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April 27, 2019

The Honorable Frances Rothschild, Presiding Justice,
and the Honorable Associated Justices
California Court of Appeal
Second Appellate District, Division One
300 South Spring Street, Second Floor, North Tower
Los Angeles, California 90013

Re: *In re Leslie Van Houten*
Court of Appeal Case No.: B291024

Dear Presiding Justice Rothschild, and the
Associate Justices of the Court of Appeal:

This letter responds to the Court's April 24, 2019, request that the parties provide briefing on the issue of whether the Governor's right to reverse Ms. Van Houten's subsequent grant of parole renders moot the matter before this Court in the present petition. For the reasons set out below, it does not.

It is well established that this Court, as with every other appellate tribunal, has a duty to decide actual controversies arising from a decision which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or otherwise declare principles or rules of law which cannot affect the matter in issue in the case before the court. (*National Assoc. of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746; *In re J.G.* (2008) 159 Cal.App.4th 1056, 1062.) Equally well established is the legal principle that, "Although courts generally avoid issuing advisory opinions on abstract propositions of law, they should not avoid the resolution of important and well-litigated controversies arising from situations which are capable of repetition, yet evading review." (*Ibid*; *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 1924 [en

banc]; accord *Moore v. Ogilvie* (1969) 394 U.S. 814, 816; *Southern Pacific Terminal Co. v. Interstate Commerce Commission* (1911) 219 U.S. 498.)

The Third District's decision in *In re J.G., supra*, is instructive. In *JG*, the defendant was incarcerated outside California as part of the Federal Witness Protection Program. He filed a petition for writ of habeas corpus challenging the California Department of Corrections and Rehabilitation's ("CDCR") denial of his request to appear in person rather than telephonically at parole hearings. (*Id.*, at p. 1061.) After an order to show cause issued, the CDCR agreed to allow in-person appearances and sought to dismiss the habeas petition as moot. (*Ibid.*) The court denied the motion. (*Id.*, at p. 1063.) The court reasoned that the CDCR's "vaguely worded assurance" that it would arrange a physical appearance at his next parole hearing, and the Board of Parole Hearings' (BPH) clarification that it would continue to facilitate physical appearances going forward did not render the challenge moot. "In spite of respondent's carefully worded assurances," the court concluded the issues raised were "capable of repetition, yet evading review" by the defendant or other similarly situated inmates. (*Ibid.*)

The California Supreme Court applied this same legal principle in a matter involving requests for declaratory relief. (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920 [en banc decision].) In *Marin*, the parties filed cross-complaints for declaratory relief addressing the validity of a county board's bylaws. (*Id.*, at p. 924.) The challenged bylaw denied nonmembers access to a real estate multiple listing service. (*Ibid.*) While the appeal was pending, the board deleted the bylaw and argued the case was rendered moot. (*Id.*, at p. 928.) The Supreme Court disagreed, noting there was "no assurance that the board will not reenact [the rule] in the future." (*Id.*, at p. 929.)

Applied to the present matter, Ms. Van Houten is entitled to a decision on the issue of whether the Governor erred in reversing her second grant of parole based primarily on the gravity of the commitment offense, where the Governor failed to cite a single aggravated circumstance of the commitment offense that has not been mitigated by Ms. Van Houten during her 49-years in prison. That is the

only way the gravity of the commitment offense is relevant. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1202, 1209.) If this Court does not issue a decision on grounds that the issue is moot, it will merely avoid the resolution of an important and well-litigated controversy arising from a situation which will be repeated, yet insulated from review. This Court's failure to rule will force Ms. Van Houten to wait until the BPH's third decision granting parole becomes final then sent to the Governor. The BPH has not yet finalized its decision, making the Governor's decision due in late June.¹ The Governor's decision is *not* due on May 11, as suggested by the Court during oral argument. If the Governor reverses the third grant of parole, Ms. Van Houten will file a habeas petition in the superior court challenging the denial. Assuming the superior court affirms the Governor's decision, as it has in the past, Ms. Van Houten will be back before this Court seeking the same ruling on a new petition. This cycle can repeat endlessly, thus insulating the issue from appellate review. The mootness doctrine does not sanction avoiding review of the important and well-litigated issue in this case, where it is capable of repetition, yet evading appellate review. (*Ibid*; *Marin County Bd. of Realtors, Inc. v. Palsson, supra*, 16 Cal.3d at p. 924; accord *Moore v. Ogilvie, supra*, 394 U.S. at p. 816; *Southern Pacific Terminal Co. v. Interstate Commerce Commission, supra*, 219 U.S. 498.)

The mootness issue in this case is not whether a decision by this Court is rendered moot because the Governor may reverse Ms. Van Houten's third grant of parole. It is the Governor's decision that will become moot if this Court grants the petition. The Governor does not have superior jurisdiction over this court. The opposite is true. Thus, a decision by this Court is not rendered moot by the speculative possibility that the Governor might, again, reverse Ms. Van Houten's grant of parole. The mootness issue lies with the Governor. It is the Governor's possible denial of Ms. Van Houten's third grant of parole that could be rendered moot.

¹ During oral argument, this Court stated it believed the Governor's decision was due by the middle of May. Petitioner's counsel contacted the BPH and determined it had not yet submitted the final decision to the Governor.

At stake in this case is Ms. Van Houten's conditional liberty interest in not spending a single extra day in prison once she is eligible for parole. (U.S. Const., 14th Amend; *Greenholtz v. Inmates of Nebraska Penal* (1979) 442 U.S. 1, 7.) She is nearly 70-years-of-age. Avoiding a decision in this case not only violates the obligation of a judicial tribunal to decide all justiciable controversies before it, the lengthy delay caused by failing to issue a decision risks that this elderly petitioner may not live long enough to benefit from her demonstrated parole suitability.

In three successive hearings, the BPH has found Ms. Van Houten suitable for parole. This finding did not come easily. It took 21 prior parole hearings before the BPH finally was convinced that Ms. Van Houten no longer posed an unreasonable risk of danger to public safety. No matter what decision the Governor may, or may not make on a subsequent grant of parole, this Court is duty-bound to issue a decision on the facts before the court in this petition. Ms. Van Houten's constitutional liberty interests at issue in this case present an important and exhaustively litigated controversy that will repeat endlessly until this Court ends the cycle by rendering a decision or Ms. Van Houten dies of old age. Ms. Van Houten recognizes that affirming the BPH's grant of parole may be unpopular. While this makes the decision difficult from a political standpoint, it has nothing to do with the legal standard governing parole suitability or this Court's obligation to render a ruling. Under the circumstances of this case, the petition is not moot.

Very truly yours,

Nancy L. Tetreault
Richard Pfeiffer
Attorneys for Petitioner
Leslie Van Houten

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY MAIL

I, Nancy L. Tetreault, declare:

I am an active member of the State Bar of California and am not a party to this action. My electronic service address is tetreault150352@gmail.com and my business address is 346 N. Larchmont Boulevard, Los Angeles, CA 90004.

On **April 27, 2019**, I served the persons and/or entities listed below by the indicated method. For those marked "Served Electronically," I transmitted a PDF version of **Petitioner's Supplemental Letter Brief** by TrueFiling electronic service as indicated below. For those served by mail, I deposited a copy of the above document in a sealed envelope with postage fully prepaid in a mailbox regularly maintained by the United States Postal Service at Los Angeles, California, to the address provided below:

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(Via TrueFiling)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **April 27, 2019**, at Los Angeles, California.

NANCY L. TETREAULT