No. S287485

In the Supreme Court of the State of California

IN RE RANDY LYNN PAYNE,

On Habeas Corpus.

Fifth Appellate District, Case No. F085863
Merced County Superior Court, Case No. SUF20408
The Honorable Mark Bacciarini, Judge

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

In 1997, petitioner Randy Lynn Payne was sentenced to life in prison under the "Three Strikes" law. At a parole hearing in 2023, the Board of Parole Hearings ("the Board") found him to be unsuitable for release based on numerous rule violations and defiant behavior while in prison, as well as a pattern of failing to remain free of crime when released on prior grants of parole.

Payne has now filed a petition for writ of habeas corpus challenging California's parole standards and asserting that his life sentence violates the Eighth Amendment. His various complaints about the parole system lack merit. His Eighth Amendment claim is untimely and barred under *In re Waltreus* (1965) 62 Cal.2d 218, 225 (*Waltreus*).

Accordingly, Payne has failed to make a prima facie showing that he is entitled to habeas corpus relief, and this Court should summarily deny the petition.

PROCEDURAL BACKGROUND

In 1997, after being found guilty of petty theft with a prior (former Pen. Code, § 666[1]) and evading arrest while operating a motor vehicle (Veh. Code, § 2800.2), with three prior serious felony convictions, Payne was sentenced to 25 years to life in prison on the felony evading count and a concurrent sentence on the felony petty theft count. (Pet.'s Exh. B at p. 297.) The Fifth Appellate District affirmed the judgment but ordered the

[1] Hereafter, all statutory references are to the Penal Code, unless otherwise noted.

punishment for the petty theft to be stayed pursuant to section 654. (*People v. Payne* (May 26, 1998, F026894) [nonpub. opn.].)

In December 2012, Payne sought Proposition 36 relief in the superior court. (*People v. Payne* (Sept. 21, 2021, F079012) [nonpub. opn.] 2021 WL 4270623, *2.) The superior court denied relief on the basis that Payne presented an unreasonable risk of danger to public safety if released. (*Ibid*.) The Fifth Appellate District affirmed the ruling. (*People v. Payne* (2014) 232 Cal.App.4th 579, 584.)

Following a hearing, on February 1, 2019, the superior court reduced the petty theft count to a misdemeanor pursuant to Proposition 47, but it kept in place the indeterminate sentence for the felony evading count. (*Payne*, *supra*, 2021 WL 4270623, *5.)

On September 21, 2021, the Fifth Appellate District held that Payne did not make an intelligent *Faretta* waiver[2] at the earlier Proposition 47 hearing, and it remanded the matter to the superior court for further proceedings. (*Payne*, *supra*, 2021 WL 4270623, *7; Pet.'s Exh. G at pp. 355-357.)

On September 30, 2022, the superior court conducted further proceedings, which it described as a "Proposition 47, Proposition 36, and *Romero* hearing." (2CT 351-396, 398.)

On December 8, 2022, the superior court issued a written order again reducing the petty theft conviction to a misdemeanor pursuant to Proposition 47 and section 1170.18. (Pet.'s Exh. H at pp. 671-680.) The court denied relief on the felony evading count

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[2] *Faretta v. California* (1975) 422 U.S. 806.

under Proposition 36, after finding that Payne continued to present an unreasonable risk of danger to public safety if released. (Pet.'s Exh. H at p. 680.)

On March 15, 2023, the Board determined that Payne was unsuitable for parole based on his inability to remain crime-free following previous grants of parole, his history of committing violent crimes, his defiant attitude while in prison, and his numerous rule violations. (Pet.'s Exh. C at pp. 146-162.) It set a new parole hearing to be held in three years. (Pet.'s Exh. C at p. 159.)

On May 10, 2024, the Fifth Appellate District affirmed Payne's life sentence. (*People v. Payne* (May 10, 2024, F085863, F085865) [nonpub. opn.] 2024 WL 2120275, *15.)

On July 24, 2024, this Court denied review. (Pet.'s Exh. A.)

FACTUAL SUMMARY

In its May 10, 2024, opinion, the Fifth Appellate District summarized Payne's offenses as follows:

> Defendant, now age 60, has an extensive criminal record. By the time the Three Strikes law was enacted in 1994, he had already suffered three qualifying felony convictions. Defendant also has a history of substance abuse.
>
> In February 1996, at the age of 32, defendant stole motor oil from a gas station in Merced. He fled in a stolen car and attempted to evade a pursuing California Highway Patrol officer on Highway 99. After reaching speeds of over 100 miles per hour, defendant lost control of the vehicle and crashed into a stationary object. The incident resulted in criminal charges, a jury trial, and convictions of felony evading (Veh. Code, §§ 2800.1, 2800.2) and felony petty theft (Pen. Code, former § 666).

