CALIFORNIA LIFER NEWSLETTER

State and Federal Court Cases

by John E. Dannenberg

Editor's Note: The commentary and opinion noted in these decisions is not legal advice.

NEW BPH HEARING ORDERED TO CONSIDER YOUTH FACTORS; SUPREME COURT GRANTS REVIEW

In re William Palmer

CA1(2); No. A147177
CA Supreme Ct. No. S252145
October 23, 2018

The Board's opening brief on the merits was filed 3/18/19.

TIMELINESS REQUIRED IN COMPASSIONATE PAROLE RELEASE REVIEWS

P. v. Rafael Servin

--- CA5th ---; CA4(3); No. G056696
January 24, 2019

The point of this case is that reviews of compassionate release decisions by the Board of Parole Hearings, by their very nature, should include expedited action.

This is an appeal from a postjudgment order denying defendant Rafael Servin a compassionate release from prison under Penal Code section 1170, subdivision (e) (section 1170(e)). During the pendency of the appeal, Servin died. This, of course, ends his appeal. Nonetheless, the Court of Appeal filed this opinion to make two points: (1) the statutory requirements and the standard of appellate review explained in *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578 apply in all cases under section 1170(e), whether the defendant or the People appeals; and (2) to alert the Attorney General and the criminal defense bar to the necessity of immediately advising the appellate court of the time exigency and the need for calendar preference in compassionate release cases.

Table of Contents

CALIFORNIA LIFER NEWSLETTER

PO BOX 277
RANCHO CORDOVA, CA 95741
Contact LSA @ (916) 402-3750
lifesupportalliance@gmail.com

COURT CASES (in order)

REVIEWED IN THIS ISSUE:

In re Williams Palmer
P. v. Rafael Servin
P. v. Nisaiah Perry
P. v. Willie Johnson
In re Robert Henry
P. v. Victor Ellis
P. v. Johnny Foster
In re Gregory Gadlin
P. v. Thomas Dixon
In re Enrique Gonzalez

Rafael Servin, a juvenile, was sentenced to LWOP for a gang-related murder. Later, he gained parolability in a resentencing action under *Miller v. Alabama* (2012) 567 U.S. 460. Subsequently, he became terminally ill, and petitioned for compassionate release. This appeal of his denial of such release extended past his demise, thus rendering it moot.

The State had initiated Servin's sentence recall proceedings.

> On May 22, 2018, the Secretary of the California Department of Corrections and Rehabilitation (the Secretary) requested that the trial court recall defendant's sentence pursuant to section 1170(e), on the grounds defendant had less than six months to live and no longer posed a threat to the community. The Secretary's request was supported by a diagnostic study and evaluation report and medical evaluation.

The trial court had explained its reasoning for the denial.

> Following an evidentiary hearing, the court denied the section 1170(e) request for compassionate release. The court explained its denial as follows:
>
> "The question that the court is faced with is: Should the court under the circumstances of this case exercise its discretion and allow the defendant to go home and die with his family? That is really the issue here. And that's the decision. [¶] . . . [¶]
>
> "There is no question from the record before me that the defendant has a terminal illness. There is no question before me that the defendant has less than six months to live as of the date of that letter.
>
> "The statement by the Department of Corrections that the defendant does not pose a threat to public safety, as I indicated yesterday, the inference from that is because of the defendant's condition. [¶] . . . [¶]
>
> "What the court is faced with here is: Should the court through compassion allow the defendant to go home and die surrounded by his family? When all is said and done, that's truly the case, that's the issue before the court.

Cont. page 4

PUBLISHER'S NOTE

***

California Lifer Newsletter (CLN) is a collection of informational and opinion articles on issues of interest and use to California inmates serving indeterminate prison terms (lifers) and their families.

CLN is published by Life Support Alliance Education Fund (LSAEF), a nonprofit, tax-exempt organization located in Sacramento, California. We are not attorneys and nothing in CLN is offered as or should be construed as legal advice.

All articles in CLN are the opinion of the staff, based on the most accurate, credible information available, corroborated by our own research and information supplied by our readers and associates. CLN and LSAEF are nonpolitical but not nonpartisan. Our interest and commitment is the plight of lifers and our mission is to assist them in their fight for release through fair parole hearings and to improve their conditions of commitment.

We welcome questions, comments and other correspondence to the address below, but cannot guarantee an immediate or in depth response, due to quantity of correspondence. For subscription rates and information, please see forms elsewhere in this issue.

EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility

www.lifesupportalliance.org

IT STARTS WITH YOU

Life Support Alliance has been hosting and presenting workshops and seminars for lifers' family members since 2012—and we're still at it. Having just completed the second family seminar of the year, with 3 more scheduled and an additional date possible, we're meeting more and more new lifer families, some just starting this long road with their loved one, some who have been on it for a while, but who, for whatever reason, haven't figured it out yet.

And maybe that's because their lifer hasn't figured it out. One of the first things we tell family members is there will be no comparing of lifers or crimes. "I know my lifer's OK, but I'm not sure about yours!" "My lifer should be let go, after all, it isn't like he killed someone." Miss us with that.

And the same goes for those family members who come prepared to blame all the misfortunes and problems inherent in prison life on CDCR and all parole denials on the BPH. "They just don't like him because he's too smart." "They'll never parole him because he's (pick one) (a) black; (b) Hispanic (c) doesn't want to play the game."

Let us assure you, parole and suitability isn't a game. Not for the commissioners and not for the more than 1000 lifers found suitable last year. Where do family members come up with these ideas, rumors, excuses and cop-outs? Largely, from their prisoners, it seems. Yeah, that would be you guys.

For those of you telling your family not to worry about that 115—it's no big deal; explaining your parole denial as bias of the parole panel or fomenting your family to rail against your prosecution and charge, we've got two words for you: Stop It. Put that energy into something that will pay off, like becoming suitable for parole.

Sure, CDCR is responsible for lots of screw up in prisons. True, not everything is fair or even right. And parole suitability is hard to achieve (hint—it's supposed to be that way). But it's up to you, the prisoner in question, to make the changes required to be paroled. Over a thousand inmates did that last year—why should you think you're any different, should get special consideration or be held to an easier standard? And for those of you feeding your family a line instead of working on your life, how foolish do you think they sound when engaged in this conversation:

"He shouldn't be there, he didn't commit a violent crime."

"What did he do?"

"It wasn't violent?"

"What was he convicted of?"

"Well, it wasn't violent. He shot a guy, but he didn't die."

Uh huh. Get real. Your suitability is your responsibility, your job while in prison and should be the main focus of your efforts. Yes, we understand the need for vocations, education and the like, but—what will you do with any of those accomplishments if you aren't free?

Be honest with yourself. Be honest with your family. And above all, be honest with the parole board. It works. Ask those 1000+ men and women who paroled last year.

To quote the celebrated (if somewhat notorious) Michael Jackson (From "Man in the Mirror):

I'm gonna make a change,
I'm starting with the man in the mirror

For once I'm my life
I'm asking him to change his ways

It's gonna feel real good,
And no message could have been any clearer

Gonna make a difference
If you want to make the world a better place

Gonna make it right
Take a look at yourself and then make a change

Cont. from pg. 2….

"The ability, if that is even the correct word, to be able to be with your family when you die, especially when you have a terminal illness, is something that we all wish for.

"Death is part of living. I don't want to be cliché here, but everybody is going to die, and the question is: When you do die, what are the circumstances?

"There are lots of situations where individuals who are innocent do not get to die with their family. It was mentioned yesterday about combat. People who defend our country who die in combat do not get to die with their family around them.

"A young person who is killed, even by an accident in an automobile collision, does not get to die with their family around them.

"And the victim in this case obviously did not get to die with his family around him.

"So the question for the court is: Should the court exercise its discretion and allow compassion for this defendant to go home with his family? And the court at this time will answer that question, 'no.'

"This was a tragic case. This victim was basically assassinated. The defendant, although [he] should be complimented on his journey to rehabilitation, but has he earned the compassion in this court's mind to be able to go home and to die with his family? And the answer is no.

"So for all of those reasons, at this time the court will deny the request to

recall the sentence under 1170 subsection (e)."

The Court first recalled the underlying law.

> Section 1170(e), provides: "(1) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary [of the Department of Corrections and Rehabilitation] or the Board of Parole Hearings or both determine that a prisoner satisfies the criteria set forth in paragraph (2), the secretary or the board may recommend to the court that the prisoner's sentence be recalled.
>
> "(2) The court shall have the discretion to resentence or recall if the court finds that the facts described in subparagraphs (A) and (B) . . . exist:
>
> "(A) The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department.
>
> "(B) The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety. [¶] . . . [¶]
>
> "The Board of Parole Hearings shall make findings pursuant to this subdivision before making a recommendation for resentence or recall to the court. This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole." (§ 1170, subd. (e)(1), (2).)

The Court noted it would have remanded the case to the Superior Court because that Court had used the wrong standards in its earlier denial.

> "[A]lthough section 1170(e) authorizes the trial court to exercise discretion whether to release a prisoner for compassionate reasons, the statute also establishes clear eligibility criteria [citation], suggesting that discretion is not unfettered when evidence is presented satisfying the statutory criteria." (*People v. Loper* (2015) 60 Cal.4th 1155, 1161, fn. 3.) The proper standard of review is whether "some evidence" supports the Secretary's recommendation for compassionate release (*Martinez v. Board of Parole Hearings, supra*, 183 Cal.App.4th at pp. 582 583, 593 594), and is "'highly deferential'" to the Secretary's factfinding (*id*. at p. 593).
>
> In considering a request for release of a defendant under section 1170(e), the trial court must consider only the factors specified in that statute and must make findings regarding those factors, with deference to the Secretary's recommendation. In this case, the trial court did not make a finding regarding defendant's threat to public safety. Instead, the court made findings regarding whether defendant deserved to be released from prison, which is not a proper factor for consideration under section 1170(e). For understandable reasons, the trial court did not believe that defendant deserved to be released, especially in light of the record and the statements by the victim's family at the resentencing hearing. However, the statute has two requirements; the trial court needed to make findings on both, and not on other factors. Had defendant not died during the pendency of these proceedings, based on the record, we would have remanded this matter to the trial court to make findings on the statutory factors.

The Court then dealt with the applicability of timeliness to 1170(e) adjudications.

> Section 1170(e) is designed to ensure that the process of requesting a compassionate release from prison is conducted expeditiously. The statute makes no specific provisions for appeals of a trial court's order, however. The California Supreme Court has expressed its opinion that an appeal of the trial court's order is preferable to a petition for a writ of mandate. "[R]espondent argues that permitting defendant to appeal the denial of compassionate release is contrary to the Legislature's purpose of expediting cases in which prisoners who meet the criteria for compassionate release can quickly be released from custody. Respondent suggests prisoners should instead seek writ relief because that avenue would more quickly resolve the case. We disagree: 'A remedy by immediate direct appeal *is presumed to be adequate*, and a party seeking review by extraordinary writ bears the burden of demonstrating that appeal would not be an adequate remedy under the particular circumstances of that case.' [Citation.] While not foreclosing the possibility of writ relief in all cases, we observe that prisoners remain free to seek expedited processing of their appeal on a showing of good cause, as defendant did in this case." (*People v. Loper, supra*, 60 Cal.4th at p. 1167.)

In order to ensure that such cases may be resolved fully and expeditiously, we urge any party or counsel appealing from a trial court's order under section 1170 (e) to advise the appellate court at the earliest possible time of the nature of the issues on appeal and the date on which a medical professional determined the defendant had no more than six months to live, and to seek calendar preference. (Cal. Rules of Court, rule 8.240.)

Accordingly, the Court of Appeal entered an order directing the Superior Court below to enter an order permanently abating all proceedings with respect to Servin.

MARIJUANA POSSESSION IN PRISON NOT EXCUSED UNDER NEW STATE MARIJUANA LAWS

P. v. Nisaiah Perry

CA1(2); No. A153649
March 1, 2019

The essence of this case is that although limited marijuana possession is now legal by California adults, it is not allowed by adult prisoners. This is of major importance to lifers – the Board would look very dimly on a writeup or conviction for marijuana possession inside the walls.

> While serving a prison sentence for another offense, appellant Nisaiah J. Perry pled no contest to a charge of possession of marijuana in prison and was sentenced to a two-year term. He contends the trial court erred in summarily denying his petition to recall or dismiss this sentence after the passage of Proposition 64, which legalized possession of up to 25.8 grams of marijuana by adults 21 years of age and older. We conclude that Proposition 64 did not remove possession of marijuana in prison from the reach of Penal Code section 4573.6, the statute under which appellant was convicted, and therefore affirm.

Perry's crime dated back to 2010.

> In 2010, appellant entered a plea of no contest to a charge of unauthorized possession of marijuana in prison. (Pen. Code, § 4573.6, subd. (a).) A charge of

bringing drugs into a prison (Pen. Code, § 4573) and an alleged prior conviction for first degree robbery (Pen. Code, § 211) were dismissed, and appellant was sentenced to the low term of two years, consecutive to the prison term he was already serving.

Prop. 64 came along and permitted expungement of past pot crimes.

On November 8, 2016, the voters adopted Proposition 64, which, with certain limitations, legalized possession of "not more than 28.5 grams of cannabis" by persons 21 years of age or older. (Health & Saf. Code, § 11362.1; Prop. 64, § 4.4, approved Nov. 8, 2016, eff. Nov. 9, 2016.) The new law provided that a person "serving a sentence for a conviction . . . who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 113632.3, and 11362.4 as those sections have been amended or added by that act." (§ 11361.8.)

Although Perry's offense long predated the new Prop. 64 legalization of pot, but he and his wife sought Prop. 64 expungement.

On November 15, 2016, appellant and his wife each separately wrote to the Solano County Superior Court inquiring about having appellant's conviction expunged in light of the passage of Proposition 64. Their letters were forwarded to the offices of the district attorney and public defender.

On May 4, 2017, appellant filed a petition for recall or dismissal of sentence, alleging that his Penal Code section 4573.6 offense involved only 14 grams of marijuana and was therefore eligible for expungement under Proposition 64. The trial court's May 4, 2017, order denying the petition concluded that appellant failed to state a basis for relief because "Prop. 64 did not amend Penal Code section 4573.6, which remains a felony offense."

On January 10, 2018, appellant filed another petition in the trial court, arguing that he was entitled to relief under Proposition 64 despite having been convicted of violating Penal Code section 4573.6, rather than a provision of the Health and Safety Code, and that section 11361.8 required the court to presume he was eligible for resentencing or dismissal. The trial court denied the petition on the basis that appellant had not cited new facts, circumstances or law to support reconsideration of its previous denial.

Appellant filed a notice of appeal, and this court appointed counsel to represent him.

The Court recounted the relevant statutes.

Penal Code section 4573.6, subdivision (a), provides in pertinent part: "Any person who knowingly has in his or her possession in any state prison . . . any controlled substances, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, . . . without being authorized to so possess the same by the rules of the Department of Cor-

rections, rules of the prison . . . or by the specific authorization of the warden, superintendent, jailer, or other person in charge of the prison . . . is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years."

When appellant pled no contest to violating this statute in 2010, section 11357, subdivision (b), made possession of not more than 28.5 grams of marijuana a misdemeanor. As amended by Proposition 64, section 11357 no longer defines possession of not more than 28.5 grams of marijuana by a person age 21 or older as an offense. (§11357, subd. (a).) Possession of cannabis by persons under age 21 remains an offense (§ 11357, subd. (a) (1), (2)), as does possession of more than 28.5 grams of cannabis by persons over age 18 years. (§ 11357, subd. (b).)

In addition, Proposition 64 affirmatively legalized possession of not more than 28.5 grams of marijuana, by a person at least 21 years of age, by the addition of section 11362.1: "(a) Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to: [¶] . . . (1) Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of cannabis not in the form of concentrated cannabis . . . ."

As indicated above, section 11361.8, subdivision (a), provides that "[a] person currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act."

Appellant argues he would not have been guilty of an offense under Penal Code section 4573.6 if Proposition 64 had been in effect at the time of his offense because, as a result of the amendments to section 11357 and addition of section 11362.1, the possession of 28.5 grams or less of cannabis is not "prohibited by Division 10 . . . of the Health and Safety Code." (Pen. Code, § 4573.6., subd. (a).)

Perry then unsuccessfully tried to argue that "possession" of marijuana was unrelated to consuming it.

While section 11362.45, subdivision (d), does not expressly refer to "possession," its application to possession is implied by its broad wording—"[l]aws *pertaining* to smoking or ingesting cannabis." Definitions of the term "pertain" demonstrate its wide reach: It means "to belong as an attribute, feature, or function" (<merriam-webster.com/dictionary/pertain> [as of Feb. 28, 2019]), "to have reference or relation; relate" (<dictionary.com/browse/pertain?s=1> [as of Feb. 28, 2019]), "[b]e appropriate, related, or applicable

to" (<en.oxforddictionaries.com/definition/pertain> [as of Feb. 28, 2019]). We would be hard pressed to conclude that possession of cannabis is *unrelated* to smoking or ingesting the substance.

