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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 LIFER HEARING ORDERED BASED ON LACK OF EVIDENCE TO DENY PAROLE; ANCILLARY LEGAL QUESTIONS REGARDING MARSY'S LAW PREJUDICE AND APPOINTED ATTORNEY FEE PREJUDICE REMANDED TO SUPERIOR COURT FOR EVIDENTIARY HEARING

In re Darryl Poole

CA1(2); No. A154517
CA Supreme Ct. No. S251034
August 31, 2018

This decision was reported in CLN 82. However, it is not final. The California Supreme Court is considering whether or not to grant the BPH's petition for review on the remanded Marsy's Law sub-case, A154517. As of Oct. 9, 2018, that question was still pending. CLN will follow this case and report on any updates.

SB 1437 SIGNED INTO LAW, ENDING THE PROSECUTION OF ACCOMPLICE LIABILITY "FELONY MURDER" IN MANY CASES; WILL HAVE RETROACTIVE EFFECT.

In a major change in the law, the age-old concept of "felony murder," a process wherein if a victim was killed during the course of a crime committed by more than one person, *every* person involved in that underlying crime would be guilty of murder in the first degree, even if they did not commit the killing or even know of it at the time – has now been abated. This conviction was punished at 7-life in the ISL sentencing era, and later, at 25-life in the DSL sentencing era.

To dispel rumors or misunderstanding of this new law, CLN is reproducing the full explanation of the bill as given in SB 1437 itself.

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COURT CASES (in order)

SB 1437, Skinner. Accomplice liability for felony murder.

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. Existing law defines malice for this purpose as either express or implied and defines those terms.

This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the person was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. Existing law defines 2nd degree murder as all murder that is not in the first degree and imposes a penalty of imprisonment in the state prison for a term of 15 years to life.

This bill would prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or the person was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer, or the person was a major participant in the underlying felony and acted with reckless indifference to human life, unless the victim was a peace officer who was killed in the course of performing his or her duties where the defendant knew or should reasonably have known the victim was a peace officer engaged in the performance of his or her duties.

This bill would provide a means of vacating the conviction and resentencing a defendant when a complaint, information, ...Cont. on page 4

PUBLISHER'S NOTE

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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

THANK YOU, AND GOODBYE

As Governor Edmund G. "Jerry" Brown, Jr. prepares to leave the office of California governor for what really and truly will be the last time (unlike when he left the office some 28 years ago), it appears to be a good time to assess what impact Brown has had on our particular area of interest, California prisoners, most especially those sentenced to life. Brown holds a unique position in California politics, having been Governor for an unprecedented four terms, albeit not consecutively, Secretary of State (1971-1975), Attorney General of California (2007-2011), Mayor of Oakland, erstwhile presidential candidate, and all -around political gadfly for many decades.

In his first two terms as Governor, Brown's most notable prisoner-related positions came from his personal opposition to capital punishment, while at the same time vowing to uphold the laws of the state, which then, as now, included execution. By the time Brown returned to the capitol, 28 years of 'tough on crime' laws and zealous prosecutions presented him with a massively overcrowded prison system, a corrections system just beginning to feel the effects of the 2008 In RE Lawrence decision and facing looming federal intervention in the state prison system.

Under Brown's watch AB 109 passed, which 'realigned' inmates from state prison to county jails, beginning a series of far-reaching reforms in California's prison system. Propositions 37, 47 and, eventually 57 followed, along with a series of legislatively sponsored and passed changes in sentencing and definition of crime and violent crime. Brown supported these changes, signed bills modifying three strikes and changing the parole landscape.

But of equal impact were his appointments within the state Department of Corrections. Long the department of "NO" when it came to transparency and change, Brown's appointees took a different tact, looking for new solutions and ideas, opening cracks in the green wall and even soliciting input from stakeholders outside the custody arena. Brown's appointment of a new Executive Director of the Board of Parole Hearings early in his first/third term, the first attorney to hold the post, the first director dedicated to following the law.

Appointments to the Parole Board itself followed, breaking, forever, it is to be hoped, the virtual monopoly of white, retired law enforcement officers, adding more women, ethnicities and attorneys to the board, which expanded from 12 to 15 members, as more and more lifers and other long-term inmates were considered for parole as the result of co-occurring changing laws. And the grant rate reflected these changes, slowly climbing from a miniscule few dozen grants a year to over 900 in 2017.

Brown also improved on previous Governors' performance in reversing parole grants, though not as much as some advocates (us among them) would like. At one point, California governors were reversing lifer parole grants about 80% of the time. And although Brown hasn't totally eschewed the practice (and still seems stuck when it comes to some individual inmates, who he continues to repeatedly reverse), his reversal rate in the last two years has been in the 10-11% range.

Not great, but certainly an improvement. We'll take it and keep working for more improvement in the next administration. To say nothing of the unprecedented number of commutation and pardon requests, especially for LWOP inmates, not only entertained but acted on and granted by Brown.

So, to Governor Brown, thank you, Governor, for your efforts to implement change and reform in a flawed and very human system. And while we we'll continue to push for more, even from you in your remaining months as the state's top executive, we would be hypocritical if we didn't acknowledge the forward steps supported and, in many cases, initiated by you.

Our respect and appreciation, from those of us at LSA, follow you into retirement.

……Cont. from page 2.

or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder, and the defendant could not be charged with murder after the enactment of this bill. By requiring the participation of district attorneys and public defenders in the resentencing process, this bill would impose a state-mandated local program.

The effective date of the Bill is January 1, 2019. Prior to that time, anyone whose trial is pending, or whose direct appeal of such a felony murder conviction is pending, would be well placed to delay final decision until after January 1.

For those whose convictions/appeals are final, there will be a process available beginning January 1 to petition the superior trial court for resentencing of such a felony murder conviction. Here, "felony murder conviction" means either a first-degree murder conviction, *or a conviction of a lesser crime (typically, second-degree murder) on a plea to avoid the first degree punishment*. No doubt, everyone and his brother with a felony murder conviction will try their luck (as did so many who requested Third-Strike resentencing under Prop. 36).

But this writer predicts that there will be many court tests of just what constitutes having had "intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer," on the one hand, or having been "a major participant in the underlying felony and acted with reckless

indifference to human life," on the other hand. One thing is plain: not everyone currently in prison under a felony murder conviction will be eligible for sentencing relief.

Notably, if one *does* fall under the ambit of relief via SB 1437, and they were *not charged before with any felony other than felony murder*, they can now be retrospectively charged and convicted of a lesser offense if their felony murder conviction is lately tossed. However, many in such circumstances will undo their life -top sentence, and be eligible for earlier – if not immediate – release onto parole. *CLN* will monitor and report on all appellate court developments regarding this enticing new opportunity!

NEW BPH HEARING ORDERED TO CONSIDER YOUTH FACTORS

In re William Palmer

---Cal.App.5th ---; CA1(2); No. A147177
September 3, 2018

We reported this case in CLN #78, following which review was granted pending the CA Supreme Court's decision in *In re Butler*. In this post-*Butler* follow-up decision, the Court of Appeal reconsidered its earlier *Palmer* ruling, but now relying on the purported absence of prior Board consideration of youth factors as its criterion.

> This case returns to us from the California Supreme Court for reconsideration in light of its opinion in *In re Butler* (2018) 4 Cal.5th 728. For the reasons we will explain, we find Palmer entitled to a new parole hearing due to the failure of the Board of Parole Hearings to comply with a statutory mandate to give "great weight" to certain factors related to Palmer having been a minor when he committed his crime, a matter we found unnecessary to address when the case was first before us. …
>
> On June 27, 2018, the Supreme Court remanded the present appeal to our court with directions to vacate our decision and reconsider the cause in light of its decision in *In re Butler, supra*, 4 Cal.5th 728. Palmer then filed a supplemental brief acknowledging that the Supreme Court's decision in *Butler* required us to revise our decision in this case but contending that he remained entitled to relief due to the Board's failure to afford "great weight" to the youth offender factors, the alternative ground for his petition. The majority of our court had felt it unnecessary to reach the alternative claim because it agreed with Palmer's contention that the Board violated the *Butler* settlement. Considering that the ground upon which we initially granted Palmer's petition has now been rejected by the Supreme Court, and that the alternate claim was fully briefed by the parties but not decided by us, we deem it appropriate to now address Palmer's claim that the Board failed to give "great weight" to the youth offender factors at his hearing.

Earlier in life, Palmer had suffered four serious/violent felony convictions – some while on probation. His life offense was for kidnapping for robbery (with use of a gun) of an off-duty police officer. In prison, although Palmer engaged in a great number of rehabilitation programs, he continued to make what he told the Board were "bad decisions," that garnered serious CDC 115s.

Two psych evaluations reached somewhat dissonant conclusions. One found that his remorse was genuine, and that he was a good candidate for parole. The other focused on his disciplinary history and raised his risk from low-moderate to moderate.

In its most recent denial (5 year), the Board did consider youth factors.

The Board found Palmer posed an unreasonable risk of danger and therefore was ineligible for parole. The presiding commissioner stated that this conclusion was reached "after giving great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and maturity," and observed that the record reflected "some circumstances tending to show suitability in that he committed his crime as a juvenile, 17 years of age." The commissioner stated that the panel had assumed Palmer's culpability was diminished as compared to that of adults and considered his background, lack of maturity, "underdeveloped sense of responsibility," failure to "weigh the long-term consequences of his actions" and impulsivity, and evaluated whether Palmer had shown growth and positive rehabilitation. The commissioner further noted that Palmer was "at an age that would reduce the probability of recidivism" and had "realistic plans for release."

The Board was not persuaded that his youth factors were controlling, however.

The panel found, however, that these circumstances were "far outweighed by other circumstances tending to show unsuitability and suggest if released Mr. Palmer would pose a potential threat to public safety." After discussing the commitment offense, the presiding commissioner told Palmer that he had made "a mistake in life" and then "multiplied that mistake 27 times," failing to "learn from the errors of your ways," take advantage of opportunities for rehabilitation or address the "consequences of your action as an adult." The commissioner emphasized Palmer's failure to remain free from discipline, with 115s showing a "consistently obvious pattern" of denying responsibility for his actions, and said Palmer's "inability to follow the rules and regulations of this institution or whatever institution you might be at . . . shows who you are as a person at the time." Telling Palmer, "your actions will speak louder than your words," the commissioner noted that it was rare for a comprehensive risk assessment to increase, as Palmer's had, and that Palmer would need to be honest with himself and, as Dr. Geca's report stated, " 'demonstrate consistently improving behaviors in these critical areas for a protracted time in order to be able to lower your current determined risk.' " The deputy commissioner added, among other things, that according to Palmer's own testimony he was "the same person in 2014 as [he was] in 1988," and while his rule violations were not violent, Palmer "had a very sophisticated criminal mentality over a number of years" in prison, as reflected in his having and finding a way to pay for a cell phone that he used to avoid the prison's monitoring of his communications.

The Court then summarized recent law on youth offender factors.

Palmer's claim is based on the 2013 enactment of Senate Bill No. 260, which added provisions to the Penal Code relating to parole hearings for "youth offenders" who were 18 years of age or younger at the time of their controlling offense (i.e., that for which the longest period of imprisonment was imposed). (Stats. 2013, ch. 312, §§ 3046, subd. (c), 3051, 4801, subd. (c).) Later amendments raised the age of a "youth offender" first to 23 years of age or less and then to 25 years of age or less. (Stats. 2015, ch. 471, § 1; Stats. 2017, ch. 674, §§ 1, 2.)

Section 4801 provides that the Board "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).) Similarly, section 3051 provides that any psychological evaluations and risk assessment

instruments used by the Board "shall take into consideration the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (§ 3051, subd. (f)(1).)

> As our Supreme Court noted in *People v. Franklin* (2016) 63 Cal.4th 261, 277 (*Franklin*), the Legislature passed Senate Bill No. 260 for the explicit purpose of bringing the parole process into conformity with the opinions of the United States Supreme Court in *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*) and *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*) and the consonant opinion of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*). Accordingly, these opinions, which apply the " 'foundational principle' " that, under the Eighth Amendment prohibition against cruel and unusual punishment, "the 'imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children' " (*Franklin*, at p. 273, quoting *Miller*, at p. 474), necessarily inform the meaning of the youth offender statutes.

The Court then proceeded to distinguish the precedent cases from Palmer's case, based on the crime itself.

> The present case differs from *Miller*, *Graham*, and *Roper* because, unlike the juveniles in those cases, Palmer was not convicted of a homicide, was not sentenced to life without the possibility of parole, does not claim his sentence is the functional equivalent of life without parole, and does not challenge the life sentence he received. The relevance of those cases is their recognition of the significance of the diminished culpability of youth offenders to the proportionality of punishment, which is a constitutional principle based on individual culpability. As stated in *Graham*, " '[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.' " (*Graham, supra*, 560 U.S. at p. 71.) The youth offender statutes do not mean that a juvenile offender may not be sentenced to a life term as an adult who committed the same offense would be, but they do mean that such punishment cannot be imposed on a juvenile without giving "great weight" to the factors that account for the diminished culpability of youth offenders and, therefore, might point to the constitutional disproportionality of the punishment. By enacting the youth offender statutes, which are not crime specific, the Legislature mandated that, for the reasons described in *Miller, Graham, Roper*, and *Caballero*, youth offenders sentenced to indeterminate life terms and eligible for parole, or to substantial determinate terms, must all be treated differently from other life prisoners. (§ 3051, subd. (b)(1).)

The Court then proceeded to tackle the central question, "what is the meaning of 'great weight'?"

> Although no court has yet defined what "great weight" signifies at a youth offender hearing, the California Supreme Court has addressed the meaning of that phrase in other contexts. The most pertinent is *People v. Martin* (1986) 42 Cal.3d 437 (*Martin*), which reversed a divided opinion of our court. The defendant in that case, who was convicted of seven robberies, was sentenced to five years' imprisonment for the principal robbery, a one-year enhancement for the use of a knife, and six consecutive one-year terms for the remaining robberies, for a total of 12 years. At that time, the parole board (then called the Board of Prison Terms) was required by former section 1170, subdivision (f), to conduct sentencing review to assure uniformity in sentencing and notify a sentencing court if it considered a given sentence disparate. The parole board notified the trial court

that the defendant could not legally be sentenced to more than 11 years' imprisonment, that an 11-year sentence would be disparate and that the sentence should fall into a range of 5 to 10 years. The trial court granted the parole board's motion for resentencing only with respect to the legal error, but otherwise refused to modify the sentence. We affirmed the ruling in a split decision. The Supreme Court reversed.

