's crime must be more than *minimally necessary to convict him* of the offense for which he is confined."¹³⁵

Petitioner John Dannenberg was convicted of second-degree murder for killing his wife.¹³⁶ The record indicates that he struck multiple blows to his wife's head with a pipe wrench.¹³⁷ "Bleeding profusely, she then 'fell or was pushed' into a bathtub full of water, where she drowned."¹³⁸ Although Dannenberg vehemently denied killing his wife, it could be inferred that while the victim was helpless from the blows, "Dannenberg placed her head in the water, or at least left it there without assisting her until she was dead."¹³⁹

¹²⁹ *Id.* at 408.

¹³⁰ *Id.* at 416–17.

¹³¹ *Id.* at 416.

¹³² *Id.* at 428.

¹³³ *In re Dannenberg*, 104 P.3d 783 (Cal. 2005). For an in-depth discussion of *Dannenberg*, see Alexander K. Mircheff, *In re Dannenberg: California Forgoes Meaningful Judicial Review of Parole Denials*, 39 LOY. L.A. L. REV. 907 (2006).

¹³⁴ *Dannenberg*, 104 P.3d at 808 (Moreno, J., dissenting).

¹³⁵ *Id.* at 802 (emphasis in original) (citing *In re Rosenkrantz*, 59 P.3d 174, 222 (Cal. 2002)).

¹³⁶ *Id.* at 785.

¹³⁷ *Id.* at 802.

¹³⁸ *Id.*

¹³⁹ *Id.*

Without any discussion of how exactly these facts suggested viciousness beyond the minimum elements of second-degree murder, or any comparison of these facts to other second-degree murders,¹⁴⁰ the *Dannenberg* majority simply stated that “there clearly was ‘some evidence’ to support the Board’s determination that Dannenberg’s crime was ‘especially callous and cruel.’”¹⁴¹ Therefore, under *Rosenkrantz*, the BPH could use Dannenberg’s murder “as a basis to find him unsuitable, for reasons of public safety, to receive a firm parole release date.”¹⁴²

Justice Moreno vigorously dissented, stating that “the concept of a crime being ‘more than minimally necessary to convict [a prisoner] of the offense for which he is confined’ is essentially meaningless.”¹⁴³ Second-degree murder, he stated, is essentially a legal abstraction, and the facts that constitute second-degree murder are “never ‘necessary’ or ‘minimally necessary’ to convict someone of a second degree murder, because we can always imagine other facts that would also lead to a second degree murder conviction.”¹⁴⁴ Furthermore, he pointed out, the majority’s analysis implied that there is no way for a court to review a BPH’s determination that an inmate’s crime was particularly heinous, atrocious, or cruel, and disagree with it.¹⁴⁵

Rosenkrantz, *Van Houten*, *Dannenberg*, and subsequent appellate cases are all concerned with attempting to define what constitutes an “especially heinous, atrocious, or cruel” murder as set forth in Section 2402(c)(1) of Title 15 of the California Code of Regulations.¹⁴⁶ However, three fatal flaws mar the continued use of Section 2402(c)(1) to deny parole and the “violence beyond the minimum necessary” standard of review.

First, as a result of the ambiguous “violence beyond the minimum necessary” standard of review under *Dannenberg*, Section 2402(c)(1) parole denials inadvertently rob inmates of a meaningful minimum eligible parole date and accumulated postconviction credit.¹⁴⁷

¹⁴⁰ Two appellate courts have suggested that a comparative analysis is at least useful in determining whether an inmate’s commitment offense is particularly heinous, atrocious, or cruel. *In re Lee*, 49 Cal. Rptr. 3d 931, 937 (Ct. App. 2006) (“the inquiry is whether among murders the one committed by [the inmate] was particularly heinous, atrocious or cruel”) (citing *In re Ramirez*, 114 Cal. Rptr. 2d 381, 397 (Ct. App. 2001), *disapproved on another point by Dannenberg*, 104 P.3d 783).

¹⁴¹ *Dannenberg*, 104 P.3d at 803.

¹⁴² *Id.*

¹⁴³ *Id.* at 808 (Moreno, J., dissenting).

¹⁴⁴ *Id.* (Moreno, J., dissenting).

¹⁴⁵ *Id.* at 109 (Moreno, J., dissenting).

¹⁴⁶ CAL. CODE OF REGS. tit. 15, § 2402(c)(1) (2008).

¹⁴⁷ *See Dannenberg*, 104 P.3d 783.

Second, the circumstances of an inmate's commitment offense have no demonstrated relationship to the inmate's future risk of danger to public safety. Because public safety is the "overarching consideration" in parole suitability determinations,¹⁴⁸ the BPH and the Governor should not be allowed to calculate the circumstances of the inmate's commitment offense into the parole suitability equation.

Finally, Section 2402(c)(1) parole denials create collateral effects arising from plea bargains. It is likely that inmates who have made a plea agreement, reducing their sentence from first to second-degree murder, will have a more difficult time winning habeas relief than inmates who went to trial and were convicted of first-degree murder. These collateral effects of plea bargaining undermine the primary reasons defendants enter into plea agreements and are antithetical to fairness in our justice system.