Appellant attempts to avoid this conclusion by challenging respondent's assertion that "[o]ne has to possess marijuana in order to smoke or ingest it." Appellant points out that possession is not necessarily an inherent aspect of smoking or ingesting marijuana. A person can smoke marijuana without possessing it, for example, by smoking a joint in the possession of another person. Caselaw has recognized that "[i]ngestion . . . at best raises only an inference of prior possession." (*People v. Palaschak* (1995) 9 Cal.4th 1236, 1241.) "[D]epending on the circumstances, mere ingestion of a drug owned or possessed by another might not involve sufficient control over the drug, or knowledge of its character, to sustain a drug possession charge." (*Ibid.; People v. Spann* (1986) 187 Cal.App.3d 400, 408 [" 'possession,' as used in [Penal Code section 4573.6], does not mean 'use' and mere evidence of use (or being under the influence) of a proscribed substance cannot circumstantially prove its 'possession' "].)

That use of cannabis does not sufficiently prove possession to support a conviction of the latter, however, does not establish that possession is not *related* to use. In the context of possession in prison, it is particularly obvious that possession must "pertain" to smoking or ingesting. For what purpose would an inmate possess cannabis that was not meant to be smoked or ingested by anyone? The exception stated in subdivision (d) of section 11362.45 makes it clear that Proposition 64's legalization of adult cannabis use was not meant to extend to use in prison. Why, then, would the electorate have intended to legalize possession *in prison*? Appellant, in attempting to demonstrate that "use" is distinct from "possession," points to the statement in *People v. Spann, supra*, 187 Cal.App.3d at page 406, that the "history of the drug laws shows a consistently different classification and punishment of the use and possession of regulated substances, with use (or being under the influence) invariably treated as less culpable or not culpable at all." While appellant's point is that possession and use have been treated differently under state law, the fact that *possession* has been treated as the *more* culpable conduct makes it even more unreasonable to infer that Proposition 64 was meant to legalize possession of cannabis in prison while not legalizing its use.

The Court found that the controlling statute barring prisoners from possessing controlled substances was not overridden by Prop. 64.

Penal Code section 4573.6, meanwhile, is not specific to cannabis: It deals with the possession in penal institutions of all controlled substances. Penal Code section 4573.6 is one of several "closely related" provisions that the California Supreme Court has said "flow from the assumption that drugs, weapons, and other contraband promote disruptive and violent acts in custody, including gang involvement in the drug trade" and therefore "are viewed as ' "prophylactic" ' measures that attack ' "the very presence" ' of such items in

the penal system." (*People v. Low, supra*, 49 Cal.4th at pp. 382, 386, 388.) The need for such measures has not been altered by Proposition 64.

In conclusion, the Court found that Perry was not entitled to resentencing for his prior marijuana offense in prison.

As this case illustrates, the definition of in-custody offenses in Penal Code section 4573.6 (as in the related Penal Code sections 4573 and 4573.9) by reference to possession prohibited by division 10 has become more complicated since Proposition 64 with respect to cannabis, a matter that might warrant Legislative attention. But it does no violence to the words of the Penal Code section 4573.6 to interpret "controlled substance, the possession of which is prohibited by Division 10," as including possession of cannabis in prison. Cannabis remains a controlled substance under division 10. Under the Health and Safety Code provisions affected by Proposition 64, all of which are part of division 10, cannabis possession is prohibited in a number of specific circumstances and its possession or use in penal institutions is excluded from the initiative's affirmative legalization provision. We decline to adopt an interpretation of these statutes, or Penal Code section 4573.6, that appears to be so at odds with the intent behind and language of Proposition 64.

For these reasons, we conclude appellant is not entitled to resentencing pursuant to section 11361.8.

SENATE BILL NO. 620 DOES NOT AUTOMATICALLY TRIGGER RESENTENCING FOR PRISONER PREVIOUSLY FOUND TO HAVE USED A FIREARM IN THE COMMISSION OF A FELONY

P. v. Willie Johnson

--- CA5th ---; CA2(6); No. B290213
March 4, 2019

The essence of this case is that a prisoner who seeks SB620 resentencing to lately abate a use-of-firearm conviction may only seek such relief if his conviction is not final, i.e., if he has any direct appeal rights remaining. In this case, Willie Johnson's conviction was final, and he was for that reason not entitled to resentencing, as noted in the Court's synopsis below.

Senate Bill No. 620 does not automatically trigger resentencing for a prisoner who was previously found to have used a firearm in the commission of a felony. The Legislature has expressly limited the reach of newly enacted Penal Code § 12022.53, subd. (h). A defendant serving a sentence pursuant to a "final" judgment, who asks for such relief, should receive a "summary denial." (See People v. Romero (1994) 8 Cal.4th 728, 737.) The State of California has a "powerful interest in the finality of its judgments. . . . [P]articularly strong in criminal cases, for '[w]ithout finality, the criminal law is deprived of much of its deterrent effect.' [Citations.]" (In re Harris (1993) 5 Cal.4th 813, 831.) The state certainly has a strong interest in deterring the use of firearms in the commission of a felony.

Appellant contends that he is entitled to 1. be present in the trial court, 2. counsel, 3. de novo sentencing hearing,

4. present evidence, and 5. confront and cross-examine witnesses. These enumerated rights attach to an original sentence hearing. Unless and until the trial court issues an order in the nature of an order to show cause, a defendant has no "entitlement" to these rights.

Johnson has vigorously appealed his second degree murder conviction over the years. He has been denied relief at all levels, as recounted now by the appellate Court.

Appellant shot and killed Tina Gatlin, his former girlfriend, on December 11, 2007. In 2009, appellant was convicted, by jury, of second degree murder. The verdict included a finding that the enhancement alleging use of a firearm was true. (§§ 187, 189, 12022.53, subd. (b).) The trial court sentenced appellant to a term in state prison of 15 years to life, plus a 10-year consecutive term for the firearm use.

We affirmed his second degree murder conviction with the use of firearm finding enhancement in *People v. Johnson*, Mar. 29, 2011, B220820 [nonpub. opn.]. The California Supreme Court denied review on June 15, 2011 (S193001). Appellant's time to file a petition for writ of certiorari in the United States Supreme Court expired on September 13, 2011. (Supreme Court Rules, rule 13.)

Appellant is no stranger to seeking post sentence relief from final judgments. He has filed numerous petitions for writs of habeas in state and federal courts. He has had no success. The United States Supreme Court denied appellant's petition for writ of certiorari in the federal habeas matter on January 12, 2015.

Appellant also filed in state court a motion to reduce the amount of restitution he was ordered to pay. The motion was denied. We affirmed that order in an unpublished opinion on September 7, 2016 (B268763). Appellant then filed a motion to set aside the restitution order as void. The motion was denied. We affirmed that order in another unpublished opinion on September 26, 2017 (B282684). We issued the remittitur in that matter on November 30, 2017. Appellant did not file a petition for review in the California Supreme Court, nor did he file a petition for a writ of certiorari.

On April 9, 2018, appellant filed his "Motion for stay of Gun Enhancement (Penal Code, 1385)." As indicated, the trial court summarily denied the motion.

The essential flaw in Johnson's recent Motion for stay of Gun Enhancement was that it was procedurally time-barred because of the finality of his conviction.

Respondent correctly contends the trial court's order is not appealable because the trial court lacked jurisdiction to consider the merits of appellant's motion. We agree. The trial court had no jurisdiction to grant relief pursuant to Senate Bill No. 620, which amended section 12022.53, subdivision (h). As we explain, the new amendment does not apply to final judgments. The trial court's order denying the motion is not appealable because it is not an "order made after judgment, affecting the substantial rights of the party." (§ 1237, subd. (b).) The appeal is "irregular" and will be dismissed. (§ 1248.)

The Court went on to explain its legal reasoning behind this decision. It published the ruling, and therefore it is appli-

cable to all others similarly situated.

Senate Bill No. 620

When appellant was originally sentenced in 2009, the trial court had no discretion to strike or dismiss a firearm use enhancement. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 506 (*Arredondo*).) However, Senate Bill No. 620 amended the statute, effective January 1, 2018, to give the trial court discretion, in limited circumstances, pursuant to section 1385, to strike a firearm enhancement in the interest of justice. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080.) Subdivision (h) of section 12022.53 now provides, "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (*Ibid*.)

The amendment applies to nonfinal judgments. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) By its plain language, subdivision (h) "extends the benefits of Senate Bill 620 to defendants who have exhausted their rights to appeal and for whom a judgment of conviction has been entered but who have obtained collateral relief by way of a state or federal habeas corpus proceeding." (*Arredondo, supra*, 21 Cal.App.5th at p. 507.) This does not include appellant.

"'[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. [Citations.]' [Citation.]" (*People v. Vieira* (2005) 35 Cal.4th 264, 306.) For appellant, that time passed on September 13, 2011 which was the last day on which he could have filed a petition for writ of certiorari from the judgment of conviction in his murder case.

Appellant's subsequent habeas petitions and motions do not extend the date on which his judgment became final for purposes of Senate Bill No. 620 because, although he sought it, appellant did not "obtain[] collateral relief by way of a state or federal habeas corpus proceeding." (*Arredondo, supra*, 21 Cal.App.5th at p. 507.) Because he did not obtain collateral relief, appellant was not eligible for "resentencing . . . pursuant to any other law." (§ 12022.53, subd. (h).) Section 12022.53, subdivision (h), as amended by Senate Bill 620, does not apply. The trial court correctly entered an order summarily denying the sentencing request.

LWOP OVER 18 AT TIME OF CRIME NOT ENTITLED TO RESENTENCING AS A YOUTHFUL OFFENDER

In re Robert Henry

CA1(4); No. A150637
February 13, 2019

This case concerns an LWOP prisoner who sought appellate relief to be treated like a minor (at the time of his crime) because new laws recognize the fallibility of youth beyond age 18.

More than 30 years ago, defendant was convicted of murder with a special circumstances allegation and sentenced to a term of life in prison without possibility of parole (LWOP). In March 2016,

the trial court denied a petition filed by defendant that sought resentencing on the ground that the imposition of the LWOP sentence, without individual consideration of his age-related characteristics, violated the Eighth Amendment prohibition on cruel and unusual punishment. We find no error in the denial of defendant's petition because defendant was 19 years old when he committed his crime.

The superior court had denied relief below because no US Supreme Court or CA Supreme Court ruling had recognized such relief.

In March 2016, defendant filed a pro se petition for recall of sentence under Penal Code section 1170, subdivision (d)(2). Defendant's petition acknowledged that he was 19 years old at the time the crime was committed. He argued, however, that under the rationale of *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*) and its progeny, he was entitled to be resentenced because, like a juvenile offender, as a young adult he also was entitled to individualized consideration under the Eighth Amendment.

On February 10, 2017, after appointing counsel for defendant and requesting additional briefing by the parties, the trial court denied defendant's petition. The court explained, "I'm not make any ruling on the merits of the underlying substance of whether or not he has earned relief. Based upon his unique circumstances, it seems to me that the only mechanism under which I could resentence him would be pursuant to *Miller* . . . analysis, which does basically authorize such actions for minors. In this case the defendant is not a minor. . . . [¶] So, based on the specific procedural posture, I'm going to deny his request." Defendant timely filed a notice of appeal.

The Attorney General argued that in any event, the correct mechanism for Henry here would be to file a petition for writ of habeas corpus. In the interests of judicial economy, the Court here treated the instant petition for resentencing as a habeas petition. Having done so, it now denied relief.

As a procedural matter, we agree that because defendant was not under the age of 18 at the time he committed his crime, his petition was not authorized under section 1170, subdivision (d)(2). The Attorney General is correct that the proper mechanism for challenging a sentence based on a claim of constitutional error in this circumstance is via a petition for writ of habeas corpus. (*In re Kirchner* (2017) 2 Cal.5th 1040, 1052-1053.) Because defendant filed an improper petition for resentencing, the court correctly denied the petition. The denial of the invalid petition is not an appealable order as it is neither (1) a "final judgment of conviction" nor (2) an order made after judgment which affects the "substantial rights of the party." (§ 1237; see *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725 [defendant's substantial rights not affected by trial court's denial of untimely motion to recall sentence under § 1170, subd. (d)(1)].) While the court might have deemed his petition a petition for writ of habeas corpus, the denial of a petition for habeas corpus is also not an appealable order. The remedy is to file a new habeas petition in the appellate court. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) Anticipating this issue, defendant requests that we treat his ap-

peal as a petition for writ of habeas corpus and resolve the matter on the merits. In the interests of resolving the matter in a timely manner, we adopt this course of action and address the matter on the merits.

Because defendant was 19 years old when he committed his crime, the rationale applicable to the sentencing of juveniles in *Miller* and other cases relied upon by defendant does not apply. (*People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482 [rationale of *Miller* does not extend to defendant, who was just over 18 years old at the time of his offenses]; see also *People v. Perez* (2016) 3 Cal.App.5th 612, 617 [agreeing with *Argeta* and declining defendant's "invitation to conclude new insights and societal understandings about the juvenile brain require us to conclude the bright line of 18 years old in the criminal sentencing context is unconstitutional"].) While an argument can be made based on the Supreme Court's observation in *Roper v. Simmons* (2005) 543 U.S. 551, 574 that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18," the court in that case also clearly stated that "a line must be drawn" and "18 is the point where society draws the line for many purposes between childhood and adulthood." Until the United States Supreme Court or the California Supreme Court directs otherwise, we are bound by the line previously drawn for Eighth Amendment purposes at age 18. (*People v. Fletcher* (1996) 13 Cal.4th 451, 469, fn. 6; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we must hold that defendant's sentence does not violate the Eighth Amendment's proscription against cruel and unusual punishment.

Importantly, however, the Court of Appeal observed that there could still be a problem with the law as written, under equal protection principles. The Court noted that this was not raised as issue by Henry, and thus was not before the Court. But in its denial of habeas relief, the Court did so "without prejudice" for Henry to properly raised this issue in separate pleadings.

> Defendant has not raised any argument regarding relief under the youthful offender statute. (See § 3051 [requiring that a "youth offender parole hearing" be held after specified years of incarceration "for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense"].) Although the statute extends the availability of relief to an offender who was 25 years of age or younger at the time of the controlling offense, by its own terms, the statute does not apply to offenders, like defendant, who were sentenced to life without the possibility for parole for an offense that was committed after they turned 18 years old. (§ 3051, subd. (h) ["This section shall not apply . . . to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age."].) Defendant has not argued, and we express no opinion, whether the exclusion of certain offenders from relief under the statute violates a defendant's right to equal protection under the Fourteenth Amendment. (See *People v. Contreras*

(2018) 4 Cal.5th 349, 382 [declining to consider whether disparate treatment of juvenile one strike offenders under the youthful offender statute violates principles of equal protection].) Our denial of relief at this time is without prejudice to the subsequent consideration of this issue.

CDCR MAY GARNISH WAGES TO SATISFY OLD RESTITUTION FINE DEBT

P. v. Victor Ellis

--- CA5th ---; CA4(1); No. D074710
January 14, 2019

The instant case requires interprets Penal Code section 2085.5, subdivision (a). That subdivision allows CDCR to deduct a portion of an inmate's prison wages if that inmate owes a restitution fine under certain enumerated statutes. (See § 2085.5, subd. (a).)

In 1992, Victor Lee Ellis was sentenced to prison for seven years and was accessed a fine under section 1202.4, which qualified for garnishment under section 2085.5, subdivision (a). In 1999, Ellis finished serving his prison sentence.

Ellis returned to prison in 2011. Under section 2085.5, subdivision (a), the CDCR resumed deducting a portion of Ellis's prison wages based on the fine arising out of his 1992 crime. Ellis now maintains the CDCR does not have authority to garnish his prison wages under section 2085.5, subdivision (a) because he no longer is in custody for the 1992 crime.

In this published decision, the Court of Appeal disagreed with Ellis.

We disagree with Ellis's reading of section 2085.5, subdivision (a). As such, we affirm the superior court's order denying Ellis's motion challenging the deduction of his prison wages.

The history of Ellis's litigation is straightforward.

On December 14, 1992, in case number VCR6638, Ellis pled guilty to second degree robbery and admitted he had a prior serious felony conviction. The court sentenced Ellis to prison for seven years. As part of the sentence, the court imposed a $5,000 restitution fine under section 1202.4. Ellis represents that he completed his sentence and was discharged no later than 1999. The People do not dispute this representation.

On April 26, 2011, Ellis pled no contest to one count of robbery (§ 211). He also admitted he had one prior strike conviction (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and one prior serious felony conviction (§ 667.5, subd. (b)). Consistent with a plea agreement, the court sentenced Ellis to prison for 15 years.

Six years later, Ellis filed a pleading entitled "Motion to Vacate Restitution." In that motion, he argued the CDCR could not withdraw funds from his trust account because he had finished serving his prison term on case number VCR6638. The trial court issued a minute order denying the motion. Ellis timely appealed.

To begin its analysis, the Court recited the statute to be interpreted here.

Section 2085.5, subdivision (a) states:

"If a prisoner owes a restitution fine imposed pursuant to subdivision (a) of Section 13967 of the Government Code, as operative prior to September 29, 1994, subdivision (b) of Section 730.6 of the Welfare and Institutions Code, or subdi-

vision (b) of Section 1202.4 of this code, the secretary shall deduct a minimum of 20 percent or the balance owing on the fine amount, whichever is less, up to a maximum of 50 percent from the wages and trust account deposits of a prisoner, unless prohibited by federal law, and shall transfer that amount to the California Victim Compensation Board for deposit in the Restitution Fund. The amount deducted shall be credited against the amount owing on the fine. The sentencing court shall be provided a record of the payments."

