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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re RICHARD SCHOENFELD on
Habeas Corpus.

A131917

Petitioner Richard Schoenfeld (Schoenfeld) challenges the determination of his parole release date by the Board of Parole Hearings (the Board) under regulations applicable to the indeterminate sentencing law (ISL) (former Pen. Code, § 1168, repealed eff. Jan. 1, 1977¹). (Former Cal. Admin. Code, tit. 15, § 2100 et seq. [Prior Board Rules or PBR].) Over 34 years ago, Schoenfeld pleaded guilty to 27 counts of kidnapping for ransom in the notorious Chowchilla mass kidnapping case. He was 23 years old at the time of his crimes, and was sentenced under the then-existing ISL and Youthful Offender Act (former § 1202b, repealed by Stats. 1976, ch. 1139, § 274, eff. July 1, 1977). In accordance with those laws, Schoenfeld was ultimately sentenced by the superior court to 27 life terms, running concurrently, with eligibility for parole to be considered after a minimum of six months. The sentencing court recommended nine years as an appropriate time to serve for a youthful offender. Over the next three decades, on 19 occasions the Board found him not suitable for parole, in large part because of the seriousness of his offenses.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

At Schoenfeld's 20th parole hearing in 2008, the Board found he "would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison," and was therefore suitable for release on parole. While again acknowledging the seriousness of his crimes, and after carefully reviewing the record of Schoenfeld's 31-year tenure in prison, the Board found Schoenfeld had accepted full responsibility for his crimes, and over his many years in prison had, among other positive conduct, earned his Associate of Arts and Bachelor of Science degrees, consistently received exceptional work reports, and successfully participated in a multitude of counseling programs, including peer counseling and alternatives to violence. In addition, no recent disciplinary actions had been taken against him, he had no prior criminal history, and he presented solid, realistic parole plans. The Board therefore found him rehabilitated and suitable for parole. After later considering whether to rescind its parole suitability decision, the Board again found Schoenfeld suitable for release on parole.

Because Schoenfeld's crimes were committed while the ISL was in effect, the Board had to determine the period of his confinement in prison under both the ISL Prior Board Rules and the regulations applicable to the subsequently enacted determinate sentencing law (DSL). The shorter term had to be applied to Schoenfeld. (*In re Stanworth* (1982) 33 Cal.3d 176, 188.) While the Board determined his period of confinement under the DSL regulations, it did not do so under the ISL Prior Board Rules until Schoenfeld filed a petition for writ of habeas corpus, which this court granted. (See *In re Schoenfeld* (Aug. 4, 2010, A127680 [nonpub. opn.].) The Board then set a "total" ISL period of confinement of 45 years 4 months, which included the maximum period under the Prior Board Rules matrix for the crimes, plus a two-year upward adjustment for each of the remaining 26 counts of which he had been convicted.

In the instant writ proceeding, Schoenfeld challenges the Board's determination of his ISL period of confinement on several grounds, one of which is that the upward adjustment was not permissible under the ISL Prior Board Rules. Following our order to show cause, the return and traverse framed no disputed factual issues. (*People v. Romero* (1994) 8 Cal.4th 728, 738; *In re Hochberg* (1970) 2 Cal.3d 870, 873–874, fn. 2.) Having

heard oral argument, we now agree with Schoenfeld that in upwardly adjusting his period of confinement the Board did not set his parole release date in accordance with the governing Prior Board Rules. Those adjustments must be stricken as a matter of law, and Schoenfeld's base period of confinement has run. We therefore grant Schoenfeld's petition for writ of habeas corpus.

STATEMENT OF FACTS AND PROCEDURAL HISTORY²

In 1977, Schoenfeld, his older brother James Schoenfeld, and Frederick Woods each entered pleas of guilty to 27 counts of kidnapping for ransom (§ 209), while reserving the right to contest the disputed allegations of bodily harm in a bifurcated proceeding before the trial court without a jury. Following a contested hearing the court decided that the kidnap victims named in three of the 27 charged counts (counts three, five, and seven) suffered "bodily harm," and sentenced all three defendants to terms of life imprisonment on each of the 27 counts of kidnapping, but without possibility of parole as to three of the counts found to involve "bodily harm," the sentences to be served concurrently. (*People v. Schoenfeld, supra*, 111 Cal.App.3d 671, 675–676.) Petitioner alone was sentenced pursuant to the then-existing provisions of the Youthful Offender Act (former § 1202b, repealed by Stats. 1976, ch. 1139, § 274, eff. July 1, 1977) to concurrent life terms with a minimum term of six months on each count. (*Schoenfeld, supra*, at p. 676, fn. 3.) Because the crime took place July 15, 1976, Schoenfeld was committed under the ISL sentencing scheme in effect until July 1, 1977.