The Martin majority held that in determining whether the sentence was in fact disparate, as found by the Board, "the determination of the board is entitled to 'great weight.' " (*Martin, supra*, 42 Cal.3d at p. 446, quoting *People v. Herrera* (1982) 127 Cal.App.3d 590, 600-601.) The *Martin* court, however, rejected the view that a " 'a trial court will have met its obligation of according the Board's finding of disparity "great weight" . . . if the record shows that the court seriously considered the information provided by the Board, and attempted to discern whether, when compared to sentences imposed by his colleagues, the sentence he imposed . . . was "disparate." ' " (*Martin*, at p. 446, quoting *Herrera*, at p. 601.)

Instead, *Martin* endorsed the definition of "great weight" it had utilized in two cases involving trial courts' review of the Youth Authority's recommendations that a juvenile convicted of crime be committed to the Youth Authority rather than state prison: The recommendation "was entitled to 'great weight' " and "must be followed in the absence of 'substantial evidence of countervailing considerations of sufficient weight to overcome the recommendation." (*Martin, supra*, 42 Cal.3d at p. 447, quoting *People v. Carl B*. (1979) 24 Cal.3d 212, 214-215, and *People v Javier A*. (1985) 38 Cal.3d 811, 819 (*Javier A*.).) In the context of sentence disparity, Martin said, the court had to accept the Board's finding "unless there is substantial evidence of countervailing considerations which justify a disparate sentence. Such considerations can include subjective factors . . . such as defendant's attitude and demeanor at the time of the crime, and the manner in which he threatened the victim." (*Martin*, at p. 448.) But "[r]equiring the trial judge merely to 'consider' the finding of disparity . . . gives no weight at all to that finding. The judge would remain free to disregard the finding for any reason, or no reason at all." (*Ibid*.)

> Applied to the present context, *Martin* directs that in order to give "great weight" to the youth offender factors as required under section 4801, subdivision (c), the Board must accept those factors as indicating suitability for release on parole absent substantial evidence of countervailing considerations indicating unsuitability.

The Board argued back that its panel had considered youth factors no less than ten times in Palmer's last hearing.

> Finally, the Board maintains that it "gave great weight to Palmer's youth factors when determining his suitability, and referenced this obligation no fewer than 10 times." As the Board sees it, Palmer misconstrues the youth offender statutes "as requiring the Board to categorically find any juvenile offender suitable for parole simply based on his age when he committed the life crime. Palmer errs because considering the youth factors does not diminish the Board's discretion to deny parole when the record demonstrates that the inmate would pose a current, unreasonable risk to public safety."

The Court retorted that "great weight" in youth factors counsels a different algorithm for youth-crime parole considerations.

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this obligation no fewer than 10 times." As the Board sees it, Palmer misconstrues the youth offender statutes "as requiring the Board to categorically find any juvenile offender suitable for parole simply based on his age when he committed the life crime. Palmer errs because considering the youth factors does not diminish the Board's discretion to deny parole when the record demonstrates that the inmate would pose a current, unreasonable risk to public safety."

Indeed, the Court then proceeded to rip the Board for misunderstanding its duty under "youth factors" considerations.

Untenably, the Board treats the youth offender statutes as merely an exhortation for leniency, placing no limitation on the Board's unfettered discretion to decide whether a youthful offender remains an unreasonable risk of danger to society if released from prison and requiring only that the prisoner's status as a youth offender be acknowledged for the record and taken into account in some undefined fashion. Except for the repetition of that acknowledgment, the transcript of the "youth offender hearing" conducted in the present case is not materially different from those of the parole hearings conducted by the Board for adult offenders. The Board's published statistics reflect comparatively few youth offenders being granted parole, at rates very similar to those for adult offenders, which raises some question whether "great weight" is being given to the statutory youth offender factors. And a recent empirical study suggests that the "great weight" mandate is not functioning to focus the Board on the youth offender factors, while variables that do not appear related to growth and maturity have a strong impact.

The chief flaw in the Board's view of the youth offender factors is the Board's failure to appreciate that they serve a legislative purpose very different from that of the regu-

latory and other factors the Board conventionally employs to determine whether a prisoner is suitable for release. The regulatory factors tending to show suitability and unsuitability for release (Regs., §§ 2281, subd. (c)(d), 2402, subd. (c)(d)), and the non-regulatory factors that may also be used for that purpose (such as "insight" into the commitment offense or the lack thereof (see *In re Shaputis, supra*, 53 Cal.4th at pp. 218-219), include circumstances predating, relating to and postdating the life crime, but because the critical question is whether the inmate currently presents a risk to public safety, the focus is largely on postconviction circumstances. Two of the three youth factors, however—the "diminished culpability of youth offenders compared to that of adults" and "the hallmark features of youth"—look backward to the time when the life crime was committed and thus specifically relate to the constitutional principle of proportionality. The necessary inquiry in proportionality analysis is into "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society," (*In re Lynch, supra*, 8 Cal.3d at p. 425) as the punishment must fit both the offense and the offender, with both viewed "in the concrete rather than the abstract." (*People v. Dillon* (1983) 34 Cal.3d 441, 479.)

The Board argued back to the Court that its interpretation required the Board to set dates for all who were at or below a certain age at the time of their life offense. The Court disagreed.

Palmer does not, as the Board says, interpret the youth offender statutes "as requiring the Board to categorically find any juvenile offender suitable for parole simply based on his age when he committed the life crime." His position, with which we agree, is that the statutes represent a legislative determination that life prisoners who committed their controlling offense while under the age of 26 are less culpable than those who committed the same offense after reaching age 26—absent "substantial evidence of countervailing considerations" (*Martin, supra*, 42 Cal.3d at p. 448)—should therefore be punished less harshly than otherwise comparable adult offenders.

In addition to its discussion of the concept of "great weight," *Martin* held that the trial court "should state on the record its reasons for finding that a sentence is or is not disparate" and "if it finds disparity but nevertheless declines to reduce the sentence to a nondisparate term, it should explain the reasons which justify a disparate sentence." (*Martin, supra*, 42 Cal.3d at p. 450.) Reaffirming the thesis of *In re Podesto* (1976) 15 Cal.3d 921, the *Martin* court explained that "a requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring the judge himself [or a Board panel] analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable." (*Martin*, at pp. 449-450, citing *In re Podesto*, at p. 937.)

A statement of reasons is no less important here. Indeed, if the Board is not required to satisfactorily explain why a youth offender is not entitled to a finding of suitability for release despite the presence of the statutory youth offender factors to which the Board is required to give "great weight," the statutory directive will all too easily become meaningless.

The Court then turned to interpreting the Board's regulations. But in so doing, it interpreted the Board's *proposed* regulations – which have not yet been adopted per the Administrative Procedures Act. Many *CLN* readers may have not seen these proposed regulations, which are laid out below.

Although the youth offender statutes, which became effective almost five years ago, directed the Board to adopt new regulations regarding determinations of suitability for youth offenders (§ 3051, subd. (e)), such regulations have not yet been added to title 15 of the California Code of Regulations. Proposed regulations were submitted to the Board at its November 2016 executive board meeting, however, which provide a useful framework for consideration of the Board's decision in the present case.

Proposed regulations section 2444 addresses the content of the youth offender factors. Subdivision (a) states that "[t]he diminished culpability of youths as compared to adults includes, but is not limited to, consideration of the following factors: [¶] (1) The ongoing development in a youth's psychology and brain function; [¶] (2) The impact of a youth's negative, abusive, or neglectful environment or circumstances; [¶] (3) A youth's limited control over his or her own environment; [¶] (4) The limited capacity of youths to extricate themselves from dysfunctional or crime-producing environments; [¶] (5) A youth's diminished susceptibility to deterrence; and [¶] (6) The disadvantages to youths in criminal proceedings."

Subdivision (b) of proposed regulations section 2444 states that "[t]he hallmark features of youth include but are not limited to, consideration of the following factors: [¶] (1) Immaturity; [¶] (2) An underdeveloped sense of responsibility; (3) Impulsivity or impetuosity; (4) Increased vulnerability or susceptibility to negative influences and outside pressures, particularly from family members or peers; [¶] (5) Recklessness or heedless risk-taking; [¶] (6) Limited ability to assess or appreciate the risks and consequences of behavior; (7) Transient characteristics and heightened capacity for change."

Subdivision (c) of proposed regulations section 2444 states that "[t]he subsequent growth and increased maturity of the inmate while incarcerated includes, but is not limited to consideration of the following six factors: [¶] (1) Considered reflection; [¶] (2) Maturity of judgment including, but not limited to, improved impulse control, the development of pro-social relationships, or independence from negative influences; [¶] (3) Self-recognition of human worth and potential; [¶] (4) Remorse; [¶] (5) Positive institutional conduct; and [¶] (6) Other evidence of rehabilitation."

Section 2445 of the proposed regulations states that "[w]hen preparing a risk assessment under this section for a youth offender, the psychologist shall also take into consideration the youth factors described in section 2444 and their mitigating effects" and that "[t]he psychologist's consideration of these factors shall be documented within the risk assessment under a unique heading from the remainder of the report."

Section 2446, subdivision (b) of the proposed regulation states that "[i]n considering a youth offender's suitability for parole, the hearing panel shall give great weight to the youth offender factors described in section 2444: (1) the diminished culpability of youths as compared to adults; (2) the hallmark features of youth; and (3) any subsequent growth and increased maturity of the inmate."

Subdivision (d) of section 2446 of the proposed regulations states that "[a] hearing panel shall find a youth offender suitable for parole unless the panel determines, even after giving

great weight to the youth offender factors, that the youth offender remains an unreasonable risk to public safety." Nothing in the proposed regulations requires that if the Board denies parole to a youth offender it must expressly find substantial evidence of countervailing considerations indicating unsuitability.

The Court then concluded by finding that the Board's denial determination failed to properly consider all these factors.

> Having acknowledged that all of the factors enumerated in its proposed regulations as reflecting "the diminished culpability of youths as compared to adults" and the "hallmark features of youth," are present in this case, as well as five of the six regulatory factors indicative of "subsequent growth and increased maturity," the Board's decision to deny parole appears to rest on the single factor it viewed as not present: "*Maturity of judgment including, but not limited to, improved impulse control*, the development of pro-social relationships, or independence from negative influences. (Proposed Regs., § 2444, subd. (c)(2), italics added.) Indeed, the Board relied only upon the italicized portion of this one factor.

The Board thus denied Palmer release, and subjected him to five more years of imprisonment, notwithstanding the presence of almost all of the 19 factors identified by the Board to flesh out and give meaning to the statutory youth offender factors, primarily because three years earlier he improperly used a cell phone to contact his sister about the death of their mother, and a year earlier he gave his girlfriend as a gift the T-shirt he used when he painted. This determination hardly appears to reflect "substantial evidence of countervailing considerations" (*Martin, supra*, 42 Cal.3d at p. 448) justifying a denial of parole despite giving "great weight" to the juvenile offender factors. On the contrary, in the absence of any

other explanation, the elevation of Palmer's two minor violations over all of his numerous other qualities seems to us arbitrary and capricious.

If the Board had reason to believe Palmer's failure to fully control his impulses outweighed his "considered reflection" on his past life choices, his "development of prosocial relationships" and "independence from negative impulses," his "remorse," his "positive institutional conduct," and "other evidence of rehabilitation," it has never explained why it believes this to be the case, much less pointed to substantial supporting evidence. As we have said, our previous review led us to observe that it was "hard to discern" any nexus between Palmer's recent rules violation and "present dangerousness"; the evidence was sufficient to satisfy the "ultralenient" standard, we said, "but barely. It is an extremely close case." That observation was made without regard to the Board's consideration of the youth offender factors. Considering the Board's statutory obligation to give "great weight" to those factors, its decision to find Palmer unsuitable for release despite the presence of almost all the variables the Board itself has deemed indicative of the statutory youth offender factors cannot stand.

Accordingly, the Court ordered a new hearing.

For the foregoing reasons, the petition is granted, the decision of the Board denying Palmer parole is vacated, and the Board is again ordered to hold a new hearing as soon as practicable, and in no event later than 120 days of the filing of this opinion, and to decide whether Palmer is suitable for release on parole in a manner that comports with this opinion.

(Case status: as of 10/9/18, the Board had not set a new hearing date for Palmer, nor had it filed a petition for review in the CA Supreme Court. Remittitur will issue on 11/13/18, if there is no further court action. *CLN* will continue to report on any future developments.)

NON-VIOLENT THIRD-STRIKER GAINS BENEFIT OF PROP. 57; REGULATIONS VOIDED

In re Vincenson Edwards

---Cal.App.5th ---; CA2(5); No. B288086
September 7, 2018

In what can only be described as a major coup for Third-Strikers whose third offense was non-violent, the Court of Appeal swept their cases into inclusion for the relief dictated by Prop. 57. The result is that many such lifers are now eligible for release upon having served the term of their *primary* offense – not the 'alternative' Third-Strike life term. To the extent that CDCR regulations did not recognize this change attributed to Prop. 57, they were voided by the Court.

The Court first summarized the question:

Proposition 57, approved by California voters in 2016, added a provision to California's Constitution that reads: "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." (Cal. Const., art. I, § 32, subd. (a)(1) (hereafter section 32(a)(1)).) The newly added constitutional provision defines "the full term for the primary offense" as "the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." (§ 32(a)(1)(A).) We consider whether Department of Corrections and Rehabilitation (CDCR) regulations adopted to implement this constitutional

amendment validly exclude admittedly nonviolent "Third Strike" offenders sentenced to indeterminate terms from Proposition 57 relief.

Edwards is currently serving an indeterminate life sentence in state prison, imposed pursuant to the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). He sustained the convictions that triggered his 53-years-to-life sentence—felon in possession of a firearm (former Pen. Code, § 12021) and evading a police officer while driving recklessly (Veh. Code, § 2800.2)—in 1998.

Some twenty years later, following enactment of Proposition 57, Edwards filed a habeas corpus petition challenging regulations CDCR promulgated, initially on an emergency basis (see discussion, post), that made him ineligible to seek Proposition 57 relief. We directed the California Appellate Project to appoint counsel, and appointed counsel filed an amended petition. We then issued an order directing CDCR to show cause why the relief sought in the petition should not be granted.

The Attorney General, on CDCR's behalf, filed a return defending the emergency regulations and maintaining Edwards was ineligible for Proposition 57 relief. Shortly before Edwards filed his traverse, CDCR promulgated final regulations that altered CDCR's theory on which inmates like Edwards would be deemed ineligible for relief (again, see discussion, post). We solicited supplemental briefs from the parties concerning the newly issued final regulations—both sides adhered to the bottom line positions taken in their principal briefing—and we now decide the interpretive dispute.

The Court summarized the history and import of Prop. 57.

California voters approved Proposition 57, dubbed the Public Safety and Rehabilitation Act of 2016, at the November 2016 general election. 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." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 57, p. 141 [§ 2].) The text of section 32(a)(1) that furthers these purposes is of course crucial to the question we decide, so we shall reiterate the key language. 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." (§ 32(a)(1).) 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." (§ 32(a)(1)(A).)