The Court next interpreted the statute.

Under the subdivision, the CDCR has the authority to deduct a portion of an inmate's wages (20 to 50 percent) if that inmate owes a restitution fine imposed under certain enumerated statutes. Here, Ellis does not dispute that he owes a fine that was imposed under section 1202.4, one of the enumerated statutes in section 2085.5, subdivision (a). Nor does he dispute that he is currently an inmate in a California state prison. However, Ellis insists that section 2085.5, subdivision (a) does not apply to him because he is no longer serving the prison sentence for the crime under which the subject fine was imposed. We disagree.

Section 2085.5 "is akin to a garnishment statute; it calls for deductions from an inmate's wages and trust account deposits of 20 percent or the amount of restitution outstanding, whichever amount is less (and in no case to exceed a 50 percent deduction), in order to enforce a restitution fine or order." (In re Betts (1998) 62 Cal.App.4th 821, 825.) Section 2085.5, subdivision (a) contains two prerequisites to its application. First, it only applies to prisoners. Second, the prisoner must owe a restitution fine imposed pursuant to subdivision (a) of section 13967 of the Government Code, as operative prior to September 29, 1994, subdivision (b) of section 730.6 of the Welfare and Institutions Code, or subdivision (b) of section 1202.4. The subdivision restricts the amount the CDCR can deduct. Also, it will not allow the CDCR to deduct any amount if such a deduction is prohibited by federal law. After the CDCR deducts a portion of the inmate's prison wages, the subdivision instructs the CDCR where it is to transfer those deductions (i.e., to the California Victim Compensation Board for deposit in the Restitution Fund). There are no other restrictions on the CDCR's authority to garnish prison wages present in the text of subdivision (a) of section 2085.5.

The Court found that Ellis did not escape his former liability by virtue of a new, independent, conviction.

Nevertheless, Ellis argues that he no longer falls under section 2085.5, subdivision (a). He claims that the subdivision "refers implicitly to the *imposition* of a fine and not to any prior outstanding balances; the plain language of the statute thus indicates that CDCR is not entitled to collect on an old fine connected to a prior term of imprisonment." Similarly, he asserts "[s]ection 2085.5 by its plain meaning only empowers the [CDCR] to collect fines connected with the current convictions of a prisoner." Yet, Ellis does little more than make these assertions to support his position. In reviewing the plain text of subdivision (a) of section 2085.5, we see no restriction that limits the CDCR's authority in the manner Ellis suggests. Again, the only prerequisites under the statute are that Ellis be an inmate in a California cor-

rectional facility and he owe money on a restitution fine imposed under one of a few enumerated statutes (here, section 1202.4). The fact that he is no longer serving his sentence associated with the offense that gave rise to the subject restitution fine is not of the moment. Indeed, there is no language in the statute that provides the restriction that Ellis asks us to impose. Moreover, it is not the province of this court to insert words or add provisions to an unambiguous statute. (*Hudson v. Superior Court* (2017) 7 Cal.App.5th 1165, 1172.)

In short, if Ellis still owes a portion of a qualifying fine and is an inmate in a California prison, the CDCR can deduct a portion of his prison wages under section 2085.5, subdivision (a). Because Ellis possesses those two qualifications, the superior court did not err in denying his motion

3RD STRIKE BASED ON SHANK POSSESSION IN COUNTY JAIL STANDS

P. v. Johnny Foster

CA2(8); No. B290953
January 31, 2019

This case recounts a familiar theme – denial of relief on a Prop. 36 petition for resentencing because a firearm was involved.

Johnny Foster appeals from the denial of his petition for recall of his third strike sentence for possession of a sharp instrument while confined in county jail. Because Foster was armed with a deadly weapon in the commission of the offense, he is ineligible for recall of his sentence under the Three Strikes Reform Act of 2012 (Proposition 36). Therefore, we affirm the order of denial.

Johnson got a huge break on the direct appeal of his primary offenses, which were homicides. However, the appeal confirmed the included separate offense of the county jail shank possession.

Foster was in county jail awaiting trial for gang-related murders and robberies when deputies found a jailhouse shank hidden in his possession. Shanks were also found on Foster's three cellmates, all of whom were from the same gang as Foster. The People filed an information charging Foster with possession of the shank in violation of Penal Code section 4502. Trial of the charge for possession of the shank was consolidated with his existing charges for the gang-related crimes, and Foster was convicted by a jury on all counts. Because he had prior qualifying strikes, Foster was sentenced to 25 years to life on the shank possession conviction along with several life terms for the gang-related convictions under the Three Strikes Law.

On appeal, this court reversed Foster's convictions for the gang-related murders and robberies, but affirmed the conviction for possession of the shank. On remand, Foster pleaded no contest to voluntary manslaughter with a gang allegation. He received an 11-year sentence plus a 10-year gang enhancement.

Later, Prop. 36 became available as a mechanism to challenge priors used in Three Strikes sentences. Foster availed himself of such a petition, but lost in superior court; he now appealed that denial.

In November 2012, Proposition 36 was passed by the voters to allow an inmate serving a third strike sentence to petition for recall of his sentence and be resentenced as a second strike offender if he met certain conditions. (§ 1170.126, subd. (e); *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1285–1286.) On November 5, 2014, Foster filed a petition for recall of his third strike sentence pursuant to Proposition 36. The court issued an order to show cause why the petition should not be granted. The People opposed, contending Foster was armed with a deadly weapon in the commission of the offense, which rendered him ineligible for resentencing under Proposition 36. After an evidentiary hearing, the trial court denied the petition, finding beyond a reasonable doubt that Foster was armed with a deadly weapon in the commission of the offense. The trial court reasoned the shank was available for use by Foster because it was found in his possession. The court also found the shank was "an inherently deadly weapon because it was designed or manufactured to inflict death or great bodily injury." Foster timely appealed.

The Court gave a comprehensive review of the limitations of Prop. 36 resentencing, especially as to cases like Foster's where there were prior strikes, and the later use of a weapon. CLN readers would do well to carefully study this legal analysis before filing a Prop. 36 petition for such relief.

Under the original version of the Three Strikes law, a repeat offender with two or more prior strikes was subject to an indeterminate life sentence if convicted of any new felony. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167–168.) Proposition 36 amended the Penal Code to limit indeterminate life sentences to those repeat offenders whose current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, such a recidivist will be sentenced as a second strike offender. (§§ 667, 1170.12, 1170.126, subd. (e)(2).)

Section 1170.126, subdivision (e)(2), specifies that a defendant is eligible for resentencing as a second strike offender if his current sentence was not imposed for any of the offenses listed in section 667, subdivisions (e)(2)(C)(i)–(iii), and section 1170.12, subdivisions (c)(2)(C)(i)–(iii). A defendant is disqualified from recall of sentence under subdivision (iii) if, "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) A defendant will be considered armed with a deadly weapon if the weapon was available for use, either offensively or defensively. In other words, he is armed if the weapon was under his immediate dominion and control. (*People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*); *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*) disapproved on another ground in *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8; *People v. White* (2014) 223 Cal.App.4th 512, 524 (*White*).) However, a deadly weapon "can be under a person's dominion and control without it being available for use." (*Osuna, supra*, at p. 1030.) Thus, a person's possession of a deadly weapon does not automatically result in his being armed with it. (*Ibid.;*

White, supra, at p. 524.)

A prisoner who is serving an indeterminate life sentence under the Three Strikes law may petition to have his sentence recalled and be sentenced as a second strike offender if his sentence under Proposition 36 would not have been an indeterminate life sentence. (§ 1170.126, subd. (a).) Upon receiving a petition for recall of sentence, the trial court must determine whether the petitioner is eligible for resentencing and whether resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).)

In Osuna, the defendant was convicted of being a felon in possession of a firearm. He had seven prior strike convictions and was sentenced to 25 years to life in prison for the firearm possession conviction. (*Osuna*, supra, 225 Cal.App.4th at p. 1027.) He later sought recall of his sentence under Proposition 36. As is the case here, the People asserted the defendant was disqualified from recall and resentencing because he was armed with a firearm during the commission of the crime. The defendant argued there must be an underlying felony to which the firearm possession is " 'tethered' " or to which it has some " 'facilitative nexus' " in order to be disqualified under Proposition 36. (*Id*. at p. 1030.) According to the defendant, one cannot be armed with a firearm during the commission of possession of the same firearm. (*Ibid*.)

The Osuna court agreed tethering and a " 'facilitative nexus' " are required when imposing an " 'armed with a firearm' " sentence enhancement under section 12022. (*Osuna, supra*, 225 Cal.App.4th at pp. 1030–1031.) The court explained, "However, unlike section 12022, which requires that a defendant be armed 'in the commission of' a felony for additional punishment to be imposed (italics added), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm 'during the commission of' the current offense (italics added). 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' [Citation.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]" (*Id*. at p. 1032.) "Since the Act uses the phrase '[d]uring the commission of the current offense,' and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the literal language of [Proposition 36] disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm." (*Ibid*.)

In accord with *Osuna* are a number of cases which hold that a defendant who is armed with a firearm or deadly weapon while committing the third strike offense of unlawfully possessing that weapon is ineligible for recall and resentencing under Proposition 36. (*White, supra*, 223 Cal.App.4th at p. 524; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054 (*Blakely*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 798 (*Brimmer*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 284 (*Hicks*); *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312–1313 (*Elder*).)

Foster conceded that he factually met the restrictions barring Prop. 36 relief.

> Here, the trial court found beyond a reasonable doubt that Foster was armed with a deadly weapon while committing the third strike offense. Accordingly, he was ineligible for resentencing under the express provisions of Proposition 36. (§ 1170.126, subd. (e)(2); *Osuna, supra*, 225 Cal.App.4th at pp. 1032–1040.) On appeal, Foster does not dispute the trial court's findings support denial of his petition.

But he nonetheless challenged the legality of such a restriction.

> Instead, he contends the plain language of the statute and the intent of the electorate suggest the factors listed in subdivision (iii) must attach to the current offense as an addition to and not as an element of the current offense. According to Foster, *Osuna, White, Blakely, Brimmer, Hicks*, and *Elder* misinterpreted Proposition 36 to hold otherwise. We are not persuaded.

The Court found all of Foster's complaints had been properly dealt with in earlier, controlling decision.

> Foster sets forth a number of reasons to interpret Proposition 36 to require the arming provision to be tethered to a separate felony. All of these arguments were rejected in *Osuna* and the cases that are in accord with it. We find *Osuna* persuasive and adopt much of its reasoning to affirm the denial of Foster's petition.

The Court first rejected Foster's claim that there must be a new underlying felony involved.

> Foster first argues the express language in subdivision (iii) shows an offense would only be excluded if something beyond its commission occurs, such as a separate underlying felony. Foster rests his case on the phrase, "during the commission of the current offense . . ." Foster contends this qualifying language—"during the commission of"—only makes sense if there is another offense to which the arming attaches.
>
> Foster further contrasts "during the commission of" in subdivision (iii) with the language in subdivisions (i) and (ii), which both begin with the phrase, "[t]he current offense is . . . ." Foster contends the difference between subdivision (iii) and subdivisions (i) and (ii) demonstrates "[w]here the statute is meant to exclude specific offenses entirely, it so states, but where it is meant to exclude an offense only if something beyond its mere commission occurs, it states 'during the commission of' the offense something else happens."
>
> We decline to parse the statute so finely. It is apparent Proposition 36 was written to exclude from its ambit a specified list of serious or violent felonies, as well as contain a catch-all provision designed to include unenumerated offenses during which the defendant was armed with a firearm or deadly weapon, among other disqualifying factors. That is what is plainly stated in sections 1170.12, subdivision (c)(2)(C) and 667, subdivision (e)(2)(C). The statute does not require anything more.
>
> Accordingly, we decline to read into the statute a qualifying clause indicating a separate offense must be committed in order for subdivision (iii) to be triggered. The plain language of subdivision (iii) indicates it is triggered if a defendant was

armed during the commission of the current offense. As *Osuna* reasoned, "the drafters of the initiative knew how to require a tethering offense or enhancement if desired. (See §§ 667, subd. (e)(2)(C)(i) [disqualifying inmate if current offense is controlled substance charge in which enumerated enhancement allegation was admitted or found true], 1170.12, subd. (c)(2)(C)(i) [same].)" (*Osuna, supra*, 225 Cal.App.4th at p. 1034.) It did not do that with respect to subdivision (iii). "Thus, we believe the electorate intended the disqualifying factors to have a broader reach than defendant's interpretation of the statute would give them." (*Ibid*.)

Likewise, the Court found Foster's attempts at grammar science to be unpersuasive.

We also find Foster's attempts to conflate the meanings of "during" and "in" to be unavailing, particularly when Foster relies on www.grammar-quizzes.com for that argument. As discussed extensively in *Osuna*, the words are different and we agree with the analysis in *Osuna* that "during" connotes a temporal connection while "in" connotes a facilitative one. (*Osuna, supra*, 225 Cal.App.4th at p. 1032.) As a result, the plain language of Proposition 36 disqualifies an inmate from recall of his sentence if he is armed with a deadly weapon during the unlawful possession of that weapon.

Next, the Court rejected Foster's attempt to reinterpret the term "armed."

Additionally, Foster contends the word "armed" is a term of art which means the defendant had access to a weapon to further a crime, regardless of whether it occurred "in" or "during" its commission. He relies on *Bland, supra*, 10 Cal.4th at pages 1000–1003, to support this contention. Foster misreads *Bland*. *Bland* only defined "armed" to mean "if the defendant has the specified weapon available for use, either offensively or defensively." (*Id*. at p. 997.) The *Bland* court then construed the enhancement contained in section 12022, which imposes an additional prison term for anyone " 'armed with a firearm in the commission of' " a felony. (*Bland*, at p. 995.) *Bland* does not stand for the proposition that the word "armed" automatically means the arming must be tethered to an underlying crime.

Lastly, Foster's attempt to minimize "shank possession" was flatly rejected by the Court.

Foster next urges us to go beyond the plain language of the statute. He contends the electorate could not have intended to subject every violation of section 4502, a low-level offense with one of the lowest possible range of sentences under the law, to an indeterminate term. This argument fails because the plain language of the statute is clear, and there is no reason for us to consider anything other the statute's plain language.

Additionally, it is not the case that a defendant who violates section 4502 does not pose a risk to the public or is not violent, as Foster implies. Shanks or dirks "have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029.) A defendant who has carried a concealed dirk or shank in prison would pose a risk to the public if that defendant was re-

leased.

As a last remedy, Foster asserted that his sentences were not actually consecutive, and that he was entitled to a "concurrent" reading. Again, the Court found plain evidence in the trial court record that this was not so, and denied relief.

Foster alternatively contends the abstract of judgment should be corrected to show that his sentence for possession of a weapon in jail is concurrent with, rather than consecutive to, the voluntary manslaughter sentence. Foster is mistaken; the trial court sentenced him to consecutive terms.

It is undisputed Foster was previously sentenced to consecutive terms for his gang-related convictions and his conviction for possession of a weapon in jail. After this court reversed Foster's gang-related convictions, Foster pleaded no contest to voluntary manslaughter and received a 21-year determinate sentence. At the sentencing hearing, the trial court explained to appellant that his sentence for possession of a weapon in jail would remain as previously imposed and that "nothing will happen to that particular sentence, it stands." The trial court later reiterated, "as to count nine [for possession of a weapon in jail], the court had sentenced defendant to that particular count previously 25 years to life. That particular sentence still stands."

The record demonstrates the trial court intended the sentences to remain consecutive. Thus, the oral pronouncement of sentence comports with the abstract of judgment, which shows that the "[p]reviously imposed sentence of

> 25 years to life imprisonment stands, [defendant] sentenced to a total of 25 [years] to life + 21 years." This is sufficient to show a consecutive sentence on the abstract of judgment for the voluntary manslaughter conviction.

Accordingly, the Court of Appeal affirmed in full the trial court's rejection of Foster's Prop. 36 petition.

PRIOR SEX OFFENSES DO NOT BAR PROP 57 EARLY PAROLE CONSIDERATION

In re Gregory Gadlin

--- CA5th ---; CA2(5); No. B289852
January 28, 2019

In this published decision, the Court of Appeal granted Gregory Gadlin's habeas corpus petition alleging that recent CDCR regulations that purported to follow Prop. 57, in fact, did not do so.

> In 2016, voters approved Proposition 57, which added a provision to the California Constitution that significantly expanded parole consideration to all state prisoners convicted of a nonviolent felony offense. (Cal. Const., art. 1, § 32, subd. (a)(1) (section 32(a)(1).) Petitioner Gregory Gadlin, a third-strike offender with two prior convictions that render him a sex-offender registrant, contends the regulations of the California Department of Corrections and Rehabilitation (CDCR) invalidly exclude him from Proposition 57 relief. We agree and grant the petition.

Gadlin had garnered a 35-life sentence for his present and past crimes.

> In 2007, a jury convicted Gadlin of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). The jury sustained allegations of two prior serious felony convictions (§ 667, subd. (a)(1)). Those priors were … each … a registrable offense under the Sex Offender Registration Act (§ 290, subd. (c)). Gadlin was sentenced to 25 years to life pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12), plus an additional 5-year term for each of his prior serious felony convictions, for a total of 35 years to life in state prison. On appeal, this court affirmed the judgment. (*People v. Gadlin* (May 21, 2009, B203647) [nonpub. opn.].)