In 1980, this court concluded in *People v. Schoenfeld, supra*, 111 Cal.App.3d 671, 689, "that the evidence of the injuries sustained does not constitute bodily harm within the meaning of Penal Code section 209 as a matter of law." Accordingly, we modified the judgment of conviction "by striking the findings of bodily harm and determination of parole ineligibility" relating to counts three, five and seven, and struck the associated "sentences of life imprisonment without possibility of parole." (*Schoenfeld, supra*, at pp.

² The facts pertinent to the underlying kidnapping offenses need not be recited in this opinion, and are found in our opinion in *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 676–680.

689, 690.) The judgment of conviction and sentences of life imprisonment were affirmed. (*Id.* at p. 690.)

At Schoenfeld’s 20th parole consideration hearing, and over 30 years after the kidnapping crimes were committed, the Board hearing panel determined on October 30, 2008, that he was suitable for parole. (*Schoenfeld v. Board of Parole Hearings* (Dec. 29, 2010, A128543) [nonpub. opn.] p. 2.) In finding Schoenfeld was “suitable for release and would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison,” the Board hearing panel considered the “nature and gravity of the commitment offense,” including the fact “multiple victims” were involved, but it found parole was warranted by the undisputed evidence of his unfailingly admirable conduct in prison, his strong family and community support, his stable social history, lack of criminal history, and his realistic parole plan. The Board calculated the period of Schoenfeld’s imprisonment as a life prisoner under the regulations applicable to the DSL (Cal. Code Regs., tit. 15, §§ 2282–2290) to be in excess of 187 years.³ On March 10, 2009, the Board notified Schoenfeld that the panel’s parole suitability finding had been approved and was final. (*Schoenfeld v. Board of Parole Hearings* (Dec. 29, 2010, A128543) [nonpub. opn.] p. 2.)

Schoenfeld challenged the Board’s calculation of his parole release date – his period of imprisonment – by petition for writ of habeas corpus filed in the Alameda County Superior Court. (*In re Schoenfeld* (Aug. 4, 2010, A127680 [nonpub. opn.], p. 2.) Specifically, he claimed that the Board failed to simultaneously calculate his ISL period of confinement under the Prior Board Rules, and failed to impose the earlier of the two calculated release dates, required by *In re Stanworth, supra*, 33 Cal.3d 176, 188.

After the trial court denied the prior petition on December 21, 2009, Schoenfeld pursued relief from this court. We found “that the Board panel failed to understand its role, responsibility, and discretion in calculating a release date for Schoenfeld under the DSL regulations,” and “that application of the DSL regulations promulgated after his

³ That calculation is not before us.

commitment offense to the calculation of his parole release date violates ex post facto prohibitions of the United States and California Constitutions.” (*In re Schoenfeld* (Aug. 4, 2010, A127680 [nonpub. opn.], p. 3.) We thus concluded that “the Board erred when it failed to simultaneously calculate his term under governing regulations applicable to the ISL, and thereafter failed to impose the earlier of the two calculated release dates.” We ordered the Board “to immediately set a hearing to take place on or before September 8, 2010, to recalculate Richard Schoenfeld’s release date under both ISL and DSL regulations and thereafter impose the earlier of the two release dates.” (*In re Schoenfeld* (Aug. 4, 2010, A127680 [nonpub. opn.], p. 6.)

In a somewhat convoluted series of events, while the prior petition was pending the Board first scheduled a hearing to determine petitioner’s ISL period of confinement, then cancelled the hearing, and apparently rescheduled an ISL parole release date calculation hearing for August 14, 2009. (*In re Schoenfeld* (Aug. 4, 2010, A127680 [nonpub. opn.], p. 2.) Thereafter, instead of proceeding to determine his ISL release date, the Board panel declared that the 2008 decision finding Schoenfeld suitable for parole “ ‘may be an improvident grant based upon fundamental errors or omissions of fact,’ ” and ordered, or at least recommended, that a rescission hearing be conducted.⁴ (*Schoenfeld v. Board of Parole Hearings* (Dec. 29, 2010, A128543) [nonpub. opn.] p. 3.)

A rescission hearing was set by the Board, but repeatedly postponed. Schoenfeld filed a motion for a preliminary injunction and petition for writ of mandate in which he sought to preclude the rescission hearing. (*Schoenfeld v. Board of Parole Hearings* (Dec. 29, 2010, A128543) [nonpub. opn.] p. 3.) The trial court denied him relief. On appeal we determined the Board had the authority to set a hearing to rescind the 2008 suitability finding, and affirmed the trial court’s denial of his petition for writ of mandate. (*Schoenfeld v. Board of Parole Hearings* (Dec. 29, 2010, A128543) [nonpub. opn.] pp. 1, 3.) The rescission hearing was ultimately conducted, and the Board reaffirmed its prior suitability determination by deciding not to rescind the grant of parole.