III. HOW SECTION 2402(C)(1) DENIALS AND THE "VIOLENCE BEYOND THE MINIMUM NECESSARY" STANDARD OF REVIEW ROB INMATES OF MEANINGFUL ELIGIBLE PAROLE DATES AND ACCUMULATED POSTCONVICTION CREDIT

Four years after the BPH found Robert Rosenkrantz suitable for parole,¹⁴⁹ a new panel found him unsuitable.¹⁵⁰ The new decision was not based on new evidence, but on the gravity of his commitment offense.¹⁵¹ The BPH explained that:

The offense was carried out in an especially cruel and callous manner. This was a planned assault on the victim The offense was carried out in a dispassionate and a calculated manner such as an execution style murder. And we say that knowing that this was a second degree murder. . . . The offense was carried out in a manner that demonstrates a total callous disregard for another human being¹⁵²

Rosenkrantz subsequently challenged this decision in a United States District Court for the Central District of California.¹⁵³ Among other things, he argued that the BPH's finding that he poses an unreasonable risk of dan-

¹⁴⁸ *In re* Scott, 34 Cal. Rptr. 3d 905, 917 (Ct. App. 2005).

¹⁴⁹ *Rosenkrantz v. Marshall*, 444 F.Supp. 2d 1063, 1066 (C.D. Cal 2006) (petition for a writ of habeas corpus granted).

¹⁵⁰ *Id.* at 1070.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1074.

¹⁵³ *Id.* at 1070.

ger was not supported by any evidence, and that his commitment offense was not particularly egregious for a first-degree murder.¹⁵⁴

The district court, however, did not determine whether Rosenkrantz's crime contained violence beyond the minimum necessary to sustain his conviction.¹⁵⁵ Rather, the court held that that continued reliance upon the unchanging facts of Rosenkrantz's crime makes a sham of California's parole system and amounts to an arbitrary denial of his liberty interest.¹⁵⁶ Such a denial would effectively convert Rosenkrantz's sentence of seventeen years to life to a term of life without the possibility of parole.¹⁵⁷

The opinion rested on the Ninth Circuit's decision in *Biggs v. Terhune*, which held that although reliance on the nature of a prisoner's offense may satisfy the "some evidence" requirement, continued reliance on an unchanging factor such as the circumstances of the offense could result in a due process violation if the prisoner continually demonstrates exemplary behavior and evidence of rehabilitation.¹⁵⁸

The rationale of *Biggs* and *Rosenkrantz v. Marshall* revolved around the idea that the unchanging circumstances of the petitioner's crime should only affect the parole eligibility decision when the "predictive value" of the circumstance rationally indicated that the petitioner would pose a risk of danger to public safety if released.¹⁵⁹ Otherwise, parole eligibility could be indefinitely delayed based on the nature of the crime.¹⁶⁰ Ultimately, for a parole denial based solely of Section 2402(c)(1) to comport with due process, "the facts of the unchanged circumstance must indicate a present danger to the community if released."¹⁶¹

¹⁵⁴ *Id.* It seems that Rosenkrantz, in making the latter argument, was relying on Justice Moreno's concurrence in *Rosenkrantz*. See *In re Rosenkrantz*, 59 P.3d 174, 226 (Cal. 2002) (Moreno, J., concurring).

¹⁵⁵ See *Rosenkrantz v. Marshall*, 444 F. Supp. 2d at 1070.

¹⁵⁶ *Id.* at 1082.

While relying upon the nature of petitioner's crime as an indicator of his dangerousness may be reasonable for some period of time, in this case, continued reliance on such unchanging circumstances—after nearly two decades of incarceration and half a dozen parole suitability hearings—violates due process because petitioner's commitment offense has become such an unreliable predictor of his present and future dangerousness that it does not satisfy the "some evidence" standard. After nearly twenty years of rehabilitation, the ability to predict a prisoner's future dangerousness based simply on the circumstances of his or her crime is nil. *Id.* at 1084 (citing *Irons v. Warden of Cal. State Prison—Solano*, 358 F. Supp. 2d 936, 947 n.2 (E.D. Cal. 2005), *overruled on other grounds*, *Irons v. Carey*, 479 F.3d 658 (9th Cir. 2007),

¹⁵⁷ *Rosenkrantz v. Marshall*, 444 F. Supp. 2d at 1082.

¹⁵⁸ 334 F.3d 910, 917 (9th Cir. 2003).

¹⁵⁹ *Rosenkrantz v. Marshall*, 444 F. Supp. 2d at 1081 (quoting *Bair v. Folsom State Prison*, No. CIV S-04-2257 MCE GGH P, 2005 U.S. Dist. LEXIS 43905, at *35 n.3 (E.D. Cal. Sep. 12, 2005), *report and recommendation adopted by* 2005 U.S. Dist. LEXIS 29952 (E.D. Cal. Nov. 16, 2005)).

