CALIFORNIA LIFER NEWSLETTER

State and Federal Court Cases

by John E. Dannenberg

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

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

In re William Palmer ("Palmer I")

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

The Court's question on review after the Court of Appeal granted relief on a petition for writ of habeas corpus is:

> What standard should the Board of Parole Hearings apply in giving "great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner" as set forth in Penal Code section 4801, subdivision (c), in determining parole suitability for youth offenders?

On December 10, 2018, the Clerk further requested the following answer:

> Having received the reply to the answer to the petition for review filed on December 7, 2018, the court has directed that I request answers, in the form of a letter brief, to the following questions: 1. What formal action, if any, was taken at the Board of Parole Hearings' December 2018 Executive Board Meeting regarding proposed regulations for Parole Consideration Hearings for Youth Offenders (Cal. Code Regs., tit. 15, proposed §§ 2440-2446)? 2. What is the significance of this action for the issues presented in the petition for review and depublication request in this proceeding? The answer must be electronically filed with this court and emailed to petitioner's counsel by December 19, 2018, with the original to follow by mail. Counsel for William M. Palmer is requested to respond by December 21, 2018 to the above requested letter brief by the Attorney General. No extensions of time are contemplated.

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CALIFORNIA LIFER NEWSLETTER

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COURT CASES (in order)

REVIEWED IN THIS ISSUE:

In re Williams Palmer
P. v Jeremy Foster
In re D'Arcey Bolton
In re Leslie Van Houten
In re La'Nare Wise
In re Adam Lopez

On January 18, 2019, the Court granted review and ordered the lower court opinion depublished.

> The petition for review is granted. The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled proceeding filed September 13, 2018 which appears at 27 Cal.App.5th 120. (Cal. Const., art. VI, section 14; Cal. Rules of Court, rule 8.1125(c)(1).) Votes: Cantil-Sakauye, C.J., Chin, Corrigan, Liu, Cuéllar, Kruger and Groban, JJ.

The opening brief and answer brief have been filed. The Board's reply brief is now due on July 3, 2019. Palmer is no longer incarcerated – see related case below.

10/19/19 UPDATE: AS OF JULY 24, 2019, THE CASE WAS FULLY BRIEFED. SIX BRIEFS OF AMICUS CURIAE HAVE BEEN FILED. NO DATE HAS BEEN SET YET FOR ORAL ARGUMENT.

SERIAL DENIALS OF PAROLE RESULTED IN PUNISHMENT SO DISPROPORTIONATE TO LIFER'S INDIVIDUAL CULPABILITY FOR THE OFFENSE HE COMMITTED, THAT IT MUST BE DEEMED CONSTITUTIONALLY EXCESSIVE

In re William Palmer ("Palmer II")

33 CA5th 1199; CA1(2); No. A154269
CA Supreme Ct. No. S256149
April 5, 2019

In addition to the case reported above, William Palmer had another writ going in the same division of 1st Appellate District, which challenged his continued denial of parole as constitutionally excessive punishment for his kidnap-for-robbery conviction. In another published decision, the 1st DCA recently granted this writ petition, and ordered Palmer released per se - and without parole.

> Petitioner has already served a prison term grossly disproportionate to his offense. His continued constructive custody thus constitutes cruel and unusual punishment within the meaning of article 1, section 17, of the California Constitution and the Eighth Amendment to the United States Constitution. He is entitled to release from all forms of custody, including parole supervision.

PUBLISHER'S NOTE

***

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

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

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

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

> Respondent is directed to discharge petitioner from all forms of custody, physical and constructive, upon the finality of this opinion.

But the opinion is not yet final. On June 4, 2019, the CA District Attorney's Association petitioned the CA Supreme Court for an order depublishing this new case. On that same day, the CA Supreme Court issued an order extending time to consider reviewing the lower court decision.

> The time for ordering review on the court's own motion is hereby extended to and including August 3, 2019. (Cal. Rules of Court, rule 8.512(c).)

In the underlying 1st DCA ruling, the Court found that the number of years served on a "life" sentence could be deemed unconstitutionally excessive – as a controlling factor that trumped the "dangerousness" criterion of the BPH. This ruling by the 1st DCA was grounded in the 2005 *Dannenberg* ruling of the CA Supreme Court:

> Our Supreme Court has recognized, however, 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 (*Dannenberg*).) "The proportionality of a sentence turns entirely on the culpability of the offender as measured by "circumstances existing *at the time of the offense*." (*Rodriguez, supra*, 14 Cal.3d at p. 652, italics added.) Where an inmate's sentence is disproportionate to his or her individual culpability for the offense, the Supreme Court has acknowledged, "section 3041, subdivision (b) cannot authorize such an inmate's retention, *even for reasons of public safety*, beyond the constitutional maximum period of confinement." (*Dannenberg*, at p. 1096, citing *Rodriguez*, at pp. 646-656, italics added & *Wingo, supra*, 14 Cal.3d at pp. 175-183; accord, *Butler, supra*, 4 Cal.5th at p. 744.) "[I]nmates may bring their claims directly to court through petitions for habeas corpus if they 'believe, because of the particular circumstances of their crimes, that their confinements have become constitutionally excessive as a result.' " (*Butler*, at p. 745, quoting *Dannenberg* at p. 1098.) In this sort of challenge, deference to the legislatively prescribed penalty is no longer a relevant factor, as the actual term of years served is a function of the Board's parole decisions, not the Legislature's determination of the appropriate penalty in this particular case.

[Writer's comment: This *Dannenberg* ruling did *not* result in Dannenberg's release – the Court majority held that if Dannenberg's crime "exceeded the minimum elements of the offense," he could be confined indefinitely for that reason alone. This "meaningless" (per Justice Romero's *Dannenberg* dissent) parole denial standard was later deemed "unworkable" and overturned in *In re Lawrence*.]

The new *Palmer* ruling appears to turn the concept of a "life" sentence on its head – keeping someone "too long" would justify a finding supporting their automatic release. While this

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EDITORIAL

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SEMANTICS IS EVERYTHING? WELL, MAYBE NOT

While we're all in favor of political correctness, making sure everyone is addressed in a manner acceptable to them and appropriate, there comes a time when artificially empretzeled titles become a little to facetious and self-impressed. We try to be realists, mindful of feelings and impressions, but always aware that facing the reality is usually the best path.

For many years, and still, we've objected to CDCR and BPH referring to prisoners as 'offenders' or even 'long-term offenders.' Our rational for that is that while those in prisons may have been legal 'offenders' when they committed their respective crimes, they are not currently 'offending' and in fact probably haven't been for some time, let alone 'long-term

We've been mildly chided of late by some for referring to prisoners as, well, prisoners. Or inmates. It's been suggested we refer to our prime constituents as 'incarcerated individuals' or even, 'our incarcerated loved ones.' And we considered these suggestions.

But, frankly, what do you call people at a school? Students. Usually not 'academically enrolled individuals'', or 'our loved ones in school.' And what's the term for those in hospital? Patients, not 'medically isolated individuals' or 'our ill loved ones.' So, what, then, is the term for those housed in prisons? Logically it would seem to be prisoners.

And while we often use the term inmates interchangeably with prisoners, it isn't quite as accurate, in a historical sense, as the origin of 'inmate' is from 16th century England, when travelers shared accommodations in various inns along the trip; they were 'mates' in the inn, thus inn mates/inmates. And while today's prisoners certainly share accommodations, it's hardly an inn. Nonetheless, we do use the term, simply from a stylistic position, to avoid repeating the same word over and over.

Could we say, 'incarcerated individuals'' or 'our incarcerated loved ones?' Yeah, we could. But incarcerated individuals sounds a bit obfuscating and facetious, and as for 'incarcerated loved ones,' not everyone involved in prison reform (incarceration reform?) does so in the interest of a loved one or family member—some of us are just concerned with the system as a whole.

But, not wanting to just trust our own instincts, we asked a variety of those in prison, during our frequent incursions into those institutions. What would you call yourselves, what would you prefer to be addressed? And while most really didn't care (call me a prisoner, political prisoner, offender, con, whatever, just give me a chance to come home), the majority were comfortable with prisoner. It is, after all, the fact.

And from a purely selfish standpoint, when speaking about prison issues (as we do often) or writing on the subject (as we do constantly), using factual terms such as prisoner and inmate are far more understandable and effective, to say nothing of simpler, than the 'incarcerated' terms.

So, thank you, everyone, for your feedback and certainly we'll continue to visit and explore every issue brought forward. But for now, we'll continue to refer to those housed in California's 35 adult prisons as prisoners. Or sometimes inmates. But what we'd really like to call them is free.

Cont. from pg 4

ruling, if it stands, would have a dynamite effect on parole denials and put limits on the Board's authority, CLN is not yet publishing the details of this ruling until the CA Supreme Court decides whether to grant review on its own motion or not. If it does, that would automatically depublish and nullify the 1st DCA ruling. CLN will continue to monitor this case closely and report on any updates in the procedural steps involving the CA Supreme Court.

10/19/19 UPDATE: REVIEW GRANTED; DEPUBLICATION DENIED

On July 31, 2019, a unanimous CA Supreme Court issued the following order:

> Review is ordered on the court's own motion. The issues to be briefed and argued are limited to the following: (1) Did this life prisoner's continued confinement become constitutionally disproportionate under article I, section 17 of the California Constitution and/or the Eighth Amendment of the United States Constitution? (2) If this life prisoner's continued confinement became constitutionally disproportionate, what is the proper remedy? The request for an order directing depublication of the opinion in the above-entitled appeal is denied. For the purposes of briefing and oral argument, the Attorney General is deemed the petitioner in this court. (Cal. Rules of Court, rule 8.520(a)(6).) Votes: Cantil-Sakauye, C.J., Chin, Corrigan, Liu, Cuéllar, Kruger and Groban, JJ.

[Writer's comment: Under the 2016 revision to Cal. Rules of Court 8.1115 (see rule below), it is no longer true that the granting of review *automatically* results in depublication of the case below. Rather, the CA Supreme Court may now deem parts or all of the case below (while under review) citable as precedent. That appears to be the effect of the above-quoted blanket order, which denied depublication - period.

In other words, you may presently cite *In re William Palmer* ("*Palmer II*") 33 CA5th 1199 as precedent in your current pleadings.]

> [Rule 8.1115. Citation of opinions
>
> (e) When review of published opinion has been granted
>
> (1) While review is pending
>
> Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court.
>
> (2) After decision on review
>
> After decision on review by the Supreme Court, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter, and any published opinion of a Court of Appeal in a matter in which the Supreme Court has ordered review and deferred action pending the decision, is citable and has binding or precedential effect, except to the extent it is inconsistent with the decision of the Supreme Court or is disapproved by that court.
>
> (3) Supreme Court order
>
> At any time after granting review or after decision on review, the Supreme Court

may order that all or part of an opinion covered by (1) or (2) is not citable or has a binding or precedential effect different from that specified in (1) or (2).

(Subd (e) adopted effective July 1, 2016.)]

MENTALLY DISORDERED OFFENDER (MDO) FINDING SURVIVES PROP. 47 SENTENCE REDUCTION

P. v. Jeremy Foster

--- C5th ---; No. S248046
CA Supreme Court No. S248046
August 22, 2019

This case has a narrow application, but is important to anyone who was found earlier to be a Mentally Disordered Offender (MDO).

> The Mentally Disordered Offender Act (Pen. Code, § 2960 et seq.) authorizes the Board of Parole Hearings to involuntarily commit individuals convicted of certain felony offenses for mental health treatment as a condition of parole. (Pen. Code, § 2962; all undesignated statutory references are to this code.) Commitment as a mentally disordered offender (MDO) may continue even after an offender's parole term has expired, so long as the district attorney makes a showing that the MDO's mental disorder is not in remission and that the MDO, because of the disorder, represents a substantial danger of physical harm.

Jeremy Foster, earlier found to be an MDO, later successfully petitioned the court for redesignation of his felony conviction to a misdemeanor, pursuant to Prop. 47. He later petitioned to have his MDO determination (part of his original felony prosecution) reversed, because he was no longer guilty of the original felony. He was denied relief below.

> In November 2014, California voters enacted Proposition 47, which reclassified certain drug and theft-related offenses from felonies (or wobblers) to misdemeanors. (*People v. Valencia* (2017) 3 Cal.5th 347, 355.) The initiative also authorizes individuals who have completed felony sentences affected by Proposition 47 to petition to redesignate the felony as a misdemeanor. (§ 1170.18, subd. (f).) Proposition 47 mandates that, with the exception of firearms restrictions, a redesignated conviction "shall be considered a misdemeanor for all purposes." (§ 1170.18, subd. (k) (section 1170.18(k)).)
>
> In 2016, defendant Jeremy John Foster successfully petitioned to have a felony grand theft conviction redesignated as a misdemeanor. Foster now argues that his commitment or recommitment as an MDO must be vacated because of the absence of a foundational felony.
>
> We conclude that the applicable statutes do not afford Foster the relief he seeks. Under the MDO statute (§§ 2970, 2972), the redesignation of Foster's felony as a misdemeanor does not undermine the validity of his initial civil commitment, which was legally sound at the time the determination was made. Nor does the redesignation alter the criteria governing Foster's eligibility for recommitment as an MDO. Equal protection principles do not compel a different result. Accordingly, we affirm the Court of Appeal's judgment.

Foster made several attacks on his conundrum. First, he complained that if originally prosecuted for a misdemeanor, he would not have fallen under the threat of being also considered for MDO designa-

tion. Thus, he was now asking for retroactive dismissal of that designation. The Court disagreed.

> It is true that Foster, if he had committed his theft offense today, would not be eligible for initial commitment as an MDO. (§ 2962, subds. (b), (e).) But Foster's present ineligibility for an initial commitment is not determinative of his eligibility for recommitment. On this point, In re C.B. (2018) 6 Cal.5th 118 is instructive: Two juveniles who had successfully petitioned for redesignation of certain felony convictions as misdemeanors under Proposition 47 argued that they were entitled to expungement of their DNA samples and profiles from the state's DNA databank because their obligation to submit DNA was based on the felony violations now reduced to misdemeanors. (*In re C.B.*, at pp. 122–123, citing §§ 296, 296.1 [requiring felony offenders to provide DNA sample].) We rejected the argument on the ground that "submission and removal of samples have been governed by different standards." (*In re C.B.*, at p. 126.) By statute, eligibility for expungement is confined to circumstances involving "lack of charges, acquittal, appellate reversal, or a finding of factual innocence" (*id*. at p. 128, citing § 299, subd. (b)) and is not authorized "on the ground that conduct previously deemed a felony is now punished only as a misdemeanor" (*In re C.B.*, at p. 128). We held that "a showing of changed circumstances eliminating a duty to submit a sample is an insufficient basis for expungement of a sample already submitted." (*Ibid*.) Similarly here, initial commitment and recommitment are "governed by different standards" (id. at p. 126), and "a showing of changed circumstances" eliminating eligibility for initial commitment "is an insufficient basis" for precluding recommitment of an individual who has already completed his initial commitment (*id*. at p. 128).

Foster next unsuccessfully argued that what seemed like plain language in the statute should cover him.

> Foster points to section 1170.18(k)'s directive that a redesignated felony "shall be considered a misdemeanor for all purposes." (Cf. *People v. J.S*. (2014) 229 Cal.App.4th 163, 171 ["Even after the expiration of the initial commitment, . . . the initial determination of whether an offender qualifies as an MDO continues to have practical effects. . . . Obviously, if an offender's initial commitment is improper, any extended commitment would also be improper."].) But the redesignation of Foster's underlying felony as a misdemeanor does not undermine the validity of his initial commitment as an MDO. Foster successfully petitioned for redesignation of his felony offense as a misdemeanor in 2016, six years after he was initially committed as an MDO. In *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), we examined the extent to which section 1170.18(k) operated retroactively by applying " 'the principle [codified in Penal Code section 3] that, "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the [lawmakers] . . . must have intended a retroactive application." ' " (*Buycks*, at p. 880.) We found it "significant" that "subdivisions (a) and (f) of section 1170.18 both clearly reflect an intent to have full retroactive application, whereas subdivision (k) uses no similar language." (*Id*. at pp. 880, 881.) This

disparity led us to conclude that "the default presumption applies to [section 1170.18(k)] so that its effect operates only prospectively." (*Id*. at p. 881.) ….