Parsing this language, it is obvious the electorate intended to establish a new rule: all nonviolent state prisoners are eligible for parole consideration, and they are eligible when they complete the full term for their primary offense. CDCR's implementing regulations, as finally adopted, concede Edwards and similarly situated prisoners are nonviolent, but the regulations seize on section 32(a)(1)'s language that establishes when nonviolent inmates like Edwards are entitled to parole consideration to deny them eligibility for relief altogether. CDCR, represented by the Attorney General, argues the reference to "the full term for the primary offense" can

only refer to a determinate sentence, and because Edwards and others like him are serving indeterminate sentences, the regulations properly deem him ineligible for relief because he has completed no full term that was "imposed by the court." We hold this regulatory approach is inconsistent with the newly added constitutional command—most prominently the language that specifies the full term of the primary offense must be calculated "excluding the imposition of . . . [an] alternative sentence." We shall invalidate the offending provisions of the CDCR regulations for that reason.

After recounting the provisions of the Three Strikes Act that provide for repeat serious/violent offender sentencing, the Court made it clear that this was in the form of an "alternative sentence" – not a specific sentence for just the crimes lately committed.

> Edwards and CDCR agree, as long-established authority holds, that "an indeterminate life term under the Three Strikes law . . . . is an alternative sentence . . . ." (*People v. Turner* (2005) 134 Cal.App.4th 1591, 1597; accord, *Romero, supra*, 13 Cal.4th at p. 527 ["The Three Strikes law . . . articulates an alternative sentencing scheme for the current offense rather than an enhancement"]; *People v. Frutoz* (2017) 8 Cal.App.5th 171, 174, fn. 3 ["It has long been settled that the [T]hree [S]trikes law 'articulates an alternative sentencing scheme . . .'"] (*Frutoz*).)

The Court then reviewed just what CDCR did to craft regulations in response to Prop. 57, as applied to Third Strikers. The eventual upshot of this case turned on the fact that CDCR 'synthesized' an interpretation to suit its belief that Third Strikers were never intended to be included in Prop. 57's reach – but the Court ultimately rejected that (and the regulations thus promulgated).

> Proposition 57 directed CDCR to adopt regulations "in furtherance of [section 32(a)]" and "certify that these regulations protect and enhance public safety." (Cal. Const., art. I, § 32, subd. (b) (hereafter section 32(b)).)
>
> In April 2017, California's Office of Administrative Law (OAL) approved an "emergency rulemaking action" promulgated by CDCR in response to section 32(b)'s direction. The rulemaking purported to flesh out the terms of section 32(a), adding definitions of "nonviolent offender," "primary offense," and "full term." (Cal. Code Regs., tit. 15, former § 3490.) Most relevant here was the definition of nonviolent offender, which the emergency regulations defined as all inmates except those who (1) are "[c]ondemned, incarcerated for a term of life without the possibility of parole, *or incarcerated for a term of life with the possibility of parole*," (2) are incarcerated for a violent felony within the meaning of Penal Code section 667.5, subdivision (c), or (3) have been convicted of a sexual offense that requires registration as a sex offender. (Cal. Code Regs., tit. 15, former § 3490, subd. (a), italics added; see also Cal. Code Regs., tit. 15, former § 2449.1, subd. (a).) With this definition, inmates like Edwards who were not then incarcerated for a triggering violent felony specified in Penal Code section 667.5 were nevertheless excluded from the "nonviolent offender" definition because they were serving an indeterminate sentence of life with the possibility of parole pursuant to the Three Strikes law.
>
> When it later came time to issue final, adopted regulations in May 2018 after a public comment period, CDCR reconsidered its definition of nonviolent offender. The adopted regulations, now codified at sections 3490 and 2449.1 of title 15 of the California Code of Regulations, no longer exclude Edwards and others like him

from the nonviolent offender definition. (Cal. Code Regs., tit. 15, § 3490, subd. (a) [providing an inmate is a nonviolent offender so long as the inmate is not, among other things, condemned to death, serving a life without possibility of parole sentence, or serving a sentence for commission of a violent felony within the meaning of Penal Code section 667.5, subdivision (c)]; Cal. Code Regs., tit. 15, § 2449.1, subd. (a) [same].)

> Although the adopted regulations therefore treat Edwards as a nonviolent offender, CDCR made another change in the regulations as adopted so that he and similarly situated others would remain ineligible for Proposition 57 relief. Specifically, the adopted regulations state nonviolent inmates are generally eligible for early parole consideration (Cal. Code Regs., tit. 15, § 3491, subd. (a)), but notwithstanding that general eligibility, "an inmate is not eligible for early parole consideration by the Board of Parole Hearings . . . if . . . [¶] [t]he inmate is currently incarcerated for a term of life with the possibility of parole for an offense that is not a violent felony . . . ." (Cal. Code Regs., tit. 15, § 3491, subd. (b)(1)). In a Final Statement of Reasons accompanying the adopted regulations, CDCR asserted "life term inmates remain ineligible for parole consideration because the plain text of Proposition 57 makes clear that parole eligibility only applies to determinately sentenced inmates, and furthermore, public safety requires their exclusion." (Cal. Dept. of Corrections, Credit Earning and Parole Consideration Final Statement of Reasons, April 30, 2018, p. 14.)

The Court expressly found that CDCR's regulations were inconsistent with the enabling statute, and must be vacated.

> It is (now) undisputed that Edwards qualifies as a nonviolent offender and, under section 32(a)(1), is "eligible for parole consideration after completing the full term for his . . . primary offense." There is also no dispute that Edwards is currently serving an alternative sentence and the "full term" of Edwards' primary offense is "the longest term of imprisonment imposed by the court for any offense, *excluding the imposition of an enhancement, consecutive sentence, or alternative sentence*." (§ 32(a)(1)(A), italics added.) The plain language analysis is therefore straightforward in our view. There is no question that the voters who approved Proposition 57 intended Edwards and others serving Three Strikes indeterminate sentences to be eligible for early parole consideration; the express exclusion of alternative sentences when determining the full term is dispositive. (*California Cannabis, supra*, 3 Cal.5th at p. 934 ["[W]hen construing initiatives, we generally presume electors are aware of existing law"]; *Frutoz, supra*, 8 Cal.App.5th at p. 174, fn. 3 ["It has long been settled that the [T]hree [S]trikes law 'articulates an alternative sentencing scheme . . .'"].) The Attorney General and CDCR present no persuasive interpretation of section 32(a)(1) that does not render this exclusionary language largely if not entirely surplusage—indeed, CDCR's Statement of Reasons accompanying the adopted regulations never mentions the exclusionary language at all.

Indeed, in a very telling footnote, the Court found that the State's position that *two-strike* offenders were eligible for relief under Prop. 57 because they did not have life sentences, did not constitute good cause to deny such relief to *three-strike* offenders.

> At oral argument, the Attorney General appeared to agree that so-called "two-strike" inmates, those who have one prior serious or violent felony conviction (such that the prison term

imposed for their prison conviction under the Three Strikes law is a term that is double than what otherwise would have been imposed) are eligible for Proposition 57 parole consideration once they complete the non-doubled prison term, i.e., half the sentence actually imposed. (See generally *People v. Gallardo* (2017) 4 Cal.5th 120, 125 ["[T]he Three Strikes law . . . requires a second strike defendant to be sentenced to double the otherwise applicable prison term for his or her current felony conviction. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)"].) We see no principled basis in the plain text of section 32(a)(1) to distinguish two-strike inmates from three-strike inmates. Yes, two-strike inmates are serving a determinate term, but there is no reference to determinate terms in the text of section 32(a)(1) (though such a reference would have been easy to add were the intention to provide relief only to determinately sentenced inmates). The constitutional provision instead says "excluding the imposition of an enhancement, consecutive sentence, or alternative sentence" (§ 32(a)(1)(A)), and if the impact of the Three Strikes alternative sentencing scheme is excluded for two-strike offenders—where no non-Three Strikes law sentence is actually imposed by a court—so must it be for three-strike offenders.

In rather colorful language, the Court proceeded to shoot down the State's contrived arguments.

Rather than reckon with the exclusion for alternative sentences, CDCR highlights other features of section 32(a)(1)'s text, devising an argument by negative implication that is at war with the straightforward textual conclusion just outlined. Here is the argument, as articulated by the Attorney General: "The proposition defines 'the full term for the primary offense' to mean 'the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.' [Citation.] The phrasing of this definition indicates that it applies to determinate sentences, which involve 'fixed and uniform terms, set by the court at the time of conviction.' [Citations.] That is not the same with indeterminate sentencing, in which 'the court imposing the sentence shall not fix the term or duration of the period of imprisonment.' [Citations.] An indeterminately sentenced inmate completes his term only upon a finding that he is suitable for parole." In other words, CDCR believes California voters should be understood to have barred a "nonviolent offender" like Edwards from relief not by expressly limiting Proposition 57 relief to those serving determinate sentences, but by using "term of imprisonment" in a technical, idiosyncratic sense to sub rosa exclude those currently serving indeterminate terms by implication.

The Court found that the intent of the voters in enacting Prop. 57 was unmistakable.

There is strong evidence the voters who approved Proposition 57 sought to provide relief to nonviolent offenders, and CDCR's concessions in its briefing and in the adopted regulations themselves that Edwards is such an offender (at least for Proposition 57 purposes) leaves us convinced that excluding him for relief is inconsistent with the voters' intentions. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 58 ["[A]s the California Supreme Court clearly stated: parole eligibility in Prop. 57 applies 'only to prisoners convicted of non-violent felonies'"]; Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59 ["The California Supreme Court clearly stated that parole eligibility under Prop. 57 applies, 'only to prisoners convicted of non-violent felonies.' (*Brown v. Superior Court*, June 6, 2016). Violent criminals as defined in Penal Code [section] 667.5[, subdivision] (c) are excluded from parole"]; see also *Brown v. Superior Court* (2016) 63 Cal.4th

335, 353 ["[S]ome offenders covered by the original proposal [that eventually became Proposition 57 as enacted] are serving Three Strikes sentences. Those prisoners would have been middle aged by the time they received parole suitability review. The amended version would apply to the same class of offenders, so long as their offense was nonviolent"].) In addition, excluding from early parole consideration the prison population of indeterminately sentenced inmates deemed nonviolent by CDCR frustrates rather than facilitates the voters' declared intention to avoid indiscriminate inmate releases that might otherwise be required to respond to constitutional overcrowding concerns (see, e.g., *Coleman v. Schwarzenegger* (E.D.Cal. 2009) 922 F.Supp.2d 882, 949, affd. *Brown v. Plata* (2011) 563 U.S. 493).

The final question for the Court was as to what relief Edwards was entitled to. Rejecting the State's attempt to save the day, the Court found that Edwards was entitled to immediate relief.

Rather, we agree with Edwards that the Three Strikes law indeterminate sentence "is put aside for purposes of determining the full term for his primary offense, which [here] is the upper term of three years." The language in section 32(a)(1) that excludes any alternative sentence from consideration is most naturally understood as a command to calculate the parole eligibility date as if the Three Strikes law alternative sentencing scheme had not existed at the time of Edwards' sentencing. In that circumstance, the maximum term Edwards would face for the current crimes of conviction is three years in state prison. (Pen. Code, § 18.) Edwards has long since completed that prison term, and he is therefore now eligible for early parole consideration.

The Court concluded its opinion by appropriately trashing the unlawful CDCR regulation at bar.

In sum, CDCR's adopted regulations impermissibly circumscribe eligibility for Proposition 57 parole by barring relief for Edwards and other similarly situated inmates serving Three Strikes sentences for nonviolent offenses. The offending provisions of the adopted regulations are inconsistent with section 32 and therefore void. (*Henning, supra*, 219 Cal.App.3d at p. 758.)

The petition for habeas corpus is granted. The California Department of Corrections and Rehabilitation is directed to treat as void and repeal that portion of section 3491, subdivision (b)(1) of title 15 of the California Code of Regulations challenged in this proceeding, and to make any further conforming changes thereafter necessary to render the regulations adopted pursuant to section 32(b) consistent with section 32(a) and this opinion. Edwards shall be evaluated for early parole consideration within 60 days of remittitur issuance, and the California Department of Corrections and Rehabilitation shall thereafter proceed as required by law.

[Writer's note: Edwards is no longer listed on the CDCR roster.]

LET THE GOOD TIMES ROLL – ANOTHER THIRD-STRIKER WITH NON-VIOLENT THIRD OFFENSE ORDERED RELEASED, BASED ON *EDWARDS* DECISION

In re Paul Grinker

---Cal.App.5th ---; CA2(5); No. B288812
September 7, 2018

The same division of the Second District Court of Appeal likewise granted relief to another petitioner whose case mirrored that of *Edwards* above.

We consider whether Department of Corrections and Rehabilitation (CDCR) regulations adopted to implement Article I, section 32, subdivision (a)(1) of the California Constitution

(hereafter section 32(a)(1)) validly exclude petitioner Paul A. Grinker (Grinker), an admittedly nonviolent "Third Strike" offender sentenced to an indeterminate term, from early parole consideration relief under section 32(a)(1). The outcome here is controlled by our opinion in *In re Edwards* (September 7, 2018, B288086) ___ Cal.App.5th ___ (*Edwards*), published this same day. We grant Grinker's petition and order early finality of our decision in this court.

Interestingly, petitioner Grinker had already reached his life-term MEPD, had a hearing, and was found suitable for prospective release by the BPH. But applying *Edwards*, his life term was no longer the controlling term relative to Prop. 57, and he was ordered released.

The legal issue presented in this case is identical in all material respects to the issue presented in *Edwards*. Our discussion of the merits will therefore be brief. Grinker is entitled to a writ of habeas corpus because, for the same reasons stated in our opinion in Edwards, the key provision of the regulations that makes him ineligible for early parole consideration relief under section 32(a)(1) (Cal. Code Regs., tit. 15, § 3491, subd. (b)(1)) is inconsistent with the constitutional provision and therefore void. (*Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 757-758.)

All that is left for us to mention concerns the specific remedy to be ordered. As already noted, the Board found Grinker suitable for parole in February of this year. We therefore believe it is appropriate, and consistent with California Rules of Court, rule 8.387(b)(3)(A), to order early finality in this court of the decision we reach in this proceeding.

DISPOSITION

The petition for habeas corpus is granted. The California Department of Corrections and Rehabilitation is directed to treat as void and repeal that portion of section 3491, subdivision (b)(1) of title 15 of the California Code of Regulations challenged in this proceeding. The Board of Parole Hearings shall determine whether Grinker is eligible on the merits for early parole release under section 32(a) (notwithstanding Cal. Code Regs., tit. 15, subd. 3492(c)(9)) within 5 days of the date this opinion is final. If determined to be eligible, Grinker shall be released forthwith, taking into account any necessary compliance with Penal Code section 4755, section 3075.2 of title 15 of the California Code of Regulations, or other release procedures required by law.