¹⁶⁰ *Rosenkrantz v. Marshall*, 444 F. Supp. 2d at 1081.

¹⁶¹ *Id.*

However, the Ninth Circuit has since retreated somewhat from *Biggs* and the language of “predictive value.” In *Sass v. California Board of Prison Terms*¹⁶² and *Irons v. Carey*,¹⁶³ the Ninth Circuit held that in cases where there is evidence of “circumstances beyond the minimum necessary,” parole denials based solely on the circumstances of the commitment offense do not necessarily violate due process.¹⁶⁴

In *Irons*, Petitioner Carl Merton Irons was convicted of second-degree murder in 1985 and sentenced to seventeen years to life.¹⁶⁵ In 2001, after Irons had been incarcerated for sixteen years, he filed a petition for a writ of habeas corpus challenging the BPH’s unsuitability determination.¹⁶⁶ The court in *Irons* declared that because he had not served out his “minimum term,” a denial based primarily on the circumstances of his commitment offense comported with due process:

We note that in all the cases in which we have held that a parole board’s decision to deem a prisoner unsuitable for parole solely on the basis of his commitment offense comports with due process, the decision was made before the inmate had served the minimum number of years required by his sentence. Specifically, in *Biggs*, *Sass*, and here, the petitioners had not served the minimum number of years to which they had been sentenced at the time of the challenged parole denial by the Board. All we held in those cases and all we hold today, therefore, is that, given the particular circumstances of the offenses in these cases, due process was not violated when these prisoners were deemed unsuitable for parole prior to the expiration of their minimum terms.¹⁶⁷

Thus, because Irons had only served sixteen years of his seventeen-year-to-life sentence, the court denied his habeas petition.¹⁶⁸

The holding of *Irons* means that anytime a court, using the *Dannenberg* standard,¹⁶⁹ determines that an inmate’s commitment offense contains “circumstances beyond the minimum necessary,” it can justify denials of parole *at least* up until the expiration of the minimum term length of the

¹⁶² 461 F.3d 1123 (9th Cir. 2006).

¹⁶³ 479 F.3d 658 (9th Cir. 2007).

¹⁶⁴ *Sass*, 461 F.3d at 1129; *Irons*, 479 F.3d at 663.

¹⁶⁵ *Irons*, 479 F.3d at 660.

¹⁶⁶ *Id.* at 660–61.

¹⁶⁷ *Id.* at 665 (citing *Biggs v. Terhune*, 334 F.3d 910, 912 (9th Cir. 2003); *Sass*, 461 F.3d at 1125).

¹⁶⁸ *Id.*

¹⁶⁹ See *In re Dannenberg*, 104 P.3d 783 (Cal. 2005); Mircheff, *supra* note 133.

inmate's original sentence.¹⁷⁰ Whether further parole denials comport with due process is uncertain.¹⁷¹

The Ninth Circuit's decision robs inmates of a meaningful minimum eligible parole date and accumulated postconviction credit, which may be used to reduce their base term. It renders meaningless the statutory provisions for gaining postconviction credit, and gives inmates a misplaced hope in their release date.¹⁷² Additionally, it creates a disincentive for inmates to strive for exemplary behavior in prison programming, in order to earn additional postconviction credit.¹⁷³

The ambiguity of the *Dannenberg* standard makes the situation worse; it is likely that a large number of inmates will be affected because the language is so vague.¹⁷⁴ When determining, pursuant to Section 2402(c)(1), that the circumstances of an inmate's commitment offense makes it unsafe to fix a parole date for that inmate, the BPH needs only to point to factors it considers beyond the minimum necessary.¹⁷⁵ It is not even necessary for the BPH to compare that particular crime with others of the same class.¹⁷⁶ After *Dannenberg*, to paraphrase Justice Moreno, it is nearly impossible for a court to disagree with the BPH's finding that a particular crime contains "violence beyond the minimum necessary."¹⁷⁷

These inconsistencies suggest that Section 2402(c)(1), the statutory provision that allows the BPH and the Governor to consider the circumstances of an inmate's commitment offense when making parole suitability determinations, should be removed from the suitability calculus and repealed. Furthermore, the holdings of *Dannenberg*, *Sass*, and *Irons* all ignore the implications of *Biggs*—that the "predictive value" of the inmate's commitment offense, in relation to the inmate's future risk of danger to

¹⁷⁰ *Irons*, 479 F.3d at 665; see CAL. PENAL CODE § 190(a) (West 2008). This suggests that many inmates convicted of first-degree murder will have little chance of release before they have served 25 years; similarly, inmates convicted of second-degree murder will have little chance of release before they have served 15 years.

¹⁷¹ There has been at least one case where the inmate had been incarcerated beyond the time mandated by his minimum sentence at the time a court reviewed his petition for a writ of habeas corpus. The inmate's petition was granted. See *Martin v. Marshall*, 431 F. Supp. 2d 1038, 1047, 1049 (N.D. Cal. 2006).

¹⁷² KLEIN, *supra* note 18, at 34.