In 2017, he began the quest for early parole consideration in superior court, but was denied. He later filed in the Court of Appeal.

> On November 22, 2017, Gadlin filed a habeas corpus petition in the superior court, challenging his exclusion from early parole consideration by CDCR. On March 2, 2018, the superior court denied the petition, concluding that under the then-applicable regulations, Gadlin was not entitled to early parole consideration because he had been sentenced as a third-strike offender.
>
> On May 7, 2018, Gadlin filed a habeas corpus petition in this court. We appointed counsel for Gadlin and directed counsel to file an amended petition addressing the validity of CDCR's regulations. Appointed counsel thereafter filed an amended petition challenging CDCR's regulations. We issued an order to show cause why the relief requested in the petition should not be granted. CDCR filed a return to the order to show cause, arguing that the following two factors render Gadlin ineligible for early parole consideration: (1) his status as an inmate serving an indeterminate Three

> Strikes sentence with the possibility of parole; and (2) his prior convictions for sex offenses that require him to register as a sex offender.

The landscape then changed, when CDCR adopted new regulations mooting part of his claim. The Court thereupon narrowed its focus to whether the two prior sex offenses rendered him ineligible for consideration for early release.

> The CDCR then adopted emergency regulations, effective January 1, 2019, to comply with our holding in *In re Edwards* (2018) 26 Cal.App.5th 1181, 1192-1193 (*Edwards*). (Cal. Code Regs., tit. 15, § 3491, subd. (b)(1), Register 2018, No. 52 (Dec. 26, 2018).) Those modified regulations moot CDCR's argument that Gadlin is ineligible for early parole consideration based on his status as a Three Strikes offender. We thus consider only CDCR's second argument, that Gadlin's two prior convictions for registrable sex offenses render him ineligible for consideration for early release.

The court briefly summarized Prop. 57.

> On November 8, 2016, California voters passed Proposition 57, also known as the Public Safety and Rehabilitation Act of 2016, adding section 32, article I, to the California Constitution. "As relevant here, the (uncodified) text of Proposition 57 declares the voters' purposes in approving the measure were to: '1. Protect and enhance public safety. [¶] 2. Save money by reducing wasteful spending on prisons. [¶] 3. Prevent federal courts from indiscriminately releasing prisoners. [¶] 4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.' (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 2, p. 141.)" (Edwards, supra, 26 Cal.App.5th at p. 1185.) Under section 32(a)(1), "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." And for purposes of section 32(a)(1), "the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." CDCR was directed to "adopt regulations in furtherance of these provisions, and the Secretary of [CDCR] shall certify that these regulations protect and enhance public safety." (Cal. Const., art.1, § 32, subd. (b).)

CDCR did so, focusing on public safety as its primary criterion.

> CDCR's regulations exclude from early parole consideration an inmate who "is convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in sections 290 through 290.024 of the Penal Code." (Cal. Code Regs., tit. 15, §3491, subd. (b)(3) (section 3491(b)(3).) In a Final Statement of Reasons accompanying the adopted regulations, CDCR stated, "these sex offenses demonstrate a sufficient degree of violence and represent an unreasonable risk to public safety to require that sex offenders be excluded from nonviolent parole consideration." (Cal. Dept. of Corrections, Credit Earning and Parole Consideration Final Statement of Reasons, Apr. 30, 2018, p. 20.)

The Court's analysis of PC § 32(a)(1) was short and to the point.

Section 32(a)(1) provides, "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." The reference to "convicted" and "sentenced," in conjunction with present eligibility for parole once a full term is completed, make clear that early parole eligibility must be assessed based on the conviction for which an inmate is now serving a state prison sentence (the current offense), rather than prior criminal history. This interpretation is supported by section 32 (a)(1)'s use of the singular form in "felony offense," "primary offense," and "term."

Gadlin's current offense triggering his Three Strikes sentence is assault with a deadly weapon (§ 245, subd. (a)(1)), which does not require registration as a sex offender. CDCR argues that its application of the regulations to exclude inmates who have sustained prior registrable convictions is consistent with its determination that registrable sex offenses involve a sufficient degree of violence and registrable inmates represent an unreasonable risk to public safety. These policy considerations, however, do not trump the plain text of section 32(a)(1).

CDCR's application of section 3491(b)(3) to exclude Gadlin and all similarly situated inmates from early parole consideration runs afoul of section 32(a)(1). Gadlin is entitled to early parole consideration.

We express no opinion on whether CDCR's application of its regulations to exclude inmates whose current offense requires registration as a sex offender similarly violates section 32(a)(1).

The petition for habeas corpus is granted. The California Department of Corrections and Rehabilitation is directed to consider Gadlin for early parole consideration within 60 days of remittitur issuance.

PLEA AGREEMENT CANNOT BE WITHDRAWN ON REMAND FOR YOUTH FACTORS AND GUN USE ENHANCEMENT

P. v. Thomas Dixon

CA3; No. C085151
January 24, 2019

This case involves a youthful lifer with a gun enhancement, who took a plea, as to remedies available in superior court upon remand.

> Defendant, Thomas Michael Dixon, appeals from a judgment entered after his guilty plea to second degree murder (Pen. Code, § 187, subd. (a)) with a firearm enhancement (§ 12022.5, subd. (a)) and stipulation to serve a prison sentence of 19 years to life. Defendant argues the recent amendment of section 3051 extending youthful offender parole hearings to individuals who committed the controlling offense at the age of 25 or younger, entitles him to remand to the trial court for the limited purpose of determining whether he has had an adequate opportunity to present evidence relevant to that parole hearing and to present such evidence if the court determines he did not. The People agree defendant is entitled to limited remand for these purposes.

The Court had previously recognized that Dixon was entitled to more relief when the "youth" age was upped by the Legislature

from 23 to 25 years.

In our original opinion filed July 25, 2018, we concluded a limited remand was required, as defendant was 25 years old at the time of the controlling offense (§ 3051, subd. (a)(1), (2)(B)) and was not previously entitled to present such evidence because the prior version of section 3051 applied to individuals aged 23 or younger. (*People v. Franklin* (2016) 63 Cal.4th 261, 277.)

Dixon later petitioned for relief from SB620, based on an ineffective-assistance-of-counsel claim.

> Thereafter, and presumably in response to the July 25, 2018, opinion's footnote concerning the passage of Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620), defendant filed a petition for rehearing requesting relief based upon appellate counsel's possible ineffective assistance in failing to raise the SB 620 issue. We granted defendant's request for rehearing, vacated our previous decision, and directed the parties to file supplemental letter briefs addressing two issues: (1) Whether this case should be reversed and remanded with instruction that the trial court exercise its discretion to strike the firearm enhancement pursuant SB 620; and (2) If SB 620 constitutes a retroactive change of the law regarding the firearm enhancement that constitutes a portion of defendant's stipulated sentence, whether defendant is entitled - on remand - to elect whether to withdraw his plea.

Following all of the above court actions, the Court reached two conclusions.

> We conclude remand is required to allow the trial court to exercise its discretion whether to strike the firearm enhancement (§ 12022.5, subd. (c)). We also conclude neither party is entitled to withdraw from the plea based on this change in law.

In its analysis, the Court first recounted the procedural history of the case.

> Defendant was charged with felony murder (§ 187, subd. (a)) and a firearm enhancement (personal and intentional discharge of a firearm causing great bodily injury, § 12022.53, subd. (d)), both with sentencing ranges of 25 years to life. Defendant accepted a plea agreement for a total sentence of 19 years to life. The plea agreement shows defendant would serve 15 years to life for second degree murder (§ 187, subd. (a)) and four years to life for the firearm enhancement (§ 12022.5, subd. (a)). Both the written plea form and the minute order following the plea specify the parties stipulated to a sentence of 19 years to life. The probation department recommended the stipulated 19-years-to-life sentence. The plea agreement is silent on the applicability of future changes in law and there is no information in the record indicating whether the parties ever discussed the applicability of future changes in law to the plea agreement. Defendant's later motion to withdraw his plea was denied, and defendant was sentenced to serve 19 years to life.

On October 11, 2017, the Governor signed SB 620 (2017-2018 Reg. Sess.), amending former sections 12022.5 and 12022.53, effective January 1, 2018 (Stats. 2017, ch. 682, §§ 1-2), to permit a trial court to strike a firearm enhancement: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivi-

sion applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c); 12022.53, subd. (h).)

The court framed the question before it thusly.

> Now before us is whether defendant, whose judgment is not yet final on appeal, may request remand to the trial court to consider whether to strike a firearm enhancement to which he pleaded as part of an agreement for a stipulated sentence.

This led first to an analysis as to whether Dixon was entitled to retroactivity.

We start with the proposition, agreed to by the parties, that SB 620 applies retroactively to nonfinal judgments. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091; see also *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56 (*Hurlic*) ["the courts have unanimously concluded that [SB] 620's (2017–2018 Reg. Sess.) grant of discretion to strike firearm enhancements under section 12022.53 applies retroactively to all nonfinal convictions"].)

> The People argue the lack of information in the record concerning the applicability of future changes to the law to that plea agreement requires that defendant seek relief through a writ of habeas corpus. We disagree. The general rule is that plea agreements are deemed to incorporate future changes in law. In *Doe v. Harris* (2013) 57 Cal.4th 64 at page 71 (*Doe*), the Supreme Court stated: "[T]he general rule in California is that plea agreements *are deemed to incorporate* the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. As an adjunct to that rule, and consistent with established law holding that silence regarding a statutory consequence of a conviction does not generally translate into an implied promise the consequence will not attach, prosecutorial and judicial silence on the possibility the Legislature might amend a statutory consequence of a conviction should not ordinarily be interpreted to be an implied promise that the defendant will not be subject to the amended law." (Italics added, fn. omitted.)
>
> Here, the plea agreement did not include a term that defendant will not be subject to future changes in the law. Thus, the general rule applies and the plea agreement is deemed to incorporate future changes in the law, such as SB 620. (*Doe*, at p. 71, 73-74; *Hurlic, supra*, 25 Cal.App.5th at p. 57 ["Because defendant's plea agreement does not contain a term incorporating only the law in existence at the time of execution, defendant's plea agreement will be 'deemed to incorporate' the subsequent enactment of [SB] 620 . . . and thus give defendant the benefit of its provisions without calling into question the validity of the plea"].)
>
> We conclude the trial court must be afforded the opportunity to exercise this sentencing discretion. Unlike the court in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 at page 1896, here, we cannot say the record shows the sentencing court clearly "indicated that it would not, in any event, have exercised its discretion to lessen the sentence." Nothing in the trial court's imposition of the stipulated sentence demonstrates what the court would do with this newly afforded discretion.

This then led to the second question, namely whether either party was entitled to withdraw its plea agreement.

This brings us to the second question: If the trial court does exercise its discretion to strike the firearm enhancement, are the parties entitled to withdraw from that plea agreement? The parties agree the defendant is not entitled on remand to withdraw his plea. And defendant states he is not currently seeking to withdraw his plea. Based on our conclusion the plea agreement was subject to future changes in the law, the subsequent enactment of SB 620 does not invalidate or undo the plea agreement.

In *Harris v. Superior Court* (2016) 1 Cal.5th 984 at page 991-993 (*Harris*), the Supreme Court held the defendant was entitled to have his sentence recalled under Proposition 47 and the People were not entitled to withdraw from the plea agreement. The court's conclusion was supported by the general rule announced in *Doe, supra*, 57 Cal.4th 64 that the Legislature, or the electorate, for the public good and in furtherance of public policy, and subject to the limitations imposed by the federal and state Constitutions, has the authority to modify or invalidate the terms of a plea agreement. (*Harris*, at p. 992.) This same reasoning applies to the Legislature's enactment of SB 620.

The Supreme Court also distinguished the potential change in the terms of the plea bargain from the change in law in *People v. Collins* (1978) 21 Cal.3d 208 (*Collins*). In *Collins*, the change in law decriminalized the offense pleaded to in the plea agreement that eviscerated the judgment and the underlying plea bargain entirely. (*Harris, supra*, 1 Cal.5th at p. 993.) There, the court allowed the People to withdraw from the plea. Such is not the case here. Even if the trial court exercises its discretion to strike the four-year firearm enhancement, defendant is still subject to serve 15 years to life under the plea agreement.

In sum, we conclude remand is required to allow the trial court to exercise its discretion whether to strike the firearm enhancement (§ 12022.5, subd. (c)). We also conclude neither party is entitled to withdraw from the plea based on this change in law.

Accordingly, the matter was remanded to the superior court for consideration of the youth factor and the firearm enhancement sentence.

The matter is remanded to the trial court for the limited purpose of: (1) determining whether defendant had an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings in fulfilling its statutory obligations under Penal Code section 3051, and if not, to afford defendant and the People the opportunity to present evidence relevant to that eventual youthful offender parole hearing; and (2) allowing the trial court to exercise its sentencing discretion and determine whether to strike defendant's sentencing enhancement consistent with the new authority granted by Penal Code section 12022.5, subdivision (c). The judgment is otherwise affirmed.

***CHIU* ERROR CLAIM GAINS REVERSAL**

In re Enrique Gonzalez

CA2(7); No. B285807
January 24, 2019

Enrique Gonzalez has been fighting his 1st degree murder conviction since 2004. With the many changes in the law since then, most notably the vacating of the "natural and probable consequences" the-

ory of felony murder (under *Chiu*), he finally succeeded.

> A jury convicted Enrique Gonzalez of the 2004 first degree murder of Gregory Gabriel, who was shot by Gonzalez's friend, Carlos Argueta. We affirmed Gonzalez's conviction, but remanded to the trial court for resentencing as to the firearm enhancements. (*People v. Gonzalez* (Apr. 29, 2008, B197530) [nonpub. opn.] (*Gonzalez I*).) In 2008 the Supreme Court denied review (No. S164046).
>
> On June 2, 2014 the Supreme Court held in *People v. Chiu* that the natural and probable consequences theory of aiding and abetting a crime cannot be the basis for convicting a defendant of first degree murder. (*People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*).) On October 20, 2017 Gonzalez filed a petition for a writ of habeas corpus seeking relief from his first degree murder conviction under *Chiu*. Although we summarily denied the petition, the Supreme Court granted Gonzalez's petition for review, directing this court to vacate our order denying the petition pursuant to *Chiu* and *In re Martinez* (2017) 3 Cal.5th 1216 (*Martinez*). We now grant the petition.

The facts of the case were that Gonzalez was not the shooter. The open question for the jury was whether he was guilty of felony murder. This, in turn, focused on whether the jury could have relied upon the "natural and probable consequences" theory of felony murder in reaching its verdict. The Court reviewed the instructions given, and then the prosecutor's argument from the trial record.

> The trial court instructed the jury with CALCRIM Nos. 400 and 401 on direct aider and abettor liability for the first degree murder of Gabriel, as well as CALCRIM No. 403 regarding the natural and probable consequences doctrine. The trial court also instructed the jury that it did not need to agree unanimously on the theory of liability.
>
> CALCRIM No. 403 provides in part, as read to the jury, "To prove that the defendant is guilty of murder or attempted murder under the natural and probable consequence doctrine, the People must prove that, (1) The defendant is guilty of assault with a firearm; (2) During the commission of the assault with a firearm, the crimes of murder and attempted murder were committed; AND (3) Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder or attempted murder was a natural and probable consequence of the commission of the assault with a firearm."

The prosecutor's argument was unmistakable: the jury could, without being unanimous, rely – if it so wanted – on the now forbidden "natural and probable consequences" theory of guilt.

> During her closing argument, the prosecutor first addressed direct aider and abettor liability for the first degree murder of Gabriel. She argued, "[T]his is what [Gonzalez] knew he was going to do and that's what he intended, to aid and abet a shooting and he is legally and morally as responsible as Argueta who pulled the trigger." The prosecutor then argued the jury could convict Gonzalez in the alternative under the natural and probable consequences doctrine. She argued, "[L]et's say there

[are] a few of you who just don't think that the evidence proves to you that [Gonzalez] intended to aid and abet a shooting. [¶] Maybe you think—maybe you believe and you're going to give him the benefit of the doubt even though he's already lied to you about the other shooting on February 19—maybe you're going to give him that benefit of the doubt and believe that he only intended to scare those kids despite everything that you've heard. [¶] I'm going to tell you it doesn't matter. He's still guilty."

The prosecutor provided a detailed analysis of the natural and probable consequences doctrine, including an analogy: if a child intends to break a neighbor's window by throwing a baseball through the window, the child is then also responsible for any other items that are broken in the neighbor's house, even if the child did not intend to break anything else. The prosecutor then described the elements of an assault with a firearm, and explained how an intent to commit an assault with a firearm would foreseeably result in murder.

She argued, "And if you believe [Gonzalez's] statements that he only intended to scare those kids when he called Carlos over with this gun even if you give him that benefit of the doubt he has aided and abetted an assault with a firearm. [¶] . . . Now, if you believe he intended to aid and abet that assault with a firearm and using your common sense you believe that it was a foreseeable result given all the circumstances under an objective standard that that shooting was foreseeable then he's on the hook." Finally, the prosecutor emphasized the jurors did not have to agree unanimously on the theory on which they convicted Gonzalez.

The verdict came down for the first degree murder liability of Gonzalez.