⁴ As of the date we filed our opinion in A127680, the Board had not yet determined an ISL parole release date for Schoenfeld, and no rescission hearing had occurred.

Following a hearing on August 31, 2010, the Board proceeded to set Schoenfeld's ISL parole release date. An aggravated base term for the kidnapping-for-ransom offense was set at 144 months, reduced by five months for the lack of any prior convictions before the offense. The base period was then adjusted upwards to add 24 months for each of the additional 26 kidnap-for-ransom counts "concurrent to the base offense," for an aggregate 624 months pursuant to Prior Board Rules section 2355, subdivision (a). Due to the fact that Schoenfeld was sentenced as a youthful offender, the Board reduced the adjustment for each of the concurrent counts by six months, for a total reduction of 156 months. As for "post-conviction factors," the Board awarded two months of credit for each year Schoenfeld did not "receive a 115" disciplinary report,⁵ for "a total of 63 months." Schoenfeld's confinement period was thus set at 544 months, or 45 years 4 months, resulting in a parole release date many years after the Board found him suitable for parole.

DISCUSSION

Schoenfeld filed the present petition for writ of habeas corpus challenging the Board's determination of his ISL period of confinement directly in this court. He presents several claims of error related to the Board's upward adjustment based on his "concurrent terms" for the kidnapping offenses. The focus of our review is upon Schoenfeld's argument that the Board misapplied the Prior Board Rules in calculating his ISL period of confinement, particularly by imposing two-year adjustments for each of his multiple concurrent sentences. He also asserts that the Board essentially usurped judicial sentencing authority and exceeded its jurisdiction by adding 24-month adjustments for each of the 26 counts that were ordered to run concurrently by the trial court; abused its discretion by failing to adhere to mandatory ISL guidelines that give primary consideration to the defendant's rehabilitation rather than the nature of the commitment offense; followed Parole Board Rules for calculation of an ISL parole release date that are invalid as inconsistent with controlling ISL law; abused its discretion by choosing

⁵ A "115" refers to a rules violation report concerning misconduct believed to be a violation of law or not minor in nature. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).)

two-year upward adjustments for the concurrent sentences, but only reducing the adjustments by two months each for his “discipline-free” 30-plus years of incarceration; and, the arbitrary and capricious ISL period of adjustment is violative of his due process rights.

I. Petitioner’s Failure to Challenge the Parole Board’s Decision in the Trial Court.

We first address the Attorney General’s contention that “Schoenfeld failed to properly file his petition in the superior court.” The Attorney General relies on California Rules of Court, rule 8.385(c)(2),⁶ and the California Supreme Court’s opinion in *In re Roberts* (2005) 36 Cal.4th 575, 593–594 (*Roberts*), to argue that “a habeas corpus petition challenging a decision of the parole board should be filed in the superior court, which should entertain in the first instance the petition.” (*Roberts, supra*, at p. 593.)

Our inquiry advances from the fundamental rule articulated in article VI, section 10 of the California Constitution that “The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings.”⁷ “This provision grants original subject matter jurisdiction over habeas corpus proceedings concurrently to the superior court, the Court of Appeal, and [the Supreme Court].” [Citations.]” (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 465; see also *Roberts, supra*, 36 Cal.4th 575, 582; *In re Carpenter* (1995) 9 Cal.4th 634, 645–646; *In re Estevez* (2008) 165 Cal.App.4th 1445, 1460–1461.)

Rule 8.385(c)(2) was adopted effective January 1, 2009, in response to the California Supreme Court’s decision in *Roberts, supra*, 36 Cal.4th 575, 589, in which the California Supreme Court recognized that “the superior court of any county, including the county of commitment, has jurisdiction to review a habeas corpus petition

⁶ All further references to rules are to the California Rules of Court unless otherwise indicated.

⁷ Article VI, section 10 reads in full: “The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction. [¶] Superior courts have original jurisdiction in all other causes except those given by statute to other trial courts.”

challenging the Board’s parole determination,” but established a “procedural rule” that “a petitioner who seeks to challenge by means of habeas corpus the denial of parole (or his or her suitability for parole) *should file* the petition in the superior court located in the county in which the conviction and sentence arose, and that the petition should be adjudicated in that venue.” (*Id.* at p. 593, italics added.) The court also directed “that when a habeas corpus petition challenging the denial of parole or suitability for parole is filed in the superior court in a county other than that in which the petitioner’s conviction and sentence were imposed, the filing court *should transfer* the petition to the superior court in the county of commitment in the first instance, prior to any determination being made that the petitioner has made a prima facie case.” (*Ibid.*, italics added.) Again in the exercise of its inherent authority to establish rules of judicial procedure, the court additionally stated “that, among the three levels of state courts, a habeas corpus petition challenging a decision of the parole board *should be filed* in the superior court, which should entertain in the first instance the petition.” (*Ibid.*, italics added.)