¹⁷³ See CAL. CODE REGS. tit. 15, § 2410(b) (2008) (stating that more than four months of postconviction credit may be given "if the prisoner demonstrates exceptional performance in a work assignment, exceptional participation in self-help or rehabilitative programs, or other exemplary conduct").

¹⁷⁴ *Dannenberg*, 104 P.3d at 808 (Moreno, J., dissenting).

¹⁷⁵ *Id.* at 786.

¹⁷⁶ See *id.*

¹⁷⁷ *Dannenberg*, 104 P.3d at 808 (Moreno, J., dissenting).

public safety, has very little value.¹⁷⁸ Risk of danger to public safety is supposed to be the overarching consideration for parole suitability determinations.¹⁷⁹ And as the following studies show, there is very little correlation between the circumstances of an inmate's commitment offense and their risk of danger to others.¹⁸⁰

IV. THE CIRCUMSTANCES OF AN INMATE'S COMMITMENT OFFENSE: A POOR PREDICTOR OF FUTURE RISK OF DANGER TO PUBLIC SAFETY

In the late 1970s, researchers started to question the ability of mental health experts to accurately predict future dangerousness.¹⁸¹ The "first generation" of risk assessments suggested that "psychiatrists and psychologists correctly predict future violence in only one out of every three cases."¹⁸² John D. Monahan's and numerous other researchers' work "led to a widespread conclusion among the mental health and legal communities that mental health professionals cannot reliably predict dangerousness."¹⁸³ Even if later works have challenged the methodological limitations of the previous researchers' findings, "the relevant literature generally supports the notion that early clinical risk assessment techniques were, at best, slightly better than chance at predicting future violence."¹⁸⁴

Researchers generally accept two fundamental approaches to risk assessment.¹⁸⁵ One approach is a formal method, which "uses an equation, a formula, a graph, or an actuarial table to arrive at a probability, or expected value, of some outcome."¹⁸⁶ The other approach "relies on an informal, 'in the head,' impressionistic, subjective conclusion, reached . . . by a human clinical judge."¹⁸⁷ The former is the "actuarial" approach, while the latter is the "clinical" approach.¹⁸⁸

¹⁷⁸ See *id.* at 804–05; *Sass v. Cal. Bd. Of Prison Terms*, 461 F.3d 1123, 1129 (9th Cir. 2006); *Irons v. Carey*, 479 F.3d 658, 665 (9th Cir. 2007).

¹⁷⁹ See Weiss *supra* note 59, at 1587.

¹⁸⁰ See *infra* Part IV.

¹⁸¹ Jessica M. Tanner, "Continuing Threat" to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings, 17 CAP. DEF. J. 381, 397 (2005); see also Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 LAW & PSYCHOL. REV. 43, 46 n.10 (1994).

¹⁸² Tanner, see *supra* note 181. (citation omitted).

¹⁸³ *Id.* (citation omitted).

¹⁸⁴ *Id.* (citations omitted).

¹⁸⁵ John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH. & LEE L. REV. 901, 902 (2000).

¹⁸⁶ *Id.* (citing Paul E. Meehl, *Clinical Versus Statistical Prediction* (1954)).

¹⁸⁷ *Id.* (citation omitted).

¹⁸⁸ *Id.* at 903.

The field of “violence risk assessment” has dramatically shifted away from studies trying to validate the accuracy of clinical predictions, and moved to “studies attempting to isolate specific risk factors that are actuarially (meaning statistically) associated with violence.”¹⁸⁹ Now, as more researchers adopt the actuarial approach, consensus among the researchers has shifted from the question of “how accurate are clinicians in general at predicting violence” to “how valid are specific risk factors, or specific combinations of risk factors, for assessing violence risk?”¹⁹⁰

There have been several studies dealing with “offense seriousness” as a specific risk factor associated with future violence. These studies all suggest that offense seriousness is a poor predictor of recidivism or future violence across varied populations and settings.

“In a 1990 study by Robert P. Cooper and Paul D. Werner, two groups of correctional professionals attempted to predict prisoners’ violence during the early months of incarceration” using factors such as an inmate’s “current offense” and “severity of current offense.”¹⁹¹ The professionals concluded that such variables have “poor predictive reliability,” and were not “significantly correlated with actual inmate violence.”¹⁹²

In the context of first-time juvenile offenders, the seriousness of an individual’s offense has also proven to be “a poor predictor of future criminality.”¹⁹³ “[T]he number of contacts with the juvenile justice system” is a much better predictor of future criminality than “the seriousness of the first offense.”¹⁹⁴ According to one study, juveniles that have “five or more contacts with the juvenile justice system accounted for sixty-one percent of all juvenile offenses.”¹⁹⁵

¹⁸⁹ *Id.* at 905–06 (citation omitted).

¹⁹⁰ *Id.* at 910 (citing James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOL. BULL. 123, 139 (1998)).

