S279269

Case no. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE CEDRIC GREEN, PETITIONER

ON HABEAS CORPUS

PETITION FOR WRIT OF HABEAS CORPUS

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QUESTION PRESENTED

What is the standard to be applied by the Board of Parole Hearings ("BPH") in determining whether a person is suitable for parole?

This fundamental legal and constitutional question impacting thousands of people sentenced to life in prison has never been squarely addressed by any appellate court in California, leaving confusing and conflicting opinions below. *Compare In re Hunter*, 205 Cal. App. 4th 1529, 1536 (2012) (parole turns on "risk of future violence") *with In re Reed*, 171 Cal. App. 4th 1071, 1081 (2009) (rejecting that violence is critical to parole and holding that that parole turns on any potential "antisocial" outcome).

While many issues regarding parole have been litigated over the decades, the core question—who should get out of prison and who should remain—is not squarely answered in any California statute, court decision or regulation.[1] The result is

[1] As discussed below, the statutes and regulations that purport to establish a parole standard (Penal Code section 3041 and subsection (a) of section 2422 of title 15 of the California Code of Regulations) are internally inconsistent and vague.

arbitrary outcomes, conflicting rulings among lower courts, and a vague standard that violates Due Process according to *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson v. United States*, 576 U.S. 591 (2015).

INTRODUCTION

Earlier this year, the non-partisan Legislative Analyst Office published a report raising this precise concern. Cal. Leg. Analyst Report, "Promoting Equity in the Parole Hearing Process," Jan. 5, 2023, *available at* lao.ca.gov/Publications/Report/4658. According to the report, the laws governing California's parole process are poorly defined, resulting in "[a] level of discretion [that] could result in biased decisions." In 2020, the California Committee on Revision of the Penal Code issued a similar report, concluding that the statutes, regulations, and case law governing California's parole process are "vague and internally inconsistent." Cal. Comm. Rev. Pen. Code, Annual Report, 60 (2020). Even the highest executive officer of the Board of Parole Hearings has acknowledged that the laws controlling the state's parole process are "muddled." *Id.*

Here, the decision to deny parole to Petitioner Cedric Green reveals the arbitrariness—and ultimately the unconstitutional vagueness—of the rules governing California's parole process, particularly section 3041 of the California Penal Code and subsection (a) of section 2422 of title 15 of the California Code of Regulations.

Mr. Green is serving an indeterminate life sentence imposed under the Three Strikes law for a purse-snatch robbery he committed in 1997.

Mr. Green is currently fifty-six years old and housed at the Correctional Training Facility in Soledad. According to multiple recidivism risk assessments administered by prison officials, Mr. Green is a "low risk" to commit a new crime if released from custody. (Exhibit (hereafter "Ex.") A.) Mr. Green also has a perfect prison security Classification Score based on excellent in-prison behavior, years of positive programming, and lack of rule violations. (*Id*.) Nevertheless, Mr. Green was found unsuitable for parole by BPH on September 15, 2021. (Ex. B at 117-8.)

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FACTS AND PROCEDURAL BACKGROUND

A. Mr. Green's commitment offense and criminal history.

On September 18, 1997, Mr. Green approached a couple as they were leaving a restaurant for their car in Burlingame. (Ex. C at 135.) According to the victim, Mr. Green snatched her purse "with just enough [force] to detach it" from her hand. (*Id.*) The victim testified that she was not threatened or hit during the incident. (*Id.*) Mr. Green was convicted of robbery, in violation of Penal Code section 211, and sentenced to thirty-five years-to-life under the Three Strikes law. (*Id.*)

Mr. Green's prior "strikes" are two attempted robberies he committed in San Francisco in 1991 and 1993. *People v. Green*, Case no. A141549, 2015 WL 4035249, at *1 (Cal. Ct. App. June 30, 2015).

B. Mr. Green's parole hearing and the Board's denial.

Mr. Green's parole hearing was held virtually on September 15, 2021. (Ex. B.) He told commissioners that he accepted responsibility and was remorseful for his crimes and argued that his record of in-prison programming, lack of rule

violations, and extensive reentry plans demonstrated his suitability for parole. (*Id.*)

The District Attorney for San Mateo County opposed Mr. Green's release, but acknowledged that his commitment offense was minor: "[n]o one was injured, no weapon was used, [and] all of the property was recovered." (*Id.*)

The BPH commissioners stated that they found Mr. Green unsuitable for parole based on his addictive personality, demonstrated by his "involve[ment] with video games," and the "vicious[ness]" of his commitment offense. (*Id.*) The commissioners concluded:

> [Y]our actions were then, and are now deemed to be hateful vicious, and greedy. You and your crime partners drove to the area where the 79-year old victim was walking with her 81-year old husband. You exited the vehicle and grabbed her purse resulting in a loss of property. . . . The motive for the crime appears to be greed. The crime was carried out in a manner showing a disregard for human suffering. It was cruel, dispassionate, and certainly calculated…. [F]ortunately, the victim in this case wasn't hurt, but she was a 79-year-old woman that when you pull the purse away from her, she easily could have been pulled to the ground and it could have caused very serious injuries.

(*Id.*)

C. Mr. Green's social history.

Mr. Green was born in Soledad, California, the youngest of three siblings. He is currently fifty-six years old. He survived a traumatic childhood and tried to escape negative influences by joining the Navy in 1987. (Ex. D.) In the Navy, he suffered a head injury and was prescribed pain medication, which led to addiction and discharge from the military in 1988. (*Id.*)

Mr. Green was orphaned at eleven when his mother died of sudden cardiac arrest. Mr. Green's great-grandmother took care of him after that, but she died just before he finished high school. After completing high school, where he excelled as a basketball player, he attended community college. He has maintained a close relationship with his high school basketball coach, who supports his release. (Ex. E at 784.)

