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.

STATUS OF *IN RE ROY BUTLER*

In re Roy Thinnes Butler

CA Supreme Court No. S237014
___Cal.App.4th___; CA1(2); A139411
May 15, 2015

On 1/4/18, the Court conducted oral argument. The case is now "submitted." Although Court of Appeal decisions must be handed down within 90 days, there is no time limit for Supreme Court decisions. We just wait.

For the record, the question on review is: Should the Board of Parole Hearings be relieved of its obligations arising from a 2013 settlement to continue calculating base terms for life prisoners and to promulgate regulations for doing so in light of the 2016 statutory reforms to the parole suitability and release date scheme for life prisoners, which now mandate release on parole upon a finding of parole suitability? (*In re Butler* (July 27, 2016, A139411) [nonpub. order])

ON PETITION FOR WRIT OF HABEAS CORPUS, *CHIU* ERROR REQUIRES REVERSAL UNLESS THE REVIEWING COURT FINDS *BEYOND A REASONABLE DOUBT* THAT THE JURY ACTUALLY RELIED ON A LEGALLY VALID THEORY IN CONVICTING DEFENDANT OF FIRST DEGREE MURDER

In re Hector Martinez

CA Supreme Ct.; S226596
December 4, 2017

For our LWOP readers: This is an important CA Supreme Court ruling expanding the rights of LWOP-sentenced murderers to gain resentencing if their original convictions were *possibly* obtained using the now admittedly wrong "natural and probable consequences" legal theory.

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Hector Martinez was convicted of first degree murder after the jury was instructed on both direct aiding and abetting and natural and probable consequence theories, based on his participation in a killing perpetrated by his codefendant. His conviction was affirmed on direct appeal.

Subsequently, Martinez filed a habeas petition after the CA Supreme Court held in *People v. Chiu* (2014) 59 Cal.4th 155, that a natural and probable consequence theory cannot be a basis for a first degree murder conviction because the connection between the perpetrator's asserted premeditation and the codefendant's culpability is too much of a stretch.

On direct appeal of his conviction, the Court of Appeal had held that there was *Chiu* error but nonetheless affirmed Martinez' conviction, determining there was sufficient evidence to support it. But upon his habeas petition to the CA Supreme Court, the Court of Appeal judgment was reversed.

As we learned in *Chiu*, an erroneous jury instruction on what constitutes aiding and abetting a first degree murder deprives a defendant of his Sixth Amendment right to jury trial because that right includes entitlement to a properly instructed jury. On direct appeal of such a conviction, *Chiu* error requires reversal unless the reviewing court concludes *beyond a reasonable doubt* that the jury based its verdict on the legally valid theory that the defendant directly aided and abetted the premeditated murder.

In its discussion here, the Supreme Court distinguished cases that have required habeas petitioners to meet a more demanding standard of prejudice on collateral review, concluding that a habeas petitioner presenting a *Chiu* claim is in the same position as a defendant raising a *Chiu* claim on direct appeal, and the same standard of prejudice should apply. The Supreme Court found that in Martinez's case, the presumption of prejudice was not rebutted by a

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PUBLISHER'S NOTE

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

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

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

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

EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility

www.lifesupportalliance.org

LET'S NOT DIVIDE AND BE CONQUERED

Around our small, tight and overflowing office, many of the communications we field everyday are from family members of lifers and other prisoners, all with questions on any sort of issues. Which we're happy to answer, as best we can.

But. We stop in our tracks when family, even prisoners themselves begin their conversation by making the point that their crime isn't really that bad, and certainly not as bad as those who are in for (pick one): murder, sex crimes, violence, repeat offender. It's the same old, "I know my lifer's OK, but I'm not sure about yours." This sort of 'us against us' also surfaces frequently in family member's social media posts, usually in the form of complaints about 'the really bad people' being offered some sort of perceived privilege or advantage not available to, or that will infringe on or delay other inmate cohorts, those 'not so bad,' from enjoying the privilege.

Most recently this has become tiresomely frequent in the discussion around the new regulations for family visiting. As covered elsewhere in this issue, those new regs, frankly sloppily written and far from easily understandable, nonetheless provide inclusion in family visiting for countless lifers and LWOPs who have, for a couple of decades, been denied the restorative and rehabilitative impact of family support and unity.

Shrill voices (on social media and telephone conversations) yammering about why some prisoners 'who really killed someone' should not get family visits, be considered for good time credits, be housed in the same quarters, maybe even breathe. It's not fair, I'm better, so I should get more consideration, I want what's coming to me. Some even opining that lifers and those with violent crimes should never come home, especially if my little boy/girl must do 20 years for 'just' a robbery, or 'just a drunk driving accident' or 'just shooting' a gun.

To which we have a pretty simple and direct answer. Shut up.

Sure, the inclusion of lifers and LWOPs in family visits may mean those who have been enjoying these visits all along may get that opportunity a bit less frequently. But no one said life would always be easy or fair. Stop trying to milk the system for all you can, at the expense of others. We're all, lifers, DSLs, LWOPs, in this together, for the most part.

We don't necessarily care what the crime was, we're more interested in who that prisoner is now. We don't compare crimes, rate culpability on any scale or pass judgment class of prisoners. And we don't appreciate being drawn into those conversations, trying to explain the process to those who are only interested in how any given situation affects them/theirs. Our efforts should be concentrated on making the entire system more responsive, transparent and helpful to the rehabilitation of all inmates, as well as promoting the unity and healing of families and communities.

And we can't do that if we're fighting each other. It calls to mind the cartoon of long ago, Pogo, the everyman possum, who, hearing about strangers invading his swamp home, galvanized an army of fellow critters to go fight the invaders. Who were similar critters, from the other side of the swamp.

Prompting the astute little possum to muse, "We has met the enemy, and they is us."

Stop being the enemy and be just us. All of us, working to come home, reintegrate into society and live life.

Cont. from pg. 2

showing the jury based its verdict on a valid ground. Accordingly, it vacated his conviction of first degree murder.

Briefly summarized, Martinez was convicted of the first degree murder of Guillermo Esparza, assault of Esparza with a semi-automatic weapon, and assault of Jimmy Parker with force likely to cause great bodily. In a general verdict, the jury found true allegations that each crime was committed for the benefit of, at the direction of, and in association with a criminal street gang; that Martinez was vicariously armed with a firearm in the commission of the murder; that the codefendants were principals in the commission of the murder; and that a principal used a firearm and proximately caused great bodily injury and death. Martinez was sentenced to six years plus 50-life.

> The court instructed the jury with CALCRIM Nos. 400 and 401 regarding aiding and abetting, and with CALCRIM No. 403 regarding the natural and probable consequences doctrine. CALCRIM No. 403 provides in part: "To prove that a defendant is guilty of murder, the People must prove that: [¶] 1. The defendant is guilty of assault and/or battery; [¶] 2. During the commission of assault and/or battery, a coparticipant in that assault and/or battery committed the crime of murder; [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault and/or battery."

While *Chiu* was still pending in the CA Supreme Court, Martinez appealed his conviction. He was denied relief on his claim of improper reliance upon a "natural and probable consequence" liability. Following issuance of *Chiu*, the CA Supreme Court granted review in Martinez' case to determine the proper standard of prejudice needed to sustain such a conviction. It held that the trial court may sustain such a conviction only if it finds *by clear and convincing evidence* that the jury in fact convicted on a legally valid theory – which, by *Chiu*, cannot be the now-invalid "natural and probable consequence" theory. Stated another way, only if the trial record demonstrates unequivocally that the jury did not rely on the improper theory of guilt, may the underlying first degree murder conviction be sustained on appeal.

The Court first recounted the heart of the *Chiu* decision.

> In *Chiu*, we said that "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the . . . public policy concern of deterrence. [¶] Accordingly, we hold that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably,

and foreseeably result in a murder under the natural and probable consequences doctrine. We further hold that where the direct perpetrator is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing a defendant to be convicted of that greater offense under the natural and probable consequences doctrine." (*Chiu, supra*, 59 Cal.4th at p. 166.)

We went on to say: "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128–1129; *People v. Green* (1980) 27 Cal.3d 1, 69–71.) Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Chiu, supra*, 59 Cal.4th at p. 167.)

Next, the Court summarized the Attorney General's argument that habeas corpus was not the proper legal vehicle to gain relief here.

