

STUDY GUIDE AND BACKGROUND MATERIALS FOR *IN RE ROSENKRANTZ*

The California Supreme Court has provided a two-page summary of the issues that may be presented in the case of *In re Rosenkrantz*, to be argued before the court in Fresno in October, 2002. That summary is attached at the end of the present materials and provides a useful overview of the case as it will be presented before the Supreme Court at oral argument.

The purpose of this study guide is to provide short answers to various questions that might arise from a student's review of the Supreme Court summary. In addition, this study guide will provide some questions for further consideration by students as they listen to oral argument of the case.

The study guide is divided into six individual sections. Review of all six sections, in the order presented, is designed to give students enough background information to allow them to understand what the attorneys are talking about in their presentations to the Supreme Court and to understand the questions the Justices might ask the attorneys. If time is limited or students begin with a more sophisticated understanding of the role of the courts within our overall state government, certain individual sections of the study guide may be useful to focus the student's attention on particular aspects of the case before the court, *In re Rosenkrantz*.

The six sections of the study guide are attached in the following order:

- I. THE HISTORY OF THIS CASE
 - II. DOING TIME FOR SECOND DEGREE MURDER
 - III. HOW THIS CASE CAME TO THE SUPREME COURT
 - IV. THE ROLE OF THE GOVERNOR IN GRANTING AND DENYING PAROLE
 - V. DISCUSSION OF THE PRIMARY LEGAL ISSUE PRESENTED IN THIS CASE: "SEPARATION OF POWERS" V. "JUDICIAL REVIEW"
 - VI. OTHER ISSUES THE COURT OR THE ATTORNEYS MAY DISCUSS
- APPENDIX: SUPREME COURT SUMMARY OF *IN RE ROSENKRANTZ* (S104701)

I. THE HISTORY OF THIS CASE

1. *Why is Mr. Rosenkrantz in prison?*

In June of 1985, Steven Redman, a friend of Rosenkrantz's brother, told Rosenkrantz's parents that Rosenkrantz was a homosexual. Redman knew the father "hated" homosexuality and that Rosenkrantz was trying to keep his own homosexuality a secret from his parents.

The next day, Rosenkrantz ordered an Uzi and began practicing at a shooting range. Three days later, he picked up the Uzi. That night, Rosenkrantz slept in his car in front of Redman's house. When Redman came out the next morning, Rosenkrantz demanded Redman tell the parents he had lied. Redman laughed and refused. Rosenkrantz shot him 10 times (at least once in the head as Redman lay on the ground) and drove off. Rosenkrantz hid for three weeks before turning himself in to police.

Rosenkrantz was charged with first degree (premeditated) murder under section 189 of the Penal Code. A jury found Rosenkrantz not guilty of first degree murder but it convicted him of second degree murder. Because of the differences in the law between first and second degree murder, the jury's decision means the jury had a least a reasonable doubt that Rosenkrantz *planned to kill* Redman before the confrontation. The judge sentenced Rosenkrantz to the only possible sentence under the law for second degree murder using a gun: prison for a term of 17 years to "life."

For more details about the crime and the original trial, please see *People v. Rosenkrantz* (1988) 198 Cal.App.3d 1187 and *In re Rosenkrantz* (2000) 80 Cal.App.4th 409.

Related Questions:

1.1 Why is this case called "In re Rosenkrantz"?

Most court proceedings are known by the names of the parties, for example, *Adams v. Allen* or *People v. Smith*. ("v." stands for "versus" or "against".) Historically, other cases -- like this habeas corpus case -- have been known only by the name of the person who is the subject of the case. "*In re*" is simply Latin for "in the case of." So, *In re Rosenkrantz* just means "in the case of Rosenkrantz."

1.2 What is "habeas corpus"?

Once again, this is a Latin phrase that has survived into modern usage. Literally, it means "you have the body." This is because a habeas corpus proceeding allows a judge to order a prison official, the police, or anyone else, to bring the person to the judge; the order says, in effect, "You have the 'body' [that is, the 'person'] of Mr. X in your possession and you must explain to me why you think it is legal for you to continue to hold him in custody."