The discretionary language used in *Roberts* to delineate the procedural rule intended to more equitably and efficiently deal with the allocation of appropriate jurisdiction to review habeas corpus petitions challenging a parole determination by the Board is mirrored in the current version of rule 8.385(c)(2), which states that, “A Court of Appeal *should deny* without prejudice a petition for writ of habeas corpus that challenges the denial of parole or the petitioner’s suitability for parole if the issue was not first adjudicated by the trial court that rendered the underlying judgment.” (As amended effective Jan. 1, 2012, italics added.)

In *In re Kler* (2010) 188 Cal.App.4th 1399, 1402, the court declared that while “in most instances, a habeas corpus petition ‘should’ be filed in the superior court,” the “language in *Roberts* does not divest the Courts of Appeal of original jurisdiction in petitions for writ of habeas corpus, as granted by article VI, section 10 of the California Constitution. Nor does it dictate that in all cases such habeas corpus petitions *must* be filed in the superior court—only that challenges to parole ‘should’ first be filed in the

superior court [citation] unless ‘extraordinary reason exists for action by’ the appellate court in the first instance [citation].” (*Id.* at pp. 1403–1404.)⁸

We further conclude that the instant petition presents an “ ‘extraordinary’ situation justifying the exercise of our constitutional prerogative” to decide the merits of Schoenfeld’s writ petition. (*Kler, supra*, 188 Cal.App.4th 1399, 1404.) The petition follows a prior reversal of the trial court’s denial of relief to Schoenfeld, in which we found that the Board erred by failing to calculate his ISL period of confinement and ordered the determination of the parole release date that is now before us. (*In re Schoenfeld* (Aug. 4, 2010, A127680 [nonpub. opn.], p. 6.) The issues Schoenfeld raises in this petition directly flow from our prior decision and the limited hearing conducted upon our directive thereafter, and do not depend upon presentation of any further evidence than already appears in the record. We therefore elect to review the decision of the Board in this habeas corpus action, even though the petition was not filed or considered first in the superior court. (*Kler, supra*, at p. 1404.)

II. The Board’s Authority to Add Enhancements to Schoenfeld’s Base Term of Confinement.

In calculating Schoenfeld’s ISL parole release date, the Board imposed an aggravated base term of confinement of 144 months, then added 24 months for each of the remaining 26 kidnap-for-ransom counts for a total period of confinement of 624 months, before reductions for postconviction factors. Schoenfeld points out that the Board, acting under the ostensible authority of the ISL Prior Board Rules, enhanced his sentence due to his multiple convictions, despite the explicit imposition of 26 concurrent terms by the sentencing court in 1977 pursuant to the statutory mandate of former Penal Code section 669 of the ISL. Schoenfeld claims the Board “misapplied the Parole Board Rules” by upwardly adjusting his base period of confinement for “concurrent terms” that

⁸ We also observe that in this habeas corpus proceeding Schoenfeld is not expressly challenging the “the denial of parole or the petitioner’s suitability for parole,” as specified in rule 8.385(c)(2). He has been found suitable for parole by the Board. Instead, he is challenging the computation of his ISL period of confinement.

did not qualify as “multiple crimes” as defined by the governing rule (PBR, § 2355, subd. (a)), on which the Board based its upward adjustment.

To resolve Schoenfeld’s contention, a historical overview of the long-superseded ISL sentencing scheme and the enactment of the ISL Prior Board Rules is in order.⁹ Under the ISL, “ ‘the Legislature prescribed both the minimum and maximum terms for each offense punishable by imprisonment in the state prison.’ ” (*People v. West* (1999) 70 Cal.App.4th 248, 257, quoting *In re Gray* (1978) 85 Cal.App.3d 255, 259.) “A sentencing court would not select a fixed term, but would impose an indeterminate term, generally expressed as a range such as five years to life.” (*In re Morrall* (2002) 102 Cal.App.4th 280, 288 (*Morrall*)). “A trial court would simply sentence a defendant to prison for ‘the term prescribed by law,’ while the actual length of a defendant’s term, within the statutory maximum and minimum, was determined by the Adult Authority.” (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.) The term prescribed by law “ ‘was deemed to be a sentence for the maximum term. [Citation.] The Adult Authority or its predecessor agencies determined and redetermined within those very wide statutory ranges, the length of term the offender would actually be required to serve.’ ” (*West, supra*, at p. 257, quoting *In re Gray, supra*, at p. 259.)¹⁰

“The legal effect of the imposition of an indeterminate term was a sentence for the maximum term. [Citation.] It would be left to the executive branch to determine the actual period of confinement by, among other things, exercise of the authority to grant parole within the minimum and maximum time specified for the commitment offense.” (*Morrall, supra*, 102 Cal.App.4th 280, 288.) “It was generally recognized that

⁹ The issue here is not “the wisdom of the indeterminate sentencing philosophy” (*In re Rodriguez* (1975) 14 Cal.3d 639, 644), but only compliance with the regulations implementing that former sentencing scheme.