In sum, the redesignation of Foster's theft offense as a misdemeanor does not undermine the continued validity of his initial commitment or preclude Foster's continued recommitment as an MDO.

Foster then argued that equal protection principles (compared to Sexually Violent Predators (SVPs) should cover him.

Foster further contends that under the logic of *In re Smith* (2004) 42 Cal.4th 1251 (*Smith*), the redesignation of his qualifying felony as a misdemeanor eliminates the basis for his continued commitment and that a failure to so hold would violate equal protection principles. In Smith, we construed the SVP Act, which requires a qualifying felony offense to support civil commitment of an offender determined to be a sexually violent predator. (*Smith*, at p. 1257.) We held that "if the People seek to continue SVP proceedings against someone whose present conviction has been reversed, it must retry and reconvict him." (*Id*. at p. 1270.) Foster also argues that he is similarly situated to the defendants in *In re Bevill* (1968) 68 Cal.2d 854 (*Bevill*) and *In re Franklin* (2008) 169 Cal.App.4th 386 (Franklin). In *Bevill*, we held that a "mentally disordered sex offender" (now called an SVP) could no longer be involuntarily committed because he was convicted under a portion of a statute that did not prohibit his conduct. (*Bevill*, at pp. 862–863, 856.) In *Franklin*, the Court of Appeal held that an SVP petition was "fatal[ly] flaw[ed]" where the petition was filed after the reversal of the petitioner's felony conviction and his resentencing as a misdemeanant. (*Franklin*, at p. 392.)

" ' "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' [Citation.] In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (*People v. McKee* (2010) 47 Cal.4th 1172, 1202.)

Even assuming that SVPs and MDOs are similarly situated for present purposes, the cases Foster cites do not establish differential treatment of the two classes of civil committees. In Smith, the reversal of the defendant's felony conviction occurred while the SVP petition was "pending"; the defendant challenged his eligibility for SVP commitment "[a]fter his conviction was reversed, and before the SVP commitment proceedings progressed any further." (*Smith*, supra, 42 Cal.4th at p. 1256.) It was in that context that we found the defendant ineligible for commitment due to the absence of a qualifying conviction. Here, by contrast, the initial commitment determination occurred years ago, and there is no dispute that Foster had been validly convicted of a qualifying felony at the time

that determination was made. ….

In sum, we reject Foster's equal protection claim because we find no differential treatment in the commitment regimes governing SVPs and MDOs in light of *Smith*, *Bevill*, or *Franklin*. (See *People v. Pipkin* (2018) 27 Cal.App.5th 1146, 1151 [discussing *Smith* and *Bevill*, and observing that "the distinguishing factor in . . . these cases is that the initial commitment was found to be legally improper from the outset" and thus "could not be viewed as supplying the requisite foundation for subsequent recommitments"].) In so holding, we express no view on whether a different analysis or result would be required if an MDO's qualifying offense were reversed on appeal after his one-year period of initial commitment had run. Whether such an individual could be validly recommitted under the criteria set forth in section 2966 or section 2972 is a question not presented by this case. Nor are we confronted here with a felony redesignation that occurred during the pendency of an initial commitment proceeding or during an initial one-year commitment period.

Lastly, Foster argued that due process principles protected him.

Finally, Foster argues that his continued commitment despite the reduction of his felony conviction to a misdemeanor violates due process of law insofar as it amounts to a commitment based solely on a diagnosis of mental illness and a prediction of dangerousness. As discussed, the redesignation of Foster's felony conviction does not undermine the continuing validity of his initial commitment. Foster makes no argument that recommitment based on present findings of mental illness and dangerousness, following upon a valid initial commitment, violates due process of law.

Accordingly, the CA Supreme Court upheld the lower appellate court ruling.

"USE A GUN, GO TO PRISON"

"USE A KNIFE, GET OUT OF PRISON"

In re D'Arcey Bolton

--- CA5th ---; CA3; No. C088774
September 30, 2019

In this most unusual (and published) case, a prisoner serving a long determinate sentence for crimes committed when he was a juvenile, but who later was convicted at age 30 of the in-prison crime of possession of a knife and sentenced to 25-life as a Third Striker, successfully petitioned the Court of Appeal to have his determinate sentence recalled so that he could be resentenced to be eligible to enjoy the earlier parole consideration afforded him under the law as a Third Striker.

If this published decision is not overturned at the Supreme Court level, it could serve as a warning to CDC not to prosecute in-prison adult knife possession allegations as a Third Strike for determinately sentenced youthful offenders. (*And, **NO**, CLN does not recommend to any similarly situated youthful offender to seek Bolton's result by keeping a shank in his cell!*)

This case presents the previously unaddressed issue of what happens when a prisoner serving a sentence for crimes committed as a juvenile that may exceed his natural lifespan is later convicted of an offense which disqualifies him from the youth offender parole provisions of Penal Code section 3051.

> While serving a 91-year term for crimes committed when he was 16, petitioner D'Arsey Lawrence Bolton was sentenced under the three strikes law to 25 years to life for a crime committed in prison at the age of 30. In this habeas proceeding, petitioner asserts his sentence violates the cruel and unusual punishment prohibition of the Eighth Amendment and asks us to order the Lassen County Superior Court to resentence him on all of his convictions consistent with the possibility of release in his lifetime, or to find he is not ineligible for youth offender parole. We find that resentencing on the juvenile offenses is necessary, but petitioner's adult sentence does not violate the Eighth Amendment. We shall vacate the 91-year term for the crimes committed as a juvenile and remand for resentencing.

Bolton was convicted of numerous vicious sex offenses committed when he was 16, and sentenced to a determinate term of 91 years. When he was 30, a shank was found in his cell during a cell search. He admitted 11 strike allegations and was sentenced to 25 years to life under the Three Strikes law.

However, over the intervening years since his juvenile conviction became final, the courts applied newer case law to avoid the equivalent of LWOP sentencing in juvenile cases. The court now concluded that Bolton's 91 year term violates the Eighth Amendment.

> We partially agree with petitioner's analogy to *Contreras*. His Eighth Amendment claims are not mooted since the 25 -year-to-life term under the three strikes law for a crime committed when he was 30 renders petitioner ineligible for section 3051 parole. (See § 3051, subd. (h).) The 91-year term for the juvenile offenses, if fully served, would keep petitioner in prison for the rest of his life for crimes he committed as a juvenile, a violation of the Eighth Amendment. Like the Supreme Court in Contreras, we are not persuaded in this case by the Attorney General's claim that petitioner's sentence is not the functional equivalent of life without parole in light of the availability of credits to reduce the term. The Attorney General notes that petitioner has earned credits during some but not all of his time in prison, and is currently scheduled to finish his juvenile term on January 7, 2042, a few weeks shy of his 65th birthday. The Eighth Amendment guarantees a juvenile offender who has not committed a homicide the possibility of parole so that the juvenile offender can meaningfully participate in the community by means such as gaining employment. The age of 65, at which many people have retired, and people generally are eligible for social security retirement benefits, is too old for a juvenile offender to rejoin the community in the manner contemplated in *Graham* and *Contreras*. Even if this was an appropriate age, as in *Contreras*, the Attorney General's argument is too speculative, as it presumes petitioner will achieve this release by earning all available credits. Applying Contreras, we conclude the 91-year term for petitioner's juvenile crimes violates the Eighth Amendment.

The court then wrestled with what to do with Bolton's adult conviction and sentence (i.e., for the knife in his cell, at age 30). After considering all the relevant precedent, it decided to order his 91 year

determinate sentence recalled, and for the trial court to resentence Bolton for his juvenile crimes, and his new Three-Strikes sentence, in a manner consistent with the Eighth Amendment.

> The question presented here is what to do with petitioner's adult conviction and sentence. Petitioner claims the sentence for his adult conviction must be taken into consideration when the trial court resentences the juvenile offenses to avoid violating the Eighth Amendment. He proposes imposing a sentence of less than life for the adult crime so that he is eligible for section 3051 parole. Thus, the trial court could strike all but one of his strike priors, resentence him to eight years on the adult offense, for a total term of 99 years, leaving him eligible for section 3051 parole after serving 15 years of his term. We are not persuaded.
>
> The Eighth Amendment proportionality guarantee applies very differently to prison terms for adult offenders. The Eighth Amendment's proportionality principle is narrow in this context. (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108, 117].) It " 'does not require strict proportionality between crime and sentence,' " but prohibits " 'extreme sentences that are "grossly disproportionate" to the crime.' [Citation.]" (*Id*. at p. 23.) Applying these principles, three strikes sentences for less serious felonies have been routinely upheld against Eighth Amendment attack. (See, e.g., *id*. at pp. 30-31 [grand theft]; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1506-1507 [possession of methamphetamine and resisting an officer]; *People v. Cooper* (1996) 43 Cal.App.4th 815, 819 [felon in possession of a firearm].)
>
> Contrary to petitioner's arguments, his crime of possessing a sharp instrument in prison is not a mere "prison rule violation." It is a felony that renders him ineligible for section 3051 parole only because he committed it when he was older than 26 and because his numerous strikes subjected him to a three strikes sentence. (§ 3051, subd. (h).) That sentence was not attacked by petitioner in his appeal from the Lassen County conviction and was subjected to an unsuccessful motion to strike on remand. Since petitioner was armed in the commission of the possession of a sharp instrument offense, he was ineligible for resentencing pursuant to Proposition 36. (See §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).) *Miller, Graham, Caballero*, and *Contreras* address only sentences imposed for juvenile offenders. As our analysis of them shows, their holdings are derived from the differences between juvenile and adult offenders, particularly the juvenile's diminished culpability and greater capacity for reform. Those factors are absent when the offender is an adult. The sentence for petitioner's adult offense does not violate the Eighth Amendment and is not subject to resentencing on remand.
>
> There is an additional reason to reject petitioner's claim regarding the three strikes term for his adult crime. Contreras found disqualifying juvenile one strike offenders from section 3051 parole raised colorable equal protection and unusual punishment (see Cal. Const., art. I, § 17) issues. (*Contreras, supra*, 4 Cal.5th at p. 382.) Since petitioner's disqualification is based on an adult offense, and one committed when

he was 30 years old, the same considerations that render his adult sentence constitutional also eliminate any colorable constitutional claim regarding his ineligibility for section 3051 parole. Accepting petitioner's claim regarding this exception to section 3051 is not required by the state or federal Constitutions, would contravene the three strikes law, and would effectively nullify part of section 3051. None of those results are acceptable, and we decline petitioner's invitation to do so.

Petitioner cites to *In re Williams* (2018) 24 Cal.App.5th 794 (*Williams*) in support of his claim for resentencing on the adult conviction. The petitioner in that case was convicted of first degree murder as a juvenile and sentenced to 28 years to life; while serving his sentence, he was convicted of battery on a noninmate and sentenced to a consecutive eight-year term, to be served after the completion of the life term, pursuant to section 1170.1, subdivision (c). (*Williams*, at pp. 796-797.) The petitioner in *Williams* was eligible for section 3051 parole, which the Board of Parole Hearings granted subject to the petitioner first completing the eight-year term for the crime committed in prison. (*Williams*, at p. 796.) The Court of Appeal found that requiring the petitioner to serve the extra term was unlawful and granted the habeas petition. (*Ibid*.)

The issue in *Williams* was "whether a youth offender granted parole under section 3051 is required to serve a consecutive sentence for an in-prison offense committed after age 25." (*Williams, supra*, 24 Cal.App.5th at p. 797.) *Williams* relied on another case addressing this same issue, *In re Trejo* (2017) 10 Cal.App.5th 972. (*Williams*, at p. 799.) *Trejo* "found that section 3051 applies to offenses committed before a youth offender is incarcerated as well as offenses committed by a youth offender in prison." (*Williams*, at p. 800; see *Trejo*, at p. 984.) The *Williams* court also agreed with *Trejo* that exceptions to section 3051 were limited to those stated in the statute, and section 3051 supplanted section 1170.1 for youth offenders. (*Williams*, at pp. 801-802; *Trejo*, at pp. 985, 988.) Applying *Trejo*, the *Williams* court also found that granting the petition would not create a windfall for the petitioner as the parole board would already consider the offense committed in prison when determining whether to grant parole. (*Williams*, at p. 802; *Trejo*, at p. 988.) *Williams* concluded that a contrary interpretation "raises grave constitutional concerns," namely that offenders like *Williams* would be denied "the meaningful opportunity to obtain release from prison required in Franklin, an opportunity that allows a proper balance in sentencing that is consistent with the constitutional limits prescribed by the United States Supreme Court and the California Supreme Court." (*Williams*, at pp. 803-804.)

Williams and *Trejo* are factually distinguishable from this case, as petitioner's adult conviction disqualifies him from section 3051. We are nonetheless mindful of *Williams'* finding regarding allowing a juvenile offender the meaningful opportunity to earn parole. Petitioner's adult conviction disqualifies him from section 3051 relief, but it does not override the Eighth Amendment as it applies to his juvenile convictions. A person sentenced for convictions in multiple cases receives a single sentence. (§ 1170.1, subd. (a).) While the trial court cannot

modify the three strikes sentence for petitioner's adult conviction, it may take the conviction into account when determining the proper terms for the juvenile crimes.

The Supreme Court did not mandate a particular term that the defendants were to receive on remand in *Contreras* and *Caballero*. (See *Contreras, supra*, 4 Cal.5th at p. 381 [declining to provide additional guidance for trial court on remand]; *Caballero, supra*, 55 Cal.4th at p. 269 ["Because every case will be different, we will not provide trial courts with a precise timeframe for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' under *Graham's* mandate"].)

The issue of whether a person who committed one or more crimes as a juvenile and then commits one or more crimes as an adult can be constitutionally sentenced to a total term that does not provide for a meaningful opportunity for parole was not presented in *Miller, Graham, Caballero*, or *Contreras*. Although *Williams* recognized a potentially serious constitutional issue with depriving a prisoner of a meaningful opportunity for parole based on an adult offense, it declined to ultimately resolve the issue, and the issue was framed in the different context of a prisoner found suitable for section 3051 release. In declining to provide additional guidance for the trial court on remand, the Supreme Court in *Contreras* found "it prudent to follow a 'cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more.' [Citation.]" (*Contreras, supra*, 4 Cal.5th at p. 381.) We take the same approach here.

The court finally concluded it would toss the ball back to the Superior (trial) court to figure out how to resentence Bolton, and do so. It is predictable that that new sentence will be challenged on appeal later, and that this case may not be over yet!

> Since petitioner has never been sentenced by a court that had the advantage of the Eighth Amendment cases discussed in this opinion, the better approach is to wait until he is sentenced by such a court before determining novel and important constitutional issues related to his sentence. Accordingly, while the trial court must take the 25-year-to-life term for petitioner's adult conviction into account when resentencing on the juvenile offenses, we take no position on whether the total sentence for both the adult and juvenile convictions must include a meaningful opportunity for parole as defined in *Miller, Graham, Caballero*, or *Contreras*. Likewise, if the trial court determines petitioner's total term must include a meaningful opportunity for parole, we leave it to the trial court to make the initial determination regarding what sentence satisfies this requirement, and the effect, if any, on the availability of elderly parole.
>
> DISPOSITION
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> The Lassen County Superior Court is directed to vacate petitioner's 91-year state prison term for his juvenile offenses and to hold a sentencing hearing on his juvenile and adult convictions consistent with this opinion.

GOVERNOR'S REVERSAL UPHELD

In re Leslie Van Houten

CA2(1); No. B291024
September 20, 2019

Following a recent grant of parole, "Manson gang" participant Leslie Van Houten suffered a reversal of that grant by Governor Newsom. Newsom gave two findings in support of his decision: (1) that Van Houten did not have sufficient insight into her crimes, and (2) that the egregiousness of the crime alone counseled for reversal. In this unpublished decision, the Court of Appeal held that there was "some evidence" in the record supporting the lack-of-insight reason, and affirmed the reversal. Because this reason was dispositive of affirmation of the Governor's reversal, the Court did not reach a decision on the egregiousness finding.