¹⁹¹ Tanner, *supra* note 181, at 400 (citing Mark D. Cunningham & Thomas J. Reidy, *Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing*, 16 BEHAV. SCI. & L. 71, 76 (1998) (citing Robert P. Cooper & Paul D. Werner, *Predicting Violence in Newly Admitted Inmates: A Lens Model Analysis of Staff Decision Making*, 17 CRIM. JUST. & BEHAV. 431 (1990))).

¹⁹² *Id.* (citation omitted).

¹⁹³ Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 733 (1997) (citing TODD R. CLEAR, STATISTICAL PREDICTION IN CORRECTIONS (1988); Magda Stouthamer-Loeber & Rolf Loeber, *The Use of Prediction Data in Understanding Delinquency*, 6 BEHAV. SCI. & L. 333, 347 (1988) (summary of environmental variables as predictors of delinquency)).

¹⁹⁴ *Id.* at 733–34 (citing Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 519–33 (1987)).

¹⁹⁵ *Id.* at 734 (citing PAUL E. TRACY ET AL., DELINQUENCY CAREERS IN TWO BIRTH COHORTS 82–86 (1990)).

In a 1986 study, Stephen and Don Gottfredson studied the accuracy of prediction in the criminal justice settings, focusing primarily on the behavior of offenders and partly on the parole decision-making process.¹⁹⁶ They noted that, on the basis of descriptive and normative studies,¹⁹⁷ parole “decision makers tend to focus heavily on offense seriousness, which generally is not found to be predictive of behavioral outcomes.”¹⁹⁸

California courts have also recognized that “the predictive value of an inmate’s commitment offense may be very questionable after a long period of time.”¹⁹⁹ The California Supreme Court has noted that “a large number of legal and scientific authorities believe that, even where the passage of time is not a factor and the assessment is made by an expert, predictions of future dangerousness are exceedingly unreliable.”²⁰⁰ Another California Supreme Court case declared that “the same studies which proved the inaccuracy of psychiatric predictions [of dangerousness] have demonstrated beyond dispute the no less disturbing manner in which such prophecies consistently err: they predict acts of violence which will not in fact take place (‘false positives’), thus branding as ‘dangerous’ many persons who are in reality totally harmless.”²⁰¹

These studies suggest that assessments of future risk based on the severity of an inmate’s commitment offense may be “subject to what researchers call ‘illusory correlation.’”²⁰²

Illusory correlation exists “when an observer reports that a correlation exists between classes of events which are not correlated, or correlated to a lesser degree, or are correlated in the opposite direction to that reported.”²⁰³ For instance, one may think that a defendant who has committed a more violent crime “on the street” would be more likely to be violent to other prisoners when imprisoned; however, as the above studies show, “severity

¹⁹⁶ Stephen D Gottfredson & Don M. Gottfredson, *Accuracy of Prediction Models*, in CRIMINAL CAREERS AND CAREER CRIMINALS, VOL. II, 212–13 (Alfred Blumstein, et al. ed., 1986), available at http://books.nap.edu/openbook.php?record_id=928&page=212.

¹⁹⁷ “Normative studies concern the decisions that people should make in a choice situation, regardless of the decisions they actually make. Descriptive studies concern the decisions actually made, regardless of those that should be made.” *Id.* at 214.

¹⁹⁸ *Id.* at 271.

¹⁹⁹ *In re Scott*, 34 Cal. Rptr. 3d 905, 920 (Ct. App. 2005) (citing *Irons v. Warden of Cal. State Prison—Solano*, 358 F. Supp. 2d 936, 947 n.2 (E.D. Cal. 2005), *overruled on other grounds*, *Irons v. Carey*, 479 F.3d 658 (9th Cir. 2007)).

²⁰⁰ *Id.* at 920 n.9 (citing *People v. Murtishaw*, 631 P.2d 446, 466–67 (Cal. 1981), *disapproved on other grounds*, *People v. Boyd*, 700 P.2d 782 (Cal. 1985)).

²⁰¹ *Id.* (citing *People v. Burnick*, 535 P.2d 352, 366 (Cal. 1975)).

²⁰² Tanner, *supra* note 181, at 399 (citing Cunningham & Reidy, *supra* note 191).

²⁰³ *Id.* at 399–400 (citing JOHN D. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES, 62–64 (1981)).

of offense is a surprisingly unreliable predictor of violent behavior in prison.”²⁰⁴ According to one National Institute of Corrections publication, “the severity of the instant offense has rarely been found to be a very useful predictor of disciplinary adjustment,” nor has it been found to be a useful predictor of danger to the public.²⁰⁵

The lack of correlation between the circumstances of an inmate’s commitment offense and the inmate’s future risk of danger to public safety is another reason that Section 2402(c)(1) should be removed from the calculus of parole suitability determinations. Once again, the overarching consideration in these determinations is supposed to be public safety; studies have shown that other factors²⁰⁶ that the BPH and the Governor are allowed to consider have a confirmed relationship to an inmate’s risk of danger to public safety.²⁰⁷ Why, then, are Section 2402(c)(1) determinations still allowed and still so common?