> The Attorney General contends that a different standard of prejudice should apply with respect to *Chiu* error when a defendant seeks to attack his conviction not by direct appeal, as in *Chiu*, but collaterally through a petition for writ of habeas corpus. The Attorney General relies on a line of our earlier cases in which we said: "Habeas corpus is available in cases where the court has

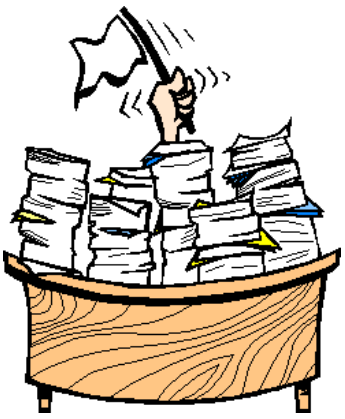
acted in excess of its jurisdiction. [Citations.] For purposes of this writ as well as prohibition or certiorari, the term 'jurisdiction' is not limited to its fundamental meaning, and in such proceedings judicial acts may be restrained or annulled if determined to be in excess of the court's powers as defined by constitutional provision, statute, or rules developed by courts. [Citations.] In accordance with these principles a defendant is entitled to habeas corpus *if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct."* (*In re Zerbe* (1964) 60 Cal.2d 666, 667–668 (*Zerbe*), italics added; see *People v. Mutch* (1971) 4 Cal.3d 389, 396 (*Mutch*) [applying same standard]; *In re Earley* (1975) 14 Cal.3d 122, 125 (*Earley*) [same].)

The Court then dealt with the old case law holding that habeas corpus is an extraordinary remedy, and should not apply here – the argument of the State.

As we have emphasized, this presumption of regularity stems from the recognition that " 'habeas corpus is an extraordinary remedy "and that the availability of the writ properly must be tempered by the necessity of giving due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments." ' " (*In re Reno* (2012) 55 Cal.4th 428, 451.) The interest in finality has led this court to develop various procedural bars to collateral attacks on the judgment. The bar most relevant to this case is the so-called *Waltreus* rule: A writ of habeas corpus will not issue for a claim that was raised and rejected on appeal. (*Reno*, at p. 476; see *In re Waltreus* (1965) 62 Cal.2d 218, 225 (*Waltreus*).) There are exceptions to this rule. One such exception applies "when there has been a change in the law affecting the petitioner." (*In re Harris* (1993) 5 Cal.4th 813, 841 (*Harris*).) To trigger this exception, the change in the law must have retroactive effect. We have said that a change in the criminal law will be given retroactive effect when a rule is substantive rather than procedural (i.e., it alters the range of conduct or the class of persons that the law punishes, or it modifies the elements of the offense) or when a judicial decision undertakes to vindicate the original meaning of the statute. (*In re Lopez* (2016) 246 Cal.App.4th 350, 357–359.) Here, as the Attorney General concedes, *Chiu* is retroactive. (See *id*. at p. 359.)

This latter concession of retroactivity became a lynchpin for the Court's analysis ruling in Martinez's favor.

The application of procedural bars and limitations on the retroactivity of changes in the criminal law serves to protect the finality of judgments on collateral review. The Attorney General argues that even when a petitioner has surmounted these hurdles, as is the case here, the imposition of an additional hurdle — a heightened standard of prejudice that a habeas corpus petitioner must meet — is necessary to safeguard finality. But the case law applying the heightened standard does not support this position. In many of the cases cited by the Attorney General,



there was no change in the law, and the court was simply asked to review a constitutional claim rejected on appeal. (See *Bell, supra*, 19 Cal.2d at p. 495; *In re Klor* (1966) 64 Cal.2d 816, 817–818, 822; *Zerbe, supra*, 60 Cal.2d at p. 667.) As noted, the courts in these cases assigned habeas corpus petitioners "the burden of proving that their convictions were based not upon the constitutional but upon the unconstitutional provisions of the ordinance" (*Bell,* at p. 501) or the burden of showing that "there is no material dispute as to the facts relating to his conviction and . . . the statute under which he was convicted did not prohibit his conduct" (*Zerbe*, at p. 668). These standards generally correspond to two other exceptions to the *Waltreus* rule. First, "where the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process . . . an opportunity for a third chance at judicial review (trial, appeal, postappeal habeas corpus) [is] justified." (*Harris, supra*, 5 Cal.4th at p. 834.) Second, review of a previously litigated claim is justified where the trial court acted in excess of jurisdiction and " 'there [was] no material dispute as to the facts.' " (*Id*. at p. 840, citing *Zerbe*, at p. 668.)

Other cases cited by the Attorney General did involve a change of law. In *Mutch, supra*, 4 Cal.3d 389, petitioner sought relief from a kidnapping conviction in connection with a robbery pursuant to section 209 after this court clarified in *People v. Daniels* (1969) 71 Cal.2d 1119, 1139, that such a conviction could not be based on "movements of the victim [that] are merely incidental to the commission of the robbery . . . ." (*Mutch*, at p. 394; see *ibid*. [*Daniels* overruled the contrary rule on kidnapping set forth in *People v. Chessman* (1951) 38 Cal.2d 168, 192].) In *Mutch*, the court first determined that *Daniels*'s construction of section 209 should be given retroactive effect because *Daniels* had not redefined the crime of kidnapping but simply declared what the Legislature's intent had been in enacting the 1951 amendment to section 209. (*Mutch*, at p. 394.) The court then recapitulated the *Zerbe* standard that a habeas corpus petitioner is entitled to relief only " 'if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct.' " (*Id*. at p. 396.) In *Mutch*, the petitioner was able to meet that burden. (*Id*. at p. 399.) In *Earley*, a case in which the same issue was raised and the same standard of prejudice articulated, the petitioner was not able to meet the burden, and we denied relief. (*Earley, supra*, 14 Cal.3d at pp. 125, 132–133.)

Unlike the present case, the petitioners in *Mutch* and *Earley* claimed they were actually innocent of kidnapping under section 209 because the statute did not proscribe their conduct. (*Mutch, supra*, 4 Cal.3d at p. 395 ["the issue is 'whether the acts of [defendant], on the record in this case, constitute the kind of conduct proscribed by section 209' "]; *Earley, supra*, 14 Cal.3d at p. 125 [petitioner seeks relief "on the ground that his conduct did not violate section 209" as construed in *Daniels*].) In evaluating this claim, the court applied the rule established in *Zerbe* that "a defendant is entitled to habeas corpus if there

is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct." (*Zerbe, supra*, 60 Cal.2d at p. 668.) The granting of relief in such circumstances would in effect be a holding that there was insufficient evidence to convict the petitioner of kidnapping when section 209 was properly construed, and it would therefore bar retrial on the kidnapping charge. (See *People v. Eroshevich* (2014) 60 Cal.4th 583, 591.)

The Court then distinguished Martinez's case from this prior jurisprudence.

Martinez's claim is different. He contends the jury was improperly instructed on what constitutes aiding and abetting a first degree murder. Such an erroneous instruction deprives a defendant of the right to a jury trial under the Sixth Amendment to the United States Constitution; that right implies a right to a jury properly instructed in the relevant law. (See *Neder v. United States* (1999) 527 U.S. 1, 12.) A reversal of his conviction on that basis does not bar retrial. (See *People v. Collins* (1992) 10 Cal.App.4th 690, 698.) A petitioner in these circumstances does not carry the burden of demonstrating that his conviction was based on insufficient evidence. Rather, once he has shown that the jury was instructed on correct and incorrect theories of liability, the presumption is that the error affected the judgment: " 'Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law — whether, for example, the action . . . fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.' " (*People v Guiton* (1993) 4 Cal.4th 1116, 1125, quoting *Griffin v. United States* (1991) 502 U.S. 46, 59.) Of course, the presumption of error can be rebutted by a showing "beyond a reasonable doubt that the jury based its verdict on the legally valid theory." (*Chiu, supra*, 59 Cal.4th at p. 167.)

Thus, both the nature and the procedural posture of the claim presented in this case distinguishes it from the claims considered in the cases on which the Attorney General relies. Because the claim was presented after a change in the law given retroactive effect, it is not barred by *Waltreus* or any other procedural rule designed to safeguard the finality of judgments against collateral attack. And the claim does not allege actual innocence or insufficiency of the evidence; it alleges a deprivation of the right to have a jury properly decide a defendant's culpability. Under these circumstances, it is inappropriate to place on a habeas corpus petitioner the burden of proving that the jury relied on the legally incorrect theory in order to vindicate his constitutional right to a jury trial. We hold that such a habeas corpus petitioner is in the same position as a defendant raising this type of error on direct appeal, and the same rule should apply: The "first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aid-

ed and abetted the premeditated murder." (*Chiu, supra*, 59 Cal.4th at p. 167.) We express no view on whether the same rule would apply to an individual asserting the same claim in a habeas corpus petition when there has been no intervening change in the law (cf. *Bell, supra*, 19 Cal.2d at pp. 500–501) or whether such a claim would fit into some other exception to the *Waltreus* rule.

The Court then tackled the controlling question of the requisite standard of proof in determining *Chiu* error. It held that while it was *possible* that the jury convicted on the right theory, it was not plain from the record that this was their *only* way to the verdict. This, then, established the "beyond a reasonable doubt" standard that is so important in *Martinez* today.