> Leslie Van Houten petitions for a writ of habeas corpus challenging Governor Edmund G. Brown's reversal of her 2017 grant of parole. Van Houten is serving concurrent sentences of seven years to life for the 1969 murders of Rosemary and Leno La Bianca, which she committed with other members of a cult led by Charles Manson. The Governor interpreted statements Van Houten made during her parole hearing as shifting blame for her crimes to Manson and his control over her, thus demonstrating lack of insight into her responsibility for the La Bianca murders. The Governor also concluded that Van Houten's crimes were sufficiently egregious to support a finding that she was not suitable for parole.
>
> We conclude that the deferential standard governing our review of Van Houten's petition is dispositive: The Governor's determination that Van Houten has not taken full responsibility for her role in the crimes, and continues to pose a risk to the public, is supported by some evidence in the record. Accordingly, we deny the petition. We do not reach the Governor's alternative conclusion that Van Houten's commitment offenses alone provide sufficient basis to deny parole.
>
> As detailed below, we recognize that the record of Van Houten's parole proceedings may be susceptible to competing inferences. We acknowledge, as did the Governor, that the record exhibits numerous factors suggesting that Van Houten is suitable for parole. Under the applicable standard of review, however, we accept all inferences in favor of the Governor's decision and do not reweigh the evidence.
>
> Adhering to the applicable standards of review is not mere procedural formalism. Standards of review define the role of courts in our trifurcated democratic form of government. The standard of review governing this petition is among the most deferential and comports with the primacy given to the executive branch in parole decisions.

Van Houten had been granted parole in 2016, but the Governor reversed that grant.

> The Board of Parole Hearings (the Board) first found Van Houten suitable for parole in 2016. The Governor reversed the Board's decision, finding that Van Houten "g[ave] the false impression that she was a victim who was forced into participating in the [Manson] Family

without any way out," and that she "characterize[d] herself as less culpable for her actions because she was merely following orders from others during the LaBianca murders." The Governor stated, "It remains unclear" how Van Houten "transformed" into "a member of one of the most notorious cults in history and an eager participant in the cold-blooded and gory murder of innocent victims aiming to provoke an all-out race war. Both her role in these extraordinarily brutal crimes and her inability to explain her willing participation in such horrific violence cannot be overlooked and lead me to believe she remains an unreasonable risk to society if released."

Since the latest reversal cites extensive interaction in the hearing between the Board and Van Houten, addressing points cited in the Governor's 2016 reversal, CLN is reporting in full the cited conversation from the Court of Appeal decision here. It is offered to be instructive on how the Board deals with insight evaluation. It also provides the alleged factual basis (i.e., "some evidence") from which the Governor took exception to the Board, and reversed.

Van Houten's next parole hearing, the hearing relevant to the instant writ petition, was September 6, 2017. The Board read from the Governor's reversal of Van Houten's prior grant of parole, noting the Governor's concern that it was unclear how Van Houten had transformed into a cult member and participant in murder. The Board asked Van Houten to provide further explanation, which she did at length, with the Board interjecting with further questions.

Van Houten described the impact of her father leaving her and her mother, after which Van Houten began using drugs and "look[ing] for permanency in a relationship with a young man." Van Houten became pregnant and had an abortion that left her "feeling . . . broken and brokenhearted." Van Houten described how she met members of the Manson commune while staying with friends in San Francisco and ended up going with them to Spahn Ranch. She described her indoctrination into the Manson cult, which among other things involved her "letting go" of her "morality" and "ethics." She described escalating violence from Manson towards female cult members who disagreed with him or displeased him. She stated that the female cult members "were basically used for sex, fixing dinner." She described it as "very misogynist."

Van Houten went on to describe Manson's shift towards preparing for the revolution he anticipated. While describing to the Board how Manson had her read to him from the book of Revelation, Van Houten began to cry. The Board asked what emotion she was feeling, and Van Houten said, "[T]o tell you the truth, the older I get, the harder it is to live with all of this, and, um, it's difficult to . . . [¶] . . . [¶] . . . know what I did."

Van Houten described further indoctrination with Manson humiliating cult members by having them stand naked in front of the others while Manson critiqued them. Van Houten said, "[I] nstead of reading the humiliation as—for God's sake, get out of here, I read it as—um, I have to let go of all of my ego. . . . [E]verything that could've indicated to me that I needed to get out of there, I couldn't interpret it that way. I was interpreting it as self judgment." When

asked why that was, Van Houten said, "Because I so desperately wanted to be what [Manson] envisioned us being," namely "[a]n empty vessel of . . . him." Van Houten joined in Manson's belief that he was Jesus Christ reincarnated.

Van Houten described Manson's rhetoric of an impending race war and his cult's role in it, which Van Houten did not question. She described cult members committing burglaries, including, at her suggestion, of her father's house.

Van Houten recalled speaking with a cult member the morning after the murders at the Polanski residence, who "said that helter skelter had started," meaning "[r]evolution and chaos." Van Houten said she was not shocked to hear of the murders. She said, "I knew that I wanted to go and commit to the cause, too. I believed in it, and I wanted to go."

Van Houten then described her participation in the La Bianca murders. She confirmed that when she entered the house, she understood the plan was to kill the people inside, and she wanted to participate in that. She said she stabbed Mrs. La Bianca "[b]ecause I had to do something," then clarified that she "wanted to" stab her "[t]o prove my dedication to the revolution and what I knew would need to be done to, um, have proved myself to Manson" and "the group."

The Board asked how Van Houten felt about her crimes today, and she replied, "I feel absolutely horrible about it, and I have spent most of my life trying to find ways to live with it."

The Board asked what in Van Houten's record demonstrated that she had remorse for her crimes. Van Houten identified her activity in the Victim Offender Education Group, the curriculum of which was "designed to get really in touch with the damage done to, um, those that loved Rosemary and Leno LaBianca." Van Houten said, "[H]onestly, I dedicate my life in here to living amends. It's how . . . I figured out [how] I live with what I did." She also identified her participation in the Executive Body of the Inmate Activities Group Committee, doing "service work for the women on the yard," and tutoring at Chaffey College. Van Houten said the tutoring was "part of my remorse to create less victims by helping other women leave here . . . [¶] . . . [¶] . . . a little more healed."

Asked if guilt or shame was part of what motivated her service activities, Van Houten said, "Yeah. I think most of what I do is out of guilt for what I've done." She went on, "But I love doing it." She said, "[I]t's my purpose . . . [¶] . . . [¶] . . . to be able to do all that."

The Board asked Van Houten what she took responsibility for. She stated, "I take responsibility for the entire crime. I take responsibility going back to Manson being able to do what he did to all of us. I allowed it. [¶] . . . [¶] I take responsibility for Mrs. LaBianca, Mr. LaBianca."

Asked what she had learned about her character defects and coping mechanisms to ensure she would not ever be involved in similar events, Van Houten stated, "I learned that I was weak in character. I was easy to give over my belief system to someone else. That I sought peer attention and acceptance more than I did my own foundation.

That I looked to men for my value, and I didn't speak up. I avoided any kind of conflicts."

Van Houten stated she lacked self-esteem and described her therapy in prison as aimed to understand "what was going on with me at the time that I became so complacent to Manson." She made a commitment to "recreate a life for myself where I would not harm others deliberately." She said she could "feel good about who I am because of the service work" but "[f]or a long time, it was hard to have good self esteem knowing what I had done."

Van Houten said she started feeling remorse for her crimes "[a]bout two or three years away from Manson," in 1973 or 1974. Asked when she started making amends, she said she "t[ook] on a more serious role of service work" in the mid 1980's.

The Board reviewed Van Houten's accomplishments and activities in prison. She had earned bachelor's and master's degrees and a tutor certification, participated in the Victim Offender Education Group, Actors Gang Prison Project, a reentry program, Victim Awareness, Lifers Group, White Bison, Alcoholics Anonymous, and personal counseling, and worked as a tutor. Van Houten described how she would locate a personal sponsor and friends who are sober to assist her if ever she felt an urge to use drugs.

The Board asked Van Houten to "look back at . . . all these various choices that you made that resulted in what happened on the . . . night of August 10th." The Board asked Van Houten, if she "could make one choice different, but only one, what would that choice be?" Van Houten said, "Easy. I would go back to Manhattan Beach, I would get a job at TRW, and I would live under my father's house, his condo." She said leaving her father's house was "[t]he beginning. Actually, using the drugs in June—I mean, January, but I could've—if I'd have stayed there, I could've gotten intervention, so I—I think. Yeah."

The Board then asked, "If you were told you could go back and change one thing, and one thing only that someone else did, what would that be?" Van Houten answered, "That my dad stay in the house. That he not leave."

Van Houten stated that if released, she initially would live in housing organized by a parole agent Van Houten had worked under, and then with a friend as a roommate. She anticipated that "as a senior leaving prison with no work history, I'm going to be living humbly." She stated she planned to work as a grant writer for programs that contribute to rehabilitation in the prison system.

The Board noted over 100 letters in support of Van Houten's release, with a "recurrent theme . . . talking about the change that they've witnessed in you over the years and how helpful that you are now." The Board had also received more than 40,000 letters opposing her release. Asked how she dealt with knowing many people wished her to remain in prison, Van Houten said, "I focus on the people that love me and know that I can't change other people and that there will always be people that have a set idea of who I am. And, um, they haven't gotten to know me."

The Board reviewed Van Houten's psychological assessments dating back to 2006, all of which concluded she was a

low risk for future violence. Her most recent risk assessment observed Van Houten exhibited prosocial behaviors throughout most of her imprisonment, and stated she scored "well below the cutoff threshold commonly used to identify dissocial or pathologic personalities." The assessment found Van Houten's advanced age, maturity, and positive programming mitigated the risk of violent recidivism, and concluded that Van Houten was "overall a low risk for future violence."

The Board addressed a portion of Van Houten's risk assessment that "the Governor had issues with" in his prior reversal, "the section that says you cited a lack of real consequences for your misbehavior growing up. Feelings of abandonment and your father. We talked about that following your parents' divorce. Your resentment and anger toward your mother, . . . trauma of your abortion, . . . [and] drug addiction. You believed that these made you . . . vulnerable to the cult led by Manson. This—this lack of real consequences is quoted by the Governor as a concern." Van Houten explained that during the risk assessment, she had been describing her mother's child rearing style. She said that "other kids had . . . curfews, and they had consequences." If they stayed out late, they would "be grounded for 3 weeks," but her mother "would say—I don't have to do that because you will never let me down. And so I felt that I always had to anticipate what her expectation was of me. . . . I didn't have a measured set of rules that my other friends did."

Asked by the Board why she had been gullible and "easily swayed," Van Houten said the loss of her baby to an abortion at age 17 was devastating, and she "just gave up" and first turned to the Self Realization Fellowship, then to drugs, and then to the Manson cult.

A deputy district attorney attending the hearing asked the Board to inquire whether Van Houten's previous statements that she believed Mrs. La Bianca was already dead when Van Houten stabbed her made Van Houten less responsible for the murder. Van Houten responded that when she was younger she believed she was less responsible, but no longer felt that way. The Board asked when Van Houten's feelings about that had changed, and Van Houten estimated 20 years earlier.

The deputy district attorney prompted the Board to ask Van Houten what she meant by her statement at a prior parole hearing that Manson "conducted what we did, but we did it . . . . I hope you're not understanding that I know it's my responsibility that I allowed this to happen to me." Van Houten responded, "That it's difficult to say that things were being conducted by Manson and that I . . . accept responsibility that I allowed him to conduct my life in that way." The deputy district attorney asked for clarification whether Van Houten was "t [aking] responsibility for the action or does she take responsibility for allowing Manson to help her conduct her life in that way?" Van Houten elaborated: "I take responsibility that I allowed myself to follow him, and in that, I take responsibility for the actions that I did by allowing him to influence me in the manner that he did [¶] . . . [¶] without minimizing my . . . involvement."

During her closing statement, Van Houten said, "I also want to apologize to

> all of those in the room and those that are not for the damage that I did and the stealing of their loved ones' life in a senseless manner. I apologize very deeply for that. And, um, I just hope that I was able to convey the truth of who I am today to you."

The Board granted Van Houten parole, finding that the circumstances favoring parole outweighed the circumstances against it. The Board gave "great weight" to Van Houten's age at the time she committed her crimes, noting the "diminished culpability of juveniles compared to adults" and their "susceptib[ility] to negative influences" and "outside pressures." The Board felt Van Houten was not able to "really extricate [her]self [from the Manson cult] as a youthful offender." The Board found that in prison Van Houten "showed growth and maturity," including "developing the skill sets and coping mechanisms that you would need to abate . . . the key issues that were . . . at the core of why you became the person you were." The Board noted that Van Houten had no significant history of violent crime apart from her commitment offenses and had a "stable social history now."

The Board stated it believed Van Houten felt "sincere" remorse and took responsibility for her actions without minimizing them. The Board noted that Van Houten's age reduced the probability of recidivism. The Board felt Van Houten had "engaged in suitable activities that indicate an enhanced ability to function within the law upon release, . . . and you lack any serious rules violations while in prison." The Board recounted the positive activities with which Van Houten had been involved. The Board found that Van Houten had "made realistic plans for release." The Board noted that Van Houten's risk assessments over the past decade had all concluded she was a low risk for future violence. The Board found that "despite how bad, horrible the crimes were, there's no nexus for current dangerousness."

The Governor's reversal was summarized by the Court.

> On January 19, 2018, the Governor issued a decision reversing the Board's grant of parole. The decision began with a description of the murders at the Polanski and La Bianca residences. The Governor then summarized the Board's decision finding Van Houten suitable for parole. He noted that she was 19 years old when she committed her crimes and now, at age 68, had been incarcerated for 48 years. He noted her "laudable strides in self-improvement in prison," listing her positive psychological report, her lack of serious misconduct in prison, her educational achievements, her positive work reports and commendations from staff, and her participation in and facilitation of self-help programs. The Governor stated he "gave great weight to all the factors relevant to her diminished culpability as a juvenile," "to her subsequent growth in prison," and to "evidence that she had been the victim of intimate partner battering at the hands of Manson."
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> "However," the Governor stated, "these factors are outweighed by negative factors that demonstrate she remains unsuitable for parole."
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> The Governor referred again to the murders, stating that Van Houten "played a vital part" in the Manson Family's

"atrocious, high-profile murders to incite retaliatory violence." The Governor found that Van Houten "has long downplayed her role in these murders and in the Manson Family, and her minimization of her role continues today. At her 2017 parole hearing, Van Houten claimed full responsibility for her crimes. However, she still shifted blame for her own actions onto Manson to some extent, saying, 'I take responsibility for the entire crime. I take responsibility going back to Manson being able to do what he did to all of us. I allowed it.' She later stated, 'I accept responsibility that I allowed [Manson] to conduct my life in that way.'"

The Governor continued: "Van Houten's statements show that she still has not come to terms with her central role in these murders and in the Manson Family. Van Houten told the 2016 psychologist that when asked to join Charles Manson's 'utopia' at the Spahn Ranch, she 'bit into it, hook, line and sinker.' By her own account, she idolized Manson and wanted to please him. At her 2017 hearing, Van Houten explained that she 'desperately wanted to be what [Manson] envisioned us being.' She admitted that following the Tate murders, she wanted to participate in the LaBianca murders because she 'wanted to go and commit to the cause, too.' Van Houten told the Board she committed the crimes in order to 'prove my dedication to the revolution and what I knew would need to be done to, um, have proved myself to Manson.' "

The Governor then quoted a prior superior court ruling: "As the Los Angeles Superior Court found last year, Van Houten's recent statements, 'specifically her inability to discuss her role in the Manson Family and LaBianca murders without imputing some responsibility to her drug use and her danger of falling prey to the influence of other people because of her dependent personality,' have demonstrated a lack of insight into her crimes. '[She] was not violent before she met Manson, but upon meeting such a manipulative individual she chose to participate in the cold-blooded murder of multiple innocent victims.' The court continued, 'While it is unlikely [Van Houten] could ever find another Manson-like figure if released, her susceptibility to dependence and her inability to fully recognize why she willingly participated in her life crime provides a nexus between the commitment offense and her current mental state, demonstrating she poses a danger to society if released on parole.' "

The Governor concluded that "Van Houten has made admirable efforts at self-improvement while incarcerated and appears more willing today to accept responsibility for the part she played in these crimes." Nonetheless, the Governor found that "even today, almost five decades later, Van Houten has not wholly accepted responsibility for her role in the violent and brutal deaths of Mr. and Mrs. LaBianca."