(*Payne*, *supra*, 2024 WL 2120275, *2.)

ARGUMENT

I. PAYNE'S ATTEMPTS TO UNDERMINE THE EXISTING PAROLE SUITABILITY STANDARD LACK MERIT

Payne raises various criticisms of the California's parole standard, contending that it is poorly defined, vague, conflicts with controlling statutes, and violates due process. (Pet. at 13-26.) None of these contentions is meritorious, and Payne has failed to set forth a prima facie case for habeas corpus relief.

A. Payne has not alleged a prima facie due process claim because he fails to allege how the parole suitability standard affected the Board's 2023 decision

Preliminarily, Payne's challenge to California's parole standard should be denied because Payne does not challenge the outcome of his 2023 parole hearing. (See generally pet.) To establish a prima facie due process claim via habeas corpus, Payne needs to allege, and later demonstrate, that he would have received a different result at the 2023 parole hearing but for the lack of more-precise governing parole law. (See *In re Paul W.* (2007) 151 Cal.App.4th 37, 53 [habeas corpus "'is to inquire into the lawfulness of a person's imprisonment or other restraint on his or her liberty'"]; *People v. Duvall* (1995) 9 Cal.4th 464, 474 [if habeas petition alleges imprisonment is illegal, petition must state "in what the alleged illegality consists"], citing § 1474, subd. (2); see also *In re Drake* (1951) 38 Cal.2d 195, 198 [habeas claim is not ripe to challenge anticipated future action].) Moreover, "[t]he ordinary rule is 'that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself.'" (*People v. Buza* (2018) 4 Cal.5th 658, 675, 681, 683,

quoting *In re Cregler* (1961) 56 Cal.2d 308, 313.) In *Buza*, for example, this Court held that the defendant's conviction for refusing to provide a DNA sample after his arrest was valid as applied to him and declined to consider other scenarios where the criminal statute may violate an arrestee's rights. (*Id.* at pp. 681-683.) To be sure, "'a court will not consider every conceivable situation that might arise . . . [n]or consider the question of constitutionality with reference to hypothetical situations.'" (*Ibid.*)

Here, Payne broadly contends that his due process rights were violated "by virtue of California's vague standard for determining parole eligibility," but he does not explain or show how. (Pet. at 8.) Although Payne raises general arguments about the alleged vagueness of California's parole standard and the Board's processes, he does not contest his 2023 parole hearing suffered from these standards, nor does he argue the evidence supporting the decision denying him parole was insufficient. (See generally pet.) This is inadequate for relief in habeas corpus, and this claim should be denied. (*Duvall, supra*, 9 Cal.4th at p. 474; *Buza*, *supra,* 4 Cal.5th at pp. 675, 681, 683.)

B. No split exists in the Courts of Appeal regarding the scope of the Board's public-safety inquiry

Payne unsuccessfully attempts to manufacture a split in the Courts of Appeal in an effort to cast doubt on the longstanding public-safety inquiry the Board makes when determining parole suitability. (Pet. at 20-21.) But the Board's suitability determination, which is currently governed by section 3041 and the Board's governing regulations, has remained constant for

over 50 years. (§ 3041, subd. (b)(1); Cal. Code Regs., tit. 15, § 2402; *In re Seabock* (1983) 140 Cal.App.3d 29, 41 ["the standards for determining suitability for parole [were] not altered" with the passage of 1977 Determinate Sentencing Law].) For the last half-century, this Court has consistently described the Board's suitability determination as an "'attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts.'" (*In re Shaputis* (2011) 53 Cal.4th 192, 219 (*Shaputis II*), citing *In re Rosenkrantz* (2002) 29 Cal.4th 616, 655, and *In re Strum* (1974) 11 Cal.3d 258, 266.) Neither the Board nor the courts misunderstand the relevant inquiry.

Payne's argument that a split exists is meritless. Though he does not raise a sufficiency-of-the-evidence challenge to the Board's 2023 decision, he relies on two appellate opinions addressing such legal claims to erroneously contend "there is disagreement among courts of appeal as to what precisely [the Board] is to decide." (Pet. at pp. 20-21, citing *In re Hunter* (2012) 205 Cal.App.4th 1529, 1536 (*Hunter*), and *In re Reed* (2009) 171 Cal.App.4th 1071, 1082 (*Reed*).) No such disagreement exists.

Payne asserts the *Hunter* court concluded parole suitability "turns on" an inmate's "risk of future violence," whereas the *Reed* court "reject[ed] that violence is critical to parole" and held that parole suitability "turns on any potential 'antisocial' outcome." (Pet. at p. 7.) But Payne distorts the cases' holdings and ignores the context of both cases, which ultimately concerned sufficiency-of-the-evidence challenges to Board decisions. The *Reed* and

Hunter courts appropriately analyzed the Board decision at issue in each respective case.

In *Reed*, the Board based its decision on Reed's inability to follow prison rules, which was relevant to his future success on parole, and the "[p]etitioner concede[d] the Board, in its parole suitability decision, may properly consider whether an inmate will comply with the reasonable conditions of parole." (*Reed*, *supra*, 171 Cal.App.4th at p. 1081, fn. 4.) In *Hunter*, however, the Board's decision rested on Hunter's purported lack of remorse, lack of insight, and incredible explanation of the crime—all factors that lacked support in the record, according to the court. (*Hunter*, *supra*, 205 Cal.App.4th at pp. 1539-1540.) Thus, the opinions in *Reed* and *Hunter* appropriately focused on the challenged parole denial. Neither *Reed* nor *Hunter* misunderstood the Board's underlying public-safety inquiry.

Payne's argument suggests the *Reed* and *Hunter* courts were deciding parole suitability. But a "reviewing court does not ask whether the inmate is currently dangerous. That question is reserved for the executive branch." (*Shaputis II*, *supra*, 53 Cal.4th at p. 221.) "It is the job of a reviewing court to proceed case by case, examining each record and applying the deferential 'some evidence' standard to the parole determination before it." (*Id.* at p. 218.) Though Payne misunderstands this Court's directives in *Shaputis II*, the courts below do not. Accordingly, this Court should deny Payne's vagueness claim.

C. Payne's contention that California's parole standard is unconstitutionally vague and violates due process is without merit

This Court should also reject Payne's related assertion that the Board uses a vague standard to determine parole suitability, and thus violates due process according to *Johnson v. United States* (2015) 576 U.S. 591 and *Sessions v. Dimaya* (2018) 584 U.S. 148—two cases unrelated to parole suitability determinations. (Pet. at 14-15, 21-26.)

Payne unpersuasively analogizes the reasoning of the two irrelevant cases, where the underlying vagueness challenges were to federal statutes addressing criminal sentencing and deportation, respectively. In *Johnson*, a defendant convicted of a federal crime faced a longer sentence if he had a number of violent felony convictions. (*Johnson*, *supra*, 576 U.S. at p. 593.) The issue was whether the statutory definition of "violent felony survives the Constitution's prohibition of vague criminal laws." (*Ibid*.) The court held it did not, and due process was violated because the criminal law at issue "both denies fair notice to defendants [of the conduct it punishes] and invites arbitrary enforcement by judges." (*Id.* at pp. 595, 597.) The court noted these due process principles "apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." (*Id.* at p. 596.)

Similarly, in *Dimaya*, a section of the Immigration and Nationality Act rendered deportable any alien convicted of an aggravated felony, including a crime of violence. (*Dimaya*, *supra*, 584 U.S. at pp. 152-153.) Dimaya challenged the definition of "crime of violence" as unconstitutionally vague, and the court

agreed. (*Id.* at p. 152.) In reaching its decision, the court repeated that the void-for-vagueness doctrine "guarantees that ordinary people have 'fair notice' of the conduct a [criminal] statute proscribes." (*Id.* at p. 152, quoting *Papachristou v. Jacksonville* (1972) 405 U.S. 156, 162.) The court added that "the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." (*Ibid*.) The holdings of *Johnson* and *Dimaya* cannot, however, be analogously applied to parole suitability decisions.

Holdings regarding the vagueness of criminal statutes where "fair notice" is an issue do not apply to the subjective decision-making in parole suitability proceedings—subjective decision-making this Court has sanctioned. (See, e.g., *Shaputis II, supra*, 53 Cal.4th at p. 219 ["[I]t has long been recognized that a parole suitability decision is an attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts"].) As explained by the United States Supreme Court, "the [parole] decision differs from the traditional mold" of judicial decision-making "in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community." (*Greenholtz v. Neb. Pen. and Correctional Complex* (1979) 442 U.S. 1, 8.)

Unlike a criminal statute prohibiting conduct, a parole suitability determination is not based on prohibited conduct;

indeed, no conduct is prohibited or automatically disqualifies an inmate from a suitability determination. (See, e.g., Cal. Code Regs., tit. 15, § 2282, subds. (b) [all relevant, reliable information shall be considered], (c) [circumstances tending to show unsuitability], (d) [circumstances tending to show suitability].) Rather, the Board decides "whether the inmate currently poses a threat to public safety," based on "the entire record, including the facts of the offense, the inmate's progress during incarceration, and the insight he or she has achieved into past behavior." (*Shaputis II, supra*, 53 Cal.4th at pp. 220-221.)

Payne offers no persuasive reason why holdings addressing federal criminal statutes prohibiting criminal conduct, fixing sentences, or defining deportation criteria would apply in the parole suitability context. Nor should they. Due process protections for criminal defendants when being convicted or sentenced do not apply equally to an inmate like Payne, who has already been convicted and sentenced to prison for life with the possibility of parole. (See, e.g., *Morrissey v. Brewer* (1972) 408 U.S. 471, 480 ["revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations"].) Payne's vagueness challenge to the Board's parole standards should be rejected.

II. PAYNE'S EIGHTH AMENDMENT CHALLENGE TO HIS SENTENCE IS UNTIMELY AND BARRED BY *WALTREUS*

Payne's claim that his life sentence violates the Eighth Amendment (pet. at 26-33) is time-barred, and it is also barred

under *Waltreus* because it was previously raised and rejected on direct appeal.

A. Untimely petitions are procedurally barred unless an exception applies, as are claims that were already raised and rejected on appeal

"Timeliness requirements vindicate society's interest in the finality of its criminal judgments, as well as the public's interest in the orderly and reasonably prompt implementation of its laws. Requiring a prisoner to file his . . . challenge promptly helps ensure that possibly vital evidence will not be lost through the passage of time or the fading of memories. Timeliness rules also help to avoid the need to set aside final judgments of conviction when retrial would be difficult or impossible." (*Robinson v. Lewis* (2020) 9 Cal.5th 883, 900.)

California's timeliness rule requires that habeas corpus petitions be filed reasonably promptly and that petitioners explain and justify any significant delay in seeking habeas corpus relief. (*In re Reno* (2012) 55 Cal.4th 428, 459 (*Reno*).) Delay in seeking habeas relief is measured from the time a petitioner or his counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. (*In re Robbins* (1998) 18 Cal.4th 770, 780, 787 (*Robbins*).) A petitioner can avoid the untimeliness procedural bar by showing: (1) the absence of substantial delay; (2) good cause for the delay; or (3) that the claim falls within an exception to the untimeliness bar. (*Robinson*, *supra*, 9 Cal.5th at p. 898; *Robbins*, *supra*, 18 Cal.4th at p. 780.)

A claim previously raised and rejected on appeal cannot be re-raised in a subsequent habeas petition under the *Waltreus* bar. (*Reno*, *supra*, 55 Cal.4th at p. 481; *Waltreus*, *supra*, 62 Cal.2d at p. 225.)

B. Payne's Eighth Amendment claim is untimely and barred under *Waltreus*

It has been 28 years since Payne was sentenced in 1997. Such a lengthy delay bars Payne's Eighth Amendment claim on the ground that it is untimely. (See *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1 [this Court "assumed" that a delay of "almost a year and a half" was substantial requiring justification].)

Payne's claim is also barred under *Waltreus* because *Payne* raised this same contention on appeal twice, and the Fifth Appellate District rejected it both times. (See *Payne*, *supra*, 2024 WL 2120275, *15 [rejecting Payne's Eighth Amendment claim and finding that "[t]he [previous] appellate panel in Payne I [F026894] [also] unanimously rejected defendant's argument that his sentence 'violated California and federal constitutional prohibitions against cruel and unusual punishment'"].)

Even if this Court considers the claim on the merits, Payne's argument fails for the same reasons set forth recently by the Fifth Appellate District. It found that the previous appellate panel had rejected Payne's argument that his sentence violated California and federal constitutional prohibitions against cruel and unusual punishment after applying the factor test articulated in *In re Lynch* (1972) 8 Cal.3d 410. (*Payne*, *supra*,

2024 WL 212024, *15.) Accordingly, Payne has failed to state a prima facie case for habeas relief.

CONCLUSION

Based on the foregoing, the petition for writ of habeas corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS uses a 13 point Century Schoolbook font and contains 3,042 words.

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 12, 2024, at Sacramento, California.

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Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S287485**
Lower Court Case Number:

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