Daniel Weiss, in his article *California’s Inequitable Parole System: A Proposal to Reestablish Fairness*, argues that the BPH “should not be allowed to consider retributive, backward-looking factors” such as the circumstances of the inmate’s crime when making a parole suitability determination.²⁰⁸ The BPH “should be allowed to consider only rehabilitative, forward-looking factors,” such as “programming, treatment, release plans, job skills, letters of support, and psychological reports.”²⁰⁹ The reason for this, Weiss states, is that “by the time inmates are eligible for parole, they have already served the time that was imposed in light of the severity of their offenses.”²¹⁰ Moreover, because the BPH makes its suitability determination years after the crime, it “has not heard or seen any of the witnesses and cannot judge their credibility, nor has it seen any of the evidence first-hand.”²¹¹ The BPH’s “concern should not be with inmates as they were at the time of the offense, but rather with inmates’ present states

²⁰⁴ *Id.* at 400 (citation omitted).

²⁰⁵ *Id.* (quoting JACK ALEXANDER & JAMES AUSTIN, U.S. DEP’T OF JUSTICE, HANDBOOK FOR EVALUATING OBJECTIVE PRISON CLASSIFICATION SYSTEMS 76 (1992), available at <http://www.nicic.org/library/010675>).

²⁰⁶ See CAL. CODE REGS. tit. 15, § 2402(c)(2)–(6) (2008).

²⁰⁷ See e.g., Gottfredson & Gottfredson, *supra* note 196, at 239 (“Not surprisingly, one of the best predictors of future criminal conduct is past criminal conduct, and the parole prediction literature amply supports this fact.”); Redding, *supra* note 193, at 733–34 (discussing how “[s]erious offenders are best identified by their persistence rather than the nature of their initial offense”); Grant T. Harris, et al., *The Construct of Psychopathy*, 28 CRIME & JUST. 197, 231 (2001) (declaring that “psychopathy is a robust predictor of recidivism and violence among criminal, forensic, and psychiatric populations”).

²⁰⁸ See Weiss, *supra* note 59, at 1599.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

of mind.”²¹² Essentially, retributive reasons for keeping an individual in prison should no longer apply once that individual has paid his debt to society by serving out his original sentence and has become eligible for parole.²¹³

This author agrees that the BPH’s ability to deny parole based on the circumstances of the crime should be eliminated, and would like to couple his reasoning with Weiss’s to help alter the landscape of parole determinations in California. Weiss’s argument, however, loses some of its force when applied to inmates who have made plea agreements to receive a lesser sentence.

The sentence an inmate receives in a plea bargain is a result of a deal with a prosecutor. A judge and jury do not have a chance to evaluate all the evidence and determine that the inmate needs to spend a certain amount of time in prison to pay his debt to society. Rather, defendants, defense counsel, and prosecutors all have certain incentives to plea bargain, none of which revolve around idealized punishments. Plea agreements add another level of complexity and concern to Section 2402(c)(1) denials, and comprise yet another reason why Section 2402(c)(1) should be repealed.

V. PLEA BARGAINING AND ITS COLLATERAL EFFECTS ON PAROLE SUITABILITY

Plea bargaining includes a formal or informal agreement between the defendant and the prosecutor.²¹⁴ The prosecutor generally agrees to a reduced prison sentence, and in exchange, defendant waives “his constitutional right against self-incrimination and his right to trial.”²¹⁵

Plea bargaining has become a dominant practice in the American criminal justice system.²¹⁶ One legal scholar notes, “Every two seconds during a typical workday, a criminal case is disposed of in an American courtroom by way of a guilty plea or nolo contendere plea.”²¹⁷ “[P]lea bargaining disposes of approximately ninety percent of cases in the United

²¹² *Id.* at 1599–1600.

²¹³ *Id.* at 1600.

²¹⁴ Timothy Lynch, *The Case Against Plea Bargaining*, 26 REGULATION 24, 24 (Fall 2003), available at <http://www.cato.org/pubs/regulation/regv26n3/v26n3-7.pdf>. For clarity, I will be using the terms “plea bargain” and “plea agreement” throughout. “Plea bargain” refers generally to the process of making an agreement, while “plea agreement” refers to the completed bargain.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

States.”²¹⁸ A 1990 study of 1,800 randomly selected felony cases in Los Angeles showed that “98% were settled with guilty pleas rather than trials.”²¹⁹

As criminal courts become overburdened, prosecutors and judges are pressured to dispose of cases quickly and efficiently.²²⁰ Whereas trials may last days, weeks or sometimes months, “guilty pleas can often be arranged in minutes.”²²¹ Moreover, the result of any trial is usually unpredictable, but a plea bargain gives both prosecution and defense some control over the outcome.²²²

For criminal defendants, there are many tangible benefits to plea bargaining. The principal benefit of a bargain is that defendants receive a lighter sentence for a lower charge than they would have received had they gone to trial and lost.²²³ For example, a criminal defendant may want to plead guilty to second-degree murder, rather than face the prospect of being convicted of first-degree murder and the possibility of life without parole.