Mr. Green was exposed to drugs at an early age. Drug use was "part of the culture" at his high school. (*Id.* at 685.) His older brother became addicted to heroin and was later murdered. (*Id.*)

Mr. Green sought a reset by leaving Salinas for San Francisco to join the Navy at age nineteen. (*Id.*) He was stationed in Alameda when he was injured in a ship-board accident. Mr.

Green was prescribed painkillers, which triggered his addiction. His drug use resulted in a positive drug test and an "other-than-honorable" discharge. (Ex. D at 666.)

Mr. Green was subsequently employed as a chauffeur for Bauer's Limousine Service, where his boss praised his good work ethic. (Ex. E at 790.)

D. Mr. Green's risk to the community.

Prior to his parole hearing, prison officials administered at least three recidivism risk assessments on Mr. Green.

First, Mr. Green received the best-possible score ("1" or "low risk") on the California Static Risk Assessment ("CSRA"). (Ex. A.) The CSRA is an objective computer-based recidivism risk assessment tool developed by prison authorities and researchers at the University of California, which accounts for twenty-two risk-factors including criminal history, prior performance on parole, and age. (*Id*.) According to validation studies conducted by prison officials, the CSRA is very effective at predicting recidivism outcomes. *See* CDCR Office of Research, *Recidivism Report for Offenders Released from the California Department of Corrections and Rehabilitation in Fiscal Year 2014*, at 24 (2020).

Second, Mr. Green also received the best-possible score on the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") assessment, which evaluates prospective parolees for needs related to anger management, employment prospects, and "criminal personality." (*Id.*) COMPAS is a proprietary recidivism prediction model developed by a private company with which California authorities contracted to assess a person's preparedness for living in a community. *See* "Frequently asked Questions (FAQ)," *available at* https://www.cdcr.ca.gov/rehabilitation/faq/. COMPAS is administered by prison officials.

Third, Mr. Green was also interviewed by a CDCR psychologist. (Ex. E at 684.) The psychologist concluded that Mr. Green represented a high risk for committing a violent crime if released, primarily because of his history of addiction. (*Id.*)

E. Prison programming and employment.

Mr. Green has participated in a wide range of rehabilitative programing while incarcerated. He worked actively in Criminal and Gang Members Anonymous under the supervision of his sponsor Reverend D. Baptista, completing programming focused

on trust, recovery, addiction, and conflict resolution. (Ex. E at 740.) He participated in addiction and victim awareness gatherings and has received training certificates in healthcare facilities maintenance, chemical hazards, use of cleaning chemicals, and floor care. (*Id*. at 749.) Mr. Green was also a "dynamic force in leading/managing" the Veterans Support Group at Mule Creek State Prison, according to Kirk Goodman, the group's sponsor. (*Id*. at 734, 736.)

Mr. Green also has an excellent in-prison employment record. For thirteen years, he worked as a porter. (Ex. F.) This included work in a dental clinic, where he was praised by Dr. D. Kamminga, DDS, for his "admirable work ethic, his attention to detail, and his desire to do his job well and exceed expectations." Dr. Kamminga wrote that Mr. Green was "quick to lend a helping hand" and made "cleanliness a priority." (Ex. E at 733.)

Miguel Flores, who supervised Mr. Green's custodial work, praised his "excellent work ethic," "reliab[ility]," "communications and consideration," and "hard work and dedication." (*Id*. at 746.) Mr. Green also helped serve prisoners with disabilities by providing transportation aid. Prison staff praised Green for this

work, noting that he is a "diligent and responsible worker" and "has always been courteous and willing to help." (*Id*.)

F. Praise and support from prison officers and the community.

Mr. Green enjoys substantial support from corrections officers and others who have worked with him in prison. Dr. Kamminga wrote that Mr. Green "could be an asset to any institution or healthcare system" and "would earn many letters of recommendation from his past associates, employers, and friends." (*Id*. at 733.) Miguel Flores wrote that "[t]he level and demonstration of skills [Mr. Green] has displayed [as a custodial worker] would be marketable." (*Id*. at 746.) His supervisor for his transportation of prisoners with disabilities wrote that Mr. Green "would continue to provide a positive influence on society when BPH grants him parole." (*Id*.)

Mr. Green's teacher and high school basketball coach, Jim Rear, has also supported his release. He wrote in a letter that Mr. Green has remained in close contact through the duration of his incarceration, writing monthly letters and calling often. Mr. Rear wrote that Mr. Green is "a changed man and regrets his previous

crimes," and that "I'm always available to help him upon his release." (*Id.* at 677.)

G. Mr. Green's prison disciplinary conduct.

Mr. Green's preliminary prison security Classification Score—which reflects each inmate's overall prison behavior—is "zero," the best-possible score. (Ex. A.) His score is automatically adjusted up to nineteen because he is serving a life sentence. (*Id.*) A score of nineteen is the lowest- and best-possible Classification Score for a person serving a life sentence.