In the present case, the order is directed to the officials of the prison system, but the Warden does not appear to defend his custody of the prisoner. Instead, the state's Attorney General appears on behalf of "The People of the State of California" and, in this particular case, on behalf of Governor Davis, whose actions Mr. Rosenkrantz is challenging.

1.3 *What is the Penal Code?*

Most laws concerning crimes in California (except drug crimes) are contained in the Penal Code, which is divided into sections. The crime of second degree murder is defined in Penal Code section 189 and the punishment is set out in Penal Code section 190. Other references to this code will be in the form “Pen. Code, § xxx.” Most laws governing drug crimes are in the Health and Safety Code.

Crimes and punishment are also governed by parts of the state and federal constitutions and by other laws based by the Legislature. We will mention some of these in later sections.

II. DOING TIME FOR SECOND DEGREE MURDER

1. *What does a prison term of “17 years to life” mean?*

This kind of prison sentence is called an “indeterminate sentence” because there is no fixed date for release. The least possible term of imprisonment is based on the fixed portion of his sentence -- in this case, 17 years. The prisoner must serve the minimum term before release on parole can be allowed. But the prisoner may serve much more than the minimum term, and can be imprisoned for the rest of his life.

2. *Who decides when an indeterminate sentence will end?*

The decision whether to release a prisoner on parole is made by the California Board of Prison Terms. This Board is composed of nine Commissioners who are appointed by the Governor. The state Senate must approve the appointments before they become effective. (Pen. Code, § 5075.)

Related Questions:

2.1 **How does the Board decide whether to grant parole?**

In deciding to grant or deny parole, the Board must consider certain factors. These factors were adopted by the Board in the form of rules and they are set out in the California Code of Regulations at title 15, section 2400. The factors are long and detailed. To give a very brief summary, they require the Board to consider the facts of the crime, the social and criminal history of the prisoner, his or her past and present mental condition, and any other information which would help determine whether the prisoner, if released, “will pose an unreasonable risk of danger to society.”

2.2 **What is “parole”?**

The underlying issue in this case is whether Rosenkrantz should be released from prison. If released, however, he will not simply be freed into society; instead, he will be released on parole.

Parole is supervised release from custody; there can be conditions imposed on parole, such as, that the prisoner must stay away from children or alcohol. (Pen. Code, § 3053.) Parole can be revoked if the prisoner violates the conditions or commits another crime.

2.3 **How long does parole last?**

For prisoners sentenced to a fixed-term sentence, a period of parole is required at the time of release from custody to help in the transition back in to free society; the period of parole is usually three years. (Pen. Code, § 3000.) For prisoners sentenced to an indeterminate sentence for second degree murder, such as Rosenkrantz, parole can last the rest of the prisoner’s life but the Board of Prison Terms is allowed to end a prisoner’s parole after five years of successful performance on parole. (Pen. Code, § 3000.1.)

III. HOW THIS CASE CAME TO THE SUPREME COURT

Most court cases in California do not *begin* in the Supreme Court, and very few of them end up there.

Usually, a case begins when a person files a suit in Superior Court or requests a hearing before a government agency, such as the Department of Motor Vehicles or the Board of Prison Terms. The losing side sometimes appeals the case to the Court of Appeal. In most of those cases, the decision of the Court of Appeal is the final decision in a case.

However, all death penalty cases are reviewed by the Supreme Court and that court has the power to “grant review” -- that is, call the case up for further review -- in cases of unusual importance. In this case, the Supreme Court granted review because of the importance of the question of judicial (court) review of independent actions taken by the Governor of the State of California.

What happened before this case got to the Supreme Court?

1. At the Board of Prison Terms.

As part of the process of granting parole, the Board of Prison Terms must hold a hearing and make a finding that the prisoner is or is not “suitable” for parole. If the prisoner is suitable, the Board then sets a date upon which the prisoner first becomes eligible for parole. The Board reviews the prisoner’s progress as he moves toward that parole date.