Defendants who hire private counsel can save attorney fees by plea bargaining.²²⁴ Bringing a case to trial almost always takes more time and effort than negotiating and handling a plea bargain.²²⁵ Defendants must wait much longer and endure more stress in trial than in plea bargaining.²²⁶

Defendants may be eligible to get out of jail immediately after making a plea:

Defendants who are held in custody—who either do not have the right to bail or cannot afford bail, or who do not qualify for release on their own recognizance—may get out of jail immediately following the judge’s acceptance of a plea. Depending on the offense, the defendant may get out altogether, on probation, with or without some community service obligations. Or, the defendant may have to serve more time but will still get out much sooner than if he or she insisted on going to trial.²²⁷

²¹⁸ Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 116–17 (1997).

²¹⁹ *Id.* at 117 n.7

²²⁰ Nolo.com, Defendants’ Incentives for Accepting Plea Bargains, <http://www.nolo.com/article.cfm/ObjectID/4E8D6815-1797-46FC-8F8AB242FFE6391A/catID/D4C65461-8D33-482C-92FCEA7F2ADED29A/104/143/272/ART/> (last visited May 15, 2008).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

As a result of a plea bargain, the defendant may also have fewer or less-serious offenses on his or her record.²²⁸

Pleading guilty or no contest in exchange for a reduction in the number of charges or the seriousness of the offenses looks a lot better on a defendant's record than the convictions that might result following trial. This can be particularly important if the defendant is ever convicted in the future. For example, a second conviction for driving under the influence (DUI) may carry mandatory jail time, whereas if the first DUI offense had been bargained down to reckless driving, there may be no jail time for the "second" DUI.²²⁹

Even for people who are never rearrested, getting a charge reduced from a felony to a misdemeanor, or from a felony that constitutes a strike under a "three strikes" law to one that doesn't, can prove to be a critical benefit. Some professional licenses must be forfeited upon conviction of a felony. Future employers may not want to hire someone previously convicted of a felony. Felony convictions may be used in certain court proceedings, even civil cases, to discredit people who testify as witnesses. Felons can't own or possess firearms. And, in many jurisdictions, felons can't vote.²³⁰

Similarly, "[h]aving a less socially stigmatizing offense on one's record" can be further incentive to plea bargain.²³¹

Prosecutors may reduce charges that are perceived as socially offensive to less-offensive charges in exchange for a guilty plea. For example, a prosecutor may reduce a molestation or rape case to an assault. This can have a major impact on the defendant's relationship with friends and family. Perhaps even more critical, sometimes defendants convicted of stigmatizing offenses may be at a greater risk of being harmed (or killed) in prison than if they are convicted of an offense that doesn't carry the same stigma.²³²

Avoiding publicity is yet another incentive for defendants to plea bargain.²³³

Famous people, ordinary people who depend on their reputation in the community to earn a living, and people who don't want to bring further embarrassment to their families all may choose to plead guilty or no contest to keep their names out of the public eye. While news of the plea itself may be public, the news is short-lived compared to news of a trial.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

And rarely is a defendant's background explored in the course of a plea bargain to the extent it may be done at trial.²³⁴

Defense counsel also has incentives to accept a plea agreement that may conflict with those of the defendant. First, acceptance of plea offers may further an attorney's career goals or quality of life.²³⁵ "These motives can include the wish to get trial experience, fear of going to trial, desire not to work excessively, and establishment of a particular reputation."²³⁶ Second, financial arrangements may pull defense counsel in an opposite direction from the client's wishes.²³⁷

David Friedman, in his book *Law's Order*, argues that the actual effect of plea bargaining may be "to make punishment more, rather than less, severe."²³⁸ To illustrate his argument, he gives the following example:

There are a hundred cases a year; the DA has a budget of a hundred thousand dollars. With only a thousand dollars to spend investigating and prosecuting each case, half the defendants will be acquitted. But if he can get 90 defendants to cop pleas, the DA can concentrate his resources on the ten who refuse, spend ten thousand dollars on each case, and get a conviction rate of 90 percent.

A defendant faces a 90 percent chance of conviction if he goes to trial and makes his decision accordingly. He will reject any proposed deal that is worse for him than a 90 percent chance of conviction but may well accept one that is less attractive than a 50 percent chance of conviction, leaving him worse off than he would be in a world without plea bargaining. All defendants would be better off if none of them accepted the DA's offer, but each is better off accepting . . . Individual rationality does not always lead to group rationality.²³⁹

In the context of parole habeas, plea bargaining may have unwanted collateral effects on the amount of time an inmate serves. Inmates who make plea agreements and receive second-degree murder sentences may actually have a more difficult time winning their freedom on a parole habeas petition than inmates that go to trial.

Criminal defendants have many reasons to plea bargain, but as discussed above, chief among those reasons is that the defendant will often re-

²³⁴ *Id.*

²³⁵ Hollander-Blumoff, *supra* note 218, at 127.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 91 (2000), available at http://www.davidfriedman.com/laws_order/index.shtml.

²³⁹ *Id.* at 91–92.

ceive a lighter sentence.²⁴⁰ The more aggravating circumstances of the defendant's crime there are, the stronger this incentive becomes.