The Classification Score is used by the Department of Corrections and Rehabilitation to account for a prisoner's positive and negative prison behavior and is "the best predictor" of misconduct. California Dept. of Corrections and Rehab., *Expert Panel Study of the Inmate Classification Score System*, at 10 (Dec. 2011). Points are added to an inmate's score for negative behavior, such as rule violations. Cal. Code Regs. tit. 15, § 3375.4. More serious violations merit more points. *Id.* Conversely, points are subtracted from a prisoner's Classification Score for prolonged periods of positive behavior, such as rehabilitative programming. *Id.*

During Mr. Green's twenty-five years of incarceration, his most serious rules violation was "conspiracy to possess alcohol," which he committed over ten years ago, in 2012. (Ex. E at 692.) In 2020, he received another rules violation report for using a prison tablet to play video games that were not authorized by the prison. (*Id*.)

Despite these violations, Mr. Green's Classification Score was as low as it could be (zero, adjusted to nineteen) at the time of his parole hearing. (Ex. A.)

H. Mr. Green's release plans.

Mr. Green submitted detailed release plans to the parole commissioners, including letters from three rehabilitation facilities granting him admission, employment plans, and details regarding his strategies for managing substance use disorder. (Ex. E at 760.)

Mr. Green developed a "Parole Action Plan," expressing his desire to participate in long-term residential treatment upon his release, engage in AA and NA programming, acquire a commercial driver's license, and pursue employment. (*Id*.) He also produced a detailed "Anger Management Plan" to help him

continue to "understand the correct way to respond to any situation that arises." (*Id*.)

TIMELINESS

The Board's decision denying Mr. Green parole became final on January 13, 2022. (Ex. B.) Despite his limited education, indigent status, and lack of access to legal materials, Mr. Green has been diligently seeking relief under various claims in this in the Superior Court and Court of Appeal with support from undersigned pro bono counsel.

Since his parole denial, Mr. Green has litigated separate claims regarding his eligibility for resentencing under Penal Code section 1170.91(b) and the legality of his current sentence under new Court of Appeal authority. Mr. Green also unsuccessfully litigated issues raised in this petition in San Mateo Superior Court (*See* San Mateo Superior Court Case number SC 041613A / HC-3053) and the First District Court of Appeal (*See* Case no. A167033).

Because Mr. Green has been diligently pursuing his rights, this petition is filed without substantial delay. *See In re Robbins*, 18 Cal. 4th 770, 780 (1998). Moreover, any delay is also with

"good cause" because Mr. Green is challenging the Constitutional validity of the parole rules underlying his continuing confinement. *Id.* at 781 (holding that sentencing under "invalid statute" always amounts to good cause to excuse substantial delay).

ARGUMENT

I. CALIFORNIA'S PAROLE STANDARD CONFLICTS WITH CONTROLLING STATUTES AND VIOLATES DUE PROCESS

The United States Supreme Court established in *Johnson v. United States*, 576 U.S. 591, 597 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018), a two-part test to determine if a statute aimed at determining a person's dangerousness is insufficiently defined, in violation of the Due Process Clause.[2]

As discussed below, the statutes, regulations, and case law defining California's parole scheme violates this two-part test and

[2] In *Swarthout v. Cooke*, 562 U.S. 216, 221 (2011), the Court held that California prisoners have a liberty interest in parole protected by the Due Process Clause. *See also In re Shaputis*, 53 Cal. 4th 192, 211 (2011); *In re Lawrence*, 44 Cal. 4th 44 Cal. 4th 1181, 1205 (2008).

creates a legal standard that is even more amorphous and "vague" than the statutes invalidated by the Court in *Johnson* and *Dimaya*.

A. Penal Code section 3041 governs the parole process.

Penal Code section 3041(b)(1) contains the statutory language governing BPH suitability determinations.[3] It provides:

> [BPH] shall grant parole to an inmate 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.

There is no other statutory language governing the parole suitability decision. The paucity of legislative direction is problematic for several reasons.

First, Penal Code section 3041(b)(1) appears to confine the parole suitability decision to a potential parolee's criminal history only—excluding consideration of prison behavior or reentry plans. In particular, the statute directs that BPH "shall grant

[3] Section 3041(a)(2) provides additional instructions, namely that commissioners "shall normally grant parole" at parole hearings.

parole" unless "the timing and gravity of current or past convicted offense or offenses" indicates a risk to public safety. *Id.* Under a plain reading of the statute, parole depends on "the timing and gravity of current or past convicted offense or offenses" alone and cannot be denied on the basis of other factors, such as in-prison behavior, social history, or post-release plans.[4] *See Blankenship v. Allstate Ins. Co.*, 186 Cal. App. 4th 87, 94 (2010) ("By long-standing rule of statutory construction, the Legislature's omission of a term in a list of terms indicates the Legislature did not intend to include the omitted term."); *Kunde v. Seiler*, 197 Cal. App. 4th 518, 531 (2011) ("[I]f a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others. . . It is an elementary rule of construction that the expression of one excludes the other.").

[4] This statutory language seems to contradict BPH regulations (discussed below), which specifically instruct commissioners to base suitability determinations on extrinsic factors. *See* Cal. Code Regs. tit. 15, § 2281. BPH commissioners here explicitly told Mr. Green: "[I]t's no longer the crime that's keeping you in prison. It's your in-prison behavior that's keeping you in prison." (Ex. B at 122.)

Second, the Penal Code appears to include a presumption favoring parole. Penal Code section 3041(a) directs that BPH "shall normally grant parole." Yet that presumption is not reflected in BPH regulations or practice. *See* Comm. Rev. Pen. Code, Annual Report at 58-60 (2020) (noting that BPH grants parole in approximately twenty percent of cases even though over eighty percent of parolees are considered "low risk" by prison risk evaluations).