In this case, after Rosenkrantz had served 10 years in prison, the Board considered his eligibility for parole. In three successive annual hearings, the Board found Rosenkrantz unsuitable for parole and decided not to set an eligibility date for his parole. After the last hearing, the Board informed Rosenkrantz that the reason for unsuitability was that the murder was especially callous and was “carried out in a dispassionate or calculated manner, such as an execution style murder.” The Board found that this factor outweighed factors favorable to Rosenkrantz: Rosenkrantz had earned a college degree while in prison, he had never been disciplined by prison authorities, he had participated in self-help groups, and he had done computer programming for the prison system.

2. In the trial court.

In 1998, Rosenkrantz filed a petition for writ of habeas corpus. In this type of proceeding, the petitioner alleges he is being held in custody illegally. (See Pen. Code, § 1473.) The petition is filed in the Superior Court, in this case, in Los Angeles. Superior Court is the general trial court in California. Rosenkrantz alleged that there was no evidence that he was unsuitable for parole; he asked the trial court to order the Board of Prison Terms to find him suitable for parole.

The trial court granted the petition and, in April of 1999, ordered the Board to hold a new parole-suitability hearing. The trial court found there was no evidence to support the unsuitability finding: the trial court pointed out that the jury had acquitted Rosenkrantz of premeditated murder, yet the Board’s statement of reasons for unsuitability described the murder as, essentially, premeditated. The court said it was impermissible to treat the case as a first degree murder case when the jury had acquitted Rosenkrantz of that charge.

The trial court ordered that, unless there was new evidence presented to the Board at a new parole hearing, the Board was to set a parole date for Rosenkrantz.

3. Back to the Board of Prison Terms.

The Board held the hearing, again found Rosenkrantz unsuitable for parole, but set a parole date because the trial court had ordered it to do so.

Meanwhile, the Board also appealed the trial court's order to the Court of Appeal in Los Angeles. That court agreed there was no evidence of unsuitability and ordered the Board to hold a new parole hearing. The appellate court ordered the Board to make a new suitability determination "in strict accordance with both the letter and the spirit of the views expressed in this opinion."

The Board held a new hearing. This time it decided Rosenkrantz had committed his crime as a result of "significant stress" and concluded Rosenkrantz would not pose an unreasonable risk of danger to society if released.

4. *To the Governor.*

Governor Gray Davis exercised his constitutional and statutory authority to review the Board's decision. He found Rosenkrantz was unsuitable for parole and reversed the Board's suitability finding. The Governor found Rosenkrantz had "brutally murdered his victim" and that he had never taken full responsibility for the crime. He said Rosenkrantz's good performance in prison was merely what "California expects ... of all prisoners." The Governor concluded that "the gravity of Mr. Rosenkrantz' offense and his repeated attempts to minimize the culpability" showed that Rosenkrantz was "a continued threat to the public requiring that he remain incarcerated."

5. *Back to court.*

Rosenkrantz filed a new petition for habeas corpus, alleging that the Governor had acted arbitrarily, that there was no evidence of unsuitability within the rules governing the Board's parole decisions, and that the Governor's finding of unsuitability for parole merely reflected the Governor's general policy that there be no parole for murderers. The Governor argued in the trial court that the courts had no authority to review his finding of unsuitability for parole under the doctrine of separation of powers and that, in any event, there was good reason for the Governor's determination of unsuitability. The trial court again granted the petition for writ of habeas corpus. It ordered that Rosenkrantz be released from prison on parole.

6. *The Court of Appeal.*

The Governor appealed to the Court of Appeal and got an order from the Supreme Court delaying the implementation of the trial court's order (this is called a "stay" of the order). In January of 2002, the Court of Appeal filed an opinion agreeing with the trial court's order that Rosenkrantz be released from custody.

Related Questions:

6.1 **What were the reasons for the Court of Appeal decision?**

The Court of Appeal, although it has many justices, assigns three justices to hear each case. Those three justices decide the case by majority vote.

Here, two of the justices said that the Governor's decision to deny parole was a decision the courts could review. They also said the Governor had to use the same considerations in reviewing the Board's decision as the Board itself was required to use under the rules contained in the Code of Regulations. They said that, in court-review of the Governor's decision, the question was whether the Governor acted arbitrarily, which means in this situation whether there was "some" evidence in the record that a reasonable person could rely upon to find the prisoner unsuitable for parole. The two justices decided that, because the court already had decided in the earlier opinions that there was "no" evidence to support the finding of unsuitability for parole, a rule of procedure

prevented the court from now considering that there was “some” evidence to support the Governor’s finding of unsuitability.