Consider, for example, a defendant who has committed a murder. The circumstances of his crime include clear evidence of premeditation, and the prosecution has physical evidence to prove it if the case were to go to trial. However, the prosecutor offers the defendant a plea bargain, in which the prosecutor will not seek a first-degree murder charge in return for the defendant's testimony against a co-conspirator. Instead of a first-degree murder conviction, the defendant will be convicted of second-degree murder.

In the short term, the plea bargain seems like an attractive choice.²⁴¹ The defendant will face a term of significantly fewer years, and may be eligible for parole earlier.²⁴² If private counsel represents the defendant, a plea agreement eliminates the need for a long and costly trial.²⁴³

Defendant's counsel will have incentives to plea bargain as well. If the evidence is strong against the defendant, private counsel may not want to risk damage to his or her reputation. A public defender may want to speed along the resolution of a losing case. At any rate, it is likely, in this scenario, that counsel would advise the defendant to take the plea bargain. Thus, the defendant may believe that a plea agreement is the best possible choice.

However, in the long term, the defendant may not be better off with the plea agreement. Once he becomes eligible for parole, the BPH may deny him parole on the basis that his crime was particularly "heinous, atrocious, or cruel."²⁴⁴ Even if the BPH grants parole, the Governor may reverse on this same basis.²⁴⁵ Under the *Dannenberg* standard, a court may simply cite the evidence of premeditation in this defendant's case to justify the denial of parole.²⁴⁶ Even if evidence of premeditation was not strong, premeditation is not difficult to find.²⁴⁷

On the other hand, if the defendant had actually gone to trial and been convicted of first-degree murder, the courts would be forced to evaluate the defendant's crime under a different standard.²⁴⁸ Evidence of premeditation

²⁴⁰ See Defendants' Incentives for Accepting Plea Bargains, *supra* note 220.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ CAL. CODE REGS. tit. 15, § 2402(c)(1) (2008).

²⁴⁵ *In re Rosenkrantz*, 59 P.3d 174, 205 (Cal. 2002).

²⁴⁶ *In re Dannenberg*, 104 P.3d 783, 803 n.16 (Cal. 2005).

²⁴⁷ See *id.*

²⁴⁸ See e.g., *In re Van Houten*, 10 Cal. Rptr. 3d 406, 422-23 (Ct. App. 2004).

would no longer suffice as a justification for denying the defendant parole. If the reviewing court were to adopt the *Van Houten* standard, circumstances meriting a life without parole or death sentence would be necessary.²⁴⁹ Minimal evidence of premeditation is likely much easier to find than any of these enumerated circumstances.²⁵⁰ In this way, the defendant who made the plea agreement and was convicted of second-degree murder may actually end up being kept in prison longer than the defendant who went to trial and was convicted of first-degree murder. This unintended collateral effect of plea bargaining is another reason that Section 2402(c)(1) should be removed from the calculus of parole suitability determinations and repealed.

Justice Moreno, in his *Rosenkrantz* concurrence, posited a potential solution to a problem that arises under the “beyond the minimum necessary” standard when applied to inmates convicted of second-degree murder.²⁵¹ Justice Moreno wrote that it would be appropriate, in cases where the petitioner was convicted of second-degree murder, to determine when that petitioner would be eligible for parole had the petitioner been convicted of first-degree murder.²⁵² If the petitioner would be eligible for parole under the first-degree murder sentence at the time of review, the petitioner’s crime would be compared against other first-degree murders to determine whether it contained any elements beyond the minimum necessary to sustain a first-degree murder conviction.²⁵³ This may eliminate any collateral consequences stemming from accepting a plea agreement that reduces a sentence from first to second-degree murder. Justice Moreno’s suggestion, however, is not a viable solution overall, given all the aforementioned problems that Section 2402(c)(1) engenders.

VI. CONCLUSION

Section 2402(c)(1) should be removed from the calculus of parole suitability determinations and repealed. The BPH and the Governor should not have the power to deny or reverse an inmate’s parole suitability determination based on the circumstances of the inmate’s commitment offense. The use of section 2402(c)(1) has led to an extremely ambiguous and unworkable standard of judicial review for parole suitability determinations. This standard of review robs inmates of a meaningful eligible parole date

²⁴⁹ *Id.* at 423.

²⁵⁰ *Dannenberg*, 104 P.3d at 803 n.16.

²⁵¹ *In re Rosenkrantz*, 59 P.3d 174, 226 (Cal. 2002) (Moreno, J., concurring).

²⁵² *Id.*

²⁵³ *Id.*

and accumulated postconviction credit that is used to reduce the inmate's base term. There is no demonstrated relationship between the circumstances of an inmate's commitment offense and the inmate's risk of danger to public safety once paroled. Finally, Section 2402(c)(1) denials create collateral effects arising from plea bargains. These collateral effects undermine the primary reasons defendants enter into plea agreements and are antithetical to fairness in our justice system. A consideration of the circumstances of an inmate's commitment offense has no place in the creation of an effective and humane parole system in California.