> The jury convicted Gonzalez of the first degree murder of Gabriel (§ 187, subd. (a)) and the attempted, premeditated, deliberate, and willful murders of Hart, Jiminez, Emmanuel, Johnson, Carrillo, and Ramos (§§ 664/187, subd. (a).). The jury also found true as to each count the allegations Gonzalez knew a principal was personally armed with a firearm in the commission of the offenses. (§ 12022, subd. (d).)
>
> The trial court sentenced Gonzalez to 25 years to life on the murder count, plus a consecutive term of two years for the firearm enhancement. The trial court also imposed six consecutive life terms for each of Gonzalez's attempted murder convictions.

On appeal, the prosecutor argued that Gonzalez' *Chiu* petition was time-barred, because it was more than three years after it could have been filed. Importantly for others who are similarly situated today, the Court held that a time bar does *not* apply here.

> The People contend Gonzalez's petition is time-barred because it was filed over three years after Chiu was decided. We disagree.
>
> There is no specific time limit by which a petitioner must file a petition for a writ of habeas corpus. (*In re Reno* (2012) 55 Cal.4th 428, 460 (*Reno*) [nine-year delay after filing prior habeas petition was substantial and lacked good cause, but some of petitioner's claims fell within an exception for a conviction under an invalid statute]; *In re Huddleston* (1969) 71 Cal.2d 1031, 1034 [two and one-half-year delay after issuance of Supreme Court decision changing law before filing

petition not unreasonable]; *In re Douglas* (2011) 200 Cal.App.4th 236, 242 [habeas petition was untimely because defendant failed to justify 12-year delay before filing the petition].) Rather, "'California courts "appl[y] a general 'reasonableness' standard" to judge whether a habeas petition is timely filed.'" (*Reno*, at p. 460; accord, *Walker v. Martin* (2011) 562 U.S. 307, 311 [California courts "'appl[y] a general "reasonableness" standard'" to determine timeliness of habeas petitions].)

Whether there has been substantial delay is measured from when a petitioner or petitioner's counsel knew or reasonably should have known of the underlying basis for the petition. (*Reno, supra*, 55 Cal.4th at p. 461; *In re Robbins* (1998) 18 Cal.4th 770, 780 (*Robbins*).) The petitioner bears the burden of demonstrating his or her petition is timely. (*Reno*, at p. 463; *Robbins*, at p. 780.) Even if there is substantial delay before the filing of a petition, we will consider the petition on the merits if the petitioner can demonstrate good cause for the delay. (*Reno*, at p. 460; *Robbins*, at p. 780.)

Gonzalez's conviction was final when the Supreme Court denied review in 2008. Thereafter, Gonzalez filed a federal habeas corpus petition in 2008, a state habeas corpus petition in 2009, and a second state habeas corpus petition in 2011. All three petitions were denied. At the time *Chiu* was decided on June 2, 2014, Gonzalez was incarcerated, had no pending appeal or petitions, and did not have legal representation. In March 2017 Gonzalez's mother contacted the California Appellate Project (CAP) to request the record from Gonzalez's appeal so Gonzalez could seek relief based on the decision in *Chiu*. On March 23, 2017 a CAP attorney contacted attorney Victor Morse, who represented Gonzalez on appeal. The CAP attorney suggested Morse represent Gonzalez in filing a petition for a writ of habeas corpus. Morse reviewed his notes from the appeal, and determined Gonzalez had a meritorious claim under *Chiu*. Morse contacted Gonzalez in state prison, and agreed to prepare and file a petition for a writ of habeas corpus.

During the seven-month period from March 23, 2017, when Morse was first contacted, until October 20, 2017, when he filed the petition, Morse diligently investigated Gonzalez's Chiu claim and prepared the petition. Morse reviewed his notes from his work on Gonzalez's direct appeal to determine whether Gonzalez had a meritorious *Chiu* claim, contacted Gonzalez to offer to prepare and file the petition, and requested assistance from CAP in obtaining the record from the direct appeal. On May 19, 2017 CAP sent Gonzalez's attorney a copy of the record. Five months later Morse filed the instant petition.

The cases on which the People rely are distinguishable. In *In re Gallego* (1998) 18 Cal.4th 825 (*Gallego*), the Supreme Court found a delay of four years and ten months was substantial where the petitioner failed to provide detail on when he and his attorney obtained the information supporting his habeas petition, and why they did not know or reasonably know the information at an earlier time. (*Id*. at pp. 829-830, 837-838.)

In re Stankewitz is also inapposite because the petitioner in that case had obtained the juror declarations on which he based his habeas claim 18 months be-

fore filing his petition. (*In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1.) In addition, although the Supreme Court concluded there was substantial delay, it found petitioner had justified the delay in that he had relied on a narrow reading of two cases to support his decision to wait to file his habeas petition simultaneously with the opening brief in his automatic appeal. (*Ibid*.)

Here, the delay was substantially shorter than the four-year 10-month delay in Gallego. Although the record does not show precisely when in 2017 Gonzalez learned of the *Chiu* decision, this occurred sometime in the two years 10 months after *Chiu* was decided (prior to when Gonzalez's mother contacted CAP on March 23, 2017). We conclude this delay was not unreasonable given that at the time *Chiu* was decided, Gonzalez was incarcerated, had no pending appeals or petitions, and had no legal representation.

Once Morse was contacted, a seven-month period during which he contacted Gonzalez, obtained the record, investigated whether Gonzalez had a valid claim, and prepared and filed the petition was not unreasonable. (*Reno, supra*, 55 Cal.4th at p. 460.)

The Court then reviewed the aider and abettor theory of conviction in felony murder, as determined in *Chiu*.

A criminal defendant may be convicted of a crime either as a perpetrator or as an aider and abettor. (Pen. Code, § 31.) "An aider and abettor can be held liable for crimes that were intentionally aided and abetted (target offenses); an aider and abettor can also be held liable for any crimes that were not intended, but were reasonably foreseeable (nontarget offenses). [Citation.] Liability for intentional, target offenses is known as 'direct' aider and abettor liability; liability for unintentional, nontarget offenses is known as the '"'natural and probable consequences' doctrine.'"' (*Loza, supra*, 27 Cal.App.5th at p. 801; accord, *Chiu, supra*, 59 Cal.4th at p. 161 ["'"A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime."'"].)

A direct aider and abettor acts "'with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the [target] offense.'" (*Chiu, supra*, 59 Cal.4th at p. 161.) An aider and abettor is liable for the nontarget offense under the natural and probable consequence doctrine if a "reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." (*Id*. at p. 162.) As an example, if a person "aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*Id*. at p. 161.)

In *Chiu*, the Supreme Court held that the natural and probable consequences theory of aider and abettor liability cannot be relied on to convict a defendant of first degree premeditated murder. (*Chiu, supra*, 59 Cal.4th at p. 167.) The premeditation and deliberation mens rea required in first degree murder "is

uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Id*. at p. 166.) Thus, under the natural and probable consequences theory, "the connection between the [aider and abettor's] culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder." (*Ibid*.) However, a defendant may still be convicted of first degree murder under a direct aider and abettor theory. (*Ibid*.)

The Court next dealt with the question of whether *Chiu* error was harmless.

As the Supreme Court held in *Chiu*, when the trial court instructs the jury on aider and abettor liability under both the direct and the natural and probable consequences theories of guilt, one of which was legally correct and one legally incorrect, the "first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Chiu, supra*, 59 Cal.4th at p. 167.) In *Martinez*, the Supreme Court applied the same harmless error analysis to a petition for a writ of habeas corpus. (*Martinez, supra*, 3 Cal.5th at p. 1218 ["We hold that on a petition for writ of habeas corpus, as on direct appeal, Chiu error requires reversal unless the reviewing court concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory in convicting the defendant of first degree murder."].)

An error is harmless when "'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary' under a legally valid theory." (*Martinez, supra*, 3 Cal.5th at p. 1226.) The prosecution "'has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict.'" (*Loza, supra*, 27 Cal.App.5th at p. 805; accord, *People v. Woods* (2006) 146 Cal.App.4th 106, 117; see *Martinez, supra*, 3 Cal.5th at p. 1227 ["we conclude that the Attorney General has not shown beyond a reasonable doubt that the jury relied on a legally valid theory in convicting [the defendant] of first degree murder"].)

Reversal is required where "the record does not permit us to rule out a reasonable possibility that the jury relied on the invalid natural and probable consequences theory in convicting [the defendant] of first degree murder." (*Martinez, supra*, 3 Cal.5th at p. 1226.) In this situation, the "erroneous instruction deprives a defendant of the right to a jury trial under the Sixth Amendment to the United States Constitution. . . ." (*Id*. at p. 1224.)

In evaluating whether *Chiu* error was harmless, we may look to the prosecutor's closing argument. (*Martinez, supra*, 3 Cal.5th at pp. 1226-1227 [the conclusion that the jury relied on the natural and probable consequence doctrine "is bolstered by the fact that the prosecutor argued the natural and probable consequences theory to the jury at length during closing argument and rebuttal"]; *Loza, supra*, 27 Cal.App.5th at p. 805 [the "'likely damage is best understood by taking the word of the prosecutor, . . . during closing arguments'"], quoting *Kyles v. Whitley* (1995) 514 U.S.

419, 444.)

In the case at bar, the prosecutor argued that the error was harmless. But she had laid it on so thick in the instructions to the jury, that it was plain that the jury was free to rely on either theory of felony murder presented to them.

> However, the People contend the record supports the conclusion beyond a reasonable doubt that the jury relied on the valid direct aider and abettor theory in convicting Gonzalez. We disagree.

The outcome was in Gonzalez' corner.

> Here, as in *Loza*, "[b]ecause the prosecutor urged the jurors to consider and utilize the natural and probable consequence theory, we cannot find beyond a reasonable doubt that one or more of the jurors may have relied upon it." (*Loza, supra*, 27 Cal.App.5th at p. 806.) The People therefore have not shown beyond a reasonable doubt the jury relied on the legally valid theory of direct aider and abettor theory of liability in convicting Gonzalez of first degree murder. (*Martinez, supra*, 3 Cal.5th at p. 1227.)

The Court granted Gonzalez' writ petition.

> Gonzalez's petition for a writ of habeas corpus is granted, and his conviction for first degree murder is vacated. If the People elect not to retry Gonzalez, the trial court shall enter judgment consistent with section 189, subdivision (a)(3), as amended by Senate Bill No. 1437 (2017-2018 Reg. Sess.), and resentence him accordingly.

The 23

California has a long history of mixing crime and punishment with raw politics. But outrage doesn't always translate into coherent policy, and unintended consequences can spark even more public anger.

With that in mind, consider the last two years of debate over what should, and should not, be a "violent" crime.

That debate begins with the index of crimes in section 667.5 of the California Penal Code. The list was first enacted in 1976, and has been tinkered with so many times it's hard to say whether it's a fair representation of the most heinous crimes.

Here's why that matters: The list is now a key part of determining which California prison inmates are eligible for early parole under Gov. Jerry Brown's 2016 ballot measure, Proposition 57. A legal fight over how to interpret the ballot measure could become a potent political issue.

Brown signed the law creating the original list of violent crimes during his first tour of duty as governor. It's since been amended or expanded 38 times, the last effort in 2014. Eight specific offenses or crime categories were in the original version. Now, there are 23 crimes. The list almost doubled in size in just the five years between 1988 and 1993.

So what's included? Some violent crimes are relatively straightforward — murder, attempted murder,

voluntary manslaughter, robbery, kidnapping. (Kidnapping, interestingly, was dropped from the list in 1977 with no noteworthy explanation and added back in 1991.) Some additions, like the inclusion of carjacking in 1993, were sparked by news events. A prosecutor told The LA Times that year that classifying the crime as "violent" would give "local district attorneys another weapon in their arsenal to attack this epidemic."

Voters opted to tweak the law twice, making substantial changes that weren't well publicized in those elections. Proposition 21 in 2000 removed the long-standing focus on specific kinds of robberies — those in someone's home and involving a "deadly or dangerous weapon" — and instead made "any robbery" a violent crime. In 2006, voters added more definitions of sex crimes.

And yet other crimes have long been sliced relatively thin. Only specific circumstances in the case of rape or first-degree burglary are on the list of violent crimes. It's doubtful, as a result, that the 23 offenses cover everything the average Californian would think of as being "violent."

This might not be a pressing issue if not for the changes brought on by Brown's 2016 ballot measure, which expanded parole opportunities to those serving time for a "nonviolent felony offense." That phrase is brand new, and Proposition 57 placed the term in the California Constitution.

It's unclear, though, whether "nonviolent felony offense" is just another way of saying any crime that's not on the list of violent crimes. A Sacramento Superior Court judge last month rejected that idea. At the same time, the judge ruled that some convicted sex offenders — who the Brown administration has deemed ineligible under Proposition 57 — should be considered for release because they weren't convicted of one of the 23 crimes.

Judge Allen Sumner's ruling seemed to hint that current law is full of knots crying out to be untangled. He wrote that "it is by no means clear what the voters understood, or intended, the term 'nonviolent' to mean."

The simplest way to clear that up would seem to be a comprehensive revision of the list of 23 violent crimes. And yet victims rights advocates want to create a new list, 51 crimes in all, that would disqualify someone for parole. How — or if — the two lists would work together is unclear. Few things are simple in the politics of criminal justice.

Board's Information Technology System

Commissioners Summary
All Institutions
February 01, 2019 to February 28, 2019

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	SHARRIEFF	TAIRA	BPH HQ	Total CMR Hrg
Suitability Hrg Total	**18**	**26**	**18**	**24**	**18**	**21**	**26**	**22**	**24**	**23**	**22**	**25**	**24**	**24**	**25**	**113**	**453**
Grants	4	7	10	3	2	8	8	3	8	5	4	9	9	4	10	0	94
Denials	11	12	6	15	10	10	13	13	12	18	13	12	12	16	14	0	187
Stipulations	2	5	1	6	2	2	4	5	4	0	4	0	2	4	1	0	42
Waivers	0	1	0	0	0	0	1	0	0	0	0	1	0	0	0	26	29
Postponements	0	1	1	0	2	1	0	1	0	0	1	2	1	0	0	73	83
Continuances	1	0	0	0	2	0	0	0	0	0	0	1	0	0	0	0	4
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	14	14

Denial Length Analysis per Commissioner (Summary of Denials and Stipulations)

Subtotal (Deny+Stip)	**13**	**17**	**7**	**21**	**12**	**12**	**17**	**18**	**16**	**18**	**17**	**12**	**14**	**20**	**15**	**0**	**229**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	5	12	7	17	7	3	8	9	12	13	9	8	11	15	11	0	147
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	5	5	0	3	5	8	6	6	4	3	7	3	3	5	4	0	67
7 years	3	0	0	1	0	1	2	3	0	2	1	1	0	0	0	0	14
10 years	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**1**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**26**	**29**
1 year	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0	18	20
2 years	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	2	3
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	4
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	**0**	**1**	**1**	**0**	**2**	**1**	**0**	**1**	**0**	**0**	**1**	**2**	**1**	**0**	**0**	**73**	**83**
Within State Control	0	0	0	0	0	0	0	0	0	0	1	1	0	0	0	73	75
Exigent Circumstance	0	0	1	0	2	0	0	0	0	0	0	1	1	0	0	0	5
Prisoner Postpone	0	1	0	0	0	1	0	1	0	0	0	0	0	0	0	0	3

Board's Information Technology System

Commissioners Summary
All Institutions
March 01, 2019 to March 31, 2019

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	SHARRIEFF	TAIRA	BPH HQ	Total CMR Hrg
Suitability Hrg Total	**29**	**17**	**30**	**28**	**24**	**19**	**30**	**27**	**18**	**19**	**32**	**32**	**27**	**25**	**22**	**127**	**506**
Grants	5	3	4	2	6	5	7	7	3	3	5	6	9	0	4	0	69
Denials	13	8	21	21	8	11	15	14	6	12	19	20	16	18	16	0	218
Stipulations	5	4	2	5	5	1	4	2	7	2	4	3	1	7	2	0	54
Waivers	0	0	0	0	2	1	0	0	0	0	1	1	0	0	0	48	53
Postponements	4	2	1	0	1	1	3	3	2	2	3	2	1	0	0	67	92
Continuances	2	0	2	0	1	0	1	0	0	0	0	0	0	0	0	0	6
Tie Vote	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	2
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	12	12

Denial Length Analysis per Commissioner (Summary of Denials and Stipulations)

Subtotal (Deny+Stip)	**18**	**12**	**23**	**26**	**13**	**12**	**19**	**16**	**13**	**14**	**23**	**23**	**17**	**25**	**18**	**0**	**272**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	7	9	16	15	4	7	8	9	6	10	10	13	15	15	7	0	151
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	4	1	4	8	9	4	8	5	5	3	8	6	2	8	5	0	80
7 years	5	2	2	3	0	1	2	2	1	1	4	3	0	1	4	0	31
10 years	2	0	1	0	0	0	1	0	1	0	1	1	0	1	2	0	10
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**0**	**0**	**0**	**2**	**1**	**0**	**0**	**0**	**0**	**1**	**1**	**0**	**0**	**0**	**48**	**53**
1 year	0	0	0	0	2	1	0	0	0	0	1	1	0	0	0	30	35
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8	8
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8	8
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	**4**	**2**	**1**	**0**	**1**	**1**	**3**	**3**	**2**	**2**	**3**	**2**	**1**	**0**	**0**	**67**	**92**
Within State Control	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	65	67
Exigent Circumstance	4	0	0	0	1	1	3	2	2	1	2	0	0	0	0	1	17
Prisoner Postpone	0	1	0	0	0	0	0	1	0	1	1	2	1	0	0	1	8

BOARD BUSINESS

February and March

Aside for the marathon en banc hearings, chronicled elsewhere in this CLN issue, February and March Executive Meetings of the BPH were remarkable only for their brevity. And while the March meeting did feature a 4-hour training session on implicit bias, that topic is best saved for another edition, when we have more information.