6.2 What about the third justice of the Court of Appeal?

The third justice disagreed. He wrote what is called a “dissenting opinion” explaining what he thought the Court of Appeal should do. The dissenting justice thought the rule of procedure, known as the “law of the case” rule, did not apply in these circumstances. He thought the court should consider the Governor’s argument that there was plenty of evidence to support the finding of unsuitability for parole. He also agreed with the Governor that the Governor had enough evidence before him to justify the unsuitability finding. This justice believed the court should reverse the trial court’s order that Rosenkrantz be allowed out of prison on parole.

7. On to the Supreme Court.

The Supreme Court granted the request of the Governor and the Attorney General that it review the case.

IV. THE ROLE OF THE GOVERNOR IN GRANTING AND DENYING PAROLE

What gives the Governor the power to decide if someone gets parole?

As we have seen, the Board of Prison Terms usually decides whether a prisoner will be released on parole. In the past, and in most instances today, if the Board grants a prisoner parole, that is the end of the matter: he or she is released. In 1988, however, the voters of California adopted Proposition 89, which amended the California Constitution.

Now, the Constitution gives the Governor the power to review decisions of the Board of Prison Terms in all cases involving parole of prisoners “sentenced to an indeterminate term upon conviction of murder.” (Cal. Const., art. V, § 8(b).) The Governor has 30 days after the Board makes a decision in which to agree with, modify, or reverse the Board’s parole decision, if he chooses to review the decision at all. In this case, the Governor chose to review the decision, and when he did review it, he decided to reverse the decision, in effect denying parole for Rosenkrantz.

Related Questions:

1. How does the Governor make his decision when reviewing a decision of the Board of Prison Terms?

The constitutional amendment adopted in 1988 says the Governor is permitted to decide each case “on the basis of the same factors which the parole authority [that is, the Board of Prison Terms] is required to consider.” (Cal. Const., art. V, § 8(b).) As we saw above, those factors are contained in the rules published by the Board in the Code of Regulations at title 15, section 2400.

2. What information does the Governor have about a case when he reviews the parole decision?

The Legislature passed a new section of the Penal Code to implement Proposition 89. Penal Code section 3041.2 says that the Governor “shall review materials provided by the parole authority” as he decides each case. These materials would include everything the Board of Prison Terms gathered together to evaluate the facts of the crime, the social and criminal history of the prisoner, his or her past and present mental condition, and any other facts used by the Board to decide whether the prisoner, if released, “will pose an unreasonable risk of danger to society.”

V. DISCUSSION OF THE PRIMARY LEGAL ISSUE PRESENTED IN THIS CASE: “SEPARATION OF POWERS” V. “JUDICIAL REVIEW”

We have seen that the Constitution and the Penal Code tell the Governor how to go about his review of a decision of the Board of Prison Terms. The Governor knows he is supposed to follow the law. But what if the prisoner claims the Governor made a mistake during his review of the parole decision? Does the prisoner try to convince the Governor that there was a mistake or can the prisoner take the matter to court?

1. *Who decides whether the Governor has followed the law?*

Similar questions have arisen ever since the government of the United States was first formed more than 200 years ago. Even though a solution to the problem was given by the United States Supreme Court in the 1803 case of *Marbury v. Madison* (officially reported at 1 Cranch 137), the problem has kept returning in different contexts because it is at the very core of our present system of government.

The problem we are talking about is the conflict between the doctrine of “separation of powers” and the doctrine of “judicial review.” We should understand each doctrine before we consider how they might conflict.

2. *What is “separation of powers”?*

Both the United States Constitution and the California Constitution divide the power of government into three parts. These are known as the executive power, the legislative power, and the judicial power. Section 3 of article III of the California Constitution says that anyone “charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.” This is the doctrine of separation of powers.

The California Constitution gives the state’s “supreme executive power” to the Governor. (Cal. Const., art. V, § 1.) In other words, the Governor is in charge of the executive branch and the other two branches are not permitted to exercise the state’s “executive power.”

