

Case no. S287485

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

IN RE RANDY PAYNE, PETITIONER

ON HABEAS CORPUS

Superior Court of the County of Merced, Case nos. SUF20408 &
SUF20409, The Honorable Mark V. Bacciarini

PETITIONER'S INFORMAL REPLY

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INTRODUCTION

Respondent argues that Mr. Payne's habeas petition is without merit. First, Respondent argues that Mr. Payne's argument that California's parole standard is void for vagueness is meritless because the due process analysis does not apply to parole determinations. (Inf. Resp. at 13-15.) Second, Respondent argues that there is no split in Courts of Appeals in determining what the standard is. (Inf. Resp. at 10-12.) Finally, Respondent contends that Mr. Payne's argument that his life sentence violated the Eighth Amendment is barred. (Inf. Resp. at 15-17.) All three arguments are incorrect. Contrary to the Respondent's assertions, Mr. Payne would no longer be in prison but for the application of a vague and inconsistent parole standard, nor would he be serving a life sentence under current Eighth Amendment jurisprudence.

I. THIS COURT MUST APPLY THE "VOID FOR VAGUENESS" DOCTRINE WHEN EVALUATING CALIFORNIA'S PAROLE STANDARD.

As an initial matter, this Court must intervene to correct the Respondent's claim that California's parole standard is immune from basic requirements of the Due Process Clause. In

its Informal Response, Respondent argues that the void-for-vagueness doctrine and requirement of fair notice “do not apply to the subjective decision-making process” inherent to California parole proceedings.” (Inf. Resp. at 13.) The Respondent is incorrect.

First, in *Swarthout v. Cooke*, 562 U.S. 216, 221 (2011), the U.S. Supreme Court held that California prisoners have a liberty interest in parole protected by the Due Process Clause. And in *Johnson v. United States*, 576 U.S. 591, 596 (2015), the Court held that the vagueness doctrine, and its requirement of clear standards in law, is “the first essential of due process.” Thus, the Court held, the void-for-vagueness doctrine applies “not only to statutes defining elements of crimes, but also to statutes fixing sentences.” *Id.*

Second, Respondent attempts to justify its claim by arguing that vagueness challenges apply only to criminal laws, not in the parole suitability context. However, the U.S. Supreme Court has explicitly rejected this argument. *Sessions v. Dimaya*, 138 S. Ct.

1204 (2018).¹ Furthermore, California’s parole law *is* a criminal law. It is located directly in the state’s Penal Code and directly controls the length of incarceration of most people in California’s prisons. *Johnson*, 576 U.S. at 596 (holding that the void-for-vagueness doctrine applies to “statutes fixing sentences.”)

The suggestion by Respondent that California’s parole provisions are immune from vagueness challenges, and therefore can be unlimitedly broad, standardless, and arbitrary is absurd and must be rejected by this Court.

II. MR. PAYNE HAS ESTABLISHED A PRIME FACIE CASE SHOWING THAT THE VAGUE AND CONFLICTING PAROLE STANDARD VIOLATES DUE PROCESS

A. California’s parole standard is vague and inconsistent and violates due process.

Respondent contends that the “subjective” decision by the Board of Parole Hearings is permitted by due process and that there is no split between the Courts of Appeal. They are mistaken

¹ *Dimaya* involved federal immigration law, and the Court flatly rejected the government’s contention that “a less searching form of the void-for-vagueness doctrine applies here . . . because this is not a criminal case.” *Dimaya*, 138 S. Ct. at 1212. It held that the same standard applied to immigration statutes because of the “grave nature” of deportation.

on both accounts. Despite their attempts to cobble together a “subjective” standard, a review of the relevant statutes, regulations and case law illustrates that Board of Parole Hearing’s current practices do not meet the standards set forth by the United States Supreme Court in *Dimaya* and *Johnson*.

Respondent attempts to paper over the conflicting standards by stating that this Court has sanctioned the parole review process as a “subjective decision-making” process. (Inf. Resp. at 14.) But subjective does not mean vague.

First, as discussed more fully in Mr. Payne’s petition the standard for parole suitability is found in a number of places—e.g. Penal Code section 3041, section 2281 of Title 15 of the California Code of Regulations, and several California Supreme Court and Courts of Appeals cases. In *In re Rosenkrantz*, 29 Cal. 4th 616, 655 (2002), this Court tried to harmonize the standardless language in Penal Code section 3041 with the Title 15 regulations by holding that the Board of Parole Hearings should determine if an individual can be released without committing any additional “antisocial” acts. This vague definition violates both *Johnson* and *Dimaya*.