Third, the legislature eliminated language authorizing BPH to set parole suitability standards in 2015. According to this Court, BPH is empowered by Penal Code section 3041(a) to establish parole suitability criteria. *In re Vicks*, 56 Cal. 4th 274, 294 (2013). But in 2015, the legislature amended Penal Code section 3041(a) and deleted the language authorizing BPH to set suitability criteria. *See* Penal Code § 3041(a); Senate Bill (SB) 230 (Hancock, 2015). No court has addressed the validity of BPH regulations following SB 230. *See* Cal. Gov't Code § 11342.1 (agency regulations must "be within the scope of authority conferred [by the legislature].")

B. Title 15, section 2281 provides BPH rules for applying Penal Code section 3041.

The most detailed directions controlling parole hearings are provided in section 2281 of title 15 of the California Code of Regulations. Section 2281(a) provides that parole shall be denied if the potential parolee poses an "unreasonable risk of danger to society if released from prison."[5] Cal. Code Regs. tit. 15, § 2281(a).

Section 2281(b) specifies the evidence BPH must consider in making a parole determination, including: the prisoner's social history, criminal history, present mental state, behavior while incarcerated, past and present attitude, "and any other information which bears on the prisoner's suitability for release." Cal. Code Regs. tit. 15, § 2281(b).[6]

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[5] Note this language is slightly different from the language in Penal Code section 3041(b), which provides that parole should be denied if "consideration of the public safety" requires continued incarceration. The California Supreme Court has added a third way to pose the question, indicating that parole should be denied if the potential parolee might engage in "antisocial acts" if released. *In re Rosenkrantz*, 29 Cal. 4th 616, 655 (2002).

[6] As noted, this regulation appears to exceed the legislative direction in Penal Code section 3041(b)(1), which states that parole depends on the potential parolee's criminal history.

Section 2281(c) enumerates factors "tending to show unsuitability for release," including: if the prisoner's commitment offense was "heinous, atrocious, or cruel," if the prisoner engaged in "sadistic sexual offenses," if the prisoner has severe mental problems, and if the prisoner engaged in "serious misconduct" while incarcerated. Cal. Code Regs. tit. 15, § 2281(c).

Section 2281(d) enumerates factors "tending to show suitability for release," including: if the prisoner has no juvenile criminal history, if the prisoner has a stable social history, if the prisoner expressed signs of remorse, if the prisoner lacks a significant history of violence, if the prisoner has realistic plans for community reentry, and if the prisoner followed prison rules. Cal. Code Regs. tit. 15, § 2281(d).

C. California courts are split on interpreting the parole standard.

California courts have attempted to synthesize the parole suitability regulations and Penal Code instructions into a coherent standard.

In *In re Rosenkrantz*, 29 Cal. 4th at 655, this Court interpreted Penal Code section 3014 and held that BPH was instructed "to predict by subjective analysis whether the inmate

[would] be able to live in society without committing additional antisocial acts." *See also Vicks*, 56 Cal. 4th at 295 (reiterating the "antisocial acts" standard).

In *In re Reed*, 171 Cal. App. 4th 1071, 1082 (2009), the Court of Appeal interpreted the "antisocial acts" standard to go beyond whether a potential parolee poses a risk of committing a new crime if released. *Reed* holds that BPH is instead to determine if a prospective parolee would be in any way "antisocial" if released in ways that do not amount to crimes, including having ability to maintain regular employment. *Id.*

By contrast, the Court of Appeal in *In re Hunter*, 205 Cal. App. 4th 1536, 1544 (2012), states that the ultimate question before BPH is whether there is "risk of future violence" if the prospective parolee is released.

Thus, there appears to be some disagreement among courts of appeal as to what precisely BPH is to decide at parole suitability hearings.

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D. California's parole rules violate due process and the U.S. Supreme Court decisions in *Johnson* and *Dimaya*.

In *Johnson* and *Dimaya*, the U.S. Supreme Court established a two-part test to determine if a statute is sufficiently defined, in accordance with the Due Process Clause.[7] The two-part test provides that a statute is unconstitutionally vague if it fails to specify (1) what activity the legislature seeks to avoid *and* (2) what level of risk of that activity is tolerable. *Johnson*, 576 U.S. at 597; *Dimaya*, 138 S. Ct. at 1223.

Both *Johnson* and *Dimaya* held that legislatures have broad discretion for determining risk of dangerousness and risk, but that the combination of these two imprecise factors invites "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 592; *Dimaya*, 138 S. Ct. at 1216.

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[7] In *Swarthout v. Cooke*, 562 U.S. 216, 221 (2011), the Court held that California prisoners have a liberty interest in parole protected by the Due Process Clause. *See also In re Shaputis*, 53 Cal. 4th 192, 211 (2011); *Lawrence*, 44 Cal. 4th at 1205.

(1) What activity does the legislature seek to avoid?

The first part of the *Johnson* and *Dimaya* test asks whether the activity targeted by the legislature is sufficiently defined.

As here, both *Johnson* and *Dimaya* involved criminal risk evaluations. In both cases, the first question was whether the individual's criminal activity constituted "violence." *Johnson*, 576 U.S. at 593 (discussing 18 U.S.C. § 924(e)(2)(B)(ii)); *Dimaya*, 138 S. Ct. at 1211 (discussing "18 U.S.C. § 16(b)).