¹⁰ However, the ISL did not divest the superior court of authority to sentence a person to the maximum period prescribed. The superior court retained “the function of determining the guilt of the defendant and of imposing the sentence *provided by law* for the offense involved. The execution of its judgment and the application of merciful measures are administrative and were properly vested in the executive branch of the government.” (*People v. Leiva* (1955) 134 Cal.App.2d 100, 103.) “The imposition of sentence and the exercise of sentencing discretion are fundamentally and inherently judicial functions.” (*People v. Navarro* (1972) 7 Cal.3d 248, 258; *People v. Burke* (1956) 47 Cal.2d 45, 52.)

indeterminate sentencing laws were intended ‘to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime.’ [Citation.] Accordingly, the executive authority would not fix the actual period of imprisonment pursuant to a formula of punishment, but would do so in accordance with the adjustment and social rehabilitation of the individual.” (*Ibid.*) “ ‘In making such a determination, the authority exercised a broad discretion [citation]; taking into consideration such factors as the nature of the prisoner’s offense, his felony conviction record, the probability of his reformation, and the interests of public security. [Citation.] Any release date earlier than the maximum sentence was supposed to reflect a recognition of the prisoner’s efforts at rehabilitation.’ ” (*People v. West, supra*, 70 Cal.App.4th 248, 257, quoting *In re Gray, supra*, 85 Cal.App.3d 255, 259.)¹¹

The Adult Authority, or currently the Board as its successor, exercises two distinct but interrelated discretionary functions for prisoners sentenced under the ISL, namely, fixing the sentencing term (the period of time the offender is subject to the jurisdiction of the Authority) and determining the period of imprisonment (the time served in prison before release on parole). (*Morrall, supra*, 102 Cal.App.4th 280, 288, fn. 2; *People v. Duran* (1983) 140 Cal.App.3d 485, 502.) Over time, the Board effectively “coupled these two functions by fixing sentence only at the time [or in this case after] it granted parole. Deferment of the inmate’s parole readiness thus prolonged the indeterminacy of his sentence. In consequence, a prison inmate might wait for many years without either a parole date or ultimate discharge date.” (*In re Stanley* (1976) 54 Cal.App.3d 1030, 1033–1034 (*Stanley*).)

¹¹ An inmate sentenced to an indeterminate life term was eligible for parole only if he had served at least seven years in prison. (PBR, § 3046.) However, an inmate sentenced as a youthful offender, as Schoenfeld was, could be considered for parole after serving six months. “No inmate could be released before serving the minimum term of imprisonment provided by law for the offense of which he or she was convicted. ([PBR,] § 3049.) A prisoner who had served the maximum term of imprisonment was discharged from the custody of the Adult Authority; an inmate whose maximum term was life in prison could remain in custody for life, if not granted parole.” (*People v. Jefferson, supra*, 21 Cal.4th 86, 95.)

In an effort to bring a greater degree of structure to and certainty in both areas, in April 1975, the Chairman of the Adult Authority issued Directive No. 75/20. The directive set standards for the establishment of discharge dates, that is, the date on which the Authority no longer had jurisdiction over the inmate. The discharge date therefore reflected both the prison term and parole period. The directive also set standards for determining parole release dates. (*Stanley, supra*, 54 Cal.App.3d 1030, 1034.)

The California Supreme Court subsequently held in *In re Rodriguez* (1975) 14 Cal.3d 639, that the Adult Authority “must fix sentences within each statutory range proportionately to the culpability of the individual offender and calling attention to the distinct character of the authority’s sentence-fixing and parole-granting functions. [Citations.] As a consequence, the authority’s chairman issued a second directive (No. 75/30, dated Sept. 2, 1975), establishing separate standards for term-fixing and limiting the April directive, No. 75/20, to the single subject of parole.” (*Stanley, supra*, 54 Cal.App.3d 1030, 1034.)

Directive No. 75/20 was then challenged in *Stanley*, which held the directive invalid to the extent it failed to adequately account for postconviction rehabilitative conduct in establishing a parole release date. (*Stanley, supra*, 54 Cal.App.3d 1030, 1040; see also *In re Stanworth, supra*, 33 Cal.3d 176, 183.)

Thereafter, in 1976, rules for the Authority were promulgated pursuant to the Administrative Code in former title 15. These were the rules in effect at the time of Schoenfeld’s offense. (See *In re Handa* (1985) 166 Cal.App.3d 966, 970; *In re Duarte* (1983) 143 Cal.App.3d 943, 946.)