This opinion shall be final in this court ten days from the date of the opinion's filing.

Writer's note: Grinker is no longer listed on the CDCR roster.]

PROP. 57 DOES NOT PROVIDE FOR RESENTENCING

In re John Dynes

---Cal.App.5th ---; CA5; No. F075158
February 15, 2018

In a parallel case, the Fifth District Court of Appeal ruled that a lately filed petition for resentencing, following Prop. 57's passage, was not authorized. The court held that the inmate was subject only to any new regulations that CDCR passed in response to Prop. 57, when issued.

Dynes' relevant criminal history is as follows.

On December 19, 2013, defendant pleaded guilty to second degree robbery in case No. F13907336 (Pen. Code, § 211); the record implies that he also admitted three prior prison term enhancements (Pen. Code, § 667.5, subd. (b)).

On March 4, 2014, a felony complaint was filed in case No. F14902059, charging defendant with count I, carrying a concealed dirk or dagger (Pen. Code, § 21310); and count II, misdemeanor giving false information to a police officer (Pen. Code, § 148.9, subd. (a)), with one prior strike conviction and six prior prison term enhancements.

On April 3, 2014, defendant pleaded no contest in case No. F14902059 to count I, carrying a concealed dirk or dagger, and admitted one prior strike conviction. The court granted the prosecution's motion to dismiss count II and the six prior prison term enhancements.

Sentencing

Also on April 3, 2014, the court sentenced defendant in both case Nos. F013907336 and F14902059. The court denied defendant's request to dismiss the prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The court imposed an aggregate second strike term of eight years four months as follows: the lower term of two years, doubled to four years for second degree robbery (case No. F13907336); a consecutive term of eight months (one-third the midterm), doubled to 16 months for carrying a concealed dirk or dagger (case No. F14902059); and three consecutive one-year terms for the prior prison term enhancements.

Dynes had written the Superior Court asking if his second degree robbery conviction was a "violent offense" under the new Prop. 57 rules. The Court construed his inquiry as one for resentencing, and denied relief because it no longer had jurisdiction.

Dynes appealed, but it its decision, the Court of Appeal dismissed the appeal because there was no appealable order from which to mount an appeal.

However, now even post-*Edwards*, Dynes would not fall under the ambit of Prop. 57 relief because Penal Code § 667.5(c)(9) defines "any robbery" as violent.

LIFE SENTENCE IS NOT CONSTITUTIONALLY EXCESSIVE; SOME EVIDENCE SUPPORTS PAROLE DENIAL DECISION

In re Ladell Dickerson

CA1(2); No. A151392
September 5, 2018

Ladell Dickerson is serving a life term for a kidnapping for robbery committed in 1985. He challenged his 2015 denial of parole on the grounds that it resulted in constitutionally excessive punishment and that there was not "some evidence" to support the decision of the Board of Parole Hearings (Board) that he presented a current risk of danger if released. The Second Division of the First District Court of Appeal, normally given to granting every lifer habeas petition before it, denied relief.

After a jury trial, petitioner was convicted of kidnapping for the purpose of robbery (Pen. Code, § 209, subd. (b)), robbery (§ 211) and taking a vehicle (Veh. Code, § 10581), with an enhancement for using a deadly weapon in the commission of the crimes (§ 12022, subd. (b)). He was sentenced on March 25, 1987, to a term of life imprisonment for the kidnapping for robbery plus a consecutive term of 10 years for two prior serious felony convictions, with sentences on the remaining counts stayed.

Petitioner had had seven parole consideration hearings prior to the present one. The last of these, in 2014, resulted in a five-year denial. In October 2014, the Board granted a petition to advance the next hearing date, noting that petitioner met the eligibility criteria for elderly parole, had remained "disciplinary-free," had been accepted upon release into the Allied Fellowship

Residential Program in Oakland and had participated in the Alternative to Violence Project.

The present parole suitability hearing, held on May 21, 2015, resulted in another five-year denial. Petitioner filed an *in propria persona* petition for writ of habeas corpus in the Alameda County Superior Court on October 17, 2016, which was denied on March 20, 2017. He filed the present petition in this court on June 15, 2017. We issued an order to show cause, returnable before this court, and appointed counsel to represent petitioner. Petitioner filed a supplemental petition, respondent filed a return and petitioner filed a response.

Dickerson had a persistent history of criminal behavior.

Petitioner dropped out of school in 10th grade, having begun to use drugs at age 16. Cocaine was his drug of choice, and by around age 19 or 20 he was using it just about every day. His criminal history began with a purse snatching at age 12, in 1965, which he committed despite knowing it was wrong because he wanted to be accepted by the "in-crowd." In the next two years he stole money from the coin box at a supermarket, broke a window at a business, and ran away from a camp placement. He committed an attempted armed robbery in 1968 and a burglary in 1969, was sent to the Youth Authority and released in August 1970, and by January 1971 was sent back to the Youth Authority for possession of drugs. Petitioner continued to commit crimes after turning 18: burglary in 1974, petty theft and forgery in 1975 and, in 1976, attempted escape from jail and robbery. He went to prison for the first time in 1976, was convicted of possession of a deadly weapon in 1978, while in prison, and was paroled in 1979, then was convicted of assault with a deadly weapon for assaulting his wife with an ashtray in 1980, and returned to prison in 1981, after being convicted of assault with a deadly weapon and possession of a firearm by a felon. At the time of the commitment offense, petitioner had been on parole for 91 days.

While in prison, Dickeron's history showed early disciplinary issues, followed by serious programming work.

Petitioner's placement score was 24, up from 19 in 2010 and down from 28 in 2013, and his custody status was level II. In the 28 years in prison preceding the 2015 hearing, he had sustained 21 "115" "Rules Violation Reports" and 13 "128a" rules violation reports. One of the 115s was for a 2011 battery on a peace officer without serious injury. Petitioner stated at the hearing that this was an incident in 2011, in which he slapped away the hand of an officer who was confiscating a bag of canteen items because petitioner could not produce his receipt. Three were alcohol related: possession of fermenting materials in May 2012, and possession of inmate-manufactured alcohol on two dates in January 2013. In 2014, petitioner was the victim of a battery and refused to identify his assailant.

Petitioner was ordered to attend a substance abuse program as a sanction for the second 115 in January 2013. He completed a substance abuse program at Folsom State Prison, where he was housed until he was transferred to the California Substance Abuse Treatment Facility (SATF) in June 2014. He voluntarily attended another substance abuse program at SATF. He had completed the basic course in nonviolent conflict resolution in the Alternatives to Violence Project. He was working as a porter, and had previously worked in "Voc Office Services." He had completed a telecommunications vocational program, "Learn Key," a computer program, and 17 modules of level one in Office

Services and Related Technology.

In his most recent psych eval, Dickerson related his current medical needs, as well as related to his history of miscreance, followed by internal processing showing maturity.

The examiner stated that petitioner presented with "pervasive antisociality characterized by poor impulse control, recklessness, and consistent irresponsibility." Petitioner reported that at the time of the life offense he did not feel regret or remorse, but he did later, "[w]hen I realized things could have been worse. You don't think about this until years later. You think of the drugs . . . it's terrible. I said I would kill her. I didn't mean it. I said it to get the money. I shouldn't have done that." He seemed to understand the impact of his conduct on the victim, and understood that although he did not harm her physically, he traumatized her. He cited his drug addiction as a causative factor but, in the examiner's view "would nonetheless benefit from further explanation as to the basis for his substance abuse and criminality." He told the examiner that prior to his prison commitment he pretended to be mean and tough but was "mostly normal"; he had changed in that he did not "pretend to be anything I'm not . . . accept myself for who I am, or don't accept me. I'm too old to put the image out. As far as drugs go, I will never do drugs again. It messed up my family. Messed me up. I'm through." He viewed his character strengths as being "an easy person to get along with" and his ability to "take my artwork and escape with it. I can draw for hours. I like sitting around people and teaching them to draw. I learned a certain technique." He described his greatest character weakness as "[p]eople who talk about drugs. I don't want to hear it. [And] not being familiar with technology [in the community]."

The conclusions of that examiner, summarized here, left record evidence for the Board to consider (or not) in its parole determination process.

> The evaluator opined, based on petitioner's substance abuse history, that he warranted diagnoses of "Cocaine Use Disorder, Severe, in a controlled environment" and "Opioid Use Disorder, Severe, in a controlled environment." He did not have a history of major mental disorder and did not warrant such a diagnosis. His juvenile delinquency history met the criteria for a diagnosis of "Conduct Disorder," a prerequisite for the adult diagnosis of "Antisocial Personality Disorder," and the examiner opined that he warranted that adult diagnosis. It was noted that his placement score, an indication of his behavior over an extended period of time, had increased to 24 from a score of 19 in 2010. His parole plans seemed "broadly viable."
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> The examiner concluded that petitioner represented a "moderate" risk for violence, an "elevated risk relative to Life-term inmates and non-elevated risk relative to other parolees." His maturity, physical health and involvement in self-help and vocational programs "potentially represent mitigating risk factors," but his four "serious RVRs . . . exemplify his continued disregard for respecting prosocial and responsible rules and regulations, and reflect his tendencies toward impulsivity and poor judgment," and "unequivocally represent[] an aggravating risk factor."

In his latest hearing, Dickerson opened up and admitted he had been less than forthright in his denial of 115 RVR charges, had been involved in selling pruno, and generally led a less than respectable life style inside the walls. But he stated that at age 62, and after 25 years in prison, he knew he had to change to be able to go home – and was thus serious in his efforts to program and gain new behavioral perspective.

Notwithstanding the above factual predicates, Dickerson petitioned the Court of Appeal, complaining that his punishment was "constitutionally excessive." The Court's rejection of this thesis – a thesis commonly held by lifers with many years under their belts, but unsuccessful in gaining parole – is reported in its entirety here. Based largely upon the Supreme Court's recent ruling in *Butler,* it confirms that the only way out of prison for a lifer is to actually do the things that make one suitable, rather than just "do the time" and ultimately get released.

> Our Supreme Court has recognized that "even if sentenced to a life-maximum term, no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense. Such excessive confinement . . . violates the cruel or unusual punishment clause (art. I, § 17) of the California Constitution." (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1096.) "The specific criminal acts proscribed by the Penal Code ordinarily 'prohibit[] a wide range of culpable conduct, with a correspondingly wide range of punishment.' (*People v. Wingo* (1975) 14 Cal.3d 169, 176 (*Wingo*).)" (*In re Stoneroad* (2013) 215 Cal.App.4th 596, 617–618 (*Stoneroad*), fn. omitted.) The proportionality of a sentence turns entirely on the culpability of the offender as measured by "circumstances existing at the time of the offense." (*In re Rodriguez* (1975) 14 Cal.3d 639, 652, italics added.)
>
> The argument put forth in the petition is that the "adjusted base term" calculated with reference to matrices created by the Board is an assessment of individual culpability for the particular crime committed and, therefore, a basis

for determining whether a sentence is constitutionally excessive. Here, because petitioner has already served more than double his base term, the petition argues his sentence is "per se grossly disproportionate."

Petitioner's reliance upon the base term as a measure of the constitutional excessiveness of a sentence has been foreclosed by the California Supreme Court's recent decision in *In re Butler* (2018) 4 Cal.5th 728. *Butler* held that due to certain changes in the statutes governing California's sentencing regime, "[b]ase term calculations no longer play a role in the public safety assessments undertaken by the Board to determine the release dates for inmates sentenced to indeterminate terms, and are not designed or obviously well suited as a tool for avoiding unconstitutionally long terms of incarceration." (*Id*. at p. 732.) While reaffirming that "[a]n inmate serving an indeterminate sentence has a constitutional right to a sentence not disproportionate to his or her offense," *Butler* held that "base term calculations were designed to set forth an inmate's minimum sentence, not to reflect the maximum sentence permitted by the Constitution." (*Id*. at p. 746.) Base terms, according to the *Butler* court, are ill-suited to serve as a measure for assessing a sentence's constitutional proportionality because they do not reflect the "broad, fact-specific inquiry" into the " 'totality of the circumstances surrounding the commission of the offense' " and "factors relating to the offender, such as 'his age, prior criminality, personal characteristics, and state of mind' " (*ibid*., quoting *People v. Dillon* (1983) 34 Cal.3d 441, 479) necessary to the inquiry whether a sentence is "so disproportionate that it 'shocks the conscience.' " (*Butler*, at p. 746, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).)

Butler thus precludes petitioner's attempt to introduce an objective measure into the determination whether a sentence is constitutionally excessive. Under the traditional test, " '[t]o determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. (*People v. Dillon, supra*, 34 Cal.3d at p. 479.) If the court concludes that the penalty imposed is "grossly disproportionate to the defendant's individual culpability" (*ibid*.), or, stated another way, that the punishment " ' "shocks the conscience and offends fundamental notions of human dignity" ' " [citation], the court must invalidate the sentence as unconstitutional.' (*People v. Hines* (1997) 15 Cal.4th 997, 1078.)" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1426–1427.) A sentence may also be found cruel and unusual if it meets this test of constitutional disproportionality in light of the punishment of more serious offenses in California or the punishment for similar offenses in other jurisdictions. (*Lynch, supra*, 8 Cal.3d at pp. 431, 436.) A petitioner "must overcome a 'considerable burden' to show the sentence is disproportionate to his level of culpability ([*Wingo, supra*], 14 Cal.3d [at p.] 174)"; " '[f]indings of disproportionality have occurred with exquisite rarity in the case law.' (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)" (*In re Nunez* (2009) 173 Cal.App.4th 709, 725.)

Petitioner urges that he is serving an excessive sentence "typically imposed for much more serious criminal acts" despite having committed "an ordinary kidnap for robbery offense." He argues that he did not commit his offense as part of a "considered plan" but rather as an addict committing a "crime of op-

portunity" because he was looking for drugs, that only one victim was involved, and that she was "released after a short time, unharmed and in a safe place." These points are true, although the victim might dispute how "short" the time was that she was held captive. But it is also true that petitioner used a knife to "secure compliance," as he puts it—forcing her into her vehicle at knifepoint after causing her to let down her guard by approaching her with friendly banter, put a jacket over her head, drove the van around the corner, picked up another man, drove to another location and threatened to kill the victim if she did not give him money, before finally releasing the victim. Luckily, the victim was not physically harmed. But, as petitioner finally came to realize, the experience was traumatic: The victim could not have known, during the incident, that petitioner would not in fact inflict physical harm: He kidnapped her at knifepoint, effectively blindfolded her, enlisted an accomplice, and threatened her life. This was not an insignificant crime.