The problem identified by the Court was that federal law required courts to imagine the "ordinary case" of a given statute to see if the crime constituted "violence." *Johnson*, 576 U.S. at 597; *Dimaya*, 138 S. Ct. at 215. In *Johnson*, 576 U.S. at 597, Court complained that this standard was untenable: "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"

Here, the problem is not the abstraction caused by the "ordinary case" analysis discussed in *Johnson* and *Dimaya*. Instead, the issue is that the activity targeted at BPH hearings is

impossibly broad. As noted, this Court has repeatedly interpreted the statutes and regulations governing BPH determinations to provide that the question before BPH is whether a potential parolee will commit "antisocial acts" if released. *Rosenkrantz*, 29 Cal. 4th at 655; *Vicks*, 56 Cal. 4th at 295.

This standard is impossible to define and is far broader and more amorphous than the question of what constitutes an "ordinary case" risking violence in *Johnson* and *Dimaya.* For example, in *Reed*, the Court of Appeal held that unemployment is "antisocial." 171 Cal. App. 4th at 1081. The Court held further than BPH is not merely evaluating risk of committing a new crime. *Id.* What then constitutes an "antisocial act"? If unemployment is "antisocial" what about homelessness, poverty, or rude behavior?

But the difficulty in defining "antisocial acts" does not alone not make the scheme unconstitutionally vague. *See Johnson*, 576 U.S. at 598*; Dimaya*, 138 S. Ct. at 1215. The "level of risk" must also be ill-defined. *Id.*

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(2) How much risk?

The second prong of the two-part test in *Johnson* and *Dimaya* asks whether "the level of risk" is sufficiently defined. *Johnson*, 576 U.S. at 598*; Dimaya*, 138 S. Ct. at 1215.

In *Johnson*, the level of risk was defined by statute as "serious potential risk." 576 U.S. at 598. In *Dimaya*, the level of risk was defined by statute as "substantial risk." 138 S. Ct. at 1214. In both cases, the Court held that these levels of risk were imprecise. *Johnson*, 576 U.S. at 592; *Dimaya*, 138 S. Ct. at 1216. And when the imprecise levels of risk were combined with the amorphous targeted activities, the result "create[d] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 592; *Dimaya*, 138 S. Ct. at 1216.

Here, the question is whether a potential parolee's release creates an "unreasonable risk" of antisocial acts. Cal. Code Regs. tit. 15, § 2281(a). This standard is no more discernable than the "serious potential risk" or "substantial risk" language that the Supreme Court found problematic in *Johnson* or *Dimaya*. If anything, California's "unreasonable risk" standard invites even more unpredictability and arbitrariness than those invalidated in

Johnson or *Dimaya*. The terms "substantial" and "serious" (from the federal statutes) indicate a level objectively "considerable in extent" or "weighty." *See* "Substantial," Black's Law Dictionary (11th ed. 2019); "Serious," Black's Law Dictionary (11th ed. 2019). On the other hand, the term "unreasonable" in California's BPH standard invites the adjudicator's subjective assessment. One BPH commissioner might think that a twenty-five percent risk is "unreasonable." Another might deem *any* level of risk unreasonable.

In sum, the constellation of statutory law, regulations, and case law that controls BPH's suitability determinations fails the two-part test established by the Supreme Court in *Johnson* and *Dimaya*. First, the object of risk to be avoided—"antisocial acts" or "danger to society"—is just as uncertain as the "ordinary case" standard scrutinized by the Supreme Court in *Johnson* and *Dimaya*. Second, the amount of risk—"unreasonable risk"—is also equal to the federal standards from *Johnson* and *Dimaya*.

Therefore, as in those Supreme Court cases, it is the combination of the two amorphous standards "unreasonable risk"

of "antisocial acts" or "danger to society" that creates more uncertainty and arbitrariness than due process permits.

For this reason, the BPH determination in Mr. Green's case should be reversed.[8]

II. THE BOARD'S DECISION THAT MR. GREEN WAS UNSUITABLE FOR PAROLE LACKED EVIDENCE ESTABLISHING CURRENT DANGEROUSNESS

A. The decision finding Mr. Green unsuitable for parole exemplifies the arbitrariness of the BPH process.

As noted, Mr. Green's commitment offense was a purse-snatch robbery in 1997. Mr. Green was not armed, and he did not touch or threaten his victim. (Ex. C.) At trial the victim testified that Mr. Green snatched her purse "with just enough [force] to detach it" from her hand. (*Id.*) All of her property was returned. (*Id.*) Mr. Green's prior "strike" felonies were two attempted robberies he committed in 1991 and 1993. *People v. Green*, Case No. A141549, 2015 WL 4035249, at *1 (Cal. Ct. App. June 30, 2015). Thus, on its face, Mr. Green has one of the least violent

[8] The Superior Court did not address this claim when it denied Mr. Green's habeas petition. (Ex. G.)

criminal histories necessary to trigger at life sentence in California, if not the entire country.

Even the BPH panel that found Mr. Green unsuitable for parole conceded, "it's no longer the crime that's keeping you in prison. It's your in-prison behavior that's keeping you in prison." (Ex. B at 122.)