The other major issue before the board in those months was reading and adoption of regulations governing Petitions to Advance and Administrative Review processes, prior to the submission of those pending regulations to the Office of Administrative Law for final consideration. Those regulations, in official language and converted to plain English, are available in following pages in this issue.

The need to promulgate such regs was created late last year when the Orange County DAs office filed a challenge in court to the Board's practice of reviewing both PTA and AR considerations using Deputy Commissioners. Relying on minute technicalities in the law, a tactic DAs have long derided inmate attorneys for employing, the DAs sought to stymie the Board from advancing parole hearings ahead of the date officially laid out in the decision articulation.

However, with the unanimous adoption of the draft regulations the BPH has codified the process of advance considerations, although not without a final shot from the DA groups. Speaking on behalf of her fellow prosecutors, Donna Lebowitz from Los Angeles County, rose during the meeting to suggest additional changes need to be made to the proposed regs, which, she claimed, would provide more definition of when a hearing should be considered for advancement.

In particular, Lebowitz suggested offenses that would preclude an inmate's hearing from being advanced would include, among other things (and the point of the whole objection) possession of a cell phone accessory as described in Section 3323 (h) 11 and 14 of Title 15. The DAs, via Lebowitz, also suggested that the 30-day window for victims to provide statements regarding hearing advancement was 'inadequate' and requested that time be extended to 90 days.

In response to Lebowitz' suggestions, BPH Executive Director Jennifer Shaffer noted that cell phone possession was already included I Division D offenses and thus would disqualify the inmate for hearing advancement via the AR process. Shaffer also noted the proposed regs did not include language from the referenced Title 15 sections, as those factors were determined to be overly broad in scope and could potentially prevent a hearing advancement for conduct that was not specifically impactful to their parole suitability. She also noted, all misconduct is considered in the advancement process.

The board also heard a report on the scheduling of hearings resulting from commutations by former Governor Brown. Of the 239 commutations of sentence Brown handed down before 'retiring,' hearings have already been held for 41 of those prisoners, with an additional 148 hearing already scheduled and the rest poised to be placed on calendar as space and time permits. Shaffer noted those inmates who have served the longest are receiving first looks in scheduling dates.

EN BANC DECISIONS

The months of February and March, the first two chances newly-installed Governor Newsom had to send grants back to the BPH board for additional consideration, were a flood of those referrals: in two months alone, Newsom asked the 15-member board to reconsider over 30 grant decisions. Unprecedented? Seems to be. And disturbing.

But, the board itself seems to be standing firm, at least generally. As a rule of thumb, it has appeared over time that the full board usually stands behind their fellow member who made the original decision, at last about half the time. In these re-

cent tumultuous months, the board has carried forth, affirming the decisions of the original parole panel in 20 of the 31 cases before them, or about 65% of the time. There are some notable exceptions, however.

Before detailing the individual decisions, pardon us if we simply cut to the chase regarding DA comments. While not every inmate up for en banc consideration had speakers in favor or opposed to said grant, in most cases, if anyone appeared, it was the DA from the commitment county (usually the larger, more urban counties). And without exception those DAs, usually touting themselves as speaking 'for the people,' opposed the grant of parole. And almost without exception those reasons for opposition boiled down simply to the grant itself and usually a recitation of the facts of the crime.

In 21 of the 31 cases considered a DA was there to state opposition. Interestingly, however, the DAs were not always successful in opposing the grant, a reassuring exhibition of independence by the Board.

Other en banc cases were also considered in the past 2 months, including five inmates seeking compassionate release due to terminal illness. On these cases the board, followed their prior record, only recommending about half the cases that the ailing inmates be considered for release before end of life. It is also worth noting that in at least one case, the DA, in opposing the possibility, stated the office was unsure of the dependability of the decisions by CDCR medical staff, who must certify an inmate seeking recall of sentence under this statute has 6 months or less to live. At least there is one area where many of us can agree: doubting the department's medicos.

In February **Terry Hulse** and **William McCrumb** were recommended for compassionate release consideration, as was **Rodney Suell** in March. But **Joseph White** was denied that relief in February, as was **Stacy Littleton** in March.

In February the BPH legal team referred 3 cases for en banc, often for misconduct reported after the grant. Both **Jerry Cobb** and **Macy Boundert** will face new hearings, reportedly due to allegations of cell phone use. **James Lee**, despite some concerns regarding mental health, saw his grant of parole confirmed, sending him to a Skilled Nursing Facility, where his needs can be met.

Members of parole panels, if they have second thoughts about a grant (or, less often, a denial) can also refer individuals for their fellow commissioners to consider and in March the board considered two such cases. Both **Anthony Alto** and **Hung Nguyen** had their grants vacated in favor of new hearings, Alto reportedly over issues with honesty in his CRA interview and Nguyen on new information.

In February the following inmates, sent for another look by the Governor, saw their grants affirmed: **Terrell Allen; Gene Demendoza; Lee Goins; Nick Hastings; Jeffrey Long, Miguel Lopez; Reno Shadden; Arturo Solorio** and **Roderick White**. The following were recommended for rescission hearing, to reconsider the grants: **Jerry Holichek; Willie Pope; Sebastian Rodriguez; Jessie Smith** and **Nailah White**.

In March grants for these inmates were affirmed: **Edy Aristondo; Willie Baker; Terri Briggs; Jaimie Evans; Byron Miller; Patrick Nunnley; Glenn Russell; Paul Shortridge; Alvin Urriza** and **Trenton Veches**. Grants for the following inmates will be reconsidered: **Louis Branch; Dustin Jeffries; Robert Keithley; Peter Nelson; Paul Robinson** and **Jose Valencia**.

Of interest to those lifers who do not face Governor reversals (that power affects only those lifers with a murder conviction) might be the Rescission Hearing Process outlined elsewhere in this issue.

To end on an interesting and hopefully encouraging note, prior to the publication of this issue of CLN, the agenda for the April Board business meeting was published. In a sharp change from the previous months, Newsom has only referred two grants for en banc consideration in April.

SEEKING VERY SPECIFIC LETTERS

It didn't take long for in-coming Governor Gavin Newsom to ruffle lots of feathers in the prison advocacy community, on both sides. After 8 years of Jerry Brown, most in the field had a decent read on the former Governor's triggers, who and why he was prone to reverse on parole grants and/or send to en banc consideration.

Not that we got that understanding immediately, but Brown didn't veer far from the guideposts he set from himself early in his second two-term stint. Newsom appeared to start off with a bang, though not quite as big a bang as some rumors would contend. At LSA we've been peppered by letters, calls, emails, questions all about the current Governor's 'massive' number of reversals. Those numbers range anywhere from 50 to 240 to over 500 reversals and 'everyone' else to en banc.

And while those numbers are inflated (it appears to be more in the area of 50 or so reversals and 30 +/- en banc referrals), it is true Newsom appeared to be pretty free with the veto pen in his first weeks in office. Of course, we, and lots of others, want to know exactly how many and why.

The obvious thing, to us, seemed to be to ask the Governor. And so, we did—posing the question both in email, through his website (the preferred method) and by phone to staff in his office. How many parole grants did Governor Newsom reverse in his first weeks in office and how many grants did he refer to en banc proceedings at the BPH? Pretty straight forward and simple; at least we thought so.

And while the result wasn't exactly a stonewall, it certainly wasn't transparent. But—we are nothing if not persistent, so when the Newsom's staff haughtily suggested (by emailed letter) we might have to file a FOIA (Freedom of Information Act) request for 'specific documents,' (even though we hadn't asked for documents, only numbers), well, OK, it that's the way you want it, we'll be happy to accommodate you.

So, while the process of crafting the letter citing 'specific documents' we'd like to see is being created, we thought we'd reach out to a much more forthcoming and helpful population—lifers who received those grant reversals and en banc referrals. It appears those letters from the Governor's office to the inmates affected might not be wholly in the realm of public record, at least not until the end of the year when by law the Governor's office is required to report on reversals to the state legislature.

But we don't want to wait until then. We're persistent, yes, but not terribly patient. Which leads us to this: for those lifers who were reversed by Newsom and/or had their parole grant referred to the BPH for en banc, we're asking you to contribute to our data and information bank by sending us a copy of those letters notifying you of the reversal or en banc referral. If you send us the original, we'll copy it and send it back, just specify if you need it returned.

What to we hope to learn from this? As with our past examination of reversal letters from Brown, we hope to mine each letter for the specific reasons the Governor noted in making his decision, as well as get something of a 'read' on just how many dates were impacted in Newsom's first weeks. Your name won't be used, but your information could provide real 'insight' into this new era now underway.

And we would be remiss here, if we didn't give credit where due. Even though we're a bit flummoxed by Newsom's apparent nervousness about releasing lifers, we are heartened by his moratorium on executions. On March 12 Newsom signed an executive order halting executions during his time in office.

While Newsom's action does not do away with the death penalty (only an amendment to the state Constitution can do that), it does mean that while this debate rages on no more men or women will

be subjected to state-sanctioned murder during Newsom's term. So far, Governor, you're 1 and 1: kudos on the death penalty action, but ya gotta loosen up on parole grants and provide us, the public, with some solid information.

In the meantime, if you've had a grant reversed or sent to en banc since January 7, please send us that notification letter: PO Box 277, Rancho Cordova, Ca. 95741. Thank you for our support.

REAL NUMBERS AT LAST

Late Breaking Information

Since Governor Gavin Newsom took over the big office behind the golden bear in the Capitol building, rumors about his intentions toward lifers and parole have been flying fast, furious and in all directions. His first few weeks were a series of what the heck moments, with reversals and en bancs showing up in alarming numbers, while at the same time people in were in a position to know urged patience and calm. And the Gov's office itself was irritatingly and smugly uncommunicative about the issue.

Rumors abound—200 grants have been reversed; Newsom is sending all grants back, either through en banc or reversals; he's bringing back the 'no parole' policy. But—take heed folks, things can't be hidden forever, or even for long. Real facts are starting to trickle out regarding the real numbers of lifer grants impacted by Newsom.

So far, according to the Governor's office, Newsom has reversed the parole grants for 46 lifers and sent to en banc 33 more prisoners. A much smaller number than the 200+ rumored, and more in line with the 50 +/- that we heard from reliable sources and reported. And while those reversed by the Governor have no recourse, save the fact that they will be back at the parole board for a new hearing within a year, those sent for en banc consideration by Newsom face a variety of possibilities and results.

Of those 33 decisions sent to en banc, about 60%, 20 individuals in all, had those decisions affirmed by the entire board and will be (or have been) released. The remaining 13 have been scheduled for rescission hearings, where the validity of the original grant will be again considered, this time by a panel of 3, two commissioners and one DC. If the original decision (usually a grant) is affirmed by the reviewing panel those prisoners will be released pretty quickly.

If the reviewing panel decides to rescind the grant, a new hearing will be held at in a few months and the process begins again. Interestingly, one denial was considered en banc, that denial was ordered to a rescission hearing. How that plays out, we'll be monitoring. For more on the process of rescission hearings, see article elsewhere in this issue.

There has been much speculation about the seemingly contradictory positions Newsom has exhibited, putting a halt to executions during his term in office, yet reversing more lifer grants in his first 2 months in office than Brown did in all of 2018. It has been suggested that Newsom's action on lifer grants may be in part a balancing effort because of the execution moratorium; that he needs to show he is thoughtful, firm and yet not draconian on corrections matters.

We're not sure we buy that, but at present the Governor is still something of an unknown. As additional information and 'insight' into the Governor's attitude and intent toward lifers become evident, we'll be watching.

ADVANCING PAROLE CONSIDERATION HEARING DATES

Plain language version

Background

On October 22, 2018, the Board of Parole Hearings (BPH) adopted emergency regulations detailing the process by which an inmate, denied parole, may file a petition to advance the date of the inmate's next parole consideration hearing. By way of history, prior to 2008, inmates could expect to have parole consideration hearings after a period ranging anywhere from annually to up to five years, depending upon the offense. Following passage of the Victim's Bill of Rights in 2008, inmates faced longer periods of incarceration following denial of parole by BPH. Under Penal Code section 3041.5, the period between parole consideration hearings (denial period) now ranges from a minimum three years, to a maximum 15 years. The longer denial periods were challenged, but upheld in both federal and California courts as not violating *ex post facto* laws. (*Gilman v. Schwarzenegger* (9th Cir. 2011) 638 F.3d 1101; *In re Vicks* (2013) 56 Cal.4th 274.) In upholding the longer denial periods, both courts relied upon BPH's discretion under Penal Code section 3041.5 to advance parole consideration hearing dates. More specifically, section 3041.5, subdivision (b)(4) provides as follows:

> The board may in its discretion, after considering the views and interests of the victim, advance a hearing set pursuant to paragraph (3) to an earlier date, when a change in circumstances or new information establishes a reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration of the inmate provided in paragraph (3).

The new emergency regulations outline the procedures by which BPH will review individual cases and advance hearings in appropriate circumstances. A two-prong approach is taken by BPH to advancing hearings. One prong addresses individual petitions requesting advancement of hearings, and the second prong requires BPH to initiate its own administrative review of any inmate whose most recent parole consideration hearing resulted in a denial of three years. A summary of the procedural regulations relating to individual petitions and BPH administrative review follows.

Individual Petition to Advance Hearing Date

Following a denial of parole, an individual may petition BPH to advance the date of the inmate's next parole consideration hearing by completing BPH Form 1045-A. This form must include the inmate's name, CDCR number, institution, and be dated and signed. Importantly, the inmate must set forth any change in circumstances or new information since the date of the inmate's most recent hearing resulting in a denial of parole. The inmate must include an explanation of how the change in circumstances or new information "establishes a reasonable likelihood that consideration of the public safety does not require that the inmate remain incarcerated until the date of his or her parole consideration hearing." (Cal. Code Regs., tit. 15, § 2150, subd. (b).)

There is a limit on the number of petitions the inmate may file in a given period. An inmate may file a petition to advance a hearing date once every three years from BPH's previous review, on the merits, of a request to advance the parole consideration hearing date.

Before reviewing any individual petition on its merits, BPH will conduct a preliminary review to determine whether it even has jurisdiction to advance the parole consideration hearing date. (Cal. Code Regs., tit. 15, § 2151.) In making this determination BPH will review the petition to confirm that the inmate's last parole

consideration hearing resulted in a denial of parole, and also that the inmate has not submitted a petition to advance the parole consideration hearing date that was reviewed on the merits within the past three years. (Cal. Code Regs., tit. 15, § 2151, subd. (b).) If an inmate does not meet these two jurisdictional requirements, he or she will be advised in writing of BPH's determination.

BPH Ad Hoc Administrative Review

As noted earlier, BPH may on its own initiate administrative review of any inmate to determine whether to advance the date of the inmate's next parole consideration hearing. This *ad hoc* administrative review requires no individual petition to advance the parole hearing date. Rather, it is initiated by BPH. In every case where an inmate's most recent parole hearing resulted in a denial of three years, the administrative review must be initiated within 11 months after the parole consideration hearing that resulted in the three-year denial. (Cal. Code Regs., tit. 15, § 2153.)

BPH will first conduct a preliminary screening of all cases resulting in a three-year denial to determine whether the inmate may proceed to a review on the merits. The regulations specify factors that will result in an inmate being excluded from a review on the merits. (Cal. Code Regs., tit. 15, § 2154, subd. (b).) They include the following seven circumstances:

> (1) The inmate stipulated to unsuitability at his or her last parole consideration hearing;
>
> (2) The inmate's last parole consideration hearing resulted in a denial period of more than three years;
>
> (3) The inmate's overall risk rating is high on his or her most recent comprehensive risk assessment;
>
> (4) The inmate or the inmate's attorney of record has, since the inmate's last hearing, submitted a petition under section 2150 that was reviewed on the merits under section 2156;
>
> (5) The inmate has been found guilty of a Division A-1, A-2, B, C, D, or E rule violation since the inmate's last parole consideration hearing;
>
> (6) The inmate has been convicted of a new crime since the inmate's last parole consideration hearing; or
>
> (7) The inmate's next hearing date has already been advanced since his or her last parole consideration hearing.

BPH believes that each of these screening exclusions is necessary to allow BPH to focus its resources in exercising discretion to review inmates for advancement on those most likely to be found suitable for parole. Thus, if BPH determines that none of the above circumstances apply in a given case, it will proceed with the notification process and a review on the merits. If BPH staff determines that at least one of the circumstances applies, the inmate's next parole consideration hearing will not be advanced. Importantly, inmates excluded from BPH's administrative review of a three-year denial process are still entitled to petition BPH under the individual petition to advance hearing process earlier described.