The Prior Board Rules first require the fixing of a “primary term.” (PBR, § 2100.) This term embraces the “time served inside prison and on parole. It is the period of time the parole board has jurisdiction over the individual and should not be confused with the parole release date fixed by the parole board, which determines the length of time to be served inside prison walls.” (PBR, § 2100, subd. (a).)¹² This term is to be set at a “term

¹² We express no view on the affect, if any, of the adoption of the DSL on the total length of the Board’s jurisdiction over individuals sentenced under the ISL.

hearing,” which is “almost always combined with the initial parole hearing.” (PBR, § 2100, subd. (c).) “Once fixed, the primary term cannot be refixed upward unless the original primary term was illegally fixed; a clerical error was made; or significant information was fraudulently withheld from the parole board.” (PBR, § 2012, subd. (a).)

The primary term consists “of a base term and adjustments for the individual’s criminal history. The adjustment categories are prior prison terms and current prison commitments.” (PBR, § 2150.)

In fixing the base term, the Board must characterize the offense as “typical” or “aggravated.” (PBR, § 2151.) In making that determination, the Board is to consider “general factors” bearing on the “seriousness” of the crime, such as the presence or absence of violence, the use of weapons, the extent of property damage or loss, the extent of premeditation, the age of the offender and whether the offender’s reasoning ability was impaired by disability or his own volition. (PBR, § 2200, subds. (a)–(h).) The Board is also to consider “aggravating circumstances” in assessing the seriousness of the offense. These are circumstances “which relate solely to the commitment offense and which tend to increase the seriousness of the offense.” (PBR, § 2201.) The rule provides a number of “examples.” For “homicide,” for example, it lists such circumstances as “multiple victims,” viciousness of killing and intent to inflict suffering. (PBR, § 2201, subd. (a)(1)–(2).) For “violence against a person,” the rule lists such circumstances as extent and nature of physical injury, permanency of injury, extent of medical treatment required, viciousness of assault, torture, and whether the victim was a peace officer. (PBR, § 2201, (b)(1)–(3).) Similar circumstances are identified for a number of other types of offenses. (PBR, § 2201, (c)–(j).) The Board is also to consider “mitigating circumstances,” which are circumstances “which relate solely to the commitment offense and which tend to lessen the seriousness of the offense.” (PBR, § 2202.) Such circumstances include whether the offender was provoked or had been threatened, whether there were elements of self-defense, and whether addiction played a role. (PBR, § 2202, subds. (a)–(d).)

Once the Board determines whether the offense is “typical” or “aggravated” (PBR, §§ 2151, 2152) by considering the factors that bear on the seriousness of (PBR, §§ 2200,

2201) or which mitigate (PBR, § 2202) the offense, it then refers to the “suggested base ranges” set out in the rules. (PBR, §§ 2152, 2225.) For life crimes, however, like Schoenfeld’s kidnapping-for-ransom crime, the suggested base range for both “typical” and “aggravated” offenses is “determinate life.” (PBR, § 2225.) This does not mean the Board must set the base term as “life.” “The panel may go outside (above or below) the range suggested, including setting the term at the statutory minimum or maximum, as appropriate under the facts of the case,” as indicated by the factors set forth in Prior Board Rules sections 2200 through 2202 pertinent to determining the seriousness of the crime. (PBR, § 2152.)

Once the base term is determined, the Board can “adjust” the term by increasing it “to reflect the inmate’s serious criminal history for crimes which occurred prior to the crime for which a primary term is being set.” (PBR, §§ 2153, 2226.) Such adjustments can be made for “prior prison terms” and “current prison commitments” for previously committed crimes. (PBR, §§ 2153, subd. (b), 2154, subds. (a), (b), 2226.) “A prior prison term is one for which the inmate was committed to prison and paroled or discharged.” (PBR, § 2154, subd. (a)(1).) Current prison commitments are commitments: “(1) Which resulted in actual commitment to prison and which have not been reversed in court or pardoned by the executive; and [¶] (2) Which were for crimes committed earlier than the crime being considered; and [¶] (3) On which the inmate has not been released on parole or discharge.”¹³ (PBR, § 2154, subd. (b).)

The Prior Board Rules next address parole and specify “[e]ach inmate will be considered for parole at the initial term and parole hearing after primary terms have been fixed for each indeterminate sentence” (PBR, § 2250; see also PBR, § 2251 [“first parole hearing will be scheduled in conjunction with the term hearing as provided in [PBR,] § 2125”].) If an inmate is not found “suitable for release on parole,” i.e., is “found to pose an unreasonable risk of danger to society” (PBR, § 2250), another parole hearing will be held in 12 to 24 months. (PBR, § 2304, subd. (a).) If an inmate is found

¹³ The record before us does not indicate the primary term set for Schoenfeld.

suitable for release on parole, then “a tentative parole release date” is calculated. (PBR, § 2250.)