Moreover, consideration of the " 'nature of the offense and/or the offender, with particular regard to the degree of danger both present to society' " includes consideration of the offender's prior criminality. (*People v. Dillon, supra*, 34 Cal.3d at p. 479, quoting *Lynch, supra*, 8 Cal.3d at p. 425.) Petitioner's criminal history began at age 12 and continued unabated for 20 years; he had been in and out of juvenile placements and prison, and had been on parole from his most recent incarceration only 91 days when he committed the kidnapping. His sentence in the present case included two consecutive five-year terms for two prior serious felony convictions, both robberies. Petitioner unjustifiably ignores this criminal history in arguing that his sentence has become constitutionally excessive.

California's test for cruel and unusual punishment is by definition subjective and not susceptible to precise calculation. But, considering petitioner's conduct together with his unbroken 20-year prior criminal history, we would be hard pressed to say the sentence he has served thus far so shocks the conscience as to make it one of the " 'exquisitely rare' cases which merit reversal" as constitutionally disproportionate. (*People v. Perez* (2013) 214 Cal.App.4th 49, 60; *In re Nunez, supra*, 173 Cal.App.4th at p. 725 ["rarest of the rare"].)

Petitioner's attempt to show disproportionality under the other two prongs of the *Lynch* test are also unavailing. Petitioner offers several examples of offenses he deems more serious—aggravated assault with great bodily injury, battery with serious bodily injury, arson with great bodily injury—that have lesser sentences. But comparison of the sentence for these crimes in the abstract with petitioner's actual sentence thus far is misleading. Petitioner was sentenced to life, not to 28 or 33 or 23 years, and he does not argue that a life sentence for kidnapping for robbery is unconstitutional. His claim is based on the amount of time he has actually served, which, as we have said, is based on both his sentence for the kidnapping for robbery and his prior serious felony convictions. A more relevant comparison would thus be to the sentence for a defendant who committed one of the offenses petitioner posits and also had petitioner's criminal history. The offenses petitioner offers as examples are all serious or violent felonies within the meaning of sections 667.5, subdivision (c)(1), and 1192.7, subdivision (c)(1), and, despite their shorter prescribed sentence, would subject a defendant with two prior serious felony convictions to a sentence of 25 years to life. Petitioner was sentenced prior to the 1994 enactment of the Three Strikes law, but a person with the same criminal history who committed his offense now also would be subject to a sentence of 25 years to life, as would a person who committed the less serious offenses of

robbery without the kidnapping component or simple kidnapping.

Similarly, the examples petitioner provides in arguing that the sentence he has served is disproportionate to other jurisdictions' punishment for kidnapping do not take into account whether or how a defendant's criminal history affects the punishment in those jurisdictions. Even considering only the punishment for kidnapping for robbery, without reference to sentence enhancements or recidivist sentencing schemes, our own review reveals great variation among the 50 states with regard to definition of the offense, variables affecting punishment and prescribed sentences. As petitioner maintains, a number of jurisdictions prescribe comparatively short sentences for kidnappings in which the victim is voluntarily released without physical harm, as here. But more jurisdictions do not have kidnapping statutes that expressly provide for lesser punishment where the victim is not physically harmed, and more than a few prescribe terms of up to 30 years or more for kidnapping for robbery. The term petitioner has so far served, while obviously lengthy, is not so far out of line with other jurisdictions' sentencing as to shock the conscience. (Contrast *Lynch*, *supra*, 8 Cal.3d at p. 436 [life sentence for second offense of indecent exposure invalid; permitted in only two other states and vast majority permit no more than three years]; *In re Nunez, supra*, 173 Cal.App.4th at p. 715 [life without parole for 14-year-old convicted of kidnapping for ransom; defendant "only known offender under age 15 across the country and around the world subjected to an LWOP sentence for a nonhomicide, no-injury offense].)

Finally, Dickerson challenged the Board's denial of parole as arbitrary, capricious and unreasonable in that it was not supported by "some evidence" that his release would pose an unreasonable risk of danger to society. Reviewing the evidentiary record, the Court disagreed and found that there *was* "some evidence."

' "[T]he proper articulation of the standard of review is whether there exists 'some evidence' demonstrating that an inmate poses a current threat to public safety, rather than merely some evidence suggesting the existence of a statutory factor of unsuitability. (*Lawrence*, . . . at p. 1191.)" ([*Prather*,] at pp. 251-252.)' (*Shaputis II, supra*, 53 Cal.4th at p. 209.)" (*In re Perez* (2016) 7 Cal.App.5th 65, 84-85.) ,,,

The Board discussed several reasons for its conclusion that petitioner continued to pose an unreasonable risk of danger to society, including his failure to participate in sufficient programming and internalize its lessons, his dishonesty and his rules violations. Petitioner argues there is no nexus between his substance abuse and current dangerousness, characterizing his rules violations for possessing and manufacturing alcohol as "lapses" and "setbacks" that do not portend risk of danger to the public if he is released.

,,,

The rules violations the Board was concerned with were comparatively recent, all within four years of the hearing, and two closer to two years before the hearing. The commissioners found the 2012 and 2013 violations significant not only because they involved alcohol, which related to petitioner's addiction, but because they demonstrated a willingness to engage in prohibited activity as a means to get something petitioner wanted. The commissioners saw this willingness as continuing a pattern that petitioner demonstrated in the commitment offense and his prior crimes: "Obviously, in terms of the misconduct, if you can't follow the rules in prison that says to us you're not going to be able to follow the rules

in free society if you are released. ,,,

The nexus to dangerousness is obvious: If petitioner, 28 years into his prison sentence and having been warned at his 2011 parole hearing to avoid further rules violations, was willing to break the prison rules by illegally manufacturing and possessing alcohol even for a purpose as minor as obtaining money to purchase toothpaste he preferred to that provided by the prison, there was a risk he would resort to illegal conduct once released if it would provide the means to obtain something he needed or wanted. ,,,

The Court found that this all amounted to "some evidence" from which the Board could reasonably reach the conclusion it did, and therefore denied relief.

In short, the Board concluded that petitioner's incomplete understanding of himself with respect to the causes of his addiction and criminality, his willingness to engage in prohibited conduct to obtain what he wanted and his pattern of lying to officials to hide that conduct and failing to take responsibility for his misconduct, in combination, cast doubt on his commitment to rehabilitation and indicated that he would pose a danger to society if released. The nexus to current dangerousness is established by petitioner's hiding of the truth and insufficient understanding of the reasons for his misconduct, which indicate he "has not been rehabilitated sufficiently to be safe in society." (*In re Pugh* (2012) 205 Cal.App.4th 260, 273 [inmate's version of facts of life offense that is contrary to facts at trial and inherently improbable reflects lack of credibility and refusal to admit truth].) The Board's conclusions are consistent with the 2015 risk assessment, which found petitioner showed "modest insights into his personality, attitude and behavior" and "might benefit from further and more in-depth self-exploration to explain and understand the basis of his misconduct"; viewed his rules violations as "exemplify[ing] his continued disregard respecting prosocial and responsible rules and regulations" and "reflect[ing] his tendencies toward impulsivity and poor judgment"; and concluded he posed a "moderate risk for violence."

"As explained above, our inquiry is limited to whether there is some evidence in the record to support the decision to deny parole. ([*Rosenkrantz*], *supra*, 29 Cal.4th at p. 658.) Only a modicum of evidence is required, and the resolution of any conflicts in the evidence and the weight to be given the evidence are for the Board . . . to decide. (*In re Burdan* [(2008)] 169 Cal.App.4th [18], 28.)" (*In re Taplett* (2010) 188 Cal.App.4th 440, 450.) Here, there is some evidence to support the Board's decision.

PROP. 36 PETITION: TRIAL COURT MAY NOT MAKE "ARMED" FINDING IF JURY DID NOT

P. v. Charles Piper

---Cal.App.5th ---; CA2(4); No. B280033
August 7, 2018

This important (and published) case informs that upon a Prop. 36 resentencing application, the trial court may not "fill in the blanks" by making its own finding of "armed" in the case below – where the jury did *not* make such a finding.

A jury found appellant guilty of evading a pursuing peace officer and being a felon in possession of ammunition. In connection with the evading charge, the jury found not true the allegation that appellant was armed in the commission of the offense. The jury also acquitted appellant of all firearm-related counts, including being a felon in possession of a firearm and carrying a loaded firearm. Appellant was sentenced to two concurrent terms of 25 years to life as a "three-strike" offender.

In the underlying action, the trial court denied appellant's motion under Penal Code section 1170.126 to be resentenced pursuant to the

Three Strikes Reform Act of 2012 (Reform Act). The court concluded, after an evidentiary hearing, that the People had proven beyond a reasonable doubt that appellant was "armed with a firearm" during the commission of the offenses targeted in the petition. Appellant contends the court's determination is contrary to the jury's verdict and must be reversed. For the reasons set forth below, we conclude the trial court erred in determining that appellant was ineligible for resentencing. We remand for further proceedings on appellant's resentencing petition.

Petitioner Piper had been involved in several crimes where it was suspected he used a gun, or where he was found in possession of ammunition. Despite several trials, his convictions were not for being "armed" at the time of his crimes. Nonetheless, at the time of his Prop. 36 application for resentencing, the trial court made its own finding – based on the record – that Piper was ineligible for Prop. 36 relief because of his having been "armed."

On October 31, 2001, appellant and [ ] were charged in a second amended information with shooting at an inhabited dwelling (§ 246; count 1), assault with a firearm on Montalvo and Quintana (§ 245, subd. (a)(2); counts 2 and 3), and discharge of a firearm with gross negligence (§ 246.3; count 4). Appellant was separately charged with being a felon in possession of a firearm (former § 12021, subd. (a)(1); count 5), being a felon in possession of ammunition (former § 12316, subd. (b)(1); count 7), carrying a loaded firearm after suffering a prior conviction (former § 12031, subd. (a)(1); count 8), and evading a pursuing peace officer (Veh. Code, § 2800.2; count 10). The information alleged that appellant committed all the offenses "[o]n or about January 24, 2001." As to count 10 (evading police), the information further alleged that appellant was armed with a firearm in the commission and attempted commission of the offense. Finally, the information alleged that appellant had suffered seven prior serious or violent felony convictions.

However, the jury's findings at trial were but a small subset of these charges.

On November 5, 2001, a jury convicted appellant of being a felon in possession of ammunition (count 7) and evading a pursuing peace officer (count 10). The jury found not true the allegation that while evading the police, appellant was armed with a handgun. It acquitted appellant of the remaining counts, including being a felon in possession of a firearm and carrying a loaded firearm. …

In a bifurcated court trial, the trial court found true the prior conviction allegations. The court found appellant had suffered five strikes and sentenced appellant to two concurrent terms of 25 years to life under the Three Strikes law.

At Piper's Prop. 36 resentencing hearing, the trial court found against him.

On December 5, 2016, the trial court denied the petition with prejudice, concluding that "regardless of whether the correct standard of proof is beyond a reasonable doubt or by a preponderance of the evidence," appellant was ineligible for resentencing because he "was armed with a firearm" during his commission of the target offenses.

<u>The key issue on appeal concerned the circumstances under which a jury's verdict and findings in the petitioner's trial preclude or limit the trial court's eligibility determination under Prop. 36.</u>

Under *Frierson* and *Arevalo*, on a resentencing petition, the trial court may not make an eligibility determination contrary to the jury's verdict and findings. To do so would allow the People, contrary to the Reform Act, to "compensate for any potential evidentiary shortcoming at a trial

predating the Act." (*Frierson, supra*, 4 Cal.5th at p. 238.) It also would allow a trial court, contrary to *Johnson*, to "turn[] acquittals and not-true enhancement findings into their opposites." (*Arevalo, supra*, 244 Cal.App.4th at p. 853.)

Importantly, the appellate Court found that the trial court could not reinterpret the record evidence to make a finding contrary to that of the jury.

Here, appellant was acquitted of all firearm-related charges, and the jury found not true the allegation that he was "armed" in the commission of the offense of evading the police. Respondent argues that the jury's not-true finding on the arming enhancement does not preclude a determination that appellant was ineligible for resentencing under the "armed" exception in the Reform Act, because the former requires both a facilitative nexus and a temporal nexus, while the latter requires only a temporal nexus. (See *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1111-1112 [jury's not-true finding on knife use enhancement does not render defendant eligible for resentencing under the Reform Act].) We agree that as a matter of law, a jury's not-true finding on an arming enhancement does not necessarily preclude a trial court from making an eligibility determination under the Reform Act that a defendant was armed. In this case, however, the jury's acquittals constituted findings inconsistent with either a facilitative or temporal nexus between appellant and any firearm. As noted, the jury was presented with evidence about only two firearms -- the .38-caliber handgun found in front of a residence and a .45-caliber handgun never recovered but used in the drive-by shooting. With respect to the .45, the jury acquitted appellant of all related charges, including count 8 (carrying a loaded firearm). With respect to the .38, the jury acquitted appellant of count 5 (being a felon in possession of a firearm). All the firearm-related charges encompassed the same time period as the underlying convictions for evading the police and possession of live ammunition, viz., "[o]n or about January 24, 2001." The jury's determinations thus conclusively rejected the claim that appellant was "armed with a firearm" on or about that date. That rejection foreclosed any later finding beyond a reasonable doubt that appellant was "armed with a firearm," either while evading the police or while in possession of live ammunition. Accordingly, appellant was not ineligible for resentencing under the "armed" exception.

Accordingly, the appellate Court reversed the trial court and remanded for a new Prop. 36 hearing under the proper standards.

Having reversed the trial court's eligibility determination, we remand the matter to the trial court to exercise its discretion whether to deny resentencing to a defendant who poses an unreasonable danger to the public. "In exercising its discretion, the court may consider a wide variety of factors, such as the petitioner's whole criminal history, including 'the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes,' [the] petitioner's 'disciplinary record and record of rehabilitation while incarcerated,' and any other relevant evidence." (See *Frierson, supra*, 4 Cal.5th at p. 240.) "'[T]he facts upon which the court's finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence.'" (*Id*. at p. 239, quoting *People v. Buford* (2016) 4 Cal.App.5th 886, 901.)

***CHIU* RELIEF GRANTED - AGAIN**

In re Elliot Warburton

CA4(2); No. E065385
August 15, 2018

In a continuation of reports on this important relief available to many lifers who

suffered improper first degree murder convictions, *CLN* reports on yet another successful challenge, relying on the controlling case of *People v. Chiu*.

> In 2003, a jury convicted petitioner and defendant Elliott Eugene Warburton, along with a codefendant [ ], of the first degree murder of [ ], who was shot by a fellow gang member, Fernando Stevenson. The jury also found a principal in the offense personally discharged a firearm, proximately causing death (Pen. Code, former § 12022.53, subds. (d), (e)(1)), and that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang (Pen. Code, former § 186.22, subd. (b)(1)). Defendant was sentenced to 50 years to life in prison.
>
> Defendant appealed, but his conviction and sentence were affirmed in full, and the California Supreme Court denied review. In 2016, after the superior court denied his petition for writ habeas corpus, defendant filed a petition in this court (case No. E065385) seeking relief from his conviction based on the Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155. Although we summarily denied the petition, the California Supreme Court issued an order to show cause returnable to this Court, why defendant is not entitled to relief pursuant to *In re Martinez* (2017) 3 Cal.5th 1216 and *People v. Chiu*. We now grant the petition.