Yet this explanation is undermined by Mr. Green's in-prison behavior. He has a perfect prison Classification Score—zero points (Ex. A)—which prison officials use to track incarcerated people's positive and negative behavior. A prisoner's Classification Score is calculated by prison officials, summarizing overall prison behavior, accounting for the inmate's age at first arrest, gang membership, prior incarcerations, behavior during current term, participation in work, and educational programs, and the seriousness of the current conviction. *See* Cal. Code. Regs. tit. 15, § 3375. Points are added to a prisoner's score for rule violations, and points are subtracted for periods of no serious disciplinary infractions as well as for periods of average or above average in work, school, or vocational programs. *Id.* at § 3372. Courts have consistently held that low Classification Scores are

indicative of an inmate's suitability for release. *See In re Morales*, 212 Cal App. 4th 1410, 1414 (2013); *In re Gaul*, 170 Cal. App. 4th 20, 24 (2009); *In re Ramirez*, 94 Cal. App. 4th 549, 555 (2001); *In re Stoneroad*, 215 Cal. App. 4th 596, 605 (2013) ("[A] classification score of 19 indicat[es] a very low security risk") (punctuation omitted).

Mr. Green's Classification Score is the lowest- and best-possible score for an inmate with a life sentence. And despite concerns raised by BPH about his addictive behavior, Mr. Green never had a rule violation for drug or alcohol possession or use while in prison, and never failed a random drug test, to which he was subject for his entire period of incarceration. *See* Cal. Code Regs. tit. 15, § 3290(c)-(e). Mr. Green also had the best-possible recidivism risk scores on the California Static Risk Assessment and COMPAS needs assessment, both administered by prison officials. (Ex. A.)

The BPH panel also acknowledged that Mr. Green was over fifty years old, and thus at a lower risk of recidivism, *see In re Stoneroad*, 215 Cal. App. at 633-34, n.12 (noting that recidivism rate of fifty-year-olds is "due to their age . . . infinitesimal"); that

he has physical ailments that require treatment, orthopedic shoes, and a knee brace "that probably makes you less mobile than you were twenty-four years ago;" and that his reentry plan was "good." (Ex. B at 123.)

The BPH panel explained that it nonetheless found Mr. Green unsuitable for parole because:

> We believe that you lack the necessarily understanding of the connection between your choices and criminal thinking. And why we say that is you seemed to have an issue, uh, with addictive behavior[.]

(*Id*.) The panel stressed that Mr. Green engaged in addictive, rule-breaking behavior—playing unauthorized video games—within nine months of his parole hearing, which was crucial to its decision:

> And that's the problem. . . . You really have to look at yourself and say, why am I doing this, am I self-sabotaging, because getting [rule violations] just close to a Board hearing almost seems like self-sabotage and is there some part of you that's afraid to succeed.

(*Id*. at 121.)

Despite its overriding concerns about his playing video games, the BPH panel never acknowledged that Mr. Green had zero rule violations for drug or alcohol use in over twenty years behind bars. Nor did the panel lay out any methodology in determining Mr. Green's risk or indicate what kind of "danger to the society" it believed Mr. Green would pose if released. The BPH panel spoke in generalities that could apply to any person and were impossible to refute, including its impression that Mr. Green lacked "tools and control to be able to keep [himself] from participating in the activities that resulted in the loss of freedom" which continued to indicate the absence of a "deeper understanding." (*Id.*)

As Mr. Green's case demonstrates, the regulations provide the Board with untrammeled discretion in their decision-making (*see Dimaya*, 138 S. Ct. at 1212), and preclude reasoned or consistent court review (*see Johnson*, 576 U.S. at 594).

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B. The Board's account of Mr. Green's commitment offense is a rote recitation of BPH regulations meant to apply to "execution-style murder."

While stating that Mr. Green's robbery was "not the crime of the century," the BPH panel nonetheless concluded that his crime was "cruel, dispassionate, and certainly calculated." (Ex. B at 122.)

This is a rote recitation of section 2281(c) of title 15 of the California Code of Regulations, which provides an unsuitability factor ("cruel . . . dispassionate and calculated")—except that the panel left out the example of what would qualify as "cruel . . . dispassionate and calculated" provided by the regulations, which is: "an execution-style murder." Cal. Code Regs. tit. 15, § 2281(c)(1)(B).

"Mere recitation of the circumstances of the commitment offense absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." *Lawrence*, 44 Cal. 4th at 1227. Because nearly *any* crime has some degree of potential to cause serious harm, allowing denial for this reason would license parole decisions that are "arbitrary and capricious, thereby

depriving the prisoner of due process of law." *Rosenkrantz*, 29 Cal. 4th at 657.

C. The Board relied on other facts in the record not rationally related to current dangerousness.

As noted, controlling statutes provide that BPH "shall normally grant parole," Penal Code section 3041(a), and must focus on a potential parolee's commitment offense and criminal history if denying parole, Penal Code section 3041(b). Still, *Lawrence* allowed that an offense, "when considered in light of other facts in the record," might sometimes provide some evidence for denial even "many years after commission of the offense." 44 Cal. 4th at 1221. This standard does not ask much. But the Board must still expound *some* factor "rationally indicative of the inmate's current dangerousness." *Shaputis*, 53 Cal. 4th at 219. It did not do so here.

(1) Mr. Green's past substance abuse and addiction.

The BPH panel's reliance on Mr. Green's past addiction is not some evidence of current dangerousness. In *In re Morganti*, 204 Cal. App. 4th 904 (2012), the Court of Appeals rejected the Board's denial of parole on the basis of Morganti's "inadequate

insight into his drug abuse." *Id.* at 918; *see also In re Smith*, 109 Cal. App. 4th 489, 505 (2003) ("[A] prisoner's prior addiction is not an appropriate consideration in determining parole suitability.")