Review on the Merits

After a preliminary determination is made that an individual petition or *ad hoc* administrative review

should go forward, BPH shall notify registered victims of the Board's pending review on the merits and provide an opportunity to submit a written statement. (Cal. Code Regs., tit. 15, § 2155.) Within 15 business days of the conclusion of this notification process an assigned hearing officer will conduct a review on the merits and determine whether the date of the inmate's next parole consideration hearing should be advanced.

In making this determination the hearing officer shall review and consider all relevant and reliable information about the inmate, including, but not limited to: (1) information contained in the inmate's central file; (2) any petition filed by the inmate under section 2150; and (3) written statements submitted by registered victims who received notice under section 2155. The inmate's age is an important consideration. If the inmate committed the controlling offense when he or she was 25 years of age or younger, "the hearing officer shall consider the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the inmate." (Cal. Code Regs., tit. 15, § 2156, subd. (c).) "If the inmate is 60 years of age or older and has served a minimum of 25 years of continuous incarceration on his or her current sentence, the hearing officer shall consider the inmate's age, time served, and diminished physical condition, if any." (Cal. Code Regs., tit. 15, § 2156, subd. (d).)

After reviewing and considering all relevant and reliable information and the age factors detailed above, the hearing officer will determine whether the date of the inmate's next parole consideration hearing should be advanced. "If the hearing officer determines there has been a change in circumstances or new information that establishes a reasonable likelihood that consideration of the public and the victim's safety does not require that the inmate remain incarcerated until the date of his or her next parole consideration hearing, the hearing officer shall advance the date of the inmate's next parole consideration hearing. (Cal. Code Regs., tit. 15, § 2156, subd. (e).) In the absence of such a determination, the inmate's next parole consideration hearing will not be advanced.

The hearing officer shall issue and serve on the inmate a written decision that includes a statement of reasons supporting the decision. (Cal. Code Regs., tit. 15, § 2156, subd. (f).)
Parole consideration hearing dates shall be advanced by the hearing officer either to the next available calendar or by decreasing the length of the inmate's previous parole denial to a shorter allowable period, whichever the hearing officer determines is appropriate based on the information reviewed and considered. (Cal. Code Regs., tit. 15, § 2156, subd. (g).)

Decision Review

Inmates may seek review of decisions issued by writing BPH within 30 calendar days of being served the decision. (Cal. Code Regs., tit. 15, § 2156, subd. (h).) The inmate's written request shall include a description of why the inmate believes the previous decision was not correct and may include additional information not available to BPH at the time the previous decision was issued. (Cal. Code Regs., tit. 15, § 2157, subd. (a).)
BPH may also initiate a review under this section at any time prior to the date of the inmate's next parole consideration hearing if the previous decision contained an error of law or fact, or if BPH receives new information that would have materially impacted the previous decision had it been known at the time the decision was issued. (Cal. Code Regs., tit. 15, § 2157, subd. (b).)
The officer reviewing the previous decision shall consider all relevant and reliable information and issue a decision either concurring with, or overturning the previous decision with a statement of reasons supporting the new decision. (Cal. Code Regs., tit. 15, § 2157, subd. (d).)

BPH Data Confirms Importance of Advancing Hearing Dates

BPH data confirms that its administrative review processes are meaningful mechanisms to mitigate the risk of prolonged incarceration of inmates. In its Amended Finding of Emergency in support of the regulations, BPH noted that from January 2014 through August 2018, deputy commissioners reviewed and advanced 1,885

parole consideration hearings based on petitions to advance hearing dates. As of September 27, 2018, 1,623 of those hearings had been scheduled, resulting in 421 grants of parole. (25.9 percent grant rate.) Over that same period, deputy commissioners advanced 4,679 parole consideration hearings under its *ad hoc* administrative review process. As of September 27, 2018, 3,311 of those hearings had been scheduled, resulting in 1,171 grants of parole. (33.3 percent grant rate.) These figures contrast greatly with the general grant rate of 17.76 percent for all parole hearings scheduled. BPH concluded: "As seen from the data, the grant rate for inmates whose hearings are advanced through either the [Petition to Advance] or the administrative review processes is significantly higher relative to that of all hearings. In other words, many of the inmates whose hearings are advanced are found to be suitable for parole earlier than the denial length they were given at their last hearing." (Amended Finding of Emergency, BPH RN 18-01, 10/22/18, p. 3.)

BPH RN 18-01: PROPOSED REGULATORY TEXT

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS

Chapter 2.5. ADVANCING PAROLE CONSIDERATION HEARING DATES is ***added*** to read as follows:

CHAPTER 2.5. ADVANCING PAROLE CONSIDERATION HEARING DATES

Article 1. Petition to Advance the Date of an Inmate's Next Parole Consideration Hearing is ***added*** to read as follows:

ARTICLE 1. PETITION TO ADVANCE THE DATE OF AN INMATE'S NEXT PAROLE CONSIDERATION HEARING

§ 2150. General.

Following a parole consideration hearing resulting in a denial of parole under paragraph (3) of subdivision (b) of Penal Code section 3041.5 or a stipulation of unsuitability under subsection 2253(c) of article 3 of chapter 3, the inmate or the inmate's attorney of record may file a written petition requesting that the board advance the date of the inmate's next parole consideration hearing. The inmate or the inmate's attorney of record may file a subsequent written petition once every three years from the date of the board's previous review on the merits issued under section 2156.

To file a written petition to advance the date of the inmate's next parole consideration hearing, the inmate or inmate's attorney of record shall send to the board a completed BPH Form 1045-A or a written request that includes the following:
Inmate's name;

CDCR number;

Institution at which the inmate is housed;

A change in circumstances or new information since the date of the inmate's most recent hearing resulting in a denial or stipulation of unsuitability;

How the change in circumstances or new information establishes a reasonable likelihood that consideration of the public safety does not require that the inmate remain incarcerated until the date of his or her next parole consideration hearing; and

Inmate's signature and date of signature.

NOTE: Authority cited: Section 12838.4, Government Code and Sections 3052 and 5076.2, Penal Code. Reference: Section 3041.5, Penal Code and *In re Vicks* (2013) 56 Cal.4th 274. **§ 2151. Preliminary Review.**

Within 10 business days of receiving a petition under section 2150, board staff shall review the petition to determine whether the board has jurisdiction under this section to advance the date of the inmate's next parole consideration hearing.

The board has jurisdiction to advance the date of the inmate's next parole consideration hearing if all of the following are true:
The inmate's last parole consideration hearing resulted in a denial of parole under paragraph (3) of subdivision (b) of Penal Code section 3041.5 or a stipulation of unsuitability under subsection 2253(c) of article 3 of chapter 3; and

The inmate has not submitted a petition to advance a parole consideration hearing date that was reviewed on the merits within the past three years under section 2156.

If board staff determines the board has jurisdiction under subsection (b) to review the petition, the board shall proceed with the notification process outlined in section 2155.

If board staff determines the board does not have jurisdiction under subsection (b) to review the petition, staff shall issue a written decision, a copy of which shall be served on the inmate and placed in the inmate's central file within 15 business days of being issued. The date of the inmate's next parole consideration hearing shall not be advanced

Inmates may seek review of decisions issued under this section by writing the board in accordance with section 2157 within 30 calendar days of being served with the decision. Decisions issued under this section are not subject to the department's inmate appeal process under article 8 of chapter 1 of division 3 of this title.

Nothing in this section precludes the board from conducting an ad hoc administrative review to determine whether to advance the date of the inmate's next parole consideration hearing under section 2152.

NOTE: Authority cited: Section 12838.4, Government Code and Sections 3052 and 5076.2, Penal Code. Reference: Section 3041.5, Penal Code.

Article 2. Administrative Review to Advance the Date of an Inmate's Next Parole Consideration Hearing is ***added*** to read as follows:
ARTICLE 2. ADMINISTRATIVE REVIEW TO ADVANCE THE DATE OF AN INMATE'S NEXT PAROLE CONSIDERATION HEARING

§ 2152. Ad Hoc Administrative Review.

The board may, at any time, initiate an administrative review of any inmate to determine whether to advance the date of the inmate's next parole consideration hearing under paragraph (4) of subdivision (b) of Penal Code section 3041.5. Once an administrative review is initiated under this section, the board shall proceed with the notification process outlined in section 2155.

NOTE: Authority cited: Section 12838.4, Government Code and Sections 3052 and 5076.2, Penal Code. Reference: Section 3041.5, Penal Code and *In re Vicks* (2013) 56 Cal.4th 274.

§ 2153. Administrative Review of Three-Year Denials.

The board shall, 11 months after a parole consideration hearing results in a denial period of three years, initiate an administrative review to determine whether to advance the date of the inmate's next parole consideration hearing under paragraph (4) of subdivision (b) of Penal Code section 3041.5. This section shall not apply to determinately sentenced inmates who were within 24 months of being released as a result of their Earliest Possible Release Date.

NOTE: Authority cited: Section 12838.4, Government Code and Sections 3052 and 5076.2, Penal Code. Reference: Section 3041.5, Penal Code and *In re Vicks* (2013) 56 Cal.4th 274.

§ 2154. Preliminary Screening.

Within 10 business days of an administrative review being initiated under section 2153 of this article, board staff shall conduct a preliminary screening to determine whether the inmate will be excluded from a review on the merits under section 2156.

An inmate will be excluded from a review on the merits under section 2156 if any of the following circumstances apply:

The inmate stipulated to unsuitability under subsection 2253(c) of article 3 of chapter 3 of this title at his or her last parole consideration hearing;

The inmate's last parole consideration hearing resulted in a denial period of more than three years under paragraph (3) of subdivision (b) of Penal Code section 3041.5;

The inmate's overall risk rating is high on his or her most recent comprehensive risk assessment completed under section 2240 of article 1 of chapter 3 of this title;

The inmate or the inmate's attorney of record has, since the inmate's last hearing, submitted a petition under section 2150 that was reviewed on the merits under section 2156;

The inmate has been found guilty of a Division A-1, A-2, B, C, D, or E rule violation as specified in section 3323 of article 5 of subchapter 4 of chapter 1 of division 3 of this title since the inmate's last parole consideration hearing;

The inmate has been convicted of a new crime since the inmate's last parole consideration hearing; or

The inmate's next hearing date has already been advanced since his or her last parole consideration hearing.

If board staff determines that none of the circumstances in subsection (b) apply, the board shall proceed with the notification process outlined in section 2155 and a review on the merits under section 2156.

If board staff determines that at least one of the circumstances in subsection (b) of this section applies, the in-

mate's next parole consideration hearing shall not be advanced under section 2153.

Nothing in this section precludes the board from conducting an ad hoc administrative review to determine whether to advance the date of the inmate's next parole consideration hearing under section 2152.

NOTE: Authority cited: Section 12838.4, Government Code and Sections 3052 and 5076.2, Penal Code. Reference: Section 3041.5, Penal Code and *In re Vicks* (2013) 56 Cal.4th 274.

Article 3. Review on the Merits is ***added*** to read as follows:
ARTICLE 3. REVIEW ON THE MERITS

§ 2155. Victim Notification.

Within five business days of board staff determining the board has jurisdiction under section 2151 or determining none of the circumstances in subsection 2154(b) apply, or within five business days of the board initiating an ad hoc administrative review under section 2152, the board shall notify registered victims of the board's pending review on the merits under section 2156 and provide an opportunity to submit a written statement.

Responses to the board under this section must be in writing and postmarked or electronically stamped no later than 30 calendar days after the board issued the notification.

A registered victim is any person who is registered as a victim with the department's Office of Victim and Survivor Rights and Services on the date board staff determined the board has jurisdiction under section 2151 of article 1, the date board staff determined none of the circumstances in subsection 2154(b) apply, or on the date the board initiated an ad hoc administrative review under section 2152.

NOTE: Authority cited: Section 12838.4, Government Code and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041.5 and 3043, Penal Code and *In re Vicks* (2013) 56 Cal.4th 274.

§ 2156. Review on the Merits.

Within 15 business days of the conclusion of the notification process described under section

2155, a commissioner or deputy commissioner acting in accordance with Penal Code section 5076.1 shall, as a hearing officer, conduct a review on the merits and determine whether the date of the inmate's next parole consideration hearing should be advanced under paragraph (4) of subdivision (b) or under subdivision (d) of Penal Code section 3041.5.

The hearing officer shall review and consider all relevant and reliable information about the inmate, including, but not limited to:
Information contained in the inmate's central file;

Any petition filed by the inmate under section 2150; and

Written statements submitted by registered victims who received notice under section 2155.

If the inmate committed his or her controlling offense, as defined in subdivision (a) of Penal Code section 3051, when he or she was 25 years of age or younger, the hearing officer shall consider the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the inmate.

If the inmate is 60 years of age or older and has served a minimum of 25 years of continuous incarceration on his or her current sentence, the hearing officer shall consider the inmate's age, time served, and diminished physical condition, if any.

After reviewing and considering all relevant and reliable information and the factors in subsections (c) and (d), the hearing officer shall determine whether the date of the inmate's next parole consideration hearing should be advanced. If the hearing officer determines there has been a change in circumstances or new information that establishes a reasonable likelihood that consideration of the public and the victim's safety does not require that the inmate remain incarcerated until the date of his or her next parole consideration hearing, the hearing officer shall advance the date of the inmate's next parole consideration hearing. In the absence of such a determination, the date of the inmate's next parole consideration hearing shall not be advanced.

The hearing officer shall issue a written decision that includes a statement of reasons supporting the decision. A copy of the decision shall be served on the inmate and placed in the inmate's central file within 15 business days of being issued. The board shall, within five business days of issuing a decision, send notice of the decision to any registered victim who received notice under section 2155.

Parole consideration hearing dates advanced under subsection (e) shall be advanced by the hearing officer either to the next available calendar or by decreasing the length of the inmate's previous parole denial to a shorter allowable period under paragraph (3) of subdivision (b) of Penal Code section 3041.5, whichever the hearing officer determines is appropriate based on the information reviewed and considered.

Inmates may seek review of decisions issued under this section by writing the board in accordance with section 2157 within 30 calendar days of being served the decision. Decisions issued under this section are not subject to the department's inmate appeal process under article 8 of chapter 1 of division 3 of this title.

NOTE: Authority cited: Section 12838.4, Government Code and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041.5, 3051, 3055, 4801 and 5076.1, Penal Code and *In re Vicks* (2013) 56 Cal.4th 274.

Article 4. Decision Review is ***added*** to read as follows:

ARTICLE 4. DECISION REVIEW

§ 2157. Decision Review.

An inmate may request review of a decision issued under section 2151, or a review on the merits decision issued

under section 2156 by submitting a written request to the board within 30 calendar days of the inmate being served the decision. The inmate's written request shall include a description of why the inmate believes the previous decision was not correct and may include additional information not available to the board at the time the previous decision was issued.

The Chief Hearing Officer or an associate chief deputy commissioner may also initiate a review under this section at any time prior to the date of the inmate's next parole consideration hearing if the previous decision contained an error of law, an error of fact, or if the board receives new information that would have materially impacted the previous decision had it been known at the time the decision was issued.

A hearing officer, associate chief deputy commissioner, or the Chief Hearing Officer, who was not involved in the original decision, shall complete a review of the decision within 15 business days of the board receiving the request.

The hearing officer, associate chief deputy commissioner, or the Chief Hearing Officer reviewing the previous decision shall consider all relevant and reliable information and issue a decision either concurring with the previous decision or overturning the previous decision with a statement of reasons supporting the new decision.

A copy of the decision shall be served on the inmate and placed in the inmate's central file within 15 business days of being issued.

Within five business days of issuing a decision under this section that overturns a previous decision that determined the board had jurisdiction under section 2151, or a review on the merits decision issued under section 2156, the board shall send notice of the decision to any victim who received notice under section 2155.

If a decision under this section overturns a previous decision that determined the board did not have jurisdiction to conduct a review under section 2151 or that determined one or more of the circumstances in subsection 2154 (b) applied, the board shall proceed with the notification process outlined in section 2155. The board shall also conduct a review on the merits under section 2156.

Decisions under this section are not subject to the department's inmate appeal process under article 8 of chapter 1 of division 3 of this title.

NOTE: Authority cited: Section 12838.4, Government Code and Sections 3052 and 5076.2, Penal Code. Reference: Section 3041.5, Penal Code and *In re Vicks* (2013) 56 Cal.4th 274.

WHAT'S IN A NAME: VIOLENT CRIME

We've heard from a few sources that now -former Governor Jerry Brown has quietly assured friends and compatriots that he doesn't really plan to put simply disappear into the flora and fauna of Colusa County, become a gentleman farmer/rancher and leave the tumultuous world of politics behind. Well, no surprise there. But what Brown has reportedly indicated he's interested in continuing is his support for sentence reform in the California justice system.

If that is indeed the case, well, Governor, there's lots for you to do, beginning with explaining, simplifying, even explaining PC 667.5. After all, this troublesome area of law became law during Brown's first 2 terms; even signed into law by Brown himself in 1976. But in the intervening 40+ years this one section of the penal code has been amended 38 times, expanding the list of 'violent' crimes from the original 8 to the present 23 individual offenses.