The Governor further concluded, "These crimes stand apart from others by their heinous nature and shocking motive. By her own behavior, Van Houten has shown she is capable of extraordinary violence. There is no question that Van Houten was both fully committed to the radical beliefs of the Manson Family and that she actively contributed to a bloody horror that terrorized

> the nation. As our Supreme Court has acknowledged, in rare cases, the circumstances of a crime can provide a basis for denying parole. This is exactly such a case."

Van Houten first petitioned the Superior Court of Los Angeles County for relief from the Governor's reversal. That Court denied relief.

> In 2018, Van Houten filed a petition for a writ of habeas corpus in the superior court challenging the Governor's reversal. The superior court denied the petition. The superior court found that "the facts of [Van Houten's] commitment offense alone provide some evidence supporting the Governor's decision to reverse the Board's grant of parole. If ever a murder case continued to be predictive of current dangerousness, even many years after the offense, it must surely be the instant case."

As for the Governor's conclusion that Van Houten continued to minimize her role in the crimes, the superior court stated, "[Van Houten] does appear unable to discuss the commitment offense without imputing some responsibility on Manson, although it is unclear to what degree [Van Houten] is minimizing her role in the commitment offense and to what degree she is simply recounting the events as she perceives them. Nonetheless, the evidence relied upon by the Governor, although less persuasive than the facts of the commitment offense, would constitute a bare minimum of evidence to support the Governor's reversal."

The Court of Appeal then analyzed the Governor's reasons for reversal to determine if "some evidence" supported the Governor. It is reported completely here because it offers insight into how a Governor's reversal might be better attacked in a different case.

> The Governor stated two bases for reversing the Board's grant of parole. First, he found that Van Houten's comments at the parole hearing, consistent with past comments, minimized her role in the murder of the La Biancas, thus indicating a lack of insight into her crimes. Second, he found that Van Houten's crimes presented a rare case where the egregiousness of the commitment offenses alone justified denying her parole. Because we hold that some evidence in the record supports the Governor's first conclusion, we deny Van Houten's writ petition. We do not address the Governor's second conclusion.
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> The Governor's decision stated that Van Houten "has long downplayed her role in these murders and in the Manson Family, and her minimization of her role continues today." The Governor quoted approvingly an earlier decision from the superior court finding that Van Houten's " 'inability to discuss' " her role in the crimes " 'without imputing some responsibility to her drug use and her danger of falling prey to the influence of other people because of her dependent personality,' have demonstrated a lack of insight into her crimes." The Governor concluded that "even today, almost five decades later, Van Houten has not wholly accepted responsibility for her role in the violent and brutal deaths of Mr. and Mrs. LaBianca."
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> Our Supreme Court has "expressly recognized that the presence or absence of insight" into an inmate's past criminal behavior "is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (*Shaputis*, *supra*, 53 Cal.4th at p. 218.)
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> "[L]ack of insight pertains to the inmate's current state of mind," and thus "bears more immediately on the ultimate question of the present risk to public safety posed by the inmate's release" compared to factors more remote in time like the circumstances of the inmate's commitment offense. (*Shaputis, supra*, 53 Cal.4th at p. 219.) The parole regulations "do not use the term 'insight,' but they direct the Board to consider the inmate's 'past and present attitude toward the crime (Regs., § 2402, subd. (b)) and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense' (Regs., § 2402, subd. (d)(3)). These factors fit comfortably within the descriptive category of 'insight.' " (*Shaputis*, at p. 218.)
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> We hold that the Governor's conclusion that Van Houten lacks insight into her commitment offenses, and thus remains a threat to public safety, is supported by some evidence in the record. As the Governor noted in his reversal, the record has several instances in which Van Houten appears to qualify the responsibility she feels for the crimes by emphasizing Manson's role. When the Board asked what Van Houten took responsibility for, she answered, "I take responsibility for the entire crime. I take responsibility going back to Manson being able to do what he did to all of us. I

allowed it." Then, "I take responsibility for Mrs. LaBianca, Mr. LaBianca."

Significantly, when the district attorney later requested clarification whether Van Houten was taking responsibility for her actions, or only for allowing Manson to influence how she conducted her life, Van Houten replied, "I take responsibility that I allowed myself to follow him, and in that, I take responsibility for the actions that I did by allowing him to influence me in the manner that he did . . . [¶] . . . [¶] . . . without minimizing my—my, uh, involvement."

As the Governor recognized, Van Houten has shown some willingness to accept responsibility. Her inability, however, to discuss that responsibility except through the lens of Manson's influence reasonably could suggest to the Governor that Van Houten has not accepted full moral culpability for her actions, that is, that she considers herself less blameworthy because she committed her crimes at Manson's behest. This in turn creates concern that Van Houten presents a current danger, because in emphasizing Manson's influence, she minimizes the fact that she chose, indeed enthusiastically, to murder the La Biancas. Without fully understanding her pivotal role in these crimes, the Governor could fairly conclude that she still presented a danger if she rejoined society. (See *Lawrence, supra*, 44 Cal.4th at p. 1228 ["In some cases, such as those in which the inmate . . . has shown a lack of insight or remorse, the aggravated circumstances of the commitment offense may well continue to provide 'some evidence' of current dangerousness even decades after commission of the offense"].)

In concluding that the Governor's reversal was based on some evidence, we find support not only in the evidence cited by the Governor but also in evidence indicating Van Houten failed to recognize the impact on her victims when asked to consider the choices she had made in her life. The Board asked Van Houten to "look back at . . . all these various choices that you made that resulted in what happened on the . . . night of August 10th." The Board asked Van Houten, if she "could make one choice different, but only one, what would that choice be?" Van Houten replied that she would have stayed at her father's house and sought a job, the implication being that had she done so, she would not have become involved with Manson.

Asked what one act by someone else she would change if she could, she said she would have her father not leave her and her mother.

Van Houten, asked hypothetically to rewrite the past, focused on where things went wrong for her personally rather than on the horrific acts that followed. It was only in her closing statement that she acknowledged the harm she caused the La Biancas when she said, "I also want to apologize to all of those in the room and those that are not for the damage that I did and the stealing of their loved ones' life in a senseless manner. I apologize very deeply for that." The Governor was within his discretion to conclude Van Houten's other statements in the record outweighed the impact of her somewhat belated apology.

We do not dispute that the record contains evidence from which a decisionmaker reasonably could conclude that Van Houten was suitable for parole. Again, however, under the applicable

standard of review, " '[i]t is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole.' " (*Shaputis, supra*, 53 Cal.4th at p. 210.) As for the contention that we or the Governor have taken Van Houten's statements out of context or placed her in a Catch–22 (dis. opn. post, at pp. 9–11), we have reviewed the record in full, and while arguably more than one inference may be drawn from Van Houten's statements and the context in which they were made, we respectfully disagree that the inferences drawn by the Governor were unreasonable.

Van Houten argues that the Governor's reversal relied on "isolated negative factors" rather than an "individualized assessment of [Van Houten's] entire record," and failed to consider Van Houten's "record of reform and rehabilitative programming" and "testimony regarding the social factors surrounding her alienation from her biological family and the hallmarks of youth making her vulnerable to the Ma[n]son cult." Van Houten claims the Governor "tether[ed]" her to the crimes of her fellow cult members rather than evaluating her on her own, and relied on an earlier superior court ruling regarding an earlier parole decision rather than conducting a fresh analysis based on Van Houten's current parole hearing.

Contrary to Van Houten's contention, the Governor's reversal refers not only to evidence supporting denial of parole, but also evidence of Van Houten's rehabilitation, increased maturity, diminished culpability as a youthful offender, and other factors favoring parole. To the extent the Governor chose to afford greater weight to certain factors over others, this was within his discretion.

Moreover, the evidence we have identified in support of the Governor's decision came from Van Houten's own statements, and does not rely upon any improper "tether[ing]" to the words or actions of Van Houten's confederates. As for the Governor's citation to the earlier superior court opinion, this simply reflected the Governor's agreement with the concerns voiced by the superior court, concerns the Governor concluded Van Houten had not resolved in her subsequent parole hearing. None of this suggests the Governor failed to conduct an individualized assessment. While Van Houten argues that "the quoted conclusions of the superior court have no support in the current record," the Governor was entitled to find otherwise, and as we have explained, his findings are supported by some evidence.

Van Houten contends that, although her previous 2016 parole hearing addressed her minimizing her role by blaming Manson, the Governor in reversing Van Houten's parole in 2016 did not cite that as a reason to deny her parole. Van Houten argues the Governor thereby forfeited the right to assert that basis now, because it is unfair to deny her parole on a basis of which she was unaware and therefore had no opportunity to address. Van Houten cites no authority applying the doctrine of forfeiture or estoppel in this context, and we know of none.

We similarly reject Van Houten's contention that the Governor's 2016 and 2018 reversals contradict one another, with one faulting her for emphasizing

her association with Manson and the other claiming she underemphasized her association. As we have discussed, both of the Governor's decisions expressed concern that Van Houten minimized her own culpability by shifting responsibility to Manson and the cult. We fail to see any contradiction between the two decisions.

Van Houten claims the Governor failed to comply with Penal Code section 3055, subdivision (c) by not giving " 'great weight' " to her "elderly parole status." Section 3055 establishes an "Elderly Parole Program . . . for purposes of reviewing the parole suitability of any inmate who is 60 years of age or older and has served a minimum of 25 years of continuous incarceration on his or her current sentence." (§ 3055, subd. (a).) Section 3055, subdivision (c) directs the Board to "give special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate's risk for future violence."

Although the Governor's decision did not refer expressly to the Elderly Parole Program, it did note both Van Houten's age and time served when discussing factors in favor of parole. Van Houten does not identify any evidence of "diminished physical condition" the Governor failed to consider. (§ 3055, subd. (c).) Thus, the Governor's decision accounted for the factors identified in section 3055, subdivision (c).

As to whether the Governor afforded those factors "special consideration" (§ 3055, subd. (c)), current law, as articulated by the Supreme Court, is clear that the Governor may weigh the factors suggesting parole suitability or unsuitability as he sees fit. (Shaputis, supra, 53 Cal.4th at p. 210 & fn. 7.) We therefore decline to conclude that the mandate to afford certain factors "special consideration" affects our standard of review. For the same reason, we reject Van Houten's suggestion that our standard of review is affected by the Legislature's mandate that the Board "shall give great weight" to evidence of intimate partner battering or the inmate's diminished culpability as a youthful offender (§ 4801, subds. (b)(1), (c)). We note the Governor expressly stated he gave great weight to those factors.

Notably, this was *not* a unanimous decision. In a dissenting decision almost as long as the majority decision, the dissenting Justice concluded the opposite on all counts.

I respectfully dissent.

Without question, judicial review of parole decisions is deferential. Reversing the Board's 2017 decision to grant Van Houten parole, however, departs from legislative dictates regarding parole decisions, particularly given recent legislative enactments regarding offenders who committed their offenses prior to reaching age 26, and offenders who have served lengthy terms and are of advanced age.

As a starting point, our Legislature has mandated that the Board and the Governor "shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual." (Pen. Code, § 3041, subd. (b), italics added.) Be-

cause "due process of law requires that a decision considering such factors be supported by some evidence in the record, the Governor's [and the Board's] decision is subject to judicial review to ensure compliance with this constitutional mandate. [Citation.] Thus, a petitioner is entitled to a constitutionally adequate and meaningful review of a parole decision, because an inmate's due process right 'cannot exist in any practical sense without a remedy against its abrogation.' " (In re Prather (2010) 50 Cal.4th 238, 251, quoting In re Rosenkrantz (2002) 29 Cal.4th 616, 664 (Rosenkrantz).)

The Board's decision finding Van Houten suitable for parole rested on a number of factors, including her earning a bachelor's and a master's degree in prison, her successful participation in programming and counseling, their belief that she felt remorse and took responsibility for her actions, her lack of history of violent crime apart from the commitment offense, multiple psychological assessments dating back to 2006 that uniformly concluded she presents a low risk for future violence, and assigning great weight to Van Houten's young age at the time of the life crime. The Governor based his reversal of that decision on his contrary view of two suitability factors: his conclusion that Van Houten did not wholly accept responsibility for her crimes, and his assertion that the circumstances of the crime alone support a finding of unsuitability.

Viewed in the context of the Legislature's recent statutory enactments regarding parole, particularly with respect to youth offenders, and taking into account the deferential standard of review accorded to the Board and Governor regarding findings of suitability for parole, there is not a modicum of evidence to support the conclusion that, if released, Van Houten would pose an unreasonable risk of danger to society. (Rosenkrantz, supra, 29 Cal.4th at p. 677.) Nor is there a rational nexus between the handful of statements the Governor's decision cites, excerpted from the 310-page parole hearing transcript and isolated from their context, and any current danger Van Houten poses to society. To the contrary, the evidence supports the Board's conclusion that Van Houten is remorseful, understands her crimes and what led her to commit them, and is no longer dangerous. Because the record contains no evidence that rationally supports the Governor's decision reversing the Board's grant of parole, I would hold that the reversal violated Van Houten's due process rights and would grant her petition and reinstate the Board's September 6, 2017 grant of parole.

The dissenting Justice found, specifically:

A. No evidence supports the Governor's decision.

B. The Governor failed to articulate any rational nexus to current dangerousness.

C. The Governor failed to give great weight to the youth offender factors.

D. The Governor failed to give special consideration to the elderly inmate factors.

E. The Governor appears to have improperly based his decision on Van Houten's crimes alone.

F. The Governor's serial reversals based on her commitment crime convert Van Houten's sentence into a de facto life without parole sentence.

G. Conclusion

> Even if one were to accept (I do not) that Van Houten has placed too much responsibility for the La Bianca murders on Manson's influence or inadequately explained why she committed to his nefarious cause over 50 years ago, this is not evidence that she is currently dangerous. If anything, this shows she has committed herself to remaining vigilant to identifying malign influences and has girded herself against them.
>
> Our high court has " 'clarified that in evaluating a parole-suitability determination by either the Board or the Governor, a reviewing court focuses upon "some evidence" supporting the core statutory determination that a prisoner remains a current threat to public safety—not merely "some evidence" supporting the Board's or the Governor's characterization of facts contained in the record.' " (*Shaputis II, supra*, 53 Cal.4th at p. 209.) Accordingly, the question for this Court is not whether there is "some evidence" to support the Governor's finding that Van Houten is minimizing her role in the La Bianca murders or has failed to explain adequately what led her to commit them. Nor is it whether she has expressed remorse for her crimes a sufficient number of times. Rather, the question is whether "some evidence" in the record supports the Governor's ultimate conclusion that Van Houten's release would pose an unreasonable risk to public safety. Because I find no such evidence in the record, I dissent.

Van Houten filed a Petition for Review (S258552) (prematurely) in the State Supreme Court on 10/15/19. CLN will keep you posted on any action there.

REQUEST FOR *CHIU* RELIEF FAILS ON REEXAMINATION OF FACTS ADDUCED AT TRIAL

In re La'Nare Wise

CA1(3); No. A157039
September 27, 2019

This writer has been encouraging CDC prisoners who may have been convicted of murder under the now-repudiated theory of "natural and probable consequences." In this case, the prisoner sought relief, gained a court rehearing, but was ultimately denied on the merits upon reexamination of the facts from the trial.