Warburton complained that he was convicted under jury instructions that permitted an improper conviction based on the now-outlawed "natural and probable consequences" theory of guilt.

> Defendant argues his conviction for first degree murder must be reversed because the trial court erroneously instructed the jurors that they could find petitioner guilty of first degree murder if it determined that the shooting death of the victim was the natural and probable consequence of aiding and abetting the target offense of battery, without finding that defendant deliberated and premeditated the murder. We agree.

The Court first reviewed the law on this topic.

> 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. (*People v. Medina* (2009) 46 Cal.4th 913, 920; see *People v. Chiu, supra*, 59 Cal.4th at p. 161; *People v. Prettyman* (1996) 14 Cal.4th 248, 260.) Thus, 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. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)
>
> Liability under the natural and probable consequences doctrine "is measured by whether 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." (*People v. Medina, supra*, 46 Cal.4th at p. 920, citing *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)
>
> To be "reasonably foreseeable," the consequence need not have been a strong probability; a possible consequence that might reasonably have been contemplated is enough. (*People v. Medina, supra*, 46 Cal.4th at p. 920, citing *People v. Nguyen, supra*, 21 Cal.App.4th at p. 535.) A consequence that is reasonably foreseeable is a natural and probable consequence under this doctrine. (*People v. Smith* (2014) 60 Cal.4th 603, 611.) However, the application of the natural and probable consequences doctrine does not depend on the foreseeability of every element of the nontarget offense. (*People v. Chiu, supra*, 59 Cal.4th at p. 165.)
>
> Ample case law supports the notion that a shooting may be found by the jury to be a natu-

ral and probable consequence of a battery (see *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376), or an aggravated assault (*People v. Ayala* (2010) 181 Cal.App.4th 1440, 1450), or a gang confrontation (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 10). This is a factual determination to be made by the jury. (*Olguin*, at p. 1376, citing *People v. Godinez* (1992) 2 Cal.App.4th 492, 499.) The question here is one of degree.

Importantly, the Court next distinguished the error of using the "natural and probable consequences" theory as applied specifically to first degree murder.

In the context of murder, the natural and probable consequences doctrine serves a legitimate public policy of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in homicide, by holding them culpable for the perpetrator's commission of the nontarget offense of second degree murder. (*People v. Chiu, supra*, 59 Cal.4th at p. 165, citing *People v. Knoller* (2007) 41 Cal.4th 139, 143, 151-152.) However, that public policy concern "loses its force in the context of a defendant's liability as an aider and abettor of a first degree premeditated murder." (*Chiu*, at p. 166.)

Thus, the Supreme Court held that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine (*Chiu, supra*, 59 Cal.4th at p. 166), unless he or she knowingly and intentionally assists a confederate to kill someone (*Id*. at pp. 166-167, citing *People v. McCoy, supra*, 25 Cal.4th at pp. 1117-1118). But a defendant cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Chiu*, at pp. 166-167.)

The Court noted that review of the circumstances could permit a reviewing court to find *Chiu* error – or not.

Regarding instructions on aider/abettor liability, when a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (*Chiu, supra*, 59 Cal.4th at p. 167.) An instruction on an invalid theory may be found 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. (*In re Martinez, supra*, 3 Cal.5th at p.1226, citing *People v. Chun* (2009) 45 Cal.4th 1172, 1205.)

The facts of this case are similar to those of *Martinez*. … The same is true in the instant case. …

However, the People presented an alternate theory of guilt, based on the aiding/abetting doctrine, to address the scenario that defendant did not know Stevenson intended to kill [ ], and believed that Stevenson only intended to beat up [ ]. The trial court instructed the jury that it could find defendant guilty of first degree murder as an aider/abettor based on a target offense of battery, if the jury found that murder was the natural and probable consequence of that target offense. Thus, if the jury believed Stevenson's trial testimony, as well as defendant's pretrial statements and trial testimony, the verdict of first degree murder would have been based on the improper conclusion that defendant aided and abetted the target offense of battery. *Chiu* error has been established.

Accordingly, relief was ordered.

Turning to prejudice, we cannot say, on the record before us, whether the jury based its verdict solely on the legally valid theory that defendant

directly aided and abetted the first degree murder by Stevenson. For this reason, the *Chiu* error was prejudicial and the conviction of first degree murder must be vacated. We remand the matter to the superior court where the prosecution may elect to retry defendant. If the prosecution elects not to retry the defendant, the trial court shall enter a judgment reflecting a conviction of second degree murder and resentence defendant accordingly

CODIFYING AND CLARIFYING PTA AND AR REQUIREMENTS

Since August, BPH administration has been working to rectify an oversight in the board's Administrative Review and Petition to Advance process that was exploited by the district attorneys' organizations and victims' groups in an effort to derail these processes that allow lifers denied parole to come back for hearings earlier than the denial length stated at their hearings. While the DAs bashed, berated and belittled those in prison reform who, a few years ago following the creation of the FAD, used a similar oversight to challenge that process, they showed no hesitation, hindsight or humility in self-righteously claiming the board to be promulgating an underground regulation regarding AR and PTAs.

A brief and perfunctory recap of the situation is this: in early August the Orange County Superior Court ruled in Rackauckas v State of California that the board, in not officially and formally giving Deputy Commissioners the duty and authority to make decisions to advance parole hearings under the PTA and AR process, had thus created an underground regulation. The DAs, in bringing this issue to the court, decided to pad their legal argument by focusing on a particular inmate's case, enfolding the victims' family in that case, making the claim that to advance hearings is to inflict 'harm' on those victims.

To support that argument, they prevailed on not only the victims' in the initial case under scrutiny in the suit, but also to victims' groups far and wide. While the OC Superior Court in its ruling did not outline what 'harm' the victims would suffer, victims' groups representatives, appeared at the August BPH monthly meeting, to sanctimoniously declare simply knowing about an advanced hearing was harmful to them. The various organizations and individuals also took umbrage at a statement contained in the board's reply to that charge that any harm to victims via advanced hearings was 'self-inflicted' harm, as there is no requirement that any victim appear in person at a parole hearing in order to have their concerns heard and considered, a position Harriet Solarno of Crime Victims United found 'deeply offensive.'

As a solution to the issue of legality of the hear-

ing advancement process BPH Executive Director Jennifer Shaffer "recommended that the Board vote to assign to deputy commissioners the duty of making decisions concerning the advancement of parole hearing dates." And to protect those decisions already handed down in advanced decisions, to ratify all previous advancement decisions made by a deputy commissioner.

When the floor opened for public comment on the proposal a veritable parade of DA representatives and agents of various victims' groups spoke in opposition; six Deputy DAs alone opposed the idea of the board assigning the DCs the ability to make advancement decisions, along with Solarno and affected comments read into the record from those not present. Amazingly, the only support for the BPH, for the idea of DCs making those decisions, indeed, making those advancement decisions at all, came from a prisoner advocacy group; that's right, us. Life Support Alliance.

The Board did, in fact, approve assigning deputy commissioners the duty to make decisions to advance hearing dates under and ratified all previous decisions made by a deputy commissioner to advance hearing dates. Shaffer then reported that the Board would soon draft regulations outlining AR and PTA procedures.

And, true to her word, at the September business meeting in Sacramento, the BPH was presented, considered and passed regulations outlining both the process and requirements for AR and PTA consideration and approval. While the process and requirements are essentially the same as those under which these processes have been performed for the last several years, the approved regs, now submitted to the Office of Administrative Law for review and approval, do provide more clarity and specificity regarding what DCs should be looking for to approve an advancement in a hearing.

So, the process for Administrative Review and Petition to Advance hearing dates continues, now in the process of being fully in line with legal administrative process and few changes, but more clarity. And while BPH legal staff seems to anticipate further legal action in this area, for now the AR and PTA process continue as before, albeit with clearer standards and officially sanctioned decisions by Deputy Commissioners.

The regs do clearly lay out criteria for denial of a hearing advancement, as well as timelines for replies and an appeal process when a PTA is denied. While too long to reproduce here, any prisoner wishing to obtain a copy of the regs can write us, include a stamp or SASE and we'll provide a copy of the complete 8-page document. Send your request to PO Box 277, Rancho Cordova, Ca., 95741, specify "PTA REGS" on the envelope.

In an interesting sidebar to the process, following LSA's comments at the August BPH meeting in support of the BPH's process and policy, several of the DAs in attendance were apparently piqued by our comments (which, we admit, included a reference to DAs continually seeking vengeance, with little regard to rehabilitation or change). They appeared quite surprised, and asked us if we really thought DAs were vindictive and vengeful?

Well, yeah.

Board's Information Technology System

Commissioners Summary
All Institutions
July 01, 2018 to July 31, 2018

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	MONTES	ROBERTS	RUFF	SCHNEIDER	TAIRA	TURNER
Suitability Hrg Total	**16**	**28**	**17**	**23**	**22**	**22**	**21**	**8**	**10**	**0**	**0**	**23**	**24**	**0**	**22**	**21**
Grants	5	5	5	7	3	12	8	1	6	0	0	7	11	0	9	10
Denials	9	13	5	15	14	7	12	5	3	0	0	9	11	0	12	8
Stipulations	0	9	3	1	4	1	1	2	1	0	0	5	1	0	1	3
Waivers	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Postponements	0	1	4	0	1	2	0	0	0	0	0	0	0	0	0	0
Continuances	0	0	0	0	0	0	0	0	0	0	0	2	1	0	0	0
Tie Vote	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	0

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

Subtotal (Deny+Stip)	**9**	**22**	**8**	**16**	**18**	**8**	**13**	**7**	**4**	**0**	**0**	**14**	**12**	**0**	**13**	**11**
1 year	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
3 years	4	13	5	14	13	8	4	5	3	0	0	10	7	0	9	8
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	3	6	3	2	4	0	9	2	1	0	0	3	3	0	3	3
7 years	2	3	0	0	1	0	0	0	0	0	0	1	1	0	0	0
10 years	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**2**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
1 year	1	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
3 years	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
4 years	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	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**0**	**1**	**4**	**0**	**1**	**2**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
Within State Control	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Exigent Circumstance	0	0	3	0	0	0	0	0	0	0	0	0	0	0	0	0
Prisoner Postpone	0	1	1	0	1	2	0	0	0	0	0	0	0	0	0	0

Board's Information Technology System

Commissioners Summary
All Institutions
August 01, 2018 to August 31, 2018

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	TAIRA	TURNER	BPH HQ	Total CMR Hrg
Suitability Hrg Total	16	20	22	20	29	18	34	31	18	26	23	30	18	24	28	139	496
Grants	6	4	11	4	12	8	8	11	10	8	4	12	11	9	15	0	133
Denials	9	12	4	9	12	9	21	16	5	15	8	14	7	13	9	0	163
Stipulations	1	3	3	7	2	0	3	4	1	1	6	2	0	1	2	0	36
Waivers	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	24	27
Postponements	0	1	3	0	2	1	1	0	1	0	1	0	0	1	1	105	117
Continuances	0	0	0	0	1	0	1	0	0	2	4	0	0	0	1	0	9
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	10	10

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

Subtotal (Deny+Stip)	10	15	7	16	14	9	24	20	6	16	14	16	7	14	11	0	199
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	5	13	12	8	18	8	4	10	7	11	3	8	10	0	134
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	4	2	1	2	2	1	4	8	2	4	6	4	4	5	1	0	50
7 years	1	1	1	1	0	0	2	2	0	2	1	1	0	1	0	0	13
10 years	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1
15 years	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	24	27
1 year	0	0	1	0	0	0	0	0	1	0	0	1	0	0	0	14	17
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	2	2
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	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	0	1	3	0	2	1	1	0	1	0	1	0	0	1	1	105	117
Within State Control	0	0	1	0	0	1	1	0	0	0	1	0	0	1	1	97	103
Exigent Circumstance	0	0	2	0	2	0	0	0	1	0	0	0	0	0	0	6	11
Prisoner Postpone	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	2	3

Board's Information Technology System

Commissioners Summary
All Institutions
September 01, 2018 to September 30, 2018

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	TAIRA	TURNER	BPH HQ	Total CMR Hrg
Suitability Hrg Total	**27**	**22**	**15**	**23**	**23**	**17**	**25**	**20**	**19**	**22**	**26**	**18**	**24**	**21**	**22**	**104**	**428**
Grants	6	9	6	6	3	10	5	5	13	7	8	5	8	7	10	0	108
Denials	17	8	7	9	16	5	18	12	5	13	11	11	9	11	9	0	161
Stipulations	4	4	1	5	3	2	2	2	0	1	2	2	7	1	2	0	38
Waivers	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	24	25
Postponements	0	1	1	3	1	0	0	0	1	1	2	0	0	1	0	69	80
Continuances	0	0	0	0	0	0	0	1	0	0	1	0	0	0	1	0	3
Tie Vote	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	11	12

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

Subtotal (Deny+Stip)	**21**	**12**	**8**	**14**	**19**	**7**	**20**	**14**	**5**	**14**	**13**	**13**	**16**	**12**	**11**	**0**	**199**
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	8	12	5	8	12	4	7	5	4	5	5	6	5	5	10	0	101
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	5	0	3	5	6	3	9	5	1	5	7	7	11	6	1	0	74
7 years	7	0	0	1	1	0	2	4	0	2	1	0	0	1	0	0	19
10 years	1	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	3
15 years	0	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	2

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**0**	**24**	**25**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	11	11
2 years	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	8	9
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	1	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	**0**	**1**	**1**	**3**	**1**	**0**	**0**	**0**	**1**	**1**	**2**	**0**	**0**	**1**	**0**	**69**	**80**
Within State Control	0	0	0	0	0	0	0	0	0	0	2	0	0	1	0	62	65
Exigent Circumstance	0	0	0	3	1	0	0	0	0	1	0	0	0	0	0	4	9
Prisoner Postpone	0	1	1	0	0	0	0	0	1	0	0	0	0	0	0	3	6

BOARD BUSINESS

Due to due to press times and other circumstances this issue of California Lifer Newsletter will contain reports on 3 monthly BPH business meetings, August, September and October. En banc considerations and decisions, including a veritable avalanche of commutation applications, for the above noted months will be found in a separate article, "En Banc Considerations."

In August the board took first action relating to Rackauckas v State of California, the Orange County court case challenging both the process and use of Deputy Commissioners in considering advancement of parole hearings. At that time BPH Executive Director Jennifer Shaffer presented the facts of the case to the board and suggested remedial action, which the commissioners agreed to begin. This issue is discussed more extensively elsewhere in this issue.

Shaffer and Chief Deputy Commissioner Rhonda Skipper-Dotta also updated the board on the non-violent parole review process under Prop. 57, noting that under Prop. 57 the BPH was required to perform roughly 1800 reviews in July, 2017. Those prisoners denied release under those initial reviews are now back in the cycle for a second look. Skipper-Dotta noted that in the last approximately 18 months, since July, 2017, deputy commissioners have conducted over 5,600 non-violent reviews and more than 1,200 non-violent second striker review. Each review takes nearly 3 days, with DCs plowing through about 400 each week.

At the September meeting, the commissioners got their first look at the proposed regulations which would codify the process of allowing Deputy Commissioners to review and approve hearing advancements, as well as lay out guidelines for that approval. The draft regulations, which passed unanimously, were opposed by DAs, but supported by LSA and attorneys Marc Norton and Sabina Crocette.

October proved to be a busier month for commissioners, who sat for several presentations as part of their bi-annual training, including updates from the Division of Rehabilitative Programming on programs offered both in prisons and in the community. DRP reportedly now has 4 specialized programs specifically for long-term prisoners: LTOP, "provides evidence-based programming to offenders who are subject to the Board of Parole Hearings suitability process"; the Step Down Program (SDP), providing those in the SHU " the opportunity to earn enhanced privileges by refraining from participation in Security Threat Group affiliations and behaviors"; and Offender Mentor Certification Program OMCP), where certified graduates can be assigned to be co-facilitators in substance abuse programs statewide. Also available at SATF is Cognitive Behavior interventions for Sex Offenders (CBI-SO), to address the criminogenic needs of those required to register as sex offenders.

Commissioners also heard presentations on how cases reach en banc consideration, CRAs, victims services and parole reconsideration hearings, all topics addressed elsewhere in this issue.

EN BANC DECISIONS

As noted elsewhere, the board, in recent months, faces a veritable avalanche of commutation petitions submitted to the Governor, who refers those with 2 or more felony convictions to the BPH for their appraisal and recommendation. In the three months covered in this issue the board had no less than 39 such requests, 6 in August, escalating to 16 in September and 17 at the October meeting. The good news: commutations have all been positively viewed by the board, with recommendations to the governor to grant the requests.

In August, **Deryl Armstrong, Willie Erwin, Howard Ford, John Manning, Tin Nguyen, Curtis Roberts and**

James White all requesting commutation of their sentences were saw positive recommendations from the BPH to the Governor. Armstrong, Erwin, Ford, Manning, Nguyen and White are all LWOP inmates. Another request, from **Travis Westley**, was withdrawn prior to BPH consideration.

Most, but not all, inmates requesting commutation had speakers supporting their request, and in nearly all cases the DA office in the respective counties opposed the commutation, most usually with a recitation of the facts of the crime. Chief opposers among the DAs, to no surprise, were the DAs from Los Angeles and Santa Clara Counties.

In September, of the 16 commutation applications, half were from LWOP inmates. The board recommended the Governor grant commutations to **Richard Barnfield, Jessie Biggs, Jose Esquero, Huey Ferguson, Michael Fischer, Gustavo Flores, Robert Glass, Jesus Hernandez, Johanna Hudnall, Tyrone Jackson, Dean Jacobs, John Johnson, Crystal Jones, James King, Thomas Marston and Richard Richardson**. All but Barnfield, Esquero, Fischer, Flores, Hernandez, Hudnall, King and Richardson are LWOP inmates.

In addition to a parade of supporters for some requests, the DAs, primarily from LA county, opposed 10 of the requests. The LA County DA office was joined in opposition by representatives from San Diego and, in something of a uncommon occurrence, a representatives from Yuba and San Mateo counties joined the party, to oppose commutation.

The October meeting was a marathon, with a total of 91 speakers voicing their opinions on a total of 21 en banc considerations, 17 of which were for commutations. In fact, so many speakers showed up, BPH was forced to triage speakers, allowing groups into the hearing room as other groups provided their input and exited. Anticipating the interest and numbers, the board started the meeting at 9 am, not recessing until nearly 3 pm.

Commutations were recommended for **Jameel Coles, Richard Flowers, Anthony Guzman, James Harris, Joe Hernandez, Gerald Holton, Fateem Jackson, Howard James, Kenny Lee, Huan Nguyen, Walter Oatis, Rick Rivera, Bryant Rodezno, Ramon Rodriguez, Richard Snyder, Rahsaan Thomas and Luis Velez.** Among this posse of potential parolees, only Guzman, Jackson, Oatis, Rivera, Rodezno, Snyder and Thomas are not currently LWOP inmates.

The October en banc process turned into something of a marathon performance by Donna Lebowitz from the LA County DA's office, who rose repeatedly to oppose a full dozen commutation seekers, all from LA County. She was joined by her not-infrequent fellow traveler, Aaron West, from Santa Clara County, and as a DA from Tulare County. Lebowitz commented to the board that she didn't want to sound like a broken record in always opposing change in sentences.

Unfortunately, her comment came too late, as not only opposition from the DAs, but the reasons cited for that opposition are predictably the same; heinousness of the crime, lack of remorse, potential danger to victims. It appears, both from comments and performance, that inmates from Los Angeles County can count on their requests for commutation, and any other form of relief, being opposed by the county DA. Recently however, both Lebowitz and West have added a new objection; that those sentenced to LWOP have already received compassion and grace from the justice system, in that they received an LWOP sentence, rather than the death penalty.

Several victims, and members of victims' rights groups, representing victims also spoke in opposition to several commutation requests, a trend that will probably increase as the number of commutation requests continues to grow. It also appears many victims could benefit from some basic information regarding life sentences, parole and circumstances under which inmates operate.

Victims and representatives often bemoan the fact that lifers are considered for parole, apart from commutation, often remarking their expectations, from a life sentence, is that the inmate will simply die in prison, never to be thought of by society again. And again this month victims' representatives deplored the fact that inmates had not reached out to them to apologize, apparently unaware of the fact that prisoners are precluded from doing so.

In other en banc considerations, August pardon applications from **Jose Padilla** and **Larry Thompson** were favorably forwarded to the Governor, as were similar requests in September from **Michael Crawford, Deborah Seal and Roderick Wright**. Wright, a former state Senator, was convicted and ousted from the Senate in 2014 over alleged election law violations. Wright appeared before the board to speak on his own behalf.

At the marathon October BPH meeting a pardon request by recently released and still on parole former lifer **Borey Ai** elicited the greatest interest and participation, with dozens of speakers supporting Ai's request. Ai, a stellar programmer and inmate leader in San Quentin, faces deportation to Cambodia, a nation where he has never lived, without a pardon.

Ai's request was supported by numerous staff from programs at San Quentin, a parade of former lifers who had benefited from his mentorship and support and several attorneys. The pardon request, which would allow him to stay in the United States, was opposed by the DA from Santa Clara County and several relatives of the victim. Ai's request received a positive recommendation from the BPH.

The remaining en banc considerations for August were a mixed bag of results, with commissioners recommending recall of sentence under 1170 (e) compassionate release for **Robert Desyliva**; a grant of parole for **Ruben Maldonado** was vacated, due to institutional misconduct, but the grant won by **Paul Willis**, referred by the Governor, was affirmed.

In September a calendared compassionate release consideration for **Thomas Kelley** was cancelled, as Kelley died before the request could be considered. September also saw the board vacate a pair of previous parole decisions, one to the determent of the inmate, one with a potential positive outcome. The grant to **Gilbert Escobedo** was vacated due to possible conflict of interest, in that the Deputy Commissioner on the panel had previously served as the inmate's state appointed attorney. A new hearing will be scheduled. The denial of parole for **Kristin Himmelberger** was also vacated, and a new hearing ordered to be certain any decision comports with In RE Lawrence.

In September's final en banc case, a tie vote in a parole consideration for **Carl Burnside** was decided in favor of a denial of parole, citing lack of remorse and insight and continued manipulative behavior. Although several individuals attended the meeting in hopes of expressing their opinion regarding parole, no public comment is allowed in a tie vote consideration.

In October's en banc considerations BPH legal staff refereed three inmates' cases to the entire board, and in each case the entire board voted to vacate the previous decisions. A grant of parole for **Mark Mancebo** was referred for a board investigation and possible rescission hearing, based on new confidential information.

The denial of parole for **Gerardo Menchaca** was also vacated, based on new information in the In Re Menchaca handed down in July, with a new hearing scheduled. **Lonnie Morris**, denied parole, will have a new hearing after his denial of parole was vacated due to an error of fact in the CRA. Morris will receive a new CRA prior to the rescheduled hearing.

FAD UPDATE FOR 2017

October is usually one of two training months for BPH Commissioners, when the usually 2-day monthly Board Executive Meeting turns into a week-long conference, with all commissioners and most deputy commissioners present to hear a variety of speakers and topics, all relating to making good parole decisions and evaluating the board's action in previous hearings. For the last couple of years, primarily since the Johnson v. Shaffer decision, Forensic Assessment Division Chief Psychologist Dr. Cliff Kusaj has presented the board, and whatever public is interested (that would be us, the DAs, a few victim group representatives and a smattering of attorneys) an over-view of the preceding year's CRA action. Fair warning here; the following report is replete with figures. If you aren't a numbers person, caution is indicated.

This year's multi-slide power point presentation built on the theme from previous years, indeed a theme Dr. Kusaj had expressed even before he began giving public run-downs on the FAD's work: lifers recidivate at the lowest level of any prisoner cohort, and even a lifer receiving a high risk rating is really an average risk, relative to other, non-lifer, non-long term incarcerated individuals. In fact, in the definition of risk rating Dr. Kusaj presented, those who received a High Risk rating were "expected to commit violence more frequently than Low and Moderate risk long term parolees and similarly to other [i.e. non-lifer] parolees." So even those scary High-Risk lifers are, in the professional opinion of the FAD, no more likely to engage in crime or violence than the average DSL inmate, released after fewer years, much less programming and often zero self-change.

Also, of note is that only 25% of the more than 3,000 individuals evaluated by FAD clinicians in 2017 received a High-Risk rating. Dr. Kusaj reported that most (49%) of those evaluated received a moderate risk rating, and 26% were in the low risk range.

Those are overall percentages, for all inmates given CRAs during 2017. The numbers are only slightly different when the total prisoner population is considered in various groups. YOPH inmates, who comprised 58% of those evaluated in 2017, were in line with the percentage breakdown of the overall group, 23% low, 48% moderate and 28% high, as did elderly parole candidates, average age of 65 years, came in at 24% low risk, 50% moderate risk and 26% high.

There was, however, a gender difference. Women inmates received low risk assessments in 40% of the evaluations, moderate at 46% and high risk only 15% of the time. And Indeterminately sentenced third strikers also presented differently, with only 19% assessed as low risk, 47% as moderate risk and over a third, 35% as high risk. Overall, Kusaj reported long term inmates evaluated by the FAD in 2017 were at an average of 52 years old and had spent more than 20 years in prison.

The report also found differences between indeterminate (ISL) and determinate sentenced (DSL) prisoners who were evaluated by the FAD. Under several laws passed in the last 5 years some prisoners who were not technically lifers, but who received 'toe tag' sentences as well as those in certain age and time served categories (elderly for example) are now eligible to appear before the parole board for consideration. Not only were the ISL inmates, on average, slightly older than the DSLs, (51 years for ISL, 40 for DSL), but the percentage of DSL inmates receiving low risk ratings from the FAD was remarkably smaller. Only 5% of DSL inmates received a low risk rating, compared to 27% of ISL prisoners rated as low risk. Similarly, the high-risk category saw more DSL inmates, at 54%, than ISLs, rated as high risk 24% of the time. The moderate risk category was closer, with 40% of DSLs rated moderate and 49% of ISLs getting that tag.

Kusaj also made the point that a past history of problems, whether couched in terms of 'anti-social personality disorder,' mental disorder issues, even substance abuse, were of less predictive value regarding risk than recent problems with those, or other, factors. So, while 63% of inmates receiving grants were considered by the FAD to have had recent problems with insight, that factor was deemed relevant to their risk in only 12% of the cases. Such problems were noted in 87% of those who were denied, but, more importantly, lack of insight was deemed relevant in 42% of those individuals.

Similar numbers are noted for those deemed to have recent problems with treatment or supervision response, where 27% of those granted feel into the 'recent' category, but such problems were deemed relevant in only 4% of the time. Thus, relevancy of the issue to criminal behavior appears more probative of both risk rating and hearing outcome than simply the presence of the risk factor.

Kusaj took pains to note that even those inmates with recent symptoms of major mental disorder, and he noted 'recent' is usually considered within the last year, or no more than 3 years back, is not an insurmountable barrier to parole; the key is compliance with treatment and indications of willingness to continue that compliance on parole.

He also noted the FAD clinicians no not expect to see a planned course of treatment on parole presented to them at the CRA interview, but the responsibility to convince the parole panel that such a plan both exists and will be adhered to rests on the inmate. The management and treatment of such disorders can be therapy, medication or combination of the two. He also defined major mental disorders as those conditions so persistent and immediate that they interfere with the activities of daily living and commented that the majority of lifers with a history of mental disorder still rated a lower risk that the average inmate.

While his report detailed that about 80% of those inmates evaluated were opined to have some recent problems with insight, those 'problems' were considered highly relevant in only 7% of those with low risk rating, less than half (41%) of moderate ratings and only highly relevant in those individuals with a high risk (77%). Relevancy proved to be a major contributor to the overall risk rating, as only 28% of those inmates judged to have recent problems with insight were rated as high risk, while the majority, 54% were rated as moderate and 18% received a low risk rating, even with the insight issue. In discussing the three test instruments used by the FAD, the HCL-20, the PCL-R and the Static 99-R, Kusaj explained that the HCL-20 is composed of 20 risk factors, mainly of historical incidence and therefore those issues identified by this test have somewhat less relevance in determining current risk than dynamic, or current, factors.

The PCL-R was described not as a risk assessment, but a personality assessment tool, where in the higher the 'score', the more expected problems. Any score over 30 is consider predicative of problems. Kusaj's figures show while average scores are from 0 to 40, women usually score between 10-15, men, 16-22. Among California lifers, women scored largely between 16-22, and the men, 19-25.

Overall, 15% of inmates received scores of 27 or more, with only 4% topping the 30 mark. No female inmate racked up a score of more than 30 and overall, fewer women rated in the higher numbers. Regarding risk ratings, those receiving a how risk rating had an average of 13.9 factors, moderate, 18.7 and those with a high-risk rating averaged 23 factors on the PCL-R.

The Static 99-R, created for use with adult sex offenders primarily to create treatment programs, provided diagrams showing most sex offenders (60%) were estimated by the Static-99 to be in categories of very low risk, below average risk or average risk to recidivate. In California, recidivism for 290 offenders is considered being convicted of a 290 offense within 5 years of release. Kusaj also noted that if the FAD clinician feels the Static 99-based risk assessment is overly predictive of recidivism, given other factors in the individual's case or situation, the clinician should so note in the CRA.