In this case, the Court of Appeal correctly recited the *Chiu* prejudice standard. But the court did not go on to inquire whether it could conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that Martinez directly aided and abetted the premeditated murder. Rather, it concluded there was "sufficient evidence" that Martinez acted as a direct aider and abettor: "Martinez was aware the codefendant carried a gun in the vehicle because he was aware the codefendant had it earlier, and after the girlfriend had told the codefendant to remove it from her house, Martinez accompanied the codefendant who had promised to dispose of it. Further, the gang expert's testimony provided the jury with a basis to find that Martinez likely was emboldened to challenge Parker and Esparza—by asking them where they were from—precisely because Martinez knew the codefendant was carrying a gun and Martinez relied on his codefendant's support as he attacked the others. Further, Martinez's use of violence would enhance the respect he received within the gang and for the gang among rival gangs. Lastly, Martinez encouraged and facilitated the first degree murder by attacking Parker, thus simultaneously preventing Parker from defending Esparza, and freeing up the codefendant to focus exclusively on Esparza, which the codefendant did by shooting and killing him."

The Court of Appeal's analysis, while showing that the jury could reasonably have found Martinez guilty as a direct aider and abettor of the murder of Esparza, does not show beyond a reasonable doubt that the jury actually relied on that theory. We conclude that the record does not permit us to rule out a reasonable possibility that the jury relied on the invalid natural and probable consequences theory in convicting Martinez of first degree murder.

Accordingly, the Court granted Martinez' petition, with directions.

In sum, we conclude that the Attorney General has not shown beyond a reasonable doubt that the jury relied on a legally valid theory in convicting Martinez of first degree murder.

Because the *Chiu* error here was prejudicial, we reverse the judgment of the Court of Appeal and remand with directions to enter an order granting

Martinez habeas corpus relief and vacating his conviction for first degree murder. If the prosecution elects not to retry Martinez, the trial court shall enter judgment reflecting a conviction of second degree murder and sentence him accordingly.

LWOP SENTENCE ABATED AFTER POST-*BANKS* HABEAS CHALLENGE

In re Raymond Ramirez

CA2(2); B282005
December 19, 2017

Petitioner Raymond Ramirez had filed a petition for a writ of habeas corpus seeking to vacate his sentence of life without the possibility of parole (LWOP) because, in his view, the evidence in support of the "special circumstances finding" presented to the jury was insufficient to meet the evidentiary minimum required by Penal Code section 190.2, subdivision (d), as construed by *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*). The Court of Appeal agreed, abated his LWOP sentence, and remanded for resentencing.

In 2003, petitioner Raymond Salvador Ramirez was convicted of first degree murder with a felony-murder special circumstance finding (Pen. Code, § 190.2, subds. (a)(17), (d)), and sentenced to state prison for life without the possibility of parole (LWOP). Recently, in *People v. Banks* (2015) 61 Cal.4th 788 (Banks) and *People v. Clark* (2016) 63 Cal.4th 522 (Clark), our Supreme Court explained the requirements for a special circumstance finding as to an aider and abettor of felony-murder. In April 2017, petitioner filed a petition for writ of habeas corpus, claiming the special circumstance finding against him is not supportable under Banks and Clark. We agree and accordingly grant the petition.

In addition to first degree murder, petitioner was convicted of two counts of second degree robbery, assault with a deadly weapon, and conspiracy to commit robbery. The jury found true the special circumstance allegation that petitioner committed the murder in the commission of robbery (§ 190.2, subd. (a)(17)). Petitioner was sentenced to LWOP for the special circumstance murder, with sentence stayed on the remaining counts. This division affirmed the conviction, rejecting petitioner's argument that the evidence was insufficient to support the finding under section 190.2, subdivision (d) that he was a major participant in the robbery who acted with reckless indifference to human life.

But in the meanwhile, the law changed. New evidentiary standards for the special circumstance finding were announced in *Banks* and *Clark*. The question is whether Ramirez's participation in the murder factually qualified him for an LWOP sentence under PC § 190.2(d). The State argued that Ramirez's claims were procedurally barred, which the Court rejected.

The People advance several arguments for why we should not reach petitioner's claim that the special circumstance finding is improper.

First, the People contend that the *Waltreus* rule (*In re Waltreus* (1965) 62 Cal.2d 218, 225)—which generally bars the assertion in a habeas petition of a legal claim previously raised and rejected on direct appeal—prevents petitioner from making a sufficiency of the evidence argument here since he already did so on appeal. We disagree. *In re Miller* (2017) 14 Cal.App.5th 960 (*Miller*), a recent opinion involving the application of *Banks* and *Clark*, rejected this same procedural bar contention. As *Miller* noted, *Banks* and *Clark* clarified the actual meaning of section 190.2, a statute that had previously been misapplied. (*Miller,* at pp. 978-979.) Habeas corpus is an appropriate remedy when a court has acted "in excess of its jurisdiction by imposing a punishment for conduct not prohibited by the relevant penal statute." (*Id*. at p. 979, citing *People v. Mutch* (1971) 4 Cal.3d 389, 394-396.) Review here is appropriate since petitioner asserts his conduct was not proscribed as a section 190.2 special circumstance.

Second, the People argue that petitioner's sufficiency of the evidence claim is barred by the *Lindley* rule (*In re Lindley* (1947) 29 Cal.2d 709), another contention rejected in *Miller, supra*, 14 Cal.App.5th at pp. 979-980. The *Lindley* rule generally prohibits consideration on habeas corpus of "routine claims that the evidence presented at trial was insufficient." (*In re Reno* (2012) 55 Cal.4th 428, 505.) A claim that a prior special circumstance finding cannot be supported in light of *Banks* and *Clark* is not the sort of "'routine'" claim addressed by the *Lindley* rule. (*Miller*, at pp. 979-980.)

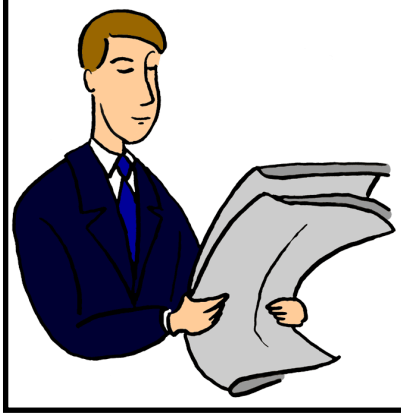
Third, the People assert that petitioner should have brought his claim earlier and improperly failed to raise it in prior habeas petitions. These arguments also fail. The bar against "piecemeal"

presentation of claims applies to "newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment." (*In re Clark* (1993) 5 Cal.4th 750, 767-768.) This is the first petition filed by petitioner in this Court following *Banks*. Moreover, petitioner did not unduly delay in filing this petition. *Banks* was decided on July 9, 2015, and *Clark* was decided on June 27, 2016. Given that *Banks* and *Clark* represented a significant change compared to how section 190.2 was previously implemented, petitioner raised the issue in a reasonably prompt manner.

The Court first reviewed the recent changes in the interpretation of the law that now, retrospectively, Govern Ramirez' case.

Section 190.2, subdivision (d) provides for a sentence of death or LWOP for a defendant convicted of first degree murder who is not the actual killer but is found to have acted with "reckless indifference to human life and as a major participant" in an enumerated felony. Robbery is a qualifying felony under section 190.2. (§ 190.2, subd. (a)(17)(A).)

The California Supreme Court, in Banks, considered for the first time the scope of section 190.2, subdivision (d)'s requirements that an aider and abettor be a "major participant" who acts "with reckless indifference to human life." (*Banks, supra*, 61 Cal.4th at p. 798.) These two requirements are directly drawn from the holdings of *Tison v. Arizona* (1987) 481 U.S. 137 (Tison) and *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*). (*Banks*, at p. 794.) *Banks* explained that *Tison* and *Enmund* recognized a "continuum" of an aider and abettor's personal involvement in felony murder, along which only "'substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life'" will justify a sentence of LWOP or death. (*Banks*, at pp. 801-802, quoting *Tison,* at p. 154.) In determining whether the elements of section 190.2, subdivision (d) are met, the "totality of the circumstances" must be considered. (*Banks*, at p. 802.)



Banks identified the following factors relevant to whether a defendant is a "major participant" within the meaning of *Tison*: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" (*Banks, supra*, 61 Cal.4th at p. 803, fn. omitted.) The *Banks* court explained: "No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation 'in criminal activities known to carry a grave risk of death' (*Tison v. Ari-*

zona, supra, 481 U.S. at p. 157) was sufficiently significant to be considered 'major' (*id*. at p. 152; see *Kennedy v. Louisiana* [2008] 554 U.S. [407,] 421.)" (*Banks*, at p. 803.)