Separation of Powers examples:

2.1 An example will show how this separation of powers ordinarily works: The Legislature passes laws defining what acts are “crimes.” The executive branch, through the police and the district attorney, charge a person with violating a criminal law. The judicial branch, through a trial court and appellate courts, decides whether the person is guilty of the crime and whether he or she should be imprisoned. The executive branch, through the Department of Corrections, holds the prisoner in custody during the prescribed prison term.

2.2 Other examples illustrate restrictions imposed by separation of powers: Under the doctrine of separation of powers, the Legislature would not be permitted to decide whether a person is guilty or innocent of a crime: the Legislature could not have passed a law that said “Robert Rosenkrantz is guilty of murder for killing Steven Redman,” because finding guilt and innocence is a function of the judicial branch. The California Supreme Court could not enact a \$500 tax on SUVs, because enacting laws is a function of the legislative branch.

3. *What is the doctrine of “judicial review”?*

Judicial review is one example of what we have all heard of as our American system of “checks and balances.”

The power of judicial review is the power to say what the Constitution or a particular law means -- and to be the final voice saying what it means. As such, it provides a “check” on the legislative and executive branches.

For example, Congress can decide that the First Amendment does not mean that burning an American flag must be protected as “free speech.” After it decides this, it can pass a law making it a crime to burn a flag. But under the doctrine of judicial review, the final power to say what the First Amendment means is a judicial power. Therefore, if the Supreme Court says that the First Amendment protects flag burning as “free speech,” the law that Congress has passed is said to be “unconstitutional” and neither Congress nor the President can enforce that law. (See *United States v. Eichman* (1990) 110 S.Ct. 2404 [holding unconstitutional the Flag Protection Act of 1989].)

Other examples of “checks and balances”:

3.1 In exercising its legislative power to spend money, the Legislature might or might not build a new courthouse for the Court of Appeal; the Legislature’s decision might have a direct effect on the exercise of the judicial power, if the Court of Appeal has outgrown its current building, but that Legislative decision will not be viewed as a violation of the doctrine of separation of powers.

3.2 The Governor is granted the power under the Constitution to appoint judges to the courts; even if he appoints a new justice to the Supreme Court that the present justices do not want, the Governor has not violated the doctrine of separation of powers.

4. *Do the doctrines of separation of powers and judicial review conflict in this case?*

The answer is “yes and no.” Let’s talk about the “no” first.

The doctrine of judicial review -- that the courts have the final power to say what a law means -- is very well established both in California and at the federal level. As a result, one would not expect the Governor to take the position that only he can say what the Constitution means when it says the Governor must review parole decisions “on the basis of the factors which the parole authority is required to consider” or what Penal Code section 3041.2 means when it says the Governor “shall review materials provided by the parole authority.”

So, in the present case, there does not appear to be a conflict between judicial review and separation of powers at one level: The Governor and his representative, the Attorney General, apparently agree that it is up to the Supreme Court to decide *what the Governor’s powers are* in reviewing parole decisions under the Constitution and section 3401.2 of the Penal Code.

Example in which Judicial Review does not conflict with Separation of Powers:

4.1 Under the doctrine of judicial review, it would **not** be a violation of the requirement of separation of powers for the Supreme Court to tell the Governor that section 3041.2 meant that the Governor could *only* review the materials provided by the Board of Prison Terms and could not send out investigators to dig up new facts. In fact, the Court of Appeal did exactly that in the case of *In re Arafiles* (1992) 6 Cal.App.4th 1467. No one would expect the Governor to simply keep sending out investigators after the court told him it was unauthorized for him to do so.

When it comes to the issue of what the application of the law in a particular case, however, we can see that the answer to our original question is, “yes,” the two doctrines *might* be in conflict.