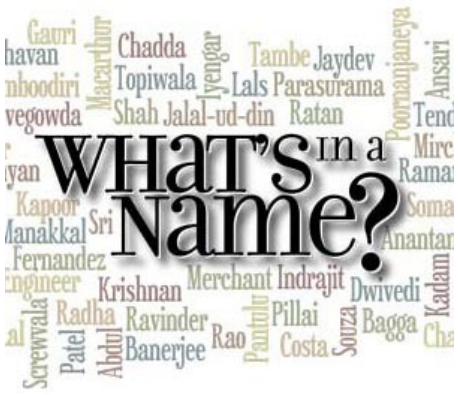
And while some of those 23 listed offenses are pretty predictable in being defined as violent (murder/voluntary manslaughter; kidnapping; arson, attempted murder; rape/spousal rape), others are rather nebulous or closely defined by references to yet other penal code definitions, including several sexual offenses explained in other sections of the law. And some are just puzzling: "Any felony punishable by death or imprisonment in the state prison for life"; mayhem, and the all-encompassing "[A]ny felony punishable by death or imprisonment in the state prison for life."

And if this weren't confusing enough, a new ballot initiative, which will be before the voters in November 2020 would add just over 50 new crimes to the list of those considered 'violent,' thus eliminating those convicted of this long list from being impacted by Prop, 47, 57 and possibly Prop. 36. The ballot proposal, self -righteously named the "California Criminal Sentencing, Parole, and DNA Collection Initiative (2020)," was authored by Crime Victims United of California and has found considerable funding and support from several retail agencies, most likely because one of the crimes that would be newly designated as felonies is theft over $250.

Bolstering this effort to take sentencing reform backward is SB 170, introduced in mid-February by Sen. Patricia Bates (R-there's a surprise) which basically would do by legislative action what the proposed initiative would do: increase the list of what crimes are considered 'violent' felonies. Starting to see a pattern here? Yeah, so do we.

And while some large retailers may be backing the ballot initiative, in an interesting move the new head of the CCPOA (yep, you read that right), has asked the PAC (Political Action Committee) supporting the initiative to return some $2 million in contributed to the PAC by the CCOPA, in what appears to be literally the last hours of the former union head's time in office. The new union leadership reportedly wants to "evaluate your positions and determine whether or not we are in support."

Other rather important opposition to the ballot measure comes from none other than former Governor Brown, who called the initiative 'flawed,' and would "cost taxpayers tens of millions of dollars and endanger public safety by restricting parole and undermining inmate rehabilitation." Nice to see you back in the fray, Governor.



THE GOOD NEWS: MORE GOING OUT THAN COMING IN

But violations are up as well

Appearing at Life Support Alliance's first lifer family seminar of 2019, Board of Parole Hearings Executive Director Jennifer Shaffer publicly broke the truly astounding news: in 2018, more prisoners were granted parole from their life terms than entered prison with new life sentences. More outflow than inflow. More leaving than coming in. More exiting than entering. Net numerical loss.

Any way you state it, that fact is historic and quietly encouraging. Which is not to say there were no life sentences meted out in California, but more to the point, more lifers than ever before were granted parole. That's the good news. But for every ying, there is a yang.

Director Shaffer also reported that more parole violations by lifers are also being recorded. For decades lifers could boast the lowest—by far—rate of recidivism among all groups of prisoners released on parole. And while that is still the case, that low number is slowly creeping up; between 3 and 5% in the last few months. And, what so many have long feared has happened; for the first time in memory, a lifer currently on parole has been arrested for a violent crime.

Without prurient details, and for those few inside the wire who may not have heard, a lifer paroled roughly two years ago, was arrested and charged in Sacramento with an attempted armed robbery, resulting in the wounding of a bystander. The parolee was quickly apprehended and is currently waiting prosecution on the armed robbery, felon in possession of a weapon, assault with GBH, and probably spitting on the sidewalk, in the Sacramento courts.

If convicted, which seems likely, the misanthropic parolee will also face reinstatement of his former life term, in addition to any new charges and sentences he may receive. Fortunately, the wounded bystander was not seriously injured, and the erstwhile robber was quickly apprehended. But the damage is done.

And while proponents of 'law 'n' order' quickly took to the public forums decrying the release of prisoners and the prospect of massive crime sprees, it appears the outcry was dampened by events the following day that, for better or worse, pushed this issue to the back pages of the news. But it seems inevitable that DAs and victim groups will weaponize this individual's actions against all prospective parolee. Just a cautionary word.

In other remarks Shaffer noted the pending and daunting increase in parole hearings scheduled looming within the next 2 years. Due to the influx of inmates headed to parole hearings via Prop. 57 and YOPH laws, the board expects to see a 38% increase in scheduled hearings by 2020. In raw numbers, that means scheduled hearings will jump from over 5,000 to over 8,000 a year.

To accommodate this increase, expect to see two new parole commissioners added to the current 15-member board at the start of the next fiscal year, beginning in July 2019. And Governor Newsom will have additional opportunities to make his mark on the parole board, as 5 commissioners' terms will end in July 2019. Newsom will have to make the decision to either re-appoint or replace Commissioners Anderson, Grounds, Cassady, LaBahn and Ruff.

Those new hearings will include about 1,800 long-term determinant sentenced inmates, and an estimated 4,000 non-violent third strikers. Those third strikers who have served the longest will be brought to parole hearings first—if they are within 5 years of their MEPD they will have hearings by 2020, the remainder by 2021.

In 2018 nearly 40% of hearings scheduled were initial hearings and the 285 grants that came from those initial hearings represented nearly 25% of all grants handed down; a striking difference from 5-6 years ago, when only 40 grants were made at initial

hearings. Shaffer reiterated what she has noted in the past: the standard to be granted parole is the same, no matter if at the first, fourth or tenth hearing, whether YOPH, elderly or third striker: is the inmate before the panel a current risk to society.

Commenting on the CRA process, Shaffer noted that less than 1% of those inmates appearing before a hearing panel with a High-risk rating CRA were granted parole; however, less than 20% of all inmates receiving a CRA are rated as High risk.

Jennifer Shaffer, Executive Director, BPH

FIRST LOOK AT NEW LAWS & POLICY IMPACT

Now that the sweep of new laws and policies that became effective January 1 of 2019 have been in place for a few months the scope of change and impact of those new rules is beginning to be measurable. Kathleen Allison, CDCR Undersecretary of Corrections for Operations, speaking in mid-March at the LSA lifer family seminar in Sacramento, offered up a laundry list of numbers and statistics on how the department is implementing and tracking those laws.

The numbers are in some ways impressive, and while not all apply to the lifer population, the newly emerging picture is nonetheless a snap shot of how CDCR is changing. Allison also made the point that it remains early days yet in some of these new processes, regulations are still being crafted and training still sinking in.

For those prisoners sentenced to long terms under the felony murder rule, who now can be considered for recall of sentenced under PC 1170(d), Allison reported CDCR has already identified and referred about 800 individuals to various sentencing courts for consideration for resentencing. CDCR classification is automatically screening inmates for application of this new law (SB 1437) that went into effect January 1, 2019. She reported one of the first inmates so referred, whom she characterized as a 'poster child' for that law, has already had a hearing, with a substantial sentence reduction and has been released, as the final sentence was covered by the years that inmate had already served. That situation, however, will be the exception rather than the rule.

The referral for resentencing process can be initiated by CDCR (which is currently reviewing inmates for eligibility) or from the DA or Public Defender's office in the county of commitment, but not from the inmate or family by direct request. Should any inmate believe he qualifies for this consideration, he/she should request review by classification committee and then referral to the sentencing court or request the Public Defender the his/her county consider the referral. However, family or inmates cannot petition the court directly under 1437 for sentence recall and consideration. Inmates and attorneys can send a petition/request to CDCR that they be considered for referral for resentencing, but the actual court referral must come from CDCR, the BPH or the DA in the county of commitment.

Prop. 57 is having an impact, again, not just on lifers (for whom that impact is relatively small). Since the beginning of the year CDCR has affirmed 4.8

million (yes, million) credits under the 3 credit-earning areas of Prop. 57, which has resulted in a decrease of 13,000 (yes, 13 thousand) years of sentences to be served. That, alone, should save the state somewhere in the area of $920 million dollars, give or take pocket change.

Allison also spoke to the CDCR policies of behavioral overrides, which allow currently well-programming prisoners to be housed at a lower custody level yard than their custody points would otherwise dictate, and to the Non-Designated or 'mixed yards' program. Those prisoners who have been disciplinary free for a year and are on a path of positive programming can request consideration for transfer to a lower custody level yard, regardless of their total accumulation of points. These requests will be individually evaluated by staff at each prison and ultimately approved by wardens.

Allison noted the department recognizes many prisoners, through their actions in the early years of their incarceration (also known as the 'knucklehead years') managed to earn an often seemingly insurmountable number of disciplinary points, and though they may have turned the corner in behavior and self-understanding, the small number of points that can be deducted each year based solely on positive behavior means those prisoners would, barring the override process, never reach a Level II point level. To date, the department has authorized some 4,000 inmates to go to lower level facilities based on behavioral overrides. And while Allison noted this program is a classic 'carrot and stick' process (positive actions receive the carrot in the form of lower level custody, rule violations get the stick, in being sent back to higher custody levels), she also noted 'very few' inmates who received a behavioral override required that privilege to be rescinded.

Regarding the non-designated or mixed-yard program, Allison affirmed the department is moving forward with this policy, in the Level I and II prisons. She affirmed there are no plans to implement this program on higher security level prisons, but noted that with few exceptions, based mostly on facility design and/or shared services with higher level yards, most lower level institutions will become fully integrated. Currently, some 34,000 inmates are housed on non-designated yards and while Allison agreed there have been initial problems when the integration is implemented, she, as has CDCR Secretary Ralph Diaz, emphasized the incidents have been relatively low level and not ongoing.

Allison also spoke to the long awaited and equally long-delayed new regulations regarding family visits for lifers. Those regs are now fully in place, and while the Undersecretary indicated there still may be some training issues in various prisons, the process for approving family visits for lifers and LWOPs and changes in those allowed those visits should be uniform across the state. As Allison discussed, one of the biggest changes, other than simply allowing LWOP and lifers to participate, is the removal of the blanket ban on family visits for those with previous domestic violence or crimes against family designations.

Those situations are now to be evaluated, by committee, not one person, on a case-by-case basis, with Allison noting the department (at least at the higher levels) recognizes that violence against one family member does not automatically assume violence against another family member. This, however, seems to be proving problematical for some prisons, as we continue to receive notices from many families on this issue.

Kathleen Allison, Deputy Director, Operations

IN THE MONTHS BEFORE A HEARING

While the years leading up to a parole hearing, especially an initial hearing, are long and arduous, once the hearing date approaches many things begin to happen in a rather rapid fashion. As provided by the BPH, these are the events taking place in a roughly 6-month period before a hearing.

Within a 4-6-month period before a hearing (usually 6 months before an initial hearing, as short as 4 months before a subsequent hearing) the hearing date is set and:

A specific hearing date will be set, and the prisoner notified of that date, along with service of Notice of Rights for the hearing.

He/she will be asked if he/she wishes an appointed attorney and is afforded a review of the C-file (Olson review)

The prisoner is interviewed by the Forensic Assessment Division for risk assessment (if for a subsequent hearing and the current CRA is more than 3 years old a new CRA will be filed)

About 4 months prior to the hearing date:

The correctional counselor will provide a summary of the prisoner's institutional behavior and programming since admission to the prisons system (for an initial hearing) or since the last hearing (for a subsequent hearing).

The prisoner is appointed a specific attorney, if he/she has not hired private counsel

At the 3 month prior to hearing mark:

Notice of the hearing date is sent to the DA in the county of commitment, victims and victims' family members (who are registered with CDCR's Office of Victims Services), alerting them to the date and location of the hearing

Notice is also sent to the attorney of record at sentencing, the sentencing judge, any law enforcement agencies involved in the original case and are provided the chance to provide statements for inclusion in the hearing record.

About 2 months before the hearing date:

The opportunity to do an Olson review is scheduled

The CRA is delivered to the inmate and inmate attorney

Both inmate counsel and the DA's office are allowed access the electronic version of the prisoner's C-file, absent the Confidential portion of the file.

In 1-2 months before the hearing:

The prisoner is served with official notice of the date of the hearing

He/she is asked if reasonable accommodations (hearing assistance, special circumstances for mobility, or other ADA needs) are needed to facilitate participation in the hearing process.

About a month before the actual hearing date an interpreter is hired for hearing impaired inmates, if required and requested.

In other timing matters, if a prisoner's grant of parole is reconsidered at an en banc hearing (for those lifers without a 187 conviction and referred back to the board by the Governor) and those considerations result in a referral for a rescission hearing, that hearing will be scheduled within 4 to 6 months of the Executive Board meeting where that rescission decision was made. That hearing, usually held with a 3-member panel of 2 commissioners and 1 deputy commissioner, will consider any new information or if a fundamental error of law was committed by the panel making the parole grant decision.

For rescission hearings the prisoner will be provided an attorney, and if the new hearing is based on a determination of new information coming to light, he/she will be able to call witnesses to provide testimonial evidence. Notices of the rescission hearing will also be sent to the DA and victims, who may also attend.

If the rescission consideration finds there is no good cause to rescind or postpone the original grant, the prisoner will be processed for timely release by CDCR and will not require any further review by either the Governor or the BPH. However, if the panel finds there is good cause to rescind the grant, a new hearing will be scheduled in a few months' time.

RESCISSION HEARING PROCESS

REFERRAL FROM GOVERNOR

The Governor states reasons for the request.

The Governor states whether the request is based on public safety concerns.

Concern the gravity of current or past offenses given inadequate consideration.

Other factors.

GOES BEFORE EN BANC BOARD

Board reviews earlier grant of parole.

Majority vote in favor of parole. Grant is upheld and matter is concluded.

Majority determines that grant and current release date may not be appropriate and thus improvident.

Board orders rescission hearing to determine whether inmate will pose an unreasonable risk to public safety if released to parole.

Matter is set for rescission hearing.

RESCISSION HEARING PANEL REVIEW

Panel determines if parole was improvidently granted.

Panel can determine this under:

Circumstances that existed at the time of the hearing, or

Circumstances that appear later.

Panel looks at factors identified by Governor.

Can be factors identified by granting panel.

Can be new factors

Panel looks at full record and independently reviews the record. The panel is constrained by the record and it is mostly a paper review.

Constrained by the record.

No new factual development.

No questioning of witnesses.

No questioning of inmate.

FORMAT

The review is (mostly) a paper review.

The inmate/inmate's attorney provided an opportunity to make a statement to address the Governor's concerns.

The inmate is not obligated to make a statement.

No follow up questions from the panel or any other hearing participants.

The DA provided an opportunity to make a statement to address the Governor's concerns.

The victim/VNOK provided an opportunity to make a statement.

THE PANEL'S DISCRETION

Permissible for the panel to reweigh the factors identified by the Governor, but only those factors. (In re Johnson (1995) 35 Cal.App.4th 160, 169.)

WHEN WEIGHING A FACTOR DIFFERENTLY

Must identify and articulate a factual basis to say that the factor should be weighed differently.

Board cannot simply mouth words saying cause for rescission, must be an adequate factual underpinning for the good cause determination.

Not enough to simply disagree with granting panel.

EVALUATION

Review the record, consider the inmate, DA, and victim statements if any were given, consider and weigh the Governor's concerns against the record.

May find cause to rescind on the basis of a public safety concern.

May find cause to rescind on the basis that the gravity of the current or past offenses may have been given inadequate consideration.

May find cause to rescind based on other factors identified by the Governor

DECISION

Conclude that the parole grant should stand. Process concluded.

Or Conclude that parole was improvidently granted. Rescind parole.

Inmate will be scheduled for new parole suitability hearing.

ASH
Artists Serving Humanity

ASH offers an opportunity for incarcerated artists to give back to society through sales of their art.

Talented artists are invited to join Artists Serving Humanity. ASH artists make the generous decision to give back to society by donating artwork or a percentage of each sale to their chosen charity. Art Shows throughout California support their efforts in giving back and making amends. We welcome your interest in Artists Serving Humanity.

For more information please contact us at

ARTISTS SERVING HUMANITY
PO Box 8817
Redlands , CA 92375-2017

JEFF CHAMPLIN

SBN: 154595
PHONE: (831) 392-6810
email:JCHAMPLINLAW@gmail.com

OVER 24 YEARS OF EXPERIENCE OF BOARD OF PAROLE HEARINGS AND PROCEDURES

- REPRESENTED SEVERAL THOUSAND INMATES AT LIFE PAROLE SUITABILITY HEARINGS AS A STATE APPOINTED ATTORNEY
- CONDUCTED THOUSANDS OF HEARINGS INDIVIDUALLY AND AS A MEMBER OF A TWO PERSON PANEL FOR LIFE PAROLE SUITABILITY HEARINGS
- CONDUCTED NUMEROUS CONSULTATION HEARINGS INFORMING AND ADVISING INMATES ON BPH CRITERIA EMPLOYED AT LIFE PAROLE SUITABILITY HEARINGS
- LET ME ASSIST YOU OR A FAMILY MEMBER RETURN TO THE COMMUNITY

ACCEPTING CLIENTS FOR HEARINGS SCHEDULED AFTER MAY, 1ST 2018

CLN
California Lifer Newsletter
P.O. Box 277
Rancho Cordova, CA 95741

WHEN DOES YOUR SUBSCRIPTION TO *CLN* EXPIRE?

Your subscription will expire on the date indicated on the first line of the mailing label above. After that date, you will not receive further issues of CLN without renewal.