Banks further held that a defendant acts with a "'reckless indifference to human life'" when he "'"knowingly engag [es] in criminal activities known to carry a grave risk of death."'" (*Banks, supra*, 61 Cal.4th at pp. 800-801, quoting *People v. Estrada* (1995) 11 Cal.4th 568, 577, quoting *Tison, supra*, 481 U.S. 137, 157.) Subsequently, our Supreme Court, in *Clark*, identified several nonexclusive factors relevant to this element. First, the defendant's awareness that a gun will be used in the felony is not alone sufficient to establish reckless indifference, though the defendant's "use of a firearm, even if the defendant does not kill the victim or the evidence does not establish which armed robber killed the victim, can be significant to the analysis of reckless indifference to human life." (*Clark, supra*, 63 Cal.4th at p. 618, original italics.) Second, "[p]roximity to the murder and the events leading up to it may be particularly significant," even though "physical presence is not invariably a prerequisite to demonstrating reckless indifference to human life." (*Id*. at p. 619.) Third, the duration of the felony may be relevant. (*Id*. at p. 620.) For example, if the murder "came at the end of a prolonged period of restraint of the victims by defendant," that would tend to show reckless indifference. (*Id*. at p. 620.) Fourth, the defendant's "knowledge of factors bearing on a cohort's likelihood of killing" is significant, such as when a defendant knows a co-

hort has a propensity for violence. (*Id*. at p. 621.) The fifth factor identified is the defendant's efforts to minimize the risks of violence during the robbery. (*Ibid*.) Evidence of an effort to minimize the risks of violence could potentially rebut a conclusion that the defendant intended to engage in activities risky to human life, though an unreasonable belief that he or she was not posing a risk to human life will not preclude a determination of reckless indifference. (*Id*. at p. 622.)

Factors relevant to the requirements of major participation and reckless indifference must be viewed in context because the elements "'significantly overlap . . . , for the greater the defendant's participation in the felony murder, the more likely he acted with reckless indifference to human life.'" (*Clark, supra*, 63 Cal.4th at pp. 614-615.)

The Court then applied the facts of the case to the law. It is important for any such applicant for relief to understand that the facts of their case must be compared to the new "standard" of the interpretation of the law. The following summary by the Court, for the facts of *this* case, are instructive.

"The standard of review for a sufficiency of the evidence claim as to a special circumstance is whether, when evidence that is reasonable, credible, and of solid value is viewed 'in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.' [Citations.] The standard is the same under the state and federal due process clauses. [Citation.] We presume, in support of the judgment, the existence of every fact the trier of fact could reasonably deduce from the evidence, whether direct or circumstantial. [Citation.]" (*Clark, supra*, 63 Cal.4th at p. 610.)

Viewing the evidence in the light most favorable to the judgment, we first examine whether petitioner could properly be found to be a "major participant." Applying the criteria of "major participant" set out in *Banks*, supra, 61 Cal.4th at page 803, the evidence at trial showed petitioner knew of the plan to rob the tax business, but no evidence showed he had a significant role in the planning. Rather, Soto, and perhaps Lopez, appeared to be the "masterminds" behind the robbery. Petitioner also was aware that firearms would be used, but the guns were supplied by Soto, and, importantly, petitioner did not personally use a gun in connection with the incident. Furthermore, the evidence did not demonstrate petitioner was aware of prior violent crimes committed by his codefendants.

Moreover, petitioner was not present at the scene of the killing. Although he was standing near the business, it appears he had no forewarning that one of his accomplices would shoot a victim, he did not instigate the shooting, and he was not in a position to prevent it. Instead, the shooting by Soto appeared to take all others by surprise; Soto afterward claimed it was a spontaneous reaction to the victim's screaming. Nevertheless, petitioner presumably heard the gunshots, so he could have investigated and tried to aid the victim, which he did not do. Petitioner also claimed to hit Visitor as Visitor fled. The effect of this act in relation to the murder was negligible,

though, because the shooting had already occurred and Visitor was understandably trying to get away from the scene rather than help the victim.

Considering all pertinent facts, due to petitioner's physical presence near the scene of the robbery, he was a more significant participant than the getaway driver found ineligible for LWOP in *Banks, supra*, 61 Cal.4th at page 805, but not by much. As an unarmed lookout with little to no role in the planning of the crime or the use of firearms, and with no direct involvement in the unforeseen shooting, it cannot reasonably be said that petitioner was a major participant.

It therefore is unsurprising that the evidence of reckless indifference to human life is also lacking. (See *Clark, supra*, 63 Cal.4th at pp. 614-615 [elements "'significantly overlap'"].) Petitioner's mere awareness that firearms would be used was not enough to show he acted with reckless indifference. (See *id*. at p. 618.) Further, although he was close enough to hear gunshots, he was not present at the scene of the killing and so had little chance to prevent it. (See *id*. at pp. 619 -620.) The robbery was not of particularly prolonged duration, such as a crime involving kidnapping or restraint. (See *id*. at pp. 620-621.) And, again, there was no evidence petitioner knew a cohort had a propensity to kill. (See *id*. at p. 621.) Finally, although petitioner did not take steps to minimize the risk of violence during the robbery (see *id*. at p. 621-622), since he did not plan the crime or enter the establishment, it is questionable how much difference any such efforts would have made.

Thus, considering the evidence in the light of the guidance provided by Banks and *Clark*, the finding that petitioner was a major participant who acted with reckless indifference to human life is not supportable.

The relief granted by the Court was the best Ramirez could hope for. His LWOP sentence was vacated, and the matter remanded for resentencing to a non-LWOP term.

The special circumstance finding against petitioner is stricken, and the matter is remanded to the superior court for resentencing.

JUVENILE LWOP CONSTITUTIONALITY CHALLENGE RULED MOOT BECAUSE OF NEW 25-YEAR LWOP PAROLE HEARING LAW

P. v. Elizabeth Lozano

___Cal.App. 5th ___; CA2(5); B278663
November 9, 2017

Prior to a recent amendment to Penal Code section 3051, juvenile homicide offenders who were sentenced to life in prison without the possibility of parole (LWOP), such as defendant and appellant Elizabeth Lozano, would die in prison without the opportunity for a parole suitability hearing. On October 11, 2017, Governor Brown signed Senate Bill No. 394 (SB 394), which amends section 3051 to expressly provide a youth offender parole hearing to Lozano and others similarly situated, meaning Lozano will receive a parole suitability hearing after 25 years of incarceration. With the amendment to section 3051, Lozano's argument that her

> LWOP sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment is moot. The appeal is dismissed.

Elizabeth Lozano was sentenced to LWOP in 1996 following her conviction of first degree murder with a robbery-murder special circumstance. She was 16 years old at the time. After the U.S. Supreme Court's decision in *Miller v. Alabama* (2012) 567 U.S. 460, she was afforded a new sentencing hearing, but was again sentenced to LWOP. Lozano appealed, arguing her LWOP sentence violates the Eighth Amendment protection against cruel and unusual punishment.

The California Court of Appeal dismissed her appeal as moot because PC § 3051(b)(4), recently amended by SB 394, now expressly provides juvenile LWOPs a parole suitability hearing after 25 years. The new law requires the BPH to not just consider, but rather to "give great weight to the diminished culpability of juveniles" and any subsequent growth or increased maturity while incarcerated. (PC § 4801(c).)

Lozano argued that the new law did not render her appeal moot because her LWOP sentence violates the Eighth Amendment based on the adverse collateral consequences she will face unless the errors in her sentence are corrected. Lozano argued that she should have been sentenced to 26-life rather than LWOP, which would have put her MEPD in 2012 instead of in 2020.

The court rejected this argument because under *Montgomery v. Louisiana* (2016) 136 S.Ct. 718, courts are permitted to remedy a *Miller* violation by providing meaningful parole consideration rather than resentencing. SB 394 provides this opportunity. The court is not required to resentence Lozano or offer any additional reduction in punishment.

In its analysis, the Court reasoned that mootness, not resentencing, was the proper resolution of her Eighth Amendment complaint.

> Prior to the passage of SB 394, Lozano's LWOP sentence meant she was not eligible for a parole suitability hearing. SB 394 amends section 3051 to add subdivision (b)(4) as follows: "A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions."
>
> We agree with the parties that under SB 394, Lozano is now eligible for parole suitability hearing during her 25th year of incarceration. In our view, this renders Lozano's appeal moot, as her situation is not materially different from that of the defendant in *Franklin*. *Franklin*, a juvenile homicide offender, "would first become eligible for parole at age 66" under his mandatory 50-year-to-life sentence imposed by the trial court. (*Franklin, supra*, 63 Cal.4th at p. 276.) After *Franklin* was sentenced, the Legislature enacted section 3051, creating a youth offender parole hearing process. "[S]ection 3051 has superseded Franklin's sentence so that notwithstanding his original term of 50 years to life, he is eligible for a 'youth offender parole

hearing' during the 25th year of his sentence. Crucially, the Legislature's recent enactment also requires the Board not just to consider but to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.' (§ 4801, subd. (c).) For those juvenile offenders eligible for youth offender parole hearings, the provisions of Senate Bill No. 260 are designed to ensure they will have a meaningful opportunity for release no more than 25 years into their incarceration." (*Franklin, supra*, 63 Cal.4th at p. 277.)