One argument the Governor could make is that the judicial branch has the power to tell him what he can review and what standards he must use in reviewing a parole decision, *but* that the judicial branch does not have the power to say whether he has “done it right” in any particular case. The Governor might argue that this is purely an executive branch matter, and whether he has done it right or not is between him and the voters at the next election. In other words, he might say it is a violation of separation of powers for the courts to review his decision in any particular parole case, and so the court should not entertain Mr. Rosenkrantz’s petition for writ of habeas corpus. The court, according to this argument, would decide that Mr. Rosenkrantz is not being held in custody illegally, because the Governor has decided under the Constitution to deny Mr. Rosenkrantz parole.

In making this argument, the Governor might point to other, more traditional, executive-branch powers, such as the power to grant a reprieve, pardon, or commutation of sentence. These powers (collectively referred to as the “clemency” powers) are given to the Governor by the Constitution to exercise on any “conditions he deems proper.” (Cal. Const., art. V, § 8(a).) The clemency powers provide another way (outside the parole system) for the Governor to let deserving individuals out of prison before they have served their full sentence. Historically, a governor’s decision not to grant clemency has not been subject to judicial review -- judicial review would violate the doctrine of separation of powers, since the clemency power is totally an executive power.

If the Governor were to make this argument to the Supreme Court, Mr. Rosenkrantz’s lawyer might have to argue that the power to review parole decisions is fundamentally different from the clemency power. He might point to the differences between the language in section 8(b) and section 8(a) of article V of the Constitution.

Questions for consideration: What do *you* think?

4.2 Would the difference in language between section 8(b) and section 8(a) of article V of the Constitution provide any basis for that argument?

4.3 Might the Governor argue that the powers are all so similar that the voters *intended* to give the Governor the same unreviewable power for parole as for clemency, even though the voters adopted slightly different language?

4.4 What other arguments could the Governor make to convince the court that the idea of separation of powers should be stronger than the idea of judicial review in this case?

5. Does a prisoner have any kind of protected interest in receiving parole?

One of the main arguments historically used to explain the power of judicial review is based on the idea that one important function of the courts is to protect individuals from the overwhelming power of the government. If one of the “separate” branches of government is attempting to take away an individual’s rights guaranteed by the Constitution or by other laws, is that, *in itself*, sufficient reason to decide that separation of powers must give way to judicial review?

Mr. Rosenkrantz might argue that he has a right, guaranteed by law, to parole unless he would be a danger to society. He might base this on Penal Code section 3041(b), which says the Board of Prison Terms “shall set a release date unless it determines that ... consideration of public safety requires a more lengthy period of incarceration.” His lawyer might use a phrase such as “constitutionally protected liberty interest” to describe this idea.

Questions for consideration: What do *you* think?

5.1 If section 3041(b) of the Penal Code establishes a protected “liberty” interest for anyone whose sentence allows parole, could Rosenkrantz argue that, traditionally, the courts grant judicial review of executive branch decisions to make sure individuals are not deprived of that type of liberty interest?

5.2 What argument could the Governor make that could convince the Supreme Court that there is no “right” to parole? Could he argue that section 3041(b) does not mean to *require* the Board to set a parole date, but merely tells the Board when it *does not have to do so* -- that is, if public safety requires further imprisonment? Are there other arguments you would make if you represented the Governor?

VI. OTHER ISSUES THE COURT OR THE ATTORNEYS MAY DISCUSS

If the Supreme Court were to decide that the Governor's actions in reviewing a parole decision were not subject to judicial review, for example, because that power is too much like the clemency power or because the voters did not intend to permit judicial review when they adopted Proposition 89, then the case is over and Mr. Rosenkrantz loses.

The Supreme Court, however, does not announce its decisions from the bench during oral argument; every case is decided by a written opinion. Therefore, during oral argument, the attorneys arguing a case have to consider a certain amount of "what ifs" -- what if the court decides the other way, and there are still some other issues that have to be decided? In almost every case, there are issues the court may never reach but that the attorneys must argue because the court *might* reach them and this is the *only* chance the attorneys will have for oral argument in a particular case. We will discuss some of the issues that might arise in the present case.

1. *How should a court review the Governor's parole decision?*

In this case, one of the issues the attorneys will need to argue is this: *If* the judicial branch is going to review the Governor's decision to deny parole to a murderer, what "standard of review" should the courts use? The standard of review might be thought of as the eyeglasses through which the courts look at the case.

Examples of different standards of review:

1.1 **Independent Judgment.**

The strongest "eyeglasses" would be the "independent judgment" standard of review. Under that standard, which is used in many different types of cases by appellate courts, the appellate court ignores the ruling of the lower court (or the Governor) and considers the matter "from scratch." Under this standard, the court would look at the facts about Mr. Rosenkrantz and look at the Board of Prison Terms rules and decide for itself whether Mr. Rosenkrantz would be a danger to society if released on parole.

1.2 **Abuse of Discretion.**

The weakest "eyeglasses" would be the "abuse of discretion" standard of review. Under that standard, which is also used in many different types of cases by appellate courts, the appellate court relies heavily on the ruling of the lower court (or the Governor). The appellate court asks, based on the information before the lower court, could *any* reasonable person have decided the case the way the lower court did? If the answer is "yes," the judicial review is complete and the lower court's decision is affirmed.

1.3 **Substantial Evidence.**

There are a variety of standards of review in between "independent review" and "abuse of discretion." The most common one is called "substantial evidence review." Under that standard, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could have made the same decision as the lower court (or the Governor). (See *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Under this standard of review, if there are witnesses who said different things in the trial court, the appellate court must accept the

testimony that best supports the lower court's decision, even if the appellate court, in reading the record before it, might believe the other witness.

In the present case, Mr. Rosenkrantz's lawyer might suggest to the Supreme Court that **substantial evidence** review is appropriate. He or she might argue that, given the consequences to Mr. Rosenkrantz if the Governor makes a mistake, at the very least the court should be sure there was reasonable evidence of solid value that supports the Governor's decision.

The Attorney General, on the other hand, might argue that, if the court is going to review the Governor's decision at all, the court should apply the **abuse of discretion** standard. That standard, the Attorney General might argue, properly recognizes that the Governor is elected by the People of California to make just such decisions as whether Mr. Rosenkrantz should be paroled. That standard would ask whether there is any evidence at all in the record before the court that might lead a reasonable person to the same conclusion reached by the Governor. If there is *some* evidence -- any evidence at all that would support a reasoned decision to deny parole -- then the Governor's decision would be affirmed under this standard.

“Standard of review question” for consideration:

1.4 Which standard seems more appropriate to you, the one that gives more recognition to Mr. Rosenkrantz's liberty interest in properly being released on parole, or the one that gives more weight to the fact that the voters elected the Governor to use his own best judgment in making decisions like this one, where public safety might be at stake?

2. *What does the evidence show about Mr. Rosenkrantz's suitability for parole?*

In this case, the trial court decided that the “some evidence” standard was the correct one. It then decided there was not enough evidence to meet this standard. Therefore, the trial court concluded, the Governor had abused his discretion in denying parole for Mr. Rosenkrantz.

If the Supreme Court decides which standard of review is to be applied, it must then decide whether there is enough evidence to support the Governor's decision under that standard of review.

The Governor will probably argue that his 12-page statement explaining why he denied parole in this case shows that there was some evidence, and also sufficient evidence, to justify the Governor's decision. Rosenkrantz might rely on the trial court's contrary conclusion and argue that the court's decision was right.

The Supreme Court may also find it necessary to decide whether the earlier decision of the Court of Appeal -- that there was no evidence to support denial of parole -- settled that issue for purposes of the present case. In that event, the court might have to decide whether the Governor was allowed to re-consider the record and come to his own conclusions, since a court already had decided the matter.

3. *Can the Governor's power of review be exercised in a case where the crime was committed before the Governor was given the power of review?*

Finally, the Supreme Court might have to decide whether the change in the Constitution under Proposition 89 effects the present case at all, since the voters adopted the change after Mr. Rosenkrantz committed his crime. At the time he committed the crime, the Governor did not have the power to review a decision of the Board of Prison Terms. Was that new power intended by the voters to be retroactive? If it was so intended, is that constitutionally permissible under the limitation that criminal laws cannot be made applicable *ex post facto* (Latin again: “after the fact”)? The Supreme Court might or might not need to answer these questions to fully decide the issues in the case of *In re Rosenkrantz*.

Supreme Court Summary of *In re Rosenkrantz* (S104701)

Robert Rosenkrantz was convicted of second degree murder in 1986, in a case arising out of his shooting an individual who revealed Rosenkrantz's homosexuality to Rosenkrantz's father; since the conviction, Rosenkrantz has been confined in state prison. Rosenkrantz filed the present case to challenge a decision of the Governor denying his request for parole. The principal legal issues presented by the case concern whether a court has the authority to review a decision by the Governor denying parole, and if so, what standard of review a court should use in reviewing the Governor's decision.

Prior to November 1988, the final decision whether to grant or deny parole was made by the California Board of Prison Terms (the official name of the parole board in California). In November 1988, the voters approved a constitutional amendment adding article V, section 8(b) to the California Constitution. That section states: "No decision of the parole authority of this State with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action."

In this case, one issue the Supreme Court must decide is whether a decision of the governor to deny parole is subject to judicial review, that is, to review by a court. The Governor contends that under the separation-of-powers doctrine, a court lacks authority to review a gubernatorial decision denying parole to determine whether the decision is supported by evidence in the record. The Governor argues that his decision to deny parole is similar to a gubernatorial decision to refuse to grant a pardon or to refuse to commute a sentence, decisions that historically have not been subject to judicial review. In response, Rosenkrantz contends that the Governor's authority to deny or grant parole is different from the Governor's authority to grant pardons or commutations, because the Constitution places limits on the Governor's authority over parole and because decisions granting or denying parole traditionally have been subject to judicial review.

If the Supreme Court concludes that a Governor's parole decision is subject to judicial review, the court must also determine the appropriate "standard of review" that a court should apply in reviewing such a decision. In this case, the trial court concluded

that a court, in reviewing a Governor's decision, should not consider whether it agrees with the Governor's decision or even whether the Governor's decision is supported by substantial evidence (the ordinary standard of review applied to most factual findings), but instead should apply a more deferential standard and should uphold the Governor's decision whenever there is "some evidence" to support it. Even under that deferential "some evidence" standard, however, the trial court found that in this case no evidence supported the Governor's decision, and on that basis the trial court concluded that the Governor's decision denying parole was improper. Accordingly, the trial court determined that Rosenkrantz should be released on parole.

The Supreme Court must determine whether the "some evidence" standard is the appropriate standard and, if it is, the court must further determine whether in this case there is "some evidence" in the record to support the Governor's decision. The Governor argues that the 12-page decision explaining his basis for denying parole demonstrates that there clearly is "some evidence" to support his decision.

A number of other legal issues are also presented by the case. The Court of Appeal concluded that, in light of an earlier appellate court decision finding that there was insufficient evidence to support *the parole board's* denial of Rosenkrantz's request for parole, the Governor in this case is barred, under the law-of-the-case doctrine, from claiming that his decision to deny parole is supported by sufficient evidence. The Governor challenges the Court of Appeal's conclusion on this issue, asserting that because the Governor and parole board are separate entities and because the Governor may rely upon different evidence than the parole board, the law-of-the-case doctrine is not applicable.

Finally, the Supreme Court may consider one additional legal issue: whether because Rosenkrantz committed his crime in 1986, before article V, section 8(b) was adopted, the ex post facto clause of the federal and state constitutions preclude the state from applying that provision to Rosenkrantz. Rosenkrantz has conceded in his legal brief that he waived or forfeited the ex post facto claim by failing timely to raise it in the Supreme Court, but he has asked the Supreme Court to address it nonetheless. If the Supreme Court agrees to consider this issue, it will have to decide whether, as Rosenkrantz contends, application of article V, section 8(b), violates the ex post facto clause on the ground that the provision authorizing the Governor to deny parole significantly increases the probability of prolonging a prisoner's incarceration, or whether, as the Governor contends, the adoption of a procedural provision like article V, section 8(b), is not the type of change to which the ex post facto clause applies.

Although the trial court and the Court of Appeal ruled in Rosenkrantz's favor, Rosenkrantz's release from prison has been stayed until the Supreme Court decides the case. Thus, the Supreme Court's decision will determine whether Rosenkrantz is released at this time or whether instead the Governor's decision to deny parole will be upheld.