Third strikers, as Kusaj noted, are beginning to be a presence in the parole cycle, and the FAD data reflect some differences in 3 Strikes ISL inmates and 'regular' ISL, or lifer, inmates. Overall ISL prisoners checked in at a 28% low risk rating; 3 strikers, however, received a low rating only 19% of the time. Three strikers also presented with a lower percentage of moderate risk ratings (47% to 49%) than other ISL inmates, but a higher level of high-risk rating, 35% of 3 strikers were evaluated as a high risk, with 23% of other ISL inmates reaching that level.

Similarly, those issues contributing to risk levels were both more prevalent in third strikers and deemed, by FAD clinicians, to be more relevant to their risk assessment than other lifer cohorts. Example: recent problems with insight were noted in 90% of third strikers and 62% of other ISL inmates, and those problems were deemed highly relevant to risk in 52% of third strikers and 40% of other lifers. Other factors, including recent treatment/ supervision issues, future problems with stress and coping, were also higher in the three strikes population than other ISL groups and deemed more relevant to their risk.

In gender issues, Kusaj reported that women present fewer risks than men, are less likely to have a history of problems with other anti-social behaviors (other than the life crime) but more likely to have a history of major mental disorder and traumatic experiences. Females are also less likely to present "recent problems with insight into one's violence risk," and while they often present with more recent symptoms of mental disorder, that factor appears to be less relevant to risk than in men, perhaps due to women often being more open to treat-

ment for such problems. Women may also be better prepared for the stress of parole, as they are usually less like ty to have problems in the community finding and utilizing professional services to assist in their living situation as well as treatment.

Kusaj's report also noted a not-unexpected reduction in risk levels as the number of hearings any given individual experiences, at least for the low risk category, noting low risk at an initial hearing is only achieved by about 19% of inmates, but by hearing 7-9 36% will be noted as low risk. The same cannot be said for the moderate risk level, where percentages fluctuate between 45 and 53%, bouncing back and forth between numbers of hearings. And the high-risk category, coming in at 35% at initial hearings, decreases to 17% by subsequent hearing 4-6, then leveling off at 15% for hearing numbers after the seventh subsequent.

Also, as expected, the report indicated more inmates are assessed as low risk as they age, especially in those in the low risk category. The reduction in risk level tied to increased age is also evident, though to a lesser degree, in moderate and high-risk categories. Kusaj noted the difference in risk level shows the greatest change between ages 18 and 35, with risk changes less notable in age groups after 35.

Length of incarceration correlation to risk level presented an interesting puzzle, as of those incarcerated less than 10 years, 51% were rated as a moderate risk, while the same percentage, 51% of those incarcerated more than 30 years were rated as a moderate risk. However, for those incarcerated 10-30 years, the moderate evaluation was given only 45-47% of the time. Those with a high-risk evaluation stayed relatively static, in the 21-26% range, regardless of length of incarceration, though the 21% numbers were at the under 10 years of incarceration and over 30 years cohorts. These figures do little to answer the question of longer in, less risk? Perhaps the difference lives more in the use of incarceration time, rather than the simple length of term.

In the all-important area of correlation of risk assessment to parole grants, the data is less clear. Kusaj's figures show 55% of inmates with a low risk rating received a grant, 42% were denied and another 3% stipulated to unsuitability. Moderate risk rating showed a 17% grant rate, 71% denials and 12% stipulation; and high-risk inmates were granted parole in less than 1% of cases, denied 61% of the time and stipulated to unsuitability in 39% of hearings. Which leads to an interesting question, which may require interactive inquiry with the results of LSA's on-going attorney survey; do inmates with high risk ratings receive advice/pressure/more frequent suggestion for their attorneys to stipulate to unsuitability than other risk rating groups?

And, rather counterintuitively, Kusaj suggests an affect (measured by the PCL-R) of 'callousness, remorselessness, and failure to accept responsibility, though sometimes relevant, does not differentiate parole grans, denials, and stipulations more than other personality characteristics or risk considerations. It appears to be a combination of factors that influence[s] parole decision making." And yet…lack of remorse, failure to accept responsibility and lack of 'sufficient' insight are almost always cited by parole panels in denying parole. How to reconcile these two situation? We just report the news, we don't interpretate it.

In closing his report to the board Kusaj reported that for CRA interviews conducted between March and July of 2018, FAD clinicians reported spending an average of 135 minutes, just over 2 hours, with each interviewee. In only 6% of cases, he noted, were the interviews less than 90 minutes long, in those cases due to "offenders' unwillingness or inability to participate." And while LSA has anecdotal reports, including several reports from prison staff, of substantially shorter, or abbreviated interviews, until CRA interviews are recorded, in much the same manner as parole hearings, we have no way of knowing for sure and are left with dueling contentions.

As we are able to parse out additional information from Kusaj's report, or are suppled answers to follow up questions, we'll update our readers.

FINAL (almost) BILL RECAP

With the 2017-18 California legislative session now wrapped up, insofar as passage of bills is concerned, herewith is a recap of those bills most applicable to lifers and long-term inmates' prospects for parole, resentencing and day to day prison life. Two of the most important to lifers, SB 1391 and SB 1437 were finally signed by Governor Brown on September 30, the last day available. Had he not signed the bills they would have become effective anyway, absent a veto by the Governor.

For those bills that have not reached the potential signature stage, that is, they are still languishing in various committees in one or the other house of the legislature, that, too is reported. Such bills will not likely be considered prior to the legislature reconvening on December 3.

The recap follows.

AB 665—would authorize any person who was sentenced for a felony conviction prior to January 1, 2015, and who is, or was, a member of the United States military and who may be suffering from suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service, to petition for a recall of sentence under specified conditions. The bill would require the court to determine whether the person satisfies the specified criteria and authorizes the court, in its discretion, to resentence the person following a resentencing hearing.

This bill is currently stalled in the suspense file of the Assembly Appropriations Committee.

AB 1940—This bill would have created an earned discharge program to allow those on parole to earn credits toward their parole discharge date through accomplishment of various educational, vocational and public service activities. Lifers, subject to possible lifetime parole, could earn credits toward their discharge review date via the same activities. Parolees would have been able to earn as much as 12 months credit toward their discharge or discharge review date in a 12-month period, as well as an increase in the distance they are allowed to travel without written permission from their parole agent. This bill failed, unable to make it out of the Assembly Public Safety Committee on a tie vote.

AB 2550—prevents male officers from performing pat down searches of female inmates or entering areas where female inmates are likely to be undressed, unless there is imminent danger of harm to the inmate or others, or unless a female officer is not available.

This bill passed and was signed into law by the Governor on August 20.
It will be effective January 1.

SB 1242—This would add language requiring additional conditions to granting parole be codified, including demonstration of remorse and insight, reasonable time free of disciplinary, realistic post release plans, all of which are already part of parole consideration, though not in legal terms. In some way this bill impinges on the discretion of the BPH yet gives no specific standards/guidelines. More importantly, and the real purpose of the bill, would be to exclude from YOPH consideration those prisoners whose victim was a peace officer or former peace officer.

This bill has been referred to the Assembly Committee on Public Safety in June, where it remains stalled. Action possible when the legislature reconvenes.

SB 1391—This bill amends Prop. 57, as allowed in the language and consistent with and in furtherance of the intent that proposition, regarding the authority of the District Attorney relative to juvenile offenders. The DA is currently allowed to transfer a minor from juvenile court to an adult court cases where the minor is alleged to have committed a felony when he or she was 16 years of age or older or in a case in which a specific offense is alleged to have been committed by a minor when he or she was 14 or 15 years of age. This bill repealed the authority of a district attorney to make a motion to transfer a minor from juvenile court to adult court for those minors alleged to have committed specified serious offenses when he or she was 14 or 15 years of age.

SB 1437—changed the felony murder rule, through legal language that would removes malice from consideration in a crime unless the individual charged personally committed the homicidal act, acted with premeditated intent to aid and abet that act where in death occurred or the person was a major participant in the underlying felony and acted in reckless indifference to human life. It would also be retrospective, providing a method of resentencing those convicted of first or second-degree murder under the felony murder rule or the natural and probable consequences doctrine.

CONSIDERING 'RECONSIDERATION'

Although it remains an infrequent event, it does happen. Parole lifers violate a law, are re-arrested, charged with another crime, and find themselves back in state custody, awaiting another sessions with a panel from the BPH. This is a reconsideration hearing, or a 3000.1 hearing.

At the October training sessions commissioners were given a brief update on the process, including who is subject to those hearings. Parolees now subject to parole reconsideration hearings are those who fall under:

PC 300.1 (a) (1); convicted of first or second degree murder committed on or after 1/1/1083

PC 3000.1 (a) (2); convicted of kidnapping for the purpose of committing specified sex offenses for which one or more victims was a child under 14, or any one-strike sex offense committed on or after 9/9/2010.

PC 3000 (b) (4) (a); convicted of specified sex offenses, for which the parolee is required to register and one or more victims was a child under 14, committed on or after 9/9/2010.

Once back in state custody, the once-paroled lifer will face a parole panel for an Initial Parole Reconsideration Hearing within 12 months of the court conviction of a new crime or violation of parole. As with a regular parole hearing, the "panel takes as true the evidentiary findings of the court that the parolee committed the misconduct."

In that hearing the panel will consider the recent events that brought the parolee back into state custody, "but in the context of the offender's past and recent history and all of the relevant suitability factors one would normally consider at a parole consideration hearing." What the panel members will be assessing is whether the circumstance and the serious of the violation of parole conditions or crime, considered in the context of the individual's history and normal suitability factors, that would lead them to believe "a more lengthy period of incarceration" is needed to protect public safety.

At the initial reconsideration hearing the panel can either grant parole or deny. If granted, the erstwhile parolee will be re-released on parole, after the normal review periods (120 days for BPH legal review, 30 days for Governor's review), although those reviews are usually completed in an accelerated fashion. If denied, the former lifer parolee will find him/herself back serving a life sentence.

The only relief available if a former lifer is denied release at the initial parole reconsideration hearing, comes via the fact that Marsy's Law denial lengths do not apply; subsequent reconsideration hearings will be scheduled every year, with the same options available; grant of parole or denial. According to information provided by the BPH, "reconsideration hearings within 12 months of the initial denial or one year prior to the EPRD on any new crimes. All subsequent reconsideration hearings are held annually."

At any subsequent reconsideration hearings, if the individual is granted parole, he/she will be released, again on parole. If denied, an annual parole reconsideration hearing will be scheduled. And although no CRA will be prepared for the initial reconsideration hearing, a new CRA will be created before any subsequent reconsideration hearings, if more than 3 years have elapsed since the last CRA for that individual.

Complicated? You bet. Confusing? Of course. Remedy? If you're paroled, abide scrupulously with all conditions of parole, think before you act, understanding that lifers, even those on parole, are held to a higher standard than the average citizen, and take exquisite care not to find yourself back in the tender care of the state.

INFORMATION RESOURCES

While we at LSA are happy to help inmates with information and assistance, there comes a time when we have to steer some inquiries in another direction. We can't take on all requests, especially those that ask us to become an individual's personal research firm, letter writer, analyst or life coach. We're here to help you, not adopt you.

Rather than put ourselves in the middle of every inquiry, we'd rather provide you with the contacts on how to get some of the information you need, directly from the source, and remove ourselves as the middle man (or woman). Here you'll find information and addresses for various agencies and organizations who can provide information we're often asked for.

While we'll continue to provide those esoteric things other groups don't (like the Kusaj report, Dr. Hall's notes on adolescent brain, and, more recently, the new regs on PTA and AR policy), providing you with direct information will make our, and your, lives much easier.

Legislative Bill Room

(free copy of any legislative bill, if you provide the bill number)
State Capitol
10th St, Room B32
Sacramento, CA 95814

California Innocence Project

225 Cedar St.
San Diego, CA 92101

Office of Victim & Survivor Rights & Services

(inquiries regarding restitution: do not send apology letters, note on envelope this is a restitution inquiry)
P.O. Box 942883
Sacramento, CA 94283

California Correctional Health Care

P.O. Box 588500
Elk Grove, CA 95758

Board of Parole Hearings

(note on envelope if PTA or DR request, or appeal of CRA)
P.O. Box 4036
Sacramento, CA 95812

Office of the Ombudsman, CDCR

(note Ombudsman's office on envelope)
1515 S. Street
Sacramento, CA 95811

OFFICES OF VICTIMS SERVICES UPDATE

BPH Commissioners were presented with an update on the Office of Victims and Survivors Rights and Services recently, and some of the information should be of interest to lifers. OVS (for short) assists victims of crime in a variety of ways, primarily

- Provide comprehensive services to crime victims
- **Make offenders aware of the impact of their actions on victims
- Provide training on OVS services to other providers and organizations
- **Collect and distribute court-ordered restitution

*** denotes OVS duties relating to life term prisoners.*

Of the two areas noted above, OVS efforts to provide victim impact information to lifers comes via a Victim-Offender Dialogue Program, which brings actual victims or survivors of victims together with the perpetrator of the crime to dialogue on the impact of the crime, change in the offender and healing for both sides going forward. The prelude to those dialogues is a lengthy and careful process, taking care to be sure all parties are ready to participate and interested in participating for the right reasons. About 30 of those encounters have been completed since 2011 and OVS is working on request from an additional 51 individuals. These encounters are always initiated by the victims/survivors, and can only be held if the prisoner is also willing to participate.

OVS is also charged with tracking and collecting any restitution fines assessed by courts. This process continues once the former prisoner is released. Within 90 days of release OVS will contact the parolee, usually via the Franchise Tax Board, to set up a payment plan

for the parolee to fulfill that financial obligation.

Also of interest and impact to lifers are OVS's part in providing 1707 forms to victims, which allow the victims/ survivors to request prisoners released either at the end of their sentence or on parole be required to remain a specified number of miles from the residence of the victims. These forms sometimes become problematic on parole, which is the subject of an upcoming article in a future CLN.

OVS also clears and facilitates victims' attendance at parole hearings. Victims must register with OVS, which then provides clearance into the institution where the hearing will be held, as well as financial assistance to travel to those hearings. Last year OVS reported over 2,000 victims/survivors attended parole hearings and paid out over $213,000 on 594 travel claims.

Future plans from OVS include creating a victim speaker network, to assist victim impact programs and culmination of efforts to create an 'Accountability Letter Bank,' where prisoners could submit apology letters to their victims. But wait—hold on, before you mail those letters.

The letter bank is not yet operational, and when it is, only letters coming via approved groups/programs/ organizations will be accepted. The letters must be sincere, appropriate and thoughtful. Several victim awareness programs provide help in reaching these goals, as does LSA's The Amends Project.

Once the letter bank become operational, estimated sometime in the coming year, CLN and LSA will up date our readers with how the process works and how they can participate.

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

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