The Court of Appeal found support in U.S. Supreme Court rulings on this point of law.

As originally enacted, section 3051, subdivision (h), "exclude[d] several categories of juvenile offenders from eligibility for a youth offender parole hearing," including those, like Lozano, "who [were] sentenced to life without parole." (*Franklin, supra*, 63 Cal.4th at pp. 277–278.) The *Franklin* court "express [ed] no view on *Miller* claims by juvenile offenders who are ineligible for such a hearing under section 3051, subdivision (h)." (*Id*. at p. 280.) As now amended, section 3051 expressly affords Lozano, a juvenile homicide offender sentenced to LWOP, a chance to participate in a youth offender parole hearing, which provides "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham v. Florida* (2010) 560 U.S. 48, 75.) This legislative remedy is consistent with the Supreme Court's conclusion in Graham

that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance" with the commands of the Eighth Amendment for juvenile offenders. (*Ibid*.)

The Supreme Court, in *Montgomery, supra*, 136 S.Ct. 718, employed the same approach as the *Franklin* court did in considering a state's ameliorative efforts to comply with the Eighth Amendment. "Giving *Miller* retroactive effect, moreover, does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. See, e.g., Wyo. Stat. Ann. § 6–10–301(c) (2013) (juvenile homicide offenders eligible for parole after 25 years). Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (*Id*. at p. 736.)

<u>The Court rejected Lozano's concern that she was excessively sentenced, and should be simply resentenced, to gain her Eighth Amendment protection.</u>

We need not determine if Lozano's calculations are correct, because her argument rests on the faulty premise that the only remedy for the asserted Eighth Amendment violation is resentencing her to no more than 26-years-to-life for her conviction of first degree murder with special circumstances. *Montgomery*, as we have explained, permits the states to remedy a *Miller* violation by

providing meaningful parole consideration—as afforded by SB 394—rather than resentencing. Moreover, the sentence cap of 26-years-to-life urged by Lozano is not required by the Eighth Amendment. (See *People v. Garcia* (2017) 7 Cal.App.5th 941, 949–50 [juvenile sentence of 32 years to life does not violate the Eighth Amendment]; *People v. Perez* (2013) 214 Cal.App.4th 49, 57 [no case has been cited in which a court struck down a juvenile's sentence as cruel and unusual where "the perpetrator still has substantial life expectancy left at the time of eligibility for parole"].)

Rather, the Court found that she was only entitled to a meaningful opportunity to obtain release, which the new law provides. The U.S. Constitution does not require more.

> What Lozano is entitled to under the Eighth Amendment is a prison term that reflects "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" (*Miller, supra*, 136 S.Ct. at p. 479), while recognizing that "prisoners who have shown an inability to reform will continue to serve life sentences" (*Montgomery, supra*, 136 S.Ct. at p. 736.) The Legislature has made the determination in SB 394 that neither Lozano, nor any other similarly situated California juvenile homicide offender, will face a sentence that possibly runs afoul of the Eighth Amendment as interpreted in *Miller*. The Constitution does not require that Lozano be resentenced or receive any additional reduction in punishment. (*Franklin, supra*, 63 Cal.4th at p. 277.)

JUVENILE LWOP CONSTITUTIONALITY CHALLENGE RULED MOOT BECAUSE OF NEW 25-YEAR LWOP PAROLE HEARING LAW

P. v. Wajuba McDuffy

CA2(1); B277418
February 6, 2018

In a case virtually indistinguishable from the *Lozano* case reported above, a different division of the Second District Court of Appeal reached the same conclusion as to a challenged Eighth Amendment violation of the (now amended) juvenile LWOP laws.

> Wajuba Zymaal McDuffy was 17 years old at the time he shot and killed Mr. Dixie Gibson during an attempted robbery. In 1998, a jury convicted him of first degree murder and found true a personal firearm use enhancement. The trial court sentenced him to a prison term of life plus 10 years without the possibility of parole (LWOP). We affirmed the conviction on appeal.
>
> While in prison, McDuffy participated in work and education activities, completed self-help programs, and achieved the lowest security level possible for an inmate serving an LWOP sentence. He has always maintained his innocence, claiming he was at his own birthday party at the time of the murder.

There was no question that, under California law, McDuffy was *eligible* for resentencing.

> In 2014, the California Supreme Court held that a juvenile offender who received an LWOP sentence prior to *Miller* may seek resentencing, and

the trial court in reconsidering the sentence must "consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1361.) The question is whether the defendant "can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults." (*Id*. at p. 1391.)

McDuffy presented substantial evidence that he had reformed his ways while in prison, and therefore was a good candidate for resentencing, notwithstanding that he steadfastly denied committing the murder.

In May 2015, McDuffy petitioned for a writ of habeas corpus, requesting that the superior court vacate his sentence and resentence him in light of *Miller*. Prior to the hearing, McDuffy offered reports from Hans H. Selvog, Ph.D., and Richard J. Subia, a longtime employee of the California Department of Corrections and Rehabilitation. Dr. Selvog reported that McDuffy grew up in an "unstable home environment where drugs, poverty, and negative role models impacted . . . his way of thinking." He had been abandoned by his biological father, and his mother and stepfather both abused cocaine. He grew up in gang territory and participated in criminal activity to gain approval, yet earned average to above average grades in school and participated in sports and band programs. During his incarceration, McDuffy "renounced his past negative lifestyle and [was] focused on becoming a good man."

Subia reported that McDuffy had "demonstrated significant acts of rehabilitation" during his 17 years of incarceration. He had "made every effort to participate in rehabilitative programming," but his opportunities were limited due to the "lack of available programs offered at maximum security prisons."

Subia testified at the hearing that McDuffy "takes advantage of rehabilitative programming, which would indicate his ability to be rehabilitated." However, he admitted McDuffy "only started getting [certificates for self-help programs] around 2013."

McDuffy read from a written statement at the hearing. He stated he was "guilty of participating [in] and glorifying the gang and criminal lifestyle," but was "serving a sentence without possibility of parole for crimes that [he] did not commit." He maintained that he had changed his life, "not just for [him]self but in honor of Mr. Gibson." In a colloquy with the trial judge, McDuffy said he had been advised to admit to the murder in order to demonstrate rehabilitation and receive a more lenient sentence, and it would have been "very easy" to do so, but he could not "live with a lie." He said, "how can I sit here in court and I know I'm innocent and say

> I did something and I didn't do it[?] [¶] . . . I can't show remorse for a crime I didn't do."

But at his resentencing hearing, the trial court could not get past McDuffy's insistence on innocence, and ruled he was therefore still a danger.

> The trial court found McDuffy had done "an outstanding job in an institutional setting." He was "a leader," and "a role model and mentor and an intelligent individual and one who . . . is seeing the mistakes of his life[. He] obviously turned it around to make a difference." However, the trial court found that "one of the components of . . . being rehabilitated is to admit that you were involved." The court stated, "you can . . . define irreparably corrupt as someone who kills somebody and then denies ever doing it." The court concluded that because McDuffy was "still in denial" and "steadfast in [maintaining his] innocence," he was "not remorseful" and did not have the capacity to be rehabilitated.
>
> The court therefore reimposed a sentence of LWOP plus 10 years. McDuffy timely appealed, contending that in light of *Miller*, he should be resentenced to 35 years to life.

However, on October 11, 2017, after briefing in this appeal was complete, Senate Bill No. 394 was enacted which amended PC § 3051 to make a juvenile offender serving an LWOP sentence eligible for parole after 25 years.

The Court invited McDuffy to address whether newly amended PC § 3051 rendered his Eighth Amendment claim moot. He responded with a supplemental brief in which he contended his claim was not moot because the amendment could be repealed before he has served 25 years, and in any event a parole suitability hearing for a nominally LWOP inmate provides no meaningful opportunity to obtain release because rehabilitative programming is largely unavailable to such inmates. He argued that removal of the "LWOP" designation would open up rehabilitative opportunities for him in prison.

The Court ruled that *Franklin* controlled its result.

> As originally enacted, Penal Code section 3051, subdivision (h), "exclude[d] several categories of juvenile offenders from eligibility for a youth offender parole hearing," including those, like McDuffy, "who [were] sentenced to life without parole." (*Franklin, supra*, 63 Cal.4th at pp. 277-278.) As now amended, however, section 3051 affords a juvenile homicide offender such as McDuffy a chance to participate in a youth offender parole hearing and demonstrate a level of maturity and rehabilitation suitable for release from prison. This statutory scheme "effectively reformed" the parole eligibility date of McDuffy's sentence so that the longest possible term of incarceration before parole eligibility is 25 years. (*Id*. at p. 286.)

Further, it relied on *Lozano*, now a published precedent.