> La'Nare Wise petitions for a writ of habeas corpus on the basis that he was improperly convicted of first-degree murder with special circumstances under the natural and probable consequences theory of liability without any finding that he harbored an intent to kill. We conclude that, although instructions to the jury on the natural and probable consequences of a non-homicide target felony did not specify the requisite mental state for murder, and the special circumstance of discharge of a firearm from a motor vehicle with the intent to inflict death contained a latent ambiguity, the record demonstrates no reasonable probability that Wise was convicted of first degree murder without a jury determination that he harbored an intent to kill. The petition for writ of habeas corpus is denied, and the order to show cause is discharged.

The case involved a drive-by shooting killing one person and injuring another. The trial court, on remand for alleged *Chiu* error, made the following express findings.

The Instructional Error on Possible Vicarious Liability for First Degree Murder

was Harmless Beyond a Reasonable Doubt.

> There is no question that the instruction given to Wise's jury on liability for the natural and probable consequences of a criminal act contained the same defect that was identified in *Chiu*. The instruction in isolation could be read to permit the jury to convict Wise of first degree murder simply based upon his participation in the target crime of shooting from a vehicle. (See *Chiu, supra*, 59 Cal.4th at pp. 160, 166-167.) There is also no doubt that Wise is correct when he argues that the instruction on the special circumstance allegation, a former version of CALJIC 8.80, could allow the jury to convict him as an aider and abettor without concluding he intended the victim be killed. The instruction has a latent ambiguity. "The jury was told that if it determined one of the defendants was the actual killer, intent to kill was not required, and that if it could not decide whether one of the defendants was the actual killer or an aider and abettor, it must find intent to kill in order to make a true finding. The jury, however, was not informed what was required in the event the jury determined that a particular defendant was an aider and abettor. [Fn. Omitted.] The omission of this third alternative made the instruction ambiguous." (*Letner, supra*, 50 Cal.4th 99 at p. 181.) But neither of these deficiencies in the instructions had any effect on Wise's verdict.

The jury here was presented with three theories of murder: Murder based on aiding and abetting an unlawful killing with malice aforethought; aiding and abetting a murder perpetrated by means of discharging a firearm from a motor vehicle with the intent to kill; and murder arising as a natural and probable consequence of aiding and abetting the crime of shooting from a vehicle. The jury was also instructed on second degree murder, voluntary manslaughter, and shooting from a moving vehicle.

The court then went on to review the relevant jury instructions, and the jury's questions relating to them.

> The instructions used in this case for aiding and abetting murder with malice aforethought required that to determine the murder was in the first degree, the jury had to conclude that "the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill." The instruction for murder by means of discharging a firearm from a motor vehicle specified the crime as first degree murder and required that "[t]he defendant specifically intended to kill a human being." But the instruction for murder as a natural and probable consequence of shooting from a motor vehicle neither required an intent to kill nor specified a degree of murder.
>
> During deliberations, the jury had a series of questions. The jury's first question asked the court to "clarify and define" the instruction on Principals—Liability for Natural and Probable Consequences. The court replied by asking the jury, "What do you mean by 'clarify and define the above mentioned cite of the law'?" As we said in our decision on appeal, "Quite reasonably, the trial court sought clarification from the jury but none was forthcoming." (*Wise I, supra*, A115148 at p. 5.)
>
> The jury's second question asked the

court to identify all the elements necessary for murder committed by discharging a firearm from a motor vehicle. The court directed the jury specifically to the instruction given for that offense, CALJIC 8.25.1. That instruction specifically focused on Wise's intent to commit murder. It said: "Murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle when the perpetrator specifically intended to inflict death, is murder of the first degree. The essential elements of drive by murder are: [¶] 1. The defendant committed the crime of murder; [¶] 2. The defendant perpetrated the murder by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle; and [¶] 3. The defendant specifically intended to kill a human being."

The jury next asked the court to specify the "elements that differentiate first degree and second degree murder." The court directed the jury to the series of instructions on homicide. The instruction on liability for the natural and probable consequences of a target crime was not among the instructions specified in the court's reply to this third question.

The jury next asked the court to reconvene to explain the charges against Wise because many jurors were "very confused and unclear about the charges." In response, on the morning of June 22, 2006, the court re-convened and read to the jury the counts alleged against Wise in the information. The court also provided the jury a summary of the charges against Wise along with the lesser included offenses for each count. Neither the charges against Wise from the information, nor the summary prepared by the court, describes possible murder liability due to the natural and probable consequence of shooting from a vehicle, nor as an aider and abettor.

The jury had two more questions before returning its verdict. Each of them focused on the verdict form for first degree murder. The first question asked if in order to find Wise guilty of murder, the jury also had to find true the special

> circumstance allegation and each of three arming allegations. The court replied, "The murder charge is independent and distinct from the clauses. You can find him guilty of first degree murder and find that none, some or all of the clauses are true or not." The jury's final question asked if it was necessary to agree unanimously on the special circumstance allegation and each of the firearm allegations in order to support the murder charge. The court answered, "No—again the murder charge stands alone, and the clauses stand alone. One is not dependent on the other. However, any decision on the murder charge and the clauses must be unanimous."
>
> The jury returned its verdict of first degree murder the afternoon of June 22 on the third day of deliberations.

The Court found that the natural-and-probable consequences theory did not survive a test of the evidence and the jury's questions to the court.

> Our review of the record leads us to conclude beyond a reasonable doubt that the jury found Wise guilty of first degree murder because he harbored a clear intent to kill as a result of deliberation and premeditation. While the jury initially asked a question about natural and probable consequences liability, its deliberation obviously moved beyond vicarious liability. The jury's third question asked the court to provide guidance on the distinction between first and second degree murder. The court's reply directed the jury to the series of instructions concerning homicide, but those instructions did not include liability based upon the natural and probable consequences of an underlying felony or Wise's potential liability as an aider and abettor. The specified instructions stated that in order to find Wise guilty of first degree murder, the jury had to "find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation." (Italics added.) If the jury concluded that Wise acted with malice aforethought, but the evidence did not prove deliberation and premeditation, the murder was of the second degree. ….
>
> In sum, on this record the notion that Wise shot at Spriggs's car without fully intending to kill or, at a minimum, assist Williams's endeavor to do so, stretches credulity beyond its breaking point. Moreover, the progression of questions from the jury and the responsive instructions from the court indicate the jurors moved their focus from natural and probable consequences of a lesser felony to a theory of liability for murder predicated on Wise's intent to kill. After examining the entire cause and considering all the relevant evidence and circumstances, we conclude the error in instructing the jury on the reasonable and probable consequences theory of vicarious liability for murder was harmless beyond a reasonable doubt.

Finally, the Court rejected Wise's attempt to get the *attempted* murder convictions abated based on alleged *Chiu* error. The Court found that *Chiu* does not apply to attempted murders.

> Finally, Wise argues that the guilty verdicts on counts two through four for attempted murder must be reversed because the in-

structions did not require the jury to conclude that a premeditated murder was the natural and probable consequence of the target crime. Because we have concluded that the record demonstrates no reasonable probability that Wise was convicted of first degree murder without a jury determination that he harbored an intent to kill, there is no merit to the argument that Wise was improperly found guilty of attempted murder on a natural and probable consequences theory. Moreover, the verdicts on their face recite that "defendant did unlawfully, and with malice aforethought, attempt to murder . . . a human being, . . . [¶] [and] [w]e, the jury, further find that the aforesaid attempted murder was . . . committed willfully, deliberately, and with premeditation."

Neither would Chiu compel a different result even if we had not concluded the error was harmless. In *People v. Favor* (2012) 54 Cal.4th 868, 880 (*Favor*) the court held: "Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation."

In discussing the policy reasons to require a finding of premeditation by each defendant guilty of first-degree murder under the natural and probable consequences doctrine, the *Chiu* court distinguished cases of attempted murder. (*Chiu, supra*, 59 Cal.4th at p. 163 [discussing *Favor*].) The determination of premeditation for an attempted murder involves a statutory penalty provision and does not create a greater degree of attempted murder. Moreover, a defendant guilty of premeditated attempted murder is facing a life sentence considerably less severe than either first or second degree murder and is eligible for parole consideration after serving seven years. (*Ibid*.)

After distinguishing cases of attempted murder, the *Chiu* court expressly held "that a defendant cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine." (*Chiu, supra*, 59 Cal.4th at p. 167.) *Chiu* does not address a verdict of vicarious liability for attempted murder. *Favor* remains the law, whether or not the policy reasons supporting its rule remain viable after *Chiu*. (But see, *People v. Mejia* (Sep. 18, 2019, G052967) ___ Cal.App.5th ___ (2019 WL 4466845).

CDC CANNOT FORCE INMATE TO TAKE X-RAY EXAM WITHOUT DOCTOR'S OK

In re Adam Lopez

CA4(1); No. D074786
August 27, 2019

This case involves an inmate who was written an RVR for refusing to take a low-dose x-ray exam after coming out of visiting, without a doctor's approval first.

Petitioner Adam R. Lopez is a prisoner confined to the Centinela State Prison in Imperial County. After visiting with a friend in the prison's visitation room, Lopez was selected for a low-dose full-body x-ray scan, designed to detect contraband that might have been passed to him during the visitation. He refused, allegedly due to health concerns. His refusal to be x-rayed resulted in a rule violation report, which he challenges in this

habeas petition.

The Attorney General's brief spills significant ink extolling the efficacy and safety of low-dose x-ray scans as a tool for prison officials trying to interdict the flow of drugs, cell phones, and other prohibited items. We have no reason to doubt these claims. But the issue in this case is not whether prisons should—or even whether they can—use low-dose x-ray equipment to search prisoners. The question is instead whether the procedures utilized in this case, to which Lopez objected, are authorized by and consistent with existing regulations adopted by the California Department of Corrections and Rehabilitation (CDCR). To the contrary, however, the perhaps-outdated-but-straightforward regulations from the CDCR's Operations Manual provide that x-ray examination for contraband "shall be utilized only upon approval of a medical doctor and under the same medical requirements and precautions as apply to x-ray examinations for other medical reasons."

There is no dispute here that there was no approval by any medical doctor before Lopez was ordered to submit to an x-ray examination. If the CDCR wants to use low-level x-rays more broadly than current regulations permit—which may be a perfectly appropriate protocol—it must first follow established procedures to revise the current regulations. Having failed to do so, it cannot punish Lopez for refusing to comply with an order that was expressly unauthorized by the CDCR's own regulations.

Adams first petitioned the superior court for habeas relief, but was denied based on that court's reliance on the Department Operations Manual (DOM).

Following a July 2017 visit with a friend in the Centinela Prison visitation room, Lopez was directed by a correctional officer to submit to a low-dose x-ray scan. He refused, allegedly due to health concerns. Instead he submitted to an unclothed body inspection. But his refusal to be x-rayed led to a rule violation report for disobeying an order from a correctional officer, resulting in (among other things) the loss of 30 days custody credits.

After exhausting his administrative remedies through the CDCR, Lopez filed a writ petition in the superior court challenging the finding of a rule violation. Relying on the CDCR's Operations Manual, he argued that the applicable regulations did not require him to submit to an x-ray scan. The court denied the petition, concluding that "the use of the Low Dose Full Body Scan is not a [sic] X-Ray Examination as the term is used in [the Operations Manual]." Lopez then filed a petition for writ of habeas corpus in this court.

CDC first tried to worm its way out of the habeas petition by arguing that because Lopez was a lifer, the loss of credits as to him was moot. The Court rejected that argument.

As a general rule, a prisoner's claim that he or she has been arbitrarily deprived of conduct credits is properly addressed on a petition for writ of habeas corpus. (*In re Rothwell* (2008) 164 Cal.App.4th 160, 165–166.) As a threshold matter here, however, the Attorney General suggests this court should recognize an exception to the general rule because Lopez is serving a life sentence and

has long since passed his minimum eligible parole date. Accordingly, it is asserted, "Lopez did not truly lose credits based on the rule violation" and so the violation will have "no effect on Lopez's life sentence or the timing of his next parole hearing." As a result, reasons the Attorney General, Lopez does not present a justiciable claim for habeas relief.

We decline the invitation to craft a complicating exception to the general rule. It is the CDCR that decides whether to revoke conduct credits or instead impose a different type or level of discipline. To accept the Attorney General's argument would be to assume that the CDCR has engaged in a wholly superfluous act by selecting a form of discipline that can and will have no conceivable effect on Lopez. As we think that is highly unlikely, we instead endorse the administratively simpler proposition that an allegedly arbitrary loss of conduct credits can be addressed by means of a habeas writ, leaving the CDCR the option of withdrawing the proposed discipline and thereby mooting the petition if it so chooses.

However, CDC took a dose of its own medicine, when the Court made a finding of law that current CDCR regulations do not authorize mandatory low-dose X-Ray scans without medical approval.

In 2017 pursuant to a local operational procedure, Centinela Prison began using the Adani Low Dose Full Body Scanner to examine inmates suspected of concealing contraband. This local procedure provided that "[i]nmates participating in the Institution's visiting program . . . shall be required to pass through the Adani Low Dose Full Body Scanner upon the conclusion of their visit."

The CDCR's Operations Manual, pertinent portions of which the CDCR has submitted as part of the record, addresses searches of various types in the custodial setting. Operations Manual section 52050.21 of chapter 5, article 19, deals specifically with the use of x-ray examinations to detect contraband. It provides: "X-ray examinations for the purpose of confirming the ingestion of contraband or concealment of contraband in body cavities shall be utilized only upon approval of a medical doctor and under the same medical requirements and precautions as apply to x-ray examinations for other medical reasons."

CDCR concedes it sought to employ a type of x-ray equipment to scan Lopez for contraband. It does not dispute the applicability of the Operations Manual or suggest that an individual prison facility can adopt procedures inconsistent with the manual. And it does not contend that any medical doctor approved the use of an x-ray scan on Lopez.

Instead it maintains that Operations Manual section 52050.21 "does not prohibit CDCR's use of body scan devices." In support of this assertion it argues that prison regulations incorporated in the Operations Manual are not designed to confer basic rights on inmates. The issue, however, is not whether Lopez has a "basic" right to refuse an x-ray, but whether CDCR can impose a disciplinary sanction for his refusal to obey an order that is facially inconsistent with its own regulation.

In suggesting that the order to Lopez was not inconsistent with Operations Manual section 52050.21, CDCR does not contest that Lopez was directed to submit to an x-ray examination. Indeed, the documents submitted by CDCR consistently refer to the device as an "x-ray scanner" or "x-ray screening system." And describing the alleged rule violation, the correctional officer explained, "I was . . . operating the Adani Low Dose Full Body Scanner X-Ray for the purpose of detecting contraband." Instead, CDCR represents that the pertinent portions of the manual were drafted more than 30 years ago, "decades before low-dose body-scan technology ever existed." So, the argument goes, when the drafters of Op-

erations Manual section 52050.21 used the term "x-ray," they didn't mean this kind of x-ray.

But CDCR's Operations Manual section 52050.21 is not limited to a particular type of x-ray, and nothing in the existing language would support such a distinction in the proper context of interpreting the words of the regulation. If technology has advanced to a point where different kinds of x-rays require different rules, the solution is to amend the rules to acknowledge the differences, not to leave outdated rules in place. CDCR recognizes the proper approach when it cites to federal prison regulations that now "distinguish between medical x-rays and full-body x-ray scans." The problem here is that California prison regulations, drafted decades ago, do not make such a distinction.

Within broad limits, CDCR is the master of its own regulations and operational procedures. We do not doubt the importance of the need to use advanced technology to maintain the safety and security of our penal institutions. It is well within CDCR's purview to ensure that the language of its regulations keeps pace with that technology. Until it does, prison officials cannot punish inmates for refusing to comply with orders not authorized by applicable CDCR regulations.

Accordingly, the Court of Appeal granted Lopez' writ.