The tentative parole release date is determined by setting “a base period of confinement and adjustments.” (PBR, § 2350.) “The base period of confinement will reflect the seriousness of the base offense (see [PBR,] § 2351[, subd. (c)]), and the adjustments will reflect incremental adjustments made for a variety of other factors (see [PBR,] §§ 2354–2356).” (PBR, § 2350.) The “base offense” is “the most serious of the commitment offenses.” (PBR, § 2352, subd. (a).)

Under the Prior Board Rules, just as the base term is determined by setting the primary term (i.e., the period of time over which the Board has jurisdiction over the offender both in and out of prison), the base period of confinement is “established solely on the gravity of the base offense . . . taking into account all of the circumstances of that offense (see [PBR,] §§ 2200–2202).”¹⁴ (PBR, § 2352; see also PBR, § 2351, subd. (c).) As discussed, Prior Board Rules sections 2200 through 2202 guide the Board in determining the “seriousness” of an offense and whether it is to be treated as a “typical” or “aggravated” offense. The base offense for purposes of determining the base period of confinement is thus also characterized as either “typical” or “aggravated.” (PBR, § 2352, subd. (b).) Once the base offense has been characterized as “typical” or “aggravated,” the Board refers to the recommended parole ranges set out in the rules “as a guideline in setting the base period of confinement.” (PBR, § 2352, subd. (c).) We note these are, as the Prior Board Rules state, “guidelines” and the Board may set a higher or lower base period of confinement if it determines the seriousness of the crime (PBR, §§ 2200–2201) or mitigating factors (PBR, § 2202) warrant.

The Board found Schoenfeld’s base offense to be aggravated for a number of reasons, including “intricate planning,” “great potential for physical injury to the victims,” the fact “the victims suffered some serious mental trauma,” the fact the victims were children, the “age of the victims,” and the duration of their confinement. Thus, the

¹⁴ Prior Board Rules section 2200 expressly states it applies in “determining the seriousness of the offense in setting the base term or base period of confinement”

Board could, and did, consider the circumstances set forth in Prior Board Rules sections 2200–2202, including the fact multiple victims were involved, in determining the seriousness of Schoenfeld’s base offense and deeming it an aggravated offense for purposes of determining his base period of confinement.¹⁵ The recommended range for the base period of confinement set forth in the regulations for aggravated kidnapping for ransom is 109 to 144 months. Based on the extreme seriousness of the offense, the Board set Schoenfeld’s base period of confinement at the highest recommended period, 144 months.

Just as “adjustments” can be made to the base term in setting the primary term (that is, the period of time over which the Board has jurisdiction over the offender), so too, “adjustments” can be made to the base period of confinement. (PBR, § 2353.) “After the base period of confinement has been established, the hearing panel will evaluate the individual facts and circumstances in each case to determine whether the total period of confinement should be increased or decreased after consideration of the factors enumerated in [PBR,] §§ 2354–2356. In making this evaluation, the comments made by the committing court, the district attorney, the defense attorney and the law enforcement agency . . . will be considered.” (PBR, § 2353, subd. (a).)

The Prior Board Rules permit adjustment of the base period of confinement for “preconviction factors.” (PBR, § 2354.) These include “criminal history,” which includes prior prison terms (defined as terms “for which the inmate was committed to prison and paroled or discharged”), prior felony convictions “pled and proven as part of the current sentence to prison,” other convictions which did not result in imprisonment, and lack of or minimal criminal history (which may result in a downward adjustment). (PBR, § 2354, subd. (a)(1)(2).) Preconviction factors also include considerations such as “the inmate’s personal and social history, family and marital status, employment history,

¹⁵ As we have discussed, the Board also repeatedly took into account the seriousness of Schoenfeld’s offense, including that multiple child victims were involved, in finding him not suitable for release on parole for more than 30 years.

intelligence and education, skills acquired and physical and emotional health.” (PBR, § 2354, subd. (b).)

Section 2355 of the Prior Board Rules permits adjustment of the base period of confinement for “commitment factors.” Commitment factors are “multiple crimes” (PBR, § 2355, subd. (a)) and “sentencing status” (PBR, § 2355, subd. (b)). It was on the basis of this regulation, and specifically its “multiple crimes” provision, that the Board added 26 two-year periods, totaling 624 additional months, to Schoenfeld’s base period of confinement.