Predictably, this has led to confusion when courts have attempted to provide guidance to the Board. Courts of Appeal have struggled to define “antisocial acts” with some looking for a risk of future violence, and others looking for a risk of behaviors that may not be criminal at all, such as failure to maintain regular employment or notify a parole officer of a change of address. *See In re Hunter*, 205 Cal. App. 4th 1529, 1544 (2012) (the Board did not establish risk of future violence), *In re Reed*, 171 Cal. App. 4th 1071, 1082 (2009) (failing to perform well on parole, including notifying parole officer of a change in address is an antisocial act). While a subjective analysis may be permitted, the current process by which that analysis occurs is vague and “so standardless that it invites arbitrary enforcement,” in violation of the Due Process Clause. *Johnson*, 576 U.S. at 591.

B. Mr. Payne is suitable for parole and should be released.

Although the standard for release is vague and inconsistent by nearly every standard that has been articulated, Mr. Payne is suitable for release. If the Board of Parole Hearings had applied a clear standard that specified both what behavior is to be avoided and the tolerable risk level for the possibility of that behavior (as

required by *Dimaya* and *Johnson*), Mr. Payne would likely be home.

Mr. Payne has a number of indicators that his continued incarceration is not necessary in “consideration of the public safety.” Penal Code § 3041(b)(1). His age (sixty-one) and medical conditions, including bilateral knee pain, chronic lower back pain, chronic shoulder pain, chronic seizure disorder, hepatitis C, stage four cirrhosis of the liver, kidney stones and urinary tract concerns, limit his ability to commit crimes. (Ex. B at 9.) A risk and needs assessment conducted by CDCR shows that he does not need support related to specific measured risk domains, including criminal personality, anger, and employment problems. (*Id.* at 8.) He has no history of violence in the community and only one violation for fighting in prison, which occurred over twenty years ago and was deemed a “mutual combat” by CDCR. (*Id.* at 15.) His classification score, a measure used by the prison to his security level, is just eleven points over the minimum, and he has received a behavioral override to place him at a lower-security facility than he would typically be housed. (*Id.* at 11.) He has extensive participation in rehabilitative and vocational

programming, earning high praise from his supervisors, one of which stated Mr. Payne is “more than ready” to be released and would “certainly be a credit to the community.” (*Id.* at 12.) Mr. Payne also has a robust reentry plan and has been accepted at Options Recovery, a residential reentry program in Berkeley, California that also contracts with CDCR to train drug counselors in prison. (*Id.* at 12-13.) This overwhelming evidence of Mr. Payne’s current lack of dangerousness, as well as his plans for the future, make it clear that his continued incarceration is no longer necessary and that he would be released under any reasonable standard.

III. MR. PAYNE’S EIGHTH AMENDMENT CLAIM IS NEITHER UNTIMELY NOR BARRED AS SUCCESSIVE

Respondent also argues that Mr. Payne’s eight amendment claim is barred as untimely because he was sentenced over twenty years ago and because the Court of Appeal addressed the argument in 1998. They are incorrect on both accounts.

First, Mr. Payne’s petition is timely. Although Mr. Payne was originally sentenced in 1997, he was resentenced in 2023 to twenty-five years to life by the Merced County Superior Court.

(CT 421.) The Court of Appeals affirmed that sentence just last year. *People v. Payne*, Case nos. F085863 & F085865, 2024 Cal. App. Unpub. LEXIS 2914 (May 10, 2024). This Court has held that when an individual is resentenced, a Court has jurisdiction to modify the entire sentence. *See People v. Buycks*, 5 Cal. 5th 857, 893 (2018) (setting out the full resentencing rule); *see also People v. Rouse*, 245 Cal. App. 4th 292, 299 (2016) (upholding resentencing counts not covered by Proposition 47, calling a resentencing hearing pursuant to Proposition 47 a “plenary sentencing”). Because Mr. Payne’s new sentence was only final on July 25, 2024 (when the remittitur was issued by the Court of Appeal), and this petition was filed less than five months later, his petition is timely.

Second, Mr. Payne’s petition is not successive and his claims have not been litigated before. Although Mr. Payne did raise a cruel and unusual punishment claim on direct appeal in 1997, the laws affecting his sentence have significantly changed since his original appeal. *See In re Harris*, 5 Cal. 4th 813, 841 (1993) (change in law affecting the defendant after an appeal is an exception to successive habeas claims). Specifically to Mr.

Payne, the Three Strikes Law was significantly amended in 2012 and no defendant with the same criminal history as Mr. Payne, convicted of the same crime as Mr. Payne would receive a life sentence today. Additionally, several Courts of Appeal have held that the “evolving state of California’s criminal jurisprudence” no longer permits Three Strike sentences, even where previously legally imposed. *People v. Avila*, 57 Cal. App. 5th 1134, 1145 (2020). Because of these changes in law which directly impact the analysis of the constitutionality of Mr. Payne’s sentence, his claim is not barred as successive.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Payne’s Petition for Writ of Habeas Corpus.

Dated: February 1, 2025

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

As required by to Rule 8.204(c)(1) of the California Rules of Court, I certify that this brief contains 1,632 words as calculated by the Microsoft Word word processing program.

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Supreme Court of California

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Case Name: **PAYNE (RANDY LYNN) ON
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Case Number: **S287485**

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