Like Mr. Green, drug abuse by the petitioner in *Morganti* was a "causative factor in the commission of his crime," 204 Cal. App. 4th at 925, and he was "clean and sober for a substantial period of time" when he appeared before the Board (*id.* at 928). The Board denied parole anyway, claiming that "sobriety in a highly controlled and structured milieu such as prison does not necessarily generalize to the free community," (*id.* at 910), and that Morganti's "relapse prevention plan," which involved his Catholic upbringing and commitment to AA's twelve-step values was inadequate. *Id.* at 910, 912. Reversing the Board, the court held that "the fact that an inmate 'used drugs extensively more than 20 years ago does not by itself represent some evidence that he is currently dangerous.'" *Id.* at 927 (quoting *Smith*, 114 Cal. App. 4th at 371); *see also In re Cerny*, 178 Cal. App. 4th 1303, 1312 (2009) ("As the negative factors . . . relied upon by the Board to deny [petitioner] parole were all due to his drug abuse, [which]

cannot . . . provide evidence that he would pose a current danger to the public if released to parole.").

Here, the Board premised its denial on Mr. Green's past addiction and failure—more than twenty-five years ago—to complete a two-year rehabilitation program. (Ex. B at 119.) The panel denied parole on this basis despite Mr. Green's lack of drug test violations, commitment to continuing participation in Alcoholics Anonymous and Narcotics Anonymous programs (*Id.*) and his plans to enter a residential rehabilitation facility upon release. These factors were not present in *Morganti*. *See* 204 Cal. App. 4th at 909. In sum, the Board's reliance on Mr. Green's past drug use is pure speculation, not evidence of dangerousness. "While there is evidence that he used drugs and abused alcohol at the time of the [crime], a prisoner's prior addiction is not an appropriate consideration in determining parole suitability." *In re Smith*, 109 Cal. App. 4th 489, 505 (2003). Risk of "relapse, which can never be entirely eliminated, cannot of itself warrant the denial of parole." *Morganti*, 204 Cal. App. 4th at 921.

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(2) Mr. Green's prison conduct.

The Board's consideration of Mr. Green's prison conduct is no more availing. "Not every breach of prison rules provides rational support for a finding of unsuitability." *In re Perez*, 7 Cal. App. 5th 65, 94 (2016) (quoting *In re Hunter*, 205 Cal. App. 4th 1529, 1543 (2012)).

Any "serious misconduct while in prison," Cal. Code Regs. tit. 15, section 2402(c)(6), is far in Mr. Green's past, as indicated by his current Classification Score of zero (adjusted to the mandatory minimum of nineteen because he is serving a life term). *See In re Stoneroad*, 215 Cal. App. 4th 596, 605 (2013) (relying on a Classification Score of nineteen as reflecting positive in-prison behavior); *In re Gaul*, 170 Cal. App. 4th 20, 24 (2009) (relying on a decreasing Classification Score to overturn a BPH unsuitability determination).

The BPH commissioners extensively discussed Mr. Green's use of a tablet to play video games, as well as his involvement in a weekend football betting pool for which he did not receive any discipline. (Ex. B at 117.) In denying parole, the Commissioner opined that Mr. Green was "addicted to criminal behavior"

because he was "involved with gambling" and "involved with video games." (*Id.*) These rule violations and prison behaviors, however, fall far short of the threshold of "evidence indicating a rational nexus between . . . misconduct and . . . a current danger to public safety," *Perez*, 7 Cal. App. 5th at 96. Conduct which hundreds of millions of Americans peacefully take up every year is not evidence of "antisocial acts"—in fact, perhaps the opposite, *see* Todd Spangler, *Number of U.S. Video Gamers Hits 227 Million, and Most Say They've Played More During COVID: ESA Study*, Variety (Jul. 13, 2021); Will Hobson, *Bracket Pools' Popularity Illustrates NCAA's Struggle with Sports Gambling*, Wash. Post (Mar. 14, 2015). There is simply "no indication" in Mr. Green's "record that he poses a threat to others." *In re Aguilar*, 168 Cal. App. 4th 1479, 1491(2008).

D. The Board's determination that Mr. Green "lack[ed] the necessary understanding" of his choices was without basis in fact or rational connection to current dangerousness.

Without evidence to deny parole on account of Mr. Green's commitment offense or other factors, BPH commissioners were left to rely on their determination that he "lack[ed] the

necessar[y] understanding of the connection between [his] choices and criminal thinking." (Ex. B at 117.)

Courts have resisted the Board's flexible application of "insight" or "understanding," "not[ing] that an inmate's lack of insight has taken the place of the heinous nature of the commitment offense as a standard reason to deny parole, 'so much so that it has been dubbed the 'new talisman' for denying parole.'" *In re Shelton*, 53 Cal. App. 5th 650, 666 (2020) (quoting *Perez*, 7 Cal. App. 5th at 86). Accordingly, decisions that hinge on "insight" and "understanding" are scrutinized to ensure they are (1) "based on a factually identifiable deficiency in perception or understanding" and (2) "that the deficiency by itself or together with the commitment offense has some rational tendency to show that the inmate currently poses an unreasonable risk or danger." *Perez*, 7 Cal. App. 5th at 86 (quoting *In re Ryner*, 196 Cal. App. 4th 533, 548-49 (2011)). Neither is the case here.