(NOTE: The Court granted petitioner's unopposed request for judicial notice of a change in Title 15, section 3287 proposed by CDC in September 2017 (three months after the incident underlying Lopez' petition) that would have added a subdivision (b)(6), providing that "[i]nmates shall be required to submit to contraband and/or metal detection devices . . . including, but not limited to, . . . low dose full body x-ray scanners . . . ." *This new regulation has not yet been adopted.*)

THE TABLE IS FINALLY FULL

Since our last issue Governor Newsom has completed the new compliment of commissioners to the parole board, appointing Deborah San Juan as the 17th and last commissioner. LSA/CLN has been among those individuals and groups urging the Governor to look to other fields of expertise for commissioners, rather than always mining either law enforcement sources or the Deputy Commissioner ranks.

With Commissioner San Juan, the Governor seems to be trying something new. Sort of. Appointed to the Board of Parole Hearings on September 26, 2019, San Juan is a Licensed Clinical Social Worker, most recently (from 2015) at the Sutter Solano Medical Center. From 1987 to 2013, she served in several positions at the California Department of Corrections and Rehabilitation, which included parole district administrator, parole agent II, supervising casework specialist and youth correctional counselor. San Juan earned a Master of Social Welfare degree from the University of California, Berkeley and a bachelor's degree from Cornell University. Combining both experience in the social and mental health field and some custody work, perhaps San Juan is the sort of hybrid needed on the board.

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	SHARRIEFF	TAIRA	THORNTON
Suitability Hrg Total	32	30	23	37	35	28	39	27	17	32	25	33	29	21	32	13
Grants	7	5	6	15	7	3	10	6	5	3	5	12	12	2	10	1
Denials	19	17	12	17	19	19	22	12	8	25	13	18	14	9	20	7
Stipulations	6	4	2	2	2	3	6	6	3	2	6	2	3	10	2	2
Waivers	0	2	1	1	0	0	0	0	0	0	1	0	0	0	0	0
Postponements	0	2	2	2	6	3	0	3	0	2	0	1	0	0	0	2
Continuances	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	1
Tie Vote	0	0	0	0	0	0	1	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)	25	21	14	19	21	22	28	18	11	27	19	20	17	19	22	9
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	17	11	14	15	8	11	16	10	7	14	11	11	13	12	19	4
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	7	8	0	3	9	9	8	8	4	12	8	8	4	7	3	3
7 years	1	2	0	1	3	1	3	0	0	1	0	0	0	0	0	2
10 years	0	0	0	0	1	1	0	0	0	0	0	1	0	0	0	0
15 years	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	2	1	1	0	0	0	0	0	0	1	0	0	0	0	0
1 year	0	0	1	1	0	0	0	0	0	0	1	0	0	0	0	0
2 years	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	0	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	2	2	2	6	3	0	3	0	2	0	1	0	0	0	2
Within State Control	0	0	2	1	0	0	0	0	0	0	0	0	0	0	0	0
Exigent Circumstance	0	1	0	1	6	3	0	3	0	2	0	0	0	0	0	2
Prisoner Postpone	0	1	0	0	0	0	0	0	0	0	0	1	0	0	0	0

Board's Information Technology System

Commissioners Summary
All Institutions
September 01, 2019 to September 30, 2019

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	GUTIERREZ	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	SHARRIEFF	TAIRA	THORNTON
Suitability Hrg Total	**17**	**23**	**20**	**16**	**23**	**29**	**24**	**0**	**28**	**14**	**19**	**21**	**18**	**20**	**32**	**5**
Grants	1	6	6	4	4	10	5	0	16	5	6	7	7	2	7	0
Denials	10	10	14	9	13	14	13	0	9	7	10	12	7	9	22	3
Stipulations	2	7	0	3	3	2	6	0	3	1	2	1	4	7	1	0
Waivers	0	0	0	0	1	0	0	0	0	0	1	0	0	1	2	0
Postponements	0	0	0	0	0	3	0	0	0	0	0	0	0	1	0	2
Continuances	3	0	0	0	2	0	0	0	0	1	0	1	0	0	0	0
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	1	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)	**12**	**17**	**14**	**12**	**16**	**16**	**19**	**0**	**12**	**8**	**12**	**13**	**11**	**16**	**23**	**3**
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	7	13	9	8	10	14	10	0	5	6	7	7	7	13	17	2
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	3	4	5	2	5	1	6	0	5	2	3	3	3	2	6	0
7 years	2	0	0	2	1	0	3	0	2	0	2	2	1	1	0	1
10 years	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	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)	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**1**	**2**	**0**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	1	2	0
2 years	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0
3 years	0	0	0	0	0	0	0	0	0	0	1	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**	**0**	**0**	**0**	**0**	**3**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**2**
Within State Control	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Exigent Circumstance	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	1
Prisoner Postpone	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	1

BOARD BUSINESS

Business at the August and September BPH Executive Meetings took on a slightly ad hoc atmosphere, due to both meetings being held off site from the Board's usually digs, in K Street. Because the board membership was recently expanded to a full 17 members, the dais in the old meeting room was a tight squeeze for all commissioners and the Executive Director.

To allow a more practical, roomy setting, to say nothing of the optics of everyone crammed together (shades of the old over-crowding days in prisons), the board meeting room was renovated, causing the relocation of meetings in August and September. While both locations were workable (in August, at CDCR HQ and in September at a private venue in West Sacramento), neither was really adequate for the board's business and clearly everyone, commissioners and public were glad to know they could return to the usual location in October.

Despite the temporary problems, the board did act on several items. In August Executive Director Jennifer Shaffer reported that as the result of the McGhee decision CDCR will be promulgating emergency regulations to allow determinately sentenced non-violent inmates to be considered under Prop. 57. These new regs, and a separate set of regs currently pending in the Office of Administrative Law, will be written (in the first instance) or amended (in current regs) to remove public safety screening criteria for indeterminately sentenced nonviolent inmates. Those DSL inmates who were previously screened out of Prop. 57 consideration under the public safety criteria will be reevaluated by the end of December.

At the September meeting Shaffer reported that initial reports on the results of parole hearings in the first 3 months after the implementation of Structured Decision Making indicate the process is helping where it was most intended, in the length of hearings. Shaffer reported the average length of hearings was decreased by 33 minutes (that's the average---some hearings were significantly shortened), thus allowing for a 21% increase in the number of hearings held. Also, a positive result, from the viewpoint of the board was a reported 7% decrease in postponements (often the result of running out of time to hold the hearings scheduled for any given day). And the impact on the grant rate, at least in the first 3 months, was a negligible .04% increase.

Coming months will see a change agendas of the board meetings, as, due to an expected increase in the number of pardon and commutation petitions on referral from the Governor's office, reports and presentations, heretofore presented on Monday's session of the 2-day meeting will be presented only every other month. Tuesdays have historically been the day for en banc hearings.

However, the anticipated increase in commutation and pardon en banc referrals and considerations has led the BPH administration to set aside Mondays on odd-numbered months for those considerations, as frequently there are several individuals who wish to speak to the board in support or opposition to the individuals proposed clemency. So to keep the board meetings at a reasonable length and still leave the commissioners adequate time to deliberate on these and other en banc hearings, commutation and pardon applications will be considered on Mondays, with the remaining en banc hearings (referrals of grants from the Governor, Chief Counsel or other panel members, as well as tie votes) will be held during the Tuesday sessions.

EN BANC RESULTS

Another 2 months of en banc hearings, including referrals from the Governor's office for pardons and commutation of sentences, are solidifying a pattern. In August, 4 former prisoners sought recommendation for the board supporting their request to the Governor for pardon, and in September, two more were considered. In what has become a not unusual event, all pardon applications were supported by the board, leaving the Governor to have the final word on clearing the records of **Gabriel Garcia, Brenda**

Ibanez, Richard Steffen and **Shannon Thomas-Bland** (in August) as well as **Tri Minh Thai** and **Monsuru Tijani** (in August).

Commutation petitions in August from **Kristopher Blehm** and **Fanon Figgers** were both approved, as was the September request for commutation from **Jose Ledesma**. Most commutation applications were opposed by the DA offices from the relevant counties.

On a less positive note, a trio of inmates were originally calendared for 1170 (e), compassionate release consideration, two in August and one in September. Of the three only **Jimmy Lee** was approved for recall of sentence recommendation. He was also the only one of the three to survive long enough to reach the board, and his release was opposed by the Mendocino County DA. Both **Vincent Ortiz** and **Richard Larson** died before consideration.

Referrals to en banc from BPH Chief Counsel in those two months constituted a mixed bag. In August **Carl Anderson's** grant of parole was vacated, based on alleged institutional misconduct. The action was supported by the Mendocino DA's office, despite forthcoming information that the alleged misconduct had not been perpetrated by Anderson. Institutional misconduct was also the reason for the board's decision to vacate the grant to **Marcus Naggles**.

Also, in August Anthony Gonzalez, granted parole in January, saw that grant referred for a rescission hearing, based on information apparently involving his possession of a cell phone. His release was supported by his family, but opposed by the Santa Clara DA.

In September **Anselmo Garcia**, referred to en banc by the BPH Chief Counsel for a consideration of an error of law. Despite a low risk rating on his CRA and no RVRs in his incarceration and the support of his attorney at the en banc Garcia's grant of parole was vacated and a new hearing scheduled. The error of law appeared by center around timely notification of the VNOK, who opposed the prisoner's grant of parole.

The Governor, in August, referred 3 grants for en banc consideration and another 4 in September. The grants for **Kimberly Fuller** and **Daniel Slayter** were affirmed, however, the grant for **Jesus Vasquez** was referred for rescission consideration. In September grants for **Haji Lanada, James Morrison**, and **Andrew Vance** were affirmed, despite the Governor's concerns. But the grant for **William Abe** was referred for rescission hearing.

Angel Aponte, the recipient of a tie vote at his August hearing, was granted parole, but only after a second vote; the first vote, to find Aponte unsuitable failed to convince a majority of commissioners. A second vote, to grant, passed.

1170 (d) UPDATE

Many prisoners are unsure if review under the 1170 (d) process, which allows exceptionally performing prisoners to be referred back to their sentencing court for possible resentencing is a possible avenue for sentencing relief. According to a report recently by the classification services unit, while its possible, chances aren't 'robust.'

Although the process has been on the books for some time, until recently only a handful of referrals were made an even fewer successful in having their sentences amended. But recent legislative and attitude changes have brought new life to the program, which is now investigating referrals by CDCR personnel under the program.

To qualify and inmate, and 'exceptional' inmate, must be referred to the process by institutional staff—specifically to a CC1 to complete a case study. And the initial referral must come from a CDCR email address; your self-help sponsor can't refer you from his/her home computer. If the individual is indeed found to be exceptional, the case is referred to the institution warden to approve or deny, and, if ap-

proved, send to CDCR HQ for additional action. Requirements?

“if an inmate’s behavior, while incarcerated, demonstrates sustained compliance with departmental regulations, rules and policies as well as a documents evidence of prolonged participation in self-help, vocational and educational programs relative to their commitment offense.” Once approved by the Sec. of Corrections, the individual’s case is referred to the sentencing court in the county of commitment.

It’s also possible for this process to be applied to gun enhancement sentences. While in the past courts were required to impose firearm enhancement, new legislation now empowers the court to exercise discretion to strike or dismiss this enhancement.

So, the process is underway. But. It’s slow. Excruciatingly slow. And then there’s the courts. Some are receptive to the process, some simply dismissive. And there is no requirement that any court act on an 1179 (d) referral.

Since the first of the year, some 126 case referrals have been completed, with 102 referred to the courts by the Sec. of Corrections. Of those, courts have acted on only 45, and only 21 have been resentenced. And the gun enhancements have even less stellar results.

Although 165 cases have been referred up the chain at CDCR, and 135 have been approved by the Secretary, courts have acted on 62, with enhancements removed in 14 cases. Again, courts are not required to even respond to the referrals, much less act or grant them.

CDCR also reports there are roughly 2 years of cases already referred and waiting processing. So, while prisoners shouldn’t disregard the 1170 (d) process, neither should they pin all their hopes on this snail’s pace avenue.

WHAT HAPPENS WHEN A SENTENCE IS RECALLED?

Since January 1 California’s lifers and even some LWOP inmates have new chances to find relief in the courts, even years after they were sentenced for murder and other felonies. Legislative bills SB 1437, AB 2942 and the 1170(d) review process all provide avenues for long-serving prisoners to go back to court to argue the possibility of being resentenced for their participation in crimes, sometimes as long as 30 years ago.

All three have various requirements and paths to the court room, and some are still under assault by ‘law ‘n’ order’ groups and will probably ultimately face challenges in the state Supreme Court. But for now, these new laws are pushing forward, courts are being deluged with petitions, attorneys are busy with petitioners and even CDCR is getting in the act, recommending some inmates for reconsideration and new sentencing by courts.

All of which means there are plenty of gears in motion right now, and some are already producing results. If you’re called out to court for consideration of recall of sentence—what then? If the judge says yes, are you cut free from CDCR, never to see the inside of a dorm or cell again? And are you free of further supervision, via a parole tail?

To coin a phrase, or two; Well, maybe. It’s complicated.

After speaking with some of the legal beagles (the real ones, at CDCR) that’s about the only firm statement we can make. Each case will be judged individually and if that isn’t enough to make it complicated, each sentencing court may consider evidence, even the constitutionality of the various resentencing laws, differently. So, once again, there are no guarantees. But. These processes represent one of the largest efforts for retroactive relief in decades and in many cases they are working.

It helps to understand than any change in a sentence must be done by a court and cannot simply be decreed by CDCR. Therein lies the ‘out to court’ process, as prisoners are entitled to be at the court

proceedings where these changes are made, although he or she can waive that appearance. At any resentencing proceedings there will be legal representation, sometimes an attorney of the prisoner's choosing, sometimes the public defender in the relevant county. It's important to note, a prisoner cannot be resentenced without legal representation at the resentencing hearing.

Once that court hearing is held and the presiding judge renders a decision, based both on the new laws and the relevant evidence in the particular case, that judge will decide if the inmate 1) qualifies under whatever new process brings him/her to court and 2) what the new (if any) sentence will be. That decision can be made and announced at that hearing or the court may elect to take the evidence under submission, to consider and hand down the decision at a later (though not much later) time.

In a best case scenario, when the new laws work, and a long-term or even LWOP inmate sees their sentence reduced (and the court consideration cannot result in a longer sentence, though it does not have to result in a sentence reduction, if the judge finds the evidence for reduction is not compelling), what then?

Well, the doors don't automatically fly open. Usually the prisoner is returned to custody while the inevitable paperwork gets done. The courts will issue and abstract of judgment or minute order, officially modifying the sentence. That document goes to CDCR case records, the denizens of which will then calculate the inmate's time based on the new sentence and giving full credit for all time incarcerated.

Usually these abstracts are sent to the individual prisons, where staff there makes the initial calculations, then forward results and supporting court documents to case records in Sacramento for review and implementation. The inmate and attorney are then notified, and the inmates' profile in CDCR's website Inmate Locator is updated to reflect the new information and parole and/or release date.

And here's where it gets really dicey and case-by-case. If the court resentences to a something-to-life term, then a parole hearing date will be scheduled, based on the new sentence and time already served by the inmate. And the parole hearing process will proceed as normal (or what passes for normal), but at an accelerated rate over what was in motion before.

If the court hands down a determinate term, perhaps modifying a life with possibility to parole to a determinate number of years or setting a new determinate term length, and the inmate has already served that number of years, or even longer, then the prisoner is eligible for immediate release. Which isn't to say the doors fly open that day, but the release process and timeline (usually 7-10 days) starts. If the new sentence is set at longer than the prisoner has currently served, he or she will still be in custody, but with a renewed release date and probably a new outlook on life.

For those that have served well past their new sentence length, the possibilities are even more problematic. Depending on the crime, the parole length usually associated with that conviction, the new sentence calculation and the inclination of the sentencing court, a long-time but newly resentenced prisoner may find himself released with no or less parole time than anticipated, as the excess time served can be applied to the inmate's parole tail.

Can be applied, but it appears that isn't required as part of resentencing. And the statues for some crimes at some periods in the past require a certain number of years on parole, regardless of any other intervening factors. It's all too complex to make blanket statements, but suffice to say, your experience may vary.

Reports say inmates up for resentencing and their attorneys may even be able to engage in a better-late-than-never plea bargain interchange with DAs, with the erstwhile prisoner agreeing to plead to a new charge, one with a much shorter sentence than the individual is currently serving, and the DA agreeing not waive further supervision under parole after that new time requirement is met. Again, the

new sentence cannot be more severe than the original sentence. Some prisoners could even see the specter of state parole evaporate, if the nature of their instant offense is downgraded from a felony to an offense that would now require only probation at the county level.

So many possibilities.

But. And there's always a but. If the courts reduce any inmate's sentence to the point that he/she is released in a relatively swift manner (weeks or at most months after the resentencing hearing), that leaves long-serving inmates with a very short window to arrange support and plans for post-release. And for those who previously had a parole tail ahead of them and had made plans for transitional housing and reentry facilities, if that parole tail is dropped, those plans are moot. There will be no assistance to find housing, reentry programs, state funding for transitional housing, basically no support.

That's a bit of a scary situation. It's theoretically possible for a prisoner, 25 or more years into an LWOP sentence, to see that sentence wiped out at resentencing, released within a few weeks' time… and having never expected to be released have no plans on where to go, what to do, how to cope. A never-before-seen debit card with $200 gate money electronically applied to it and a cheery wave from the gate cop is all you get.

Oh, you have to get from Susanville to (what used to be) home San Diego and you haven't been on a bus or in a car for 27 years? Goodbye and good luck. Trying to find a pay phone to call anyone? Those are few and far between these days.

Like most in the prison reform movement, we're ecstatic about the changes in resentencing laws and looking forward to the positive changes those new laws bring. But perhaps it's the dark humor side of us---sometimes that's all that gets us through the day—that foresees some unintended consequences to be dealt with. But we're not alone. Several forward-looking individuals at CDCR and DAPO are also concerned and scrambling to find solutions.

Stay tuned, we'll let you know how things shake out.

VETS FAQ

(Taken from the VA Healthcare System)

Can A Veteran Receive Retired Military Pay While In Prison?

Generally, yes. Being convicted of a crime almost never jeopardizes a federal pension – the rare exception to this rule are charges relating to criminal disloyalty to the United States: espionage, treason, sabotage, etc.

Can A Veteran Receive VA Benefits While In Prison?

VA can pay certain benefits to veterans who are incarcerated in a Federal, state or local penal institution. However, the amount they can pay depends on the type of benefit and reason for incarceration.

How Will Your Imprisonment Affect The Payment Of: VA Disability Compensation

Your monthly payment will be reduced beginning with the 61st day of your imprisonment for a felony. If your disability payment before you went to prison was based on a rating of 20% disabled or higher your new payment will be based on the 10% disability rating. If you were receiving disability at the 10% disability rate your new payment will be cut in half.

Note: If you are released from incarceration - participated in a work release or half-way house program, paroled, and completed sentence, your compensation payments will not be reduced.

VA Disability Pension

If you are imprisoned in a Federal, State or local penal institution as the result of conviction of a felony or misdemeanor, such pension payment will be discontinued effective on the 61st day of imprisonment following conviction.

Education Benefits

If you are incarcerated for other than a felony, you can receive full monthly benefits, if otherwise entitled. Convicted felons residing in halfway houses (also known as "residential re-entry centers"), or participating in work-release programs also can receive full monthly benefits.

If you are incarcerated for a felony conviction, you can be paid only the costs of tuition, fees, and necessary books, equipment, and supplies. VA cannot make payments for tuition, fees, books, equipment, or supplies if another Federal State or local program pays these costs in full.

If another government program pays only a part of the cost of tuition, fees, books, equipment, or supplies, VA can authorize the incarcerated claimant payment for the remaining part of the costs.

Will Your Benefits Be Automatically Resumed When You Get Out Of Prison?

Your award for compensation or pension benefits shall be resumed the date of release from incarceration if the Department of Veterans Affairs receives notice of release within 1 year from following release. Depending on the type of disability, VA may schedule you for a medical examination to see if your disability has improved. You will need to visit or call your local VA regional office for assistance.

Notes from:

GUIDEBOOK FOR CALIFORNIA INCARCERATED VETERANS

(Taken from the VA Healthcare System)

Almost all who served the U.S. Armed Forces have resources available when released from custody. Knowledge about eligibility and access are frequently misunderstood. Often Veterans hear rumors and conclude they are ineligible based on what they heard. Learn the resources that will be available to you at your release.

VA Re-entry Specialist

Each region of the U.S. has an assigned Re-entry Specialist. They are charged with offering assistance to individuals with a history of U.S. Military service and now preparing for release from state and federal custody. They can assist you in determining your eligibility for resources and assist your access to VA Healthcare. They can assist you with VA Enrollment, restarting your disability benefits, securing your DD-214, provide you with resource points of contact and linkages to the services for which you are eligible.

An individual meeting with the Re-entry Specialist occurs as a VA eligible Veteran nears their release date. VA works in collaboration with the state and federal correctional facilities to identify individuals with a history of U.S. Military Service preparing for release from custody.

When time is available the Re-entry Specialist will also arrange a group meeting for any interested Veterans wishing to learn about any recent Veteran specific updates or have general questions. Please take advantage of the group meetings when they are offered as this opportunity is not available at every visit. Due to their ongoing travel in the field VA Re-entry.

Specialists are unable to address needs by mail.

Steps To Enroll With VA

VA Enrollment opens doors to Veteran healthcare, supports and resources. Learning your eligibility for VA is accomplished by completing VA Form 10-10EZ. To acquire VA Application by mail write to the VA located closest to your location of release.

Indicate on the envelope VA enrollment. Another avenue to enroll with VA is with the VA Re-entry Specialist when they visit your location. Visits are scheduled to occur at least yearly. If you are within 6 months of your release date

and have not met with the Re-entry Specialist consider enrolling by mail to ensure VA resources will be available when you arrive to the community.

VA Application for Health Benefits, VA Form 10-10 EZ

You are encouraged to complete the 10-10EZ if any of the following applies to you:

- You don't know if you are eligible for VA Healthcare
- You are enrolled with VA but need to update the financial information requested each year
- You were previously ineligible for VA due to income (income limits have adjusted)
- You were told you weren't eligible for VA but don't understand why

Eligibility is based on many factors including when you served, length of active duty, and military discharge type and only VA can provide you with your eligibility and VA Enrollment.

Completing VA Form 10-10EZ prior to release ensures problems with enrollment can be sorted out and VA Healthcare and services can start immediately upon release. VA is often able to verify your military service through information provided by the Dept. of Defense. If unable to verify military service VA may require a copy of your DD-214. This document can be requested by mail and you can either mail it to VA or present it when you are released to VA.

Take care to fully complete VA Form 10-10EZ. If not properly and fully completed VA is unable to finalize your enrollment registration. All blanks on the application must be answered. Unless your eligibility is based on a Service Connected Disability, Purple Heart award or Prisoner of War status, questions asking for financial information must be completed; if your answer is zero please indicate 0 in the spaces provided. N/A or a line cannot be accepted when asking for a dollar figure. Questions not answered could prevent processing of the application and delay your eligibility for VA services. Income information is for the previous calendar year. Most Veterans while incarcerated will meet financial requirements for VA Health services. The results of your VA application for Healthcare Services will be sent to the location you indicated was your permanent address on the 10-10EZ. If you have an extra copy of your DD-214 (Military Discharge Papers and Separation Documents) submitting it with your VA application will assure your military service is verified.

Mailing Address for Application for Health Benefits, VA Form 10 -10EZ

You are welcome to mail your VA Form 10-10EZ Application for Health Benefits directly to your VA if you wish. Below are the mailing addresses for each VA Enrollment office.

Mather VA Medical Center (Sacramento area)

Attn: Business Office (BDMS/ SAC)

10535 Hospital Way

Mather, CA 95655

San Francisco VA Medical Center

4150 Clement Street

San Francisco, CA 94121-1545

Attn: Member Services (136A1)

VA Palo Alto Health Care System

3801 Miranda Ave.

Palo Alto, CA 94304

ATTN: 136A Admissions & Eligibility

VA Central California Healthcare System

2615 E. Clinton Ave

Fresno, CA 93706

Attn: 570/136

VA Loma Linda HCS (136/161-ELG)

11201 Benton Street

Loma Linda, CA 92357

VA Long Beach Healthcare System

Patient Business Office - 00C

5901 East 7th St.

Long Beach, CA 90822

Greater Los Angeles Healthcare System

11301 Wilshire Blvd (04E)

Los Angeles, California, 90073

VA San Diego Healthcare System

Health Benefits and Enrollment (136E)

3350 La Jolla Village Drive

San Diego CA 9216

Report of Separation / D-214

Report of Separation from your branch of military service is an important document to have in your possession once released. Employment opportunities and community resources are offered to individuals with proof of their military service. This document can also be needed to confirm your eligibility for VA Healthcare. You can write to the National Personnel Records Center, 1 Archives Drive, St. Louis, MO 63138 to request your DD-214. If you do not have the form SF – 180 request a copy of this form and return to the location indicated for your branch of service. Many Veterans have requested their DD-214 while incarcerated and received it within a month of their request.

Preparing for Parole Board Hearing

Access to Veteran resources and enrollment with VA offers many valuable resources in preparing your plan for release. VA is currently with a national commitment to end Veteran homelessness. This message has helped to raise awareness of VA's resources and ability to help Veterans in need of housing and the tools to address your establishing yourself in the community. Please be advised few resources are able to make an open ended commitment as availability of a resource is dependent on the number of Veterans in need of the resource at that time.

Correction of Military Record and Upgrade of Discharge

If results of your VA application indicate you are ineligible for VA Healthcare your letter will explain the reason. If ineligibility was based on your military discharge type it's possible to pursue an upgrade through your branch of military service. If separated from the military within the past fifteen years use DD Form 293, Application for the Review of Discharge or Dismissal from the Armed Forces of the United States. This document can be requested by writing to your branch of military service.

VA Housing

If you met with the Re-entry Specialist and received instructions for housing proceed with those arrangements. If starting fresh, each VA has a Health Care for Homeless Veteran program ready to help you. They have knowledge about housing choices near your location. Depending on circumstances housing may be available the day you arrive. If the VA Medical Center is a distance from you call the toll free phone number found in Section V or the National Call Center for Homeless Veterans hotline available 24/7 at 1-877-424-3838. There you will find a VA counselor available to help you.

VA offers a variety of housing supported programs for Veterans designed to support your individual needs. A counselor will speak with you about your goals to best determine the resources available to best meet your needs.

Veterans

are

Appreciated

Thank

You

TRENDS IN THE GOVERNOR'S OFFICE

With every new Governor it takes awhile to get a 'read' on how things will go in all areas, but particularly concerning prisoners and parole grants. During former Governor Brown's many years we were able to discern several trends or 'triggers' inherent in his grant reviews and actions.

When current Governor Gavin Newsom assumed the office and responsibilities for parole reviews, the slate was wiped clean and we started again. Of course, we'll use the yearly report from the Governor's office to the Legislature early next year that will recap all his parole grant reversals, but in the meantime, inquiring minds, like ours, want to know the trends. Hence our request to all the lifers who have had their grant either reversed or sent to en banc by this governor to share with us the letters announcing those actions, so we can data-mine those individual documents.

Now, some 10 months into his term, we're starting to get enough of those letters to identify some early trends. And they aren't really surprising. We're still concerned with the raw numbers of those referrals and reversals, but the wave has subsided somewhat from the first couple of months of the year.

Here's what we've identified so far. Newsom still seems a bit uneasy with lifer parole grants and is still reversing several, most frequently for the usual and rather nebulous notation of 'lack of insight' (for more on this see article elsewhere in this issue). But we've also noticed that those prisoners who participated in gang activity early in their term, either continuing activity they were involved in on the streets or entering into prison gang participation, are more likely to be reversed that those who eschewed any such activity right away.

Also showing up more often in reversals and especially in en banc referrals to the BPH commissioners are those cases involving a sex offense, either in the instant case or in the past. Again, not a surprise and one of Brown's triggers, but now also identifiable as one of Newsom's factors.

In the realm of pardons (for those who have been released from prison), Newsom's priority is clear: he's concentnrating on helping those former prisoners with a felony on their records that puts them at risk for deportation. In the past several months the board has heard pleas from several long-time residents of both the country and the state who are faced with deportation back to a country that in many cases they left as infants.

That doesn't mean that all those facing deportation will automatically be pardoned, but if those individuals can convince the Governor and the BPH that they've truly rehabilitated and have become productive citizens, they may be able to find relief and be able to continue their lives here. The same process does not hold for those still incarcerated and facing deportation—in those cases the Governor has no power to intervene.

If you're in the position of being reversed or sent to en banc, please remember to send us those letters—your contribution to our data and understanding is greatly appreciated

WE EXPECT BETTER

Every month, at the 2-day Executive Meeting of the BPH, where the board's 'business' is done, the public is given 5 minutes per person to speak on various issues other than specific parole hearings. In the past 10 years LSA has missed only 2 days of these meetings. And we've never failed to comment, bringing our concerns, those of prisoners and their families, to the Board's attention. And while we don't often report these comments in our newsletters, the subject of this month's remarks is, we think, of considerable interest to the prisoner population. These remarks were delivered Oct. 14, 2019.

The inmate population is pretty responsive when we put out a call for information, comment or input. And so, it's been with our request to send us copies of the Governor's letters of reversal of parole or referral to en banc.

We're data-mining these letters for trends, triggers and tidbits of information to get a better understanding of the Governor's outlook, and, frankly, insight. Already we see a couple of concerning trends.

We've identified a couple of triggers, factors of the crime or post-conviction issues that seem to catch the Governor's eye and concern. These actual factors, events and provable issues that can be documents, discussed and addressed, we understand.

But it's those gray and nebulous areas—allegations, accusations, estimations that seem to be the most unsettling, especially that old nemesis, insight. Once we get a letter reversing or sending to en banc primarily on issues of 'insufficient,' 'inadequate' or 'shallow' insight, we start looking to the transcript. And we've been doing that a lot lately.

We certainly recognize and acknowledge it's totally in the Governor's prevue to reverse or refer to his own reasons, fuzzy though they may be. We have been and will continue to discuss those issues with his office. We know the Governor in some ways has fewer constraints, or at least different legal standards to meet than the board faces.

Which brings us to the heart of the problem, at least where en bancs and rescissions are concerned… the board, having already decided the prisoner had sufficient insight, adequate, deep, whatever, insight, falls in line with the Governor's questioning and decides, well, maybe that insight isn't deep enough after all.

Maybe s/he could develop some better, sharper, clearer, greater, find, more exquisite insight—given a few more years in prison.

Just as a point of interest, insight isn't static—it's never complete or finished, but continues to develop, deepen even, as we grow more experienced, hopefully wiser and certainly older. All of us, including prisoners, continue to develop all sorts of insight as time rolls on. And the courts have similarly held that there is no final measure of insight, nothing that says X number more years in prison will bring you to Insight 2.0 and that denying parole based primarily on lack of 'adequate' insight is clearly problematic.

The same holds true for instances where a prisoner was charged with various counts in connection with the life crime or other crimes, but some of those counts were dropped, dismissed or the individual was not convicted of several specifics. We have several instances where the Governor has used these lesser, even denied crimes, in referring for your [the board] consideration, opining that the inmate hasn't taken sufficient responsibility—even for those allegations not part of the conviction, sentencing or punishment by incarceration. And while we don't know what the discussions during your [board's] en banc deliberations entail, we can see what goes on during a rescission hearing.

And what we see is sometimes those hoary old claims not only surfacing but being used to vacate a grant and start the process anew. To what end? The overriding question remains the same: is this individual an unreasonable danger to society?

The courts have held, and the board has complied, deciding that if an inmate serving perhaps multiple sentences, even life sentences, is suitable for parole on one conviction s/he is suitable on all convictions [absent Thompson terms]. Why should this be different for crimes for which that person was not convicted or maintains innocence? Suitable is suitable.

To a certain extent the Governor is still working on getting the training wheels off. And while the Board has several new commissioners, there a far more experienced commissioners currently sitting.

You are the experts—not perfect, but clearly more experienced than the Governor. We expect you, as a body, to lead the way, to have the courage of your decisions. We expect more of you. We expect better of you.

Expecting better

BETTER REPRESENTATION ON THE HORIZON?

Well, we hope so. After contemplating the results of our latest attorney survey and reporting those to the BPH (see additional article on survey elsewhere in this issue), we'd say it's high time some changes were made. And, to give credit where due, the current administration at BPH is set on making that happen.

At the recent BPH Executive Meeting BPH Executive Director Jennifer Shaffer outlined a new program for state appointed attorney selection, responsibilities and accountability practices, as well as an adjustment in the fees paid to those attorneys. Although changes had been contemplated for some time, it appears it was the IN Re: Poole case that was the catalyst in finalizing the plans.

The goals of the new program are:

- Strengthening the attorney client relationship and interview process
- Modifying timeframes
- And increasing compensation (pay) to the attorneys

Although the qualifications to be on the state-appointed list are still pretty minimal; maintain a current and active license to practice law in California and maintain malpractice insurance, clear a TB test each year and be able to pass security screening to enter prisons, there are some new caveats, including having recent experience in representing prisoners at parole hearings or having observed at least 3 hearings.

There are also several changes to the specifics of the current system. In the past attorneys could be on up to 3 panels (panels are created around clusters of prisons), were required to interview their client 45 days prior to hearing and attend training by the BPH. For this, they were paid a whopping $400 per client.

Under the new program attorneys will serve on only 1 panel (meaning they will only represent clients at one prison cluster), will be required to meet at least twice before the hearing with clients, as well as attend both an in-person training and on-line training by the BPH.

Once an attorney is 'hired' by the BPH he/she will be required to meet with their client within 30 days, with a second meeting roughly 14 days prior to the hearing. And the fee? Now up to $750 per client.

And there is a real selection process in the works also, not just apply and be lucky at the lottery selection used in past years. This time around potential counselors will actually be interviewed face-to-face by BPH staffers (just who hasn't been specified, but we hope it's safe to assume it will be members of the legal staff at BPH). And the training?

Well, LSA has been to several training sessions in the past and all have leaned heavily on the legal aspects of state work and parole issues. Needed, of course, but hardly complete training for parole hearings.

Now, the BPH will be working with the Parole and Justice Education Project at University of Southern California's Post Conviction Justice Project (PJEP). PJEP will provide legal training, review and reporting and create what has been termed "reasonable expectations of representation." The NGO will also provide updates on legal and administrative issues, as they occur, and provide victim outreach, hopefully to provide better understanding for that cohort as well.

The program, the attorneys and performance will be monitored by PJEP through periodic observations of hearings, reviews of transcripts and…wait for it….surveys. Wonder how they came up with that idea? Interviews for the new state list will begin in November, with the program kicking in hearing in January. And we'll be watching, too.

LIFE SUPPORT ALLIANCE YEAR-TO-DATE

The following report was made available to LSA's members and supporters as an update on our activities.

As we head into the third quarter of the year, we can look back on a very busy and productive several months. It often seems like we're 'in prison' every weekend, and indeed we often are.

Since January we've visited 9 different prisons, many of them more than once, to present programs and workshops to inmates. In all, we've spent about 16 weekends since January at one prison or another, interacting with several hundred men, as we usually visit more than one yard at each prison,

It's made for some very long days, but very rewarding as we bring prisoners ready and eager to change their lives information on how to identify the causes of their past actions (finding the 'causative factors' of their criminogenic thinking) through our 2-part program Connecting the Dots, followed by helping those who are ready write real, meaningful and impactful letters of apology and amends for their actions to their victims and victims' families, via The Amends Project.

The Amends Project has been in operation for just over 3 years and in that time resulting in over 400 certificates of completion awarded for successful letters. And a recent study revealed that 28% of those inmates who were successful in completing The Amends Project have now paroled. We know we have contributed to their success.

In late 2018, at the request of California Medical Facility prison in Vacaville, we created and began a 12-week program called **RISE** (Rehabilitate, Implement, Succeed and Excel). We are now in the third cycle of RISE, meeting every Friday at CMF with a class of 30 men, going through a 57-page workbook offering a curriculum on changing beliefs and attitudes, making amends and working through the challenges of reentry into society. Perhaps our success there is best shown in the 4 inmates we've trained as facilitators in RISE, who are now running the Friday classes, mentoring to their peers and practicing the pro-social lifestyle they will continue to lead when they are paroled.

Not only has it been thrilling watching these men, two of whom are sentenced to Life Without Parole (LWOP), blossom into leaders when given the opportunity, we know that when they are transferred to other prisons they can take what they've learned with RISE and seed that program in other institutions. One of these men is a senior citizen, who works in the hospice at CMF and was himself recently diagnosed with a recurrence of brain cancer, but he is still there every Friday, to share his wisdom and support with 'the youngsters.'

Since January we've been to the following institutions, often multiple times: Folsom State Prison (Folsom); Correctional Health Care Facility (Stockton); Kern Valley State Prison (Delano); Salinas Valley State Prison (Soledad); Valley State Prison (Chowchilla); California State Prison, Los Angeles County (Lancaster); High Desert State Prison (Susanville); Mule Creek State Prison (Ione); California Medical Facility (Vacaville) San Quentin (San Quentin) and Avenal. Before the year is over, we've been invited to and are hope to visit Chuckawalla State Prison (Blythe) and California Institute for Women (Chino), plus return visits to Folsom, CMF, San Quentin, High Desert, Avenal and CHCF.

Other weekends have been and will be spent in day-long seminars for the family and friends of lifers, in our Lifer Family Seminars, with the promise of "Hope*Help*Home," as we help families understand the prison and parole process, as well as how and what real help they can provide their prisoner. So far in 2019 we've done 5 such seminars, in Sacramento, Yorba Linda (Orange County), San Francisco, San Diego and Long Beach (LA County). And we've booked Fresno before year's end. Plans are underway to secure venues and schedule next year's dates and locations already.

We've been fortunate enough to be able to meet personally with many government and corrections officials, from members of Governor Newsom's legal team, to Secretary of Corrections Ralph Diaz; Parole Board Executive Director Jennifer Shaffer to (former) Parole Operations Director Jerry Powers and other DAPO and CDCR officials. These meetings have been fruitful exchanges of information and ideas and provide the officials with a 'boots on the ground' perspective they would not otherwise have.

We've also had discussions with staff from several legislative offices, with ideas for next session bills explored and we're exploring partnerships with other advocacy groups. And every month we're at the 2-day Parole Board Executive Business meeting, where we often sit in on training sessions for parole commissioners.

We're also constant participants in the quarterly Stakeholders Meetings at the Parole Board, where all sides of the corrections process meet with officials to hear new policy and procedural changes, implementation of new laws and offer input. Other days are spent in prisons again, observing actual parole hearings, where parole commissioners interview and evaluate lifers hoping to parole to freedom, a grueling and very thorough process.

We've also been able to increase our volunteer staff, send David to a week-long grant writing class and attend the picnic in June of some 300+ paroled lifers, reuniting for a celebration of freedom. We've expanded and up-graded our website, to be more inter-active and user friendly (including blog postings) and maintain a lively profile on social media, both through our Life Support Alliance Facebook page and through Lifers' Success Association on Facebook, where paroled lifers keep in contact, share job opportunities and provide support for each other. Membership in Lifer's Success Association has grown to over 600 in the last year.

Our free newsletter, *Lifer-Line*, continues to expand, now sent to nearly 2,000 email addresses, where the recipients print the newsletter and mail it to inmates in most of the 35 prisons in California. Many on our email list are legislative offices and officials with the department of corrections. Our 40-person volunteer mail tree system also provides the free newsletter to over 400 prisoners who don't have family or friends on the outside to provide that service to them. *California Lifer Newsletter*, our larger, more legally oriented newsletter, also continues to grow, with some prison law libraries subscribing to provide this resource to inmates. Correspondence never seems to slow, with about 250 letters from inmates received and answered each month, and countless emails and phone calls from friends and family members of prisoners.

Thanks to our great and faithful supporters we've also been able to upgrade some of our office equipment, purchasing a new copier (to accommodate printing the workbooks and information packets) and two 'new' computers, donated via a new volunteer from the Bay Area. The copier is super-efficient and the computers, 'gently used' previous years' models, are certainly an upgrade from our old, third-hand units, all of which makes our office days much more productive.

We're now offering 3 programs to prisoners, *The Amends Project* (apology and amends letters), *Connecting the Dots* (identifying causative factors and developing insight) and *RISE* (Rehabilitate, Implement, Succeed and Excel), a blend of the above 2 programs, with additions covering parole hearing process and reentry challenges. RISE is a 13-week program, Connecting the Dots is a 2-part presentation, and The Amends Project constitutes a presentation followed by continued correspondence.

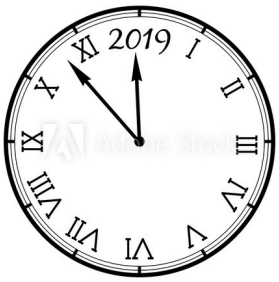
We've 'test-driven' *Understanding your CRA* and will soon be offering that workshop as well, concentrating on understanding the Comprehensive Risk Assessment, from the FAD to the finished product. And…there are various other ideas rolling around in the brain trust here, all aimed at helping lifers and others headed to parole hearings to understand and succeed at the process.

If you'd like to participate in any of the workshops

and programs offered by LSA, have your self-help sponsor or CRM contact us to ask about programs and scheduling.

Here's how you can reach us:

Life Support Alliance
PO Box 277
Rancho Cordova, Ca. 95741
(916) 402-3750
staff@lifesupportalliance.org



SURVEY SAYS…..

For the last several months LSA has been requesting, via both our newsletters, Lifer-Line and California Lifer Newsletter, inmates to weigh in on the performance of their attorneys at parole hearings. We've got quite a stack of responses now, enough to come to some conclusions. We reported those conclusions to the Board of Parole Hearings at their September Executive Board meeting. The comments we offered are below. BPH is currently re-evaluating the attorney selection process and we offered the results of our survey in the hope that the information would be of help as the new process moves forward.

REMARKS PRESENTED MONDAY, SEPT. 16, 2019 AT THE BOARD OF PAROLE HEARINGS EXECUTIVE BOARD MEETING DURING PUBLIC COMMENT

"Although responses to our survey on the performance of inmate attorneys continue to be received, we've accumulated enough replies now to present some preliminary results. Certainly, we don't represent this as a conclusive survey, an empirical study of great depth or precise scientific analysis, but it is interesting and definitely shows some trends and areas of concern.

It bears noting that we do not believe any particular attorney can achieve a grant of suitability for an unprepared inmate, no matter how good the attorney, nor can an inept attorney sink the chances of a well-prepared inmate, so from our point of view, simply the number of grants is not the measure of a well-performing attorney. However, attorneys can assist their client both in preparation and presentation. To us, that is the essence of attorney performance.

It isn't therefore surprising that about 73% of those responding to the survey were denied parole at their hearing, about 1% of the outcomes were other, stips, waivers or continuances, and the remaining 26% were grants. Only a handful of the attorneys discussed in the surveys were private hires, the overwhelming majority state appointed. Responses came from roughly 20 different prisons, all security levels.

There some comments genuinely praising the attorneys, even from inmates who were denied….and there were other comments. A few appointed attorneys stood out, in both directions.

Attorney preparedness was the big issue, with more than half the inmates reporting they didn't feel the attorney was prepared to represent them at the hearing, in large part, it appears, because of the lack of time spent with the client and/or his file. Prisoners report attorneys often meet with them only once prior to the day of the hearing, sometimes only a few days before the hearing, rarely more than the requisite 45 days. And those meetings are usually less than 20 minutes, often as briefly as 10 minutes.

Many attorneys appear to come unprepared, without requisite forms and documents sent to them by prisoners. Inmates often report they have trouble getting these documents back from attorneys as well. Attorneys often commented to their clients they didn't have time to fully prepare, as they were over-burdened with cases, or were unfamiliar with some of the finer points of parole hearings, including discussing the CRA, YOPH factors, one even telling the inmate, "I dropped the ball."

About a third of the time inmates reported their attorneys, always appointed, recommended they stipulate to unsuitability; this is a marked increase from previous survey result on this question. It's also troubling to us this appears to be a recent upswing in this trend, with several inmates reporting their attorney advised this tactic after meeting alone with commissioners. That's a practice we'd like more information on.

As to those stand out attorneys, one state appointed got 80% thumbs up rating, spending an average of 90 minutes with her clients. And another, who shall be nameless unless we're specifically asked, recommend to 75% of her clients that they stipulate and, when questioned by her client about this recommendation, reportedly leaned close to tell him, "F you. Don't ever question my integrity or performance"—said performance was reportedly witnessed by a CO, who, we hope, followed through on his stated intention to make the presiding commissioner aware of the interaction.

And yet another attorney who told his client to just say what the panel wanted to hear, regardless of whether or not it was the truth. We believe the phrase for that behavior is suborning perjury.

To be fair, of those private attorneys for whom we received surveys, several were singled out as not informed, prepared or effective—and without exception those attorneys were individuals we've not run across before and were new to parole hearings. It appears these mismatches were the result of inmates and families simply hiring a friendly attorney, much like seeing a podiatrist when they needed a pediatrician."

FOLLOW UP: BPH has announced guidelines for the new appointed attorney process as well as an increase in the fee paid to attorneys. These new fees, however, will be coupled with a new training regimen and greater expectations for attorney performance. The process for accountability, however, has not yet been revealed. More information is expected in mid-October, at the commissioner training sessions. As new details are revealed, we'll report.

CRA SURVEY

As with our previous surveys on attorneys, we are asking lifers to contribute to our understanding and information of the CRA interview process and results. Please fill in all categories; details are critical. As we continue to advocate for lifers and improvement of the CRA process your participation is our best resource. Mail to LSA, PO BOX 277, Rancho Cordova, Ca. 95741. Please note "CRA Survey" on the envelope. We would also appreciate a copy or your CRA.

Date of Interview_____ Length of interview_____

Name of clinician_____ Risk rating: Low Moderate High

What was your crime?_____ How long incarcerated_____

How many parole hearings have you had?_____ Date of last hearing-----_____---

Was CRA cited in denial or grant? Y N Were you aware ducat was for CRA? Y N

Have you had a previous CRA? Y N If so, what was the rating? Low Moderate High

Are you YOPH? Y N How long before hearing was CRA received? _____

If you were convicted of a sex offense, were you a minor time of crime? Y N

Were there factual errors in the report? Y N Have you appealed? Y N

Any comments you wish to make regarding interview, clinician, results?

ASH
Artists Serving Humanity

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

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

For more information please contact us at

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

Law Office of Jeff Champlin

P.O. Box 863 Coalinga, Ca. 93210

831.392.6810 email: jchamplinlaw@gmail.com

- Represented several inmates at life parole suitability hearings
- Conducted thousands of hearings individually as a Deputy Commissioner and as a member of a two-person panel for life parole suitability hearings
- Conducted numerous consultation hearings informing and advising and advising inmates on BPH criteria utilized at parole suitability hearings
- Youth offender and elderly parole hearings
- Writs challenging BPH denials
- Non-violent parole process memos-drafting memo to submit to BPH advocating early release. Also preparing and submitting memo/packet for consideration by BPH as part of non-violent parole process review.

"His years as a Deputy Commissioner really paid off. I was really prepared." Bobby M. CTF

"Mr. Champlin went above and beyond what any other attorney ever did for me. He made time to cover all aspects of my hearing. With his guidance and hard work, I was granted and released on Dec. 21, after 28 years." James L. CTF

CLN

California Lifer Newsletter

P.O. Box 277
Rancho Cordova, CA 95741

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