The Prior Board Rules define “multiple crimes” quite specifically as “crimes in addition to the base offense which resulted in commitment to prison *and* occurred prior to arrival in prison *and* since the latest parole or discharge.” (PBR, § 2355, subd. (a), italics added.) Conspicuous use of the conjunctive language “and” indicates the rule has separate requirements, all of which must exist to adjust the base period for multiple crimes. (See *First American Commercial Real Estate Services, Inc. v. County of San Diego* (2011) 196 Cal.App.4th 218, 227; *In re Marriage of Caldwell-Faso & Faso* (2011) 191 Cal.App.4th 945, 959–961; *In re Carr* (1998) 65 Cal.App.4th 1525, 1532; *Melamed v. City of Long Beach* (1993) 15 Cal.App.4th 70, 78.) Only if the additional crime was committed both prior to the defendant’s arrival in prison and following a previous discharge or grant of parole is adjustment of the base term for multiple crimes authorized by Prior Board Rules section 2355, subdivision (a). By its plain terms, this rule takes up where Prior Board Rules section 2354, allowing for adjustment for prior prison terms, leaves off. Whereas Prior Board Rules section 2354 allows adjustment for the crime for which the prior prison sentence was served, Prior Board Rules section 2355, subdivision (a), allows adjustment for multiple crimes committed *after* the prior prison term, while the previously convicted offender was on parole or after he was discharged altogether. The two rules “ ‘relating to the same subject matter must be harmonized to the extent possible. . . .’ [Citations.]” (*In re J.B.* (2009) 178 Cal.App.4th 751, 756.)¹⁶

¹⁶ In *Stanworth*, the Supreme Court in dicta described Prior Board Rules section 2355, subdivision (a), as permitting adjustment for “multiple victims.” (*In re Stanworth, supra*, 33

Thus, the “multiple crimes” provision of section 2355 of the Prior Board Rules has no application to Schoenfeld. He never served a prior prison sentence, and so committed no crime while on parole or after being discharged by the Adult Authority. Accordingly, the Board had no authority to upwardly adjust Schoenfeld’s base period of confinement under Prior Board Rules section 2355, subdivision (a).

This is all the more clear in light of Prior Board Rules section 2355, subdivision (b), which authorizes an adjustment to the base period of confinement for “sentencing status.” “Sentencing status” is discussed as follows: “The total period of confinement may be increased or decreased because of the inmate’s sentencing status. A *consecutive sentence* to prison imposed by the committing court under Penal Code section 669 or required by statute may be interpreted as a recommendation for severity and the total period of confinement may be increased. A sentence for a youthful offender under Penal Code section 1202b may be interpreted as a recommendation for leniency by the committing court and the total period of confinement may be decreased.” (PBR, § 2355, subd. (b), italics added.) Significantly, this provision of Prior Board Rules section 2355 does not provide for any upward adjustment for *concurrent* sentences, as were imposed on Schoenfeld by the then-applicable law (former Pen. Code, § 669; *People v. Tucker* (1954) 127 Cal.App.2d 436, 437), even though concurrent sentences clearly are a form of sentencing status, like consecutive sentences and sentencing as a youthful offender. Accordingly, the Board understandably did not rely on this subdivision for its upward adjustment of Schoenfeld’s base period of confinement on the basis of his concurrent sentences. (See *In re Sandel* (1966) 64 Cal.2d 412, 415–416.) Nor did the Board find any other regulatory provision applicable to upwardly adjust Schoenfeld’s base period of confinement, e.g., Prior Board Rules sections 2356, 2357, or 2358.

Cal.3d 176, 184.) This is not the language of this regulation. Moreover, as discussed, the regulations expressly authorize consideration of “multiple victims” in determining the seriousness of the offense and characterizing it as “typical” or “aggravated” in setting and determining the base period of confinement. (PBR, § 2152.) While an agency’s interpretation of its own regulations is entitled to deference, an agency cannot ignore language it drafted and enacted as its governing provisions. The ultimate interpretation of the regulation is a question of law. (*Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 93.)

In sum, section 2355, subdivision (a), of the Prior Board Rules authorizing an adjustment to a base period of confinement for “multiple crimes” is inapplicable to Schoenfeld, and the Board erred by upwardly adjusting his base period of confinement under that regulatory provision. Therefore, the addition of the 26 two-year adjustments to Schoenfeld’s base period of confinement – which were all reduced to 18 months due to his sentencing as a youthful offender – must be stricken as impermissible under the regulations relied on by the Board as authority to set his total period of confinement.¹⁷

DISPOSITION

The August 31, 2010 order of the Board of Parole Hearings, setting Richard Schoenfeld’s period of confinement under the ISL Prior Board Rules at 544 months, is amended by striking the 26 two-year adjustments (reduced to 18 months each due to Schoenfeld’s youthful offender status). The maximum aggravated base term of 144 months set by the Board has lapsed, and no upward adjustments to that base term are lawfully applicable. Richard Schoenfeld has been found suitable for parole. Therefore, he shall be immediately released on parole, subject to terms and conditions ordered by the Board. Upon finality of this decision, the clerk of the court shall remit certified copies of this opinion directly to the Secretary of the California Department of Corrections and Rehabilitation, and to the Board of Parole Hearings.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.

¹⁷ In light of our conclusion we need not address the remaining issues presented by petitioner.