Last month our colleagues in Division Five reached the same conclusion on materially indistinguishable facts. In *People v. Lozano* (2017) 16 Cal.App.5th 1286, Lozano was sentenced to LWOP in 1996 for a murder

she committed when she was 16 years old. She sought resentencing pursuant to Miller, and the trial court again sentenced her to LWOP. (*Lozano, supra*, at p. 1289.) She appealed, and after briefing on Lozano's appeal was complete the Legislature enacted Senate Bill 394. Division Five held that pursuant to *Franklin*, the appeal was moot. (*Lozano, supra*, at p. 1201.)

Finally, McDuffy alleged that prison programming is not available to LWOPs, and that he remains disadvantaged for parole suitability. The Court rejected this concern.

"As of this writing, the Board has yet to revise existing regulations or adopt new regulations applicable to youth offender parole hearings. In advance of regulatory action by the Board, and in the absence of any concrete controversy in this case concerning suitability criteria or their application by the Board or the Governor, it would be premature for this court to opine on whether and, if so, how existing suitability criteria, parole hearing procedures, or other practices must be revised to conform to the dictates of applicable statutory and constitutional law. So long as juvenile offenders have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination, we cannot say at this point that the broad directives set forth by Senate Bill No. 260 are inadequate to ensure that juvenile offenders have a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Franklin, supra*, 63 Cal.4th at pp. 285-286.)

Penal Code section 3051 effectively reformed McDuffy's sentence so that he will become eligible for parole during his 25th year of incarceration, "at a hearing that must give great weight to youth-related mitigating factors." (*Franklin, supra*, 63 Cal.4th at p. 286.) His sentence "is not functionally equivalent to LWOP, and the record here does not include evidence that the Legislature's mandate that youth offender parole hearings must provide for a meaningful opportunity to obtain release is unachievable in practice." (*Ibid*.) We thus conclude that McDuffy's Eighth Amendment challenge has been rendered moot.

UNTIMELY PROP. 36 PETITION REJECTED

P. v. Christopher Drew

--- Cal.App.5th ---; CA4(1); D071334
October 12, 2017

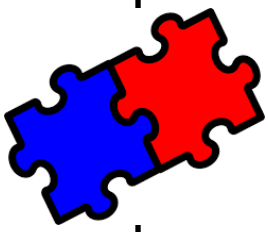
This is a case that we were bound to report on eventually. A Three-Strike lifer lost his petition for resentencing because he filed it after the two-year window to file had expired. Because the case is published, it sets precedent for this question of law.

In the 1999 proceeding that is the subject of this appeal (*People v. Drew* (Super. Ct. San Diego County, 1999, No. SCE194453) (SCE194453)), Christopher Drew was convicted of grand theft (§ 487, subd. (a)), and two counts of receiving stolen property (§ 496, subd. (a)). The court also found true the allegations that Drew had two strike priors (§§ 667, subds. (b)–(i) & 1170.12) and four prison priors (§ 667.5, subd. (b)). Based on ex-

isting law, Drew was sentenced to an indeterminate term of 29 years to life.

Two years later, in a second and separate proceeding (*People v. Drew* (Super. Ct. San Diego County, 2001, No. SCE199615) (SCE199615)), Drew was convicted of robbery (§ 211), three counts of assault with a firearm (§ 245, subd. (b)), and two counts of possession of a firearm by a felon (§ 12021, subd. (a)(1)). With attendant findings and admissions, he was sentenced to a total of 70 years to life in prison, and that sentence was ordered to run consecutive to the sentence imposed in the 1999 proceeding.

In 2016, Drew filed a petition to recall his sentence pursuant to Prop. 36, which required that petitions be filed by November 7, 2014 absent a showing of good cause for delay. Drew asserted that he did not contact anyone to seek relief because he did not know he was eligible until the California Supreme Court's ruling in *People v. Johnson* (2015) 61 Cal.4th 674.



In September 2016 Drew filed a petition to recall his 1999 sentence in case number SCE194453 pursuant to the TSRA. Because the TSRA required that petitions be filed by November 7, 2014, absent "a showing of good cause," (§ 1170.126, subd. (b)), the court issued an order to show cause (OSC) why his petition should not be denied as untimely. Drew's response to the OSC asserted that he "never contacted anyone seeking relief because he did not know he was eligible" and his case was never "caught by any of the myriad agencies who were working to identify and file the cases that were eligible for relief." According to Drew, his inaction was attributable to his lack of awareness of his possible eligibility because of "his life sentences on other nonqualifying offenses and cases." The People opposed Drew's recall petition arguing it was untimely and there was no good cause to excuse the late filing. Specifically, the People noted Drew's conviction in the 1999 proceeding had been final since April 11, 2001, but he did not file his petition until September 2016, almost two years after the petition period had expired under the TSRA. The court ultimately found Drew had not shown adequate good cause for not timely pursuing a petition under the TSRA and denied his petition.

Drew appealed, also arguing that there was good cause because he delayed during a time he lacked legal representation. Sadly, it was not disputed that had he in fact filed on time, he would have qualified for a superior court hearing on resentencing.

The parties agree that because Drew's current offense in case number SCE194453 is not defined as serious or violent, he was not otherwise disqualified from seeking resentencing, and he could have petitioned for recall of his sentence "within two years after the effective date of the act." (§ 1170.126, subd. (b).)

The parties also agree the specified two-year time frame for that recall petition expired on November 7, 2014, so measured by the general rule Drew's recall petition was not timely. But the two-year limitations period under section 1170.126 contains an exception: it permits an inmate to file his recall "at a later

date upon a showing of good cause." (*Ibid.* at subd. (b).) This appeal presents the question whether Drew has established "good cause" so as to take advantage of the exception.

Neither Prop. 36 nor any published authority has defined "good cause" for this statute. The court compared this to PC § 1382, which contains time limitations ensuring a defendant's right to a speedy trial and also contains a "good cause" exception. The Court of Appeal here concluded that two factors are relevant in determining good cause under Prop. 36: (1) the nature and strength of the justification of the delay and (2) the duration of the delay.

The briefs of both parties refer us to case law interpreting section 1382—which contains various time limitations that ensure a defendant receives a speedy trial—suggesting that it may provide at least rough guidance for construing "good cause" under section 1170.126, subdivision (b). Like section 1170.126, "[s]ection 1382 does not define 'good cause' as that term is used in the provision, but numerous California appellate decisions that have reviewed good-cause determinations under this statute demonstrate that, in general, a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay." (*People v. Sutton* (2010) 48 Cal.4th 533, 546.) The courts have concluded in other contexts that, when making a "good-cause" determination, a trial court must consider

all of the relevant circumstances of the particular case, "applying principles of common sense to the totality of circumstances." (See, e.g., *Stroud v Superior Court* (2000) 23 Cal.4th 952, 969.)

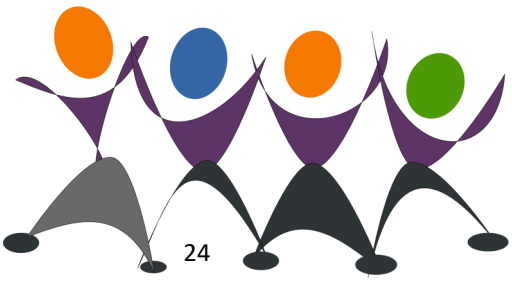
We recognize that the analogy between section 1382 (which is focused on the state's obligation to timely bringing a person to trial) and section 1170.126 (which focuses on an inmate's obligation to commence the recall petition process) is an imperfect one because they involve entirely different phases of the criminal process. But the analogy may provide some guidance because both statutes are concerned with time limits within which certain actions must be taken and under what circumstances a delay beyond those deadlines should be permitted. Under both, delays beyond the deadlines carry consequences, and "good cause" functions as a barometer to evaluate the excuse for the delay and decide whether to obviate those consequences.

At the same time, one of the judicially-crafted considerations employed under section 1382—prejudice to the opposing party—appears far less likely to be a significant factor under section 1170.126. Under the former provision, prejudice from delay can be a highly pertinent consideration because evidence can become stale, memories can fade, and witnesses can become unavailable. (See *People v. Hill* (1984) 37 Cal.3d 491, 498.) Under section 1170.126, however, it is difficult to see how the prosecution would ever be significantly prejudiced by a delay in the filing of a recall petition, because the factors guiding whether to grant the resentencing rest on largely immutable facts contained in records maintained by the courts and the prison authorities. (See § 1170.126, subd. (g).) Thus, while the first two factors identified in *People v. Sutton, supra*, 48 Cal.4th at page 546, are relevant analytical tools in determining "good cause" under section 1170.126, in most cases the third factor will not be germane.

Drew's argument that he was entitled to a delay because he did not have counsel, was rejected by the Court.

In contrast to his arguments in the trial court, on appeal Drew now concedes that his delay was not really attributable to pre-Johnson uncertainty. Instead, he appears to assert there was "good cause" within the meaning of section 1170.126 because he delayed during a time he lacked legal representation (for which he should be excused), but then promptly pursued his recall petition after the Public Defender's office serendipitously unearthed his case nearly a year after Johnson and alerted him to the potential for resentencing. In effect, he contends there should be no time limits for filing a recall petition as long as no one told him he had the ability to request resentencing. Were this contention accepted, it would be tantamount to erasing the limitations period from the statute in all but the most unusual of circumstances.