The Board found Mr. Green lacked the requisite understanding solely based on his use of drugs leading up to his commitment offense and his rules violation for playing videogames during the COVID-19 pandemic. (Ex. B at 117.) But

these factors fall away against "the full record." *In re Prather*, 50 Cal. 4th 238, 253 (2010) (citing *Lawrence*, 44 Cal. 4th at 1214); *see also Perez*, 7 Cal. App. 5th at 86 (reaffirming that a lack of insight must be "based on a factually identifiable deficiency in perception or understanding") (citation omitted). Mr. Green submitted a narrative to the board detailing his understanding of the causes of his offense more than two decades ago, writing:

> I masked my feelings by the use of drugs and alcohol. I hid behind these substances to numb my true emotions and feelings. . . . As a result, I became a daily drug user and a petty thief, a common street criminal, I preyed on the elderly, the weak and unsuspecting, those who would provide the least resistance to validate my tormented sense of importance and self worth.

(Ex. E at 768.) He reflected in detail on how his perspective has shifted over the intervening years, and his ability to now "recognize my stressors, shortcomings and pains, and how to process them into actions and good deeds." (*Id.*) Mr. Green also wrote letters of apology to his victims. (*Id.*) His statements to the board echoed these written submissions. He described how his heightened emotional acuity allowed "insight on maybe where I

went wrong at in life," and informed his work on behalf of crime victims. (*Id.*). And he apologized to his victim, recognizing that he could not "justify" his actions. (*Id.* at 771.) *See Lawrence*, 44 Cal. 4th at 1222 (noting that a petitioner "expressed deep remorse" as a factor in overturning a denial of parole); Cal. Code Regs. tit 15, § 2281(d)(3) (indicating that "signs of remorse" indicate suitability for parole).

Yet BPH insisted that despite having spent close to half of his life in prison, his years of sobriety, countless hours of employment and programming and training, and a demonstration of heartfelt remorse for his past wrongs, Mr. Green just hadn't done enough. He might, the Board maintained, achieve a "deeper understanding" with more programming, because his "present mental state" is "similar" in some way to his past state. (Ex. B at 118.) This flies in the face of reason and contradicts the law; the Board's reasoning could be used to support denial in every case. While perfect insight "has long been recognized as a worthy goal," no one "can ever fully comprehend the myriad circumstances, feelings, and current and historical forces that motivate conduct." *Ryner*, 196 Cal. App. 4th at 548.

The Board's reliance on this impossible standard reflects the absence of any justification for its decision. There is simply no evidence Mr. Green has not done *enough*: "[U]ndisputed evidence shows that" Mr. Green "has acknowledged the material aspects of his . . . conduct and offense, shown an understanding of its causes, and demonstrated remorse." *Id.* at 549. "[T]he [Board's] mere refusal to accept such evidence is not itself a rational or sufficient basis upon which to conclude that the inmate lacks insight, let alone that he or she remains currently dangerous." *Id.*

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Green's Petition for Writ of Habeas Corpus and reverse the finding by BPH that he is unsuitable for parole.

Dated: March 27, 2023

Respectfully submitted,

THREE STRIKES PROJECT
Stanford Law School
Attorneys for Petitioner

By: /s/ Michael S. Romano
Michael S. Romano
CA Bar number 232182

VERIFICATON

I, MICHAEL S. ROMANO, declare under penalty of perjury that I am counsel for petitioner Cedric Green in his Petition for a Writ of Habeas Corpus. My business address is 559 Nathan Abbott Way, Stanford, CA, in Santa Clara County.

I am making this verification on Mr. Green's behalf because he is incarcerated out of county and because these matters are more within my knowledge than his.

I have read the Petition for a Writ of Habeas Corpus and declare that the contents of the petition and reply are true to the best of my knowledge.

Dated: March 27, 2023

/s/ Michael S. Romano
Michael S. Romano

CERTIFICATE OF WORD COUNT

As required by to Rule 8.204(c)(1) of the California Rules of Court, I certify that this Petition contains 8,293 words as calculated by the Microsoft Word word processing program.

s/ Michael S. Romano

PROOF OF SERVICE BY MAIL

People v. Green, Case no.

I, CAITLIN ANDERSEN, declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is 559 Nathan Abbott Way, Stanford, CA, in Santa Clara County.

On March 27, 2023, I served the foregoing **PETITION** to the Office of the Attorney General of the State of California using the TrueFiling electronic filing system to the Office of the Attorney General at sacawttruefiling@doj.ca.gov.

On March 27, 2023, I served the foregoing **PETITION** by depositing copies in the United States mail at Stanford, California, with postage prepaid thereon, and addressed as follows:

Board of Parole Hearings
PO Box 4036
Sacramento, CA 95812-4036

San Mateo County DA
400 County Center
3rd Floor
Redwood City, CA 94063

Cedric Green, CDCR no. K93505
Correctional Training Facility
P.O. Box 689
Soledad, CA 93960

Dated: March 27, 2023

/s/ Caitlin Andersen
Caitlin Andersen

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In re Cedric Green**
Case Number: **TEMP-62NMHLXO**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **schampion@law.stanford.edu**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR WRIT OF HABEAS CORPUS	[BPH Habeas_Supr Ct (Green)]

Service Recipients:

Person Served	Email Address	Type	Date / Time
Attorney General's Office	sacawttruefiling@doj.ca.gov	e-Serve	3/27/2023 9:31:21 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

3/27/2023
Date

/s/Susan Champion
Signature

Champion, Susan (295598)
Last Name, First Name (PNum)

Three Strikes Project
Law Firm