Here, there was no evidence Drew did anything to investigate potential relief for three and one-half years (between the Nov. 7, 2012, effective date of the TSRA, through late May, 2016), even though he



was then serving a life sentence that at least arguably was impacted by the TSRA. He did not contact the court. He did not request assistance from the Public Defender's office that previously represented him. He did not inquire of anyone at the California Department of Corrections and Rehabilitation. Certainly, we do not suggest a good cause showing requires that an untutored layman such as Drew undertake yeoman efforts in an effort to navigate the intricacies of the TSRA. But neither do we accept Drew's claim on appeal that faced with years during which there is no hint of activity or even de minimus effort by the inmate to protect his rights, a trial court abuses its discretion when it determines there is no good cause to dispense with the legislatively prescribed deadline for filing recall petitions.

In this case, the delay was lengthy and the reason for Drew's inactivity is unexplained except by the absence of a lawyer proactively advising him regarding his rights and remedies. We cannot conclude it was an abuse of discretion for the trial court to find that Drew did not show "good cause" for his late-filed recall petition.

The delay in Drew's case was substantial and there was no evidence that he did anything to investigate potential relief for over three years. "[T]he reason for Drew's inactivity is unexplained except by the absence of a lawyer proactively advising him regarding his rights and remedies." Under these circumstances, the trial court did not abuse its discretion when it found that Drew did not show good cause for his late-filed recall petition.

UNTIMELY PROP. 36 PETITION REJECTED

P. v. Roberto Chaidez

CA4(1); D070609
October 23, 2017

Based on *Drew* above, another Three-Strikes lifer lost his petition for resentencing because he filed it after the two-year window to file had expired.

In 2006 a jury convicted Roberto Chaidez of two counts of residential burglary of an inhabited dwelling (§§ 459, 460); receiving stolen property (§ 496); and unlawfully taking and driving a motor vehicle (Veh. Code, § 10851). In bifurcated proceedings, the jury found true special allegations that Chaidez had incurred two prior felony convictions (§§ 667, subd. (a), 668, 1192.7, subd. (c)); two strike priors (§§ 667, subd. (b)-(i), 668, 1170.12); and three prior prison terms (§§ 667.5, subd. (b), 668). The court sentenced Chaidez to 60 years to life. (§ 654.) (*People v. Chaidez* (Sept. 10, 2008, D049656) [nonpub. opn.] (*Chaidez*).)

Chaidez filed a petition for resentencing under Prop. 36. On April 6, 2016, the trial court denied the petition on the ground it was untimely and did not state good cause for the late filing. On May 4, 2016, Chaidez filed a notice of appeal of the denial of his petition for resentencing.

Cont. pg 28

Board's Information Technology System

Commissioners Summary
All Institutions
December 01, 2017 to December 31, 2017

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	FRITZ	GROUNDS	LABAHN	MINOR	MONTES	PECK	ROBERTS	RUFF	TAIRA	TURNER	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**28**	**18**	**25**	**29**	**0**	**6**	**0**	**18**	**22**	**15**	**12**	**23**	**24**	**19**	**20**	**26**	**138**	**423**	**11**	**412**
Grants	8	4	4	6	0	1	0	0	4	2	2	5	5	3	7	11	0	62	2	60
Denials	15	9	14	19	0	2	0	10	10	9	6	12	12	13	12	11	0	154	5	149
Stipulations	2	5	4	2	0	1	0	5	6	1	1	4	3	2	0	1	0	37	2	35
Waivers	1	0	0	0	0	1	0	0	0	1	1	0	1	0	0	0	40	45	1	44
Postponements	1	0	3	2	0	1	0	2	2	1	2	2	2	1	1	3	86	109	1	108
Continuances	1	0	0	0	0	0	0	1	0	1	0	0	1	0	0	0	0	4	0	4
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	12	12	0	12

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

Subtotal (Deny+Stip)	**17**	**14**	**18**	**21**	**0**	**3**	**0**	**15**	**16**	**10**	**7**	**16**	**15**	**15**	**12**	**12**	**0**	**191**	**7**	**184**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	8	7	15	15	0	2	0	8	7	5	5	10	5	9	9	7	0	112	6	106
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	5	5	1	4	0	1	0	3	2	4	2	2	10	4	3	5	0	51	1	50
7 years	4	2	2	2	0	0	0	4	6	1	0	4	0	2	0	0	0	27	0	27
10 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
15 years	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**1**	**1**	**0**	**1**	**0**	**0**	**0**	**40**	**45**	**1**	**44**
1 year	0	0	0	0	0	1	0	0	0	1	1	0	1	0	0	0	17	21	1	20
2 years	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	11	12	0	12
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9	9	0	9
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	**1**	**0**	**3**	**2**	**0**	**1**	**0**	**2**	**2**	**1**	**2**	**2**	**2**	**1**	**1**	**3**	**86**	**109**	**1**	**108**
Within State Control	1	0	0	0	0	1	0	1	1	0	1	0	1	1	0	1	79	87	1	86
Exigent Circumstance	0	0	0	2	0	0	0	1	0	1	1	2	1	0	1	1	5	15	0	15
Prisoner Postpone	0	0	3	0	0	0	0	0	1	0	0	0	0	0	0	1	2	7	0	7

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	MONTES	PECK	ROBERTS	RUFF	TAIRA	TURNER	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**20**	**26**	**26**	**28**	**0**	**10**	**26**	**17**	**0**	**24**	**26**	**26**	**27**	**18**	**8**	**22**	**148**	**452**	**0**	**452**
Grants	8	7	9	9	0	2	5	8	0	5	7	5	3	3	5	9	0	85	0	85
Denials	10	10	11	10	0	4	18	8	0	13	10	14	13	10	3	10	0	144	0	144
Stipulations	0	9	1	4	0	4	1	0	0	3	8	2	2	3	0	2	0	39	0	39
Waivers	0	0	0	0	0	0	1	0	0	0	0	0	5	0	0	0	23	29	0	29
Postponements	1	0	5	4	0	0	1	1	0	3	1	5	3	1	0	1	113	139	0	139
Continuances	1	0	0	1	0	0	0	0	0	0	0	0	1	1	0	0	0	4	0	4
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	12	12	0	12

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

Subtotal (Deny+Stip)	**10**	**19**	**12**	**14**	**0**	**8**	**19**	**8**	**0**	**16**	**18**	**16**	**15**	**13**	**3**	**12**	**0**	**183**	**0**	**183**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	8	10	7	9	0	8	11	5	0	11	5	13	8	9	3	9	0	116	0	116
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	2	6	3	3	0	0	6	3	0	5	12	3	6	2	0	3	0	54	0	54
7 years	0	3	1	2	0	0	2	0	0	0	1	0	1	2	0	0	0	12	0	12
10 years	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**0**	**0**	**5**	**0**	**0**	**0**	**23**	**29**	**0**	**29**
1 year	0	0	0	0	0	0	1	0	0	0	0	0	4	0	0	0	13	18	0	18
2 years	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	5	6	0	6
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0	3
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	**1**	**0**	**5**	**4**	**0**	**0**	**1**	**1**	**0**	**3**	**1**	**5**	**3**	**1**	**0**	**1**	**113**	**139**	**0**	**139**
Within State Control	0	0	0	1	0	0	0	0	0	3	0	4	2	0	0	0	106	116	0	116
Exigent Circumstance	0	0	0	3	0	0	0	1	0	0	0	1	1	1	0	1	6	14	0	14
Prisoner Postpone	1	0	5	0	0	0	1	0	0	0	1	0	0	0	0	0	1	9	0	9

Cont. from pg 25

In the interests of justice, the Court of Appeal permitted his appeal of this denial, notwithstanding some question of *the appeal's* timeliness. However, it was an open and shut case, and even Chaidez conceded he was untimely.

> Chaidez concedes the trial court did not abuse its discretion in denying his petitions under Proposition 36. He states, and the record shows, the petition for resentencing under Proposition 36 did not set forth the reasons for the delay in filing. (See generally *People v. Drew* (Oct. 12, 2017, D071334) ___Cal.App.5th ___ [2017 Cal.App. Lexis 880].) In view of defendant's concession, we affirm the order of April 6, 2016, denying the petition for resentencing. Chaidez has been represented by competent counsel on appeal.

UNTIMELY PROP. 36 PETITION REJECTED

P. v. Chad Huber

CA4(2); E066430
January 19, 2018

In a third example of an untimely Prop. 36 petition, the court dealt with rejecting the denial of an excuse for delay based on alleged "good cause."

One and a half years after the filing deadline for Prop. 36 petitions had passed, Chad Huber filed a petition for resentencing. The trial court denied defendant's petition as untimely. On appeal, Huber argued that the trial court erred in denying his petition as untimely because he had shown good cause for the delay in filing his resentencing petition under Prop. 36. The Court of Appeal agreed with the trial court's determination that there was not "good cause" shown.

> In 2009, a jury found defendant guilty of unlawful driving of a vehicle (Veh. Code, § 10851, subd. (a), count 1), receiving a stolen vehicle (§ 496d, subd. (a), count 2), and felony evading an officer (Veh. Code, § 2800.2, subd. (a), count 3). In a bifurcated proceeding, the jury also found true that defendant had sustained two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). After the trial court denied defendant's motion to strike his prior strike convictions, defendant was sentenced to a total indeterminate term of 25 years to life in state prison.

On November 6, 2012, the California electorate approved Prop. 36. Prop. 36 provided for a two-year period, expiring on November 7, 2014, within which petitions for resentencing may be filed. (§ 1170.126, subd. (b).)

One and a half years later, Huber filed for Prop. 36 relief.

> On May 2, 2016, defendant filed an in propria persona petition for recall of his sentence under section 1170.126 as to all three counts. Defendant argued that his convictions for unlawful driving of a vehicle (Veh. Code, § 10851, subd. (a), count 1), receiving a stolen vehicle (§ 496d, subd. (a), count 2), and felony evading an officer (Veh. Code, § 2800.2, subd. (a), count 3) were neither serious nor violent felonies, and thus, he should be resentenced pursuant to Proposition 36.

Huber argued that he had good cause for delay.

> Defendant argues the trial court erred in deny-

ing his Proposition 36 motion as untimely because he had good cause for filing his petition late. Specifically, he asserts he had good cause for filing his petition after the two-year deadline because the law was unsettled as to whether he was eligible to petition for resentencing on his convictions in this case, even though he had the later convictions in the Riverside case that remained subject to the three strikes sentencing, until the California Supreme Court decided *Johnson, supra*, 61 Cal.4th 674.

In *Johnson, supra*, 61 Cal.4th 674, our Supreme Court held that an inmate is eligible for resentencing under section 1170.126 on a current conviction that is neither serious nor violent, even though he or she has another current conviction that is serious or violent. (*Johnson*, at p. 679.) The *Johnson* court concluded that the Act "requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a Three Strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life." (*Id*. at p. 688; see *People v. Lynn* (2015) 242 Cal.App.4th 594, 598.)

But precedent recognized the two-year limitation expressly called out in Prop. 36.

"To obtain a sentencing reduction pursuant to section 1170.126, the prisoner must file a petition for a recall of sentence in the trial court. 'Any person serving an indeterminate term of life imprisonment imposed pursuant to' the three strikes law may file a petition for a recall of his or her sentence *within two years* after the Act's effective date 'or at a later date upon a showing of good cause.' (§ 1170.126, subd. (b) . . . .)" (*Yearwood*, at p. 170, italics added; see *People v. Conley* (2016) 63 Cal.4th 646, 652-653.)

Comparing the case at bar with the recent *Drew* decision, the Court found that Huber's additional effort of relying on the public defender to file for him did not save the day.

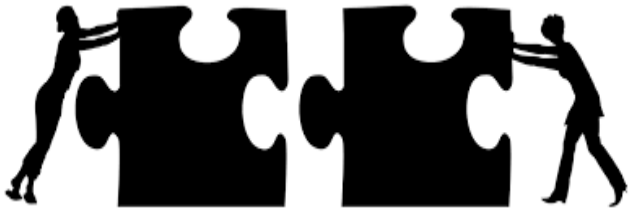
On appeal, in contrast to his arguments in the trial court, the defendant in Drew conceded his delay "was not really attributable to pre-Johnson uncertainty," and instead "during a time he lacked legal representation (for which he should be excused)." (*Drew, supra*, 16 Cal.App.5th at p. 242.) "In effect," as the court in *Drew* pointed out, the defendant argued "there should be no time limits for filing a recall petition as long as no one told him he had the ability to request resentencing." (*Ibid*.) The *Drew* court rejected the defendant's claim, stating "Were this contention accepted, it would be tantamount to erasing the limitations period from the statute in all but the most unusual of circumstances." (*Ibid*.) The court noted that there was no evidence the defendant "did anything to investigate potential relief for three and one-half years," such as contact the court, request assistance from the public defender's office that previously represented him, or inquire of anyone at the California Department of Corrections and Rehabilita-

tion. (*Id*. at p. 243.) In conclusion, the Court of Appeal did not accept the defendant's "claim on appeal that faced with years during which there is no hint of activity or even de minimus effort by the inmate to protect his rights, a trial court abuses its discretion when it determines there is no good cause to dispense with the legislatively prescribed deadline for filing recall petitions." (*Ibid*.)

Here, although defendant did a little more than the defendant in *Drew*, i.e., contact the public defender's office to file a Proposition 36 recall petition on his behalf, we cannot find, as the court in Drew concluded, "a trial court abuses its discretion when it determines there is no good cause to dispense with the legislatively prescribed deadline for filing recall petitions." (*Drew*, *supra*, 16 Cal.App.5th at p. 243.) Defendant merely made a "de minimus" effort to protect his rights. The delay was lengthy and the reason for the defendant's inactivity is unexplained except by the public defender's office opting not to file a petition on defendant's behalf. Defendant was not precluded from filing a petition in propria persona as he did in this case. The conclusion reached in *Drew* does not support defendant's good faith argument. There was no evidence in the record to show the public defender's office promised to file a petition for recall and resentencing on defendant's behalf, and defendant was not given a false sense of security his petition would be filed. As previously noted, once defendant was made aware the public defender's office would not file a petition on his behalf, defendant still could have proceeded in propria persona to file the petition in a timely manner. We cannot conclude it was an abuse of discretion for the trial court to find that defendant did not show good cause for his late-filed recall petition.

In sum, taking into account the realities of our legal system, neither reason given by defendant in filing his petition under section 1170.126 a year and a half after the filing deadline for Proposition 36 petitions passed are based on a sound reasoning. In fact, both reasons for the delay do not pass scrutiny or constitute good cause. As far as ineligibility is concerned, that became an open question as soon as the Supreme Court granted review in July 2014. Defendant was no less or more eligible when he ultimately filed his petition than he was prior to the expiration of the two-year limitations period.

We hold as a matter of law that, on these facts, neither reason given by defendant for not filing a timely petition under section 1170.126 before the statutory deadline was supported by good cause for the delay under subdivision (b) of section 1170.126.



ARMED ALLEGATION TO BE REHEARD BY COURT TO DETERMINE APPLICABILITY TO STRIKE

P. v. Sulma Gallardo

---Cal.5th ---; S231260
December 21, 2017

This case, while technically not a lifer

case, is nonetheless an important case for Three-Strikers, because it limits the ability of the trial court from making factual findings not found by the jury, in making discretionary Strike determinations.

Defendant Sulma Marilyn Gallardo was convicted of various offenses including second degree robbery and transportation of a controlled substance. Although her offenses would ordinarily be punishable by a maximum term of imprisonment of six years, the prosecution sought an increased sentence on the ground that defendant had previously been convicted of a "serious felony" under Penal Code section 667, subdivision (a), that was also a strike for purposes of the "Three Strikes" law. The conviction in question was for a crime—assault with a deadly weapon or with force likely to produce great bodily injury, in violation of Penal Code former section 245, subdivision (a)—whose statutory definition sweeps more broadly than the definition of "serious felony": An assault conviction qualifies as a serious felony if the assault was committed with a deadly weapon, but not otherwise. After reviewing the transcript of the preliminary hearing in defendant's assault case, the trial court determined that defendant did, in fact, commit the assault with a deadly weapon, and sentenced defendant to a term of 11 years in prison.

Under the Sixth Amendment to the United States Constitution, as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), any fact, other than the fact of a prior conviction, that increases the statutorily authorized penalty for a crime must be found by a jury beyond a reasonable doubt. Defendant contends that her increased sentence rests on an exercise in judicial factfinding that violated her Sixth Amendment right to a jury trial.

This was not the first time the CA Supreme Court had considered this question. But intervening US Supreme Court law now dictates that a different conclusion must be reached today. The Court disapproved of it's own earlier case *contra*.

We considered a similar issue more than a decade ago, in *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*). In *McGee*, we held that the Sixth Amendment permits courts to review the record of a defendant's prior conviction to determine whether the crime qualifies as a serious felony for purposes of the sentencing laws. Although we made clear that the inquiry is a "limited one" that "focus[es] on the elements of the offense of which the defendant was convicted," we also said that a court may review the record to determine whether "the conviction realistically may have been based on conduct that would not constitute a serious felony under California law." (*Id*. at p. 706.) We acknowledged, however, that continued examination of the scope of the rule announced in *Apprendi*—then still a relatively recent development in the high court's jurisprudence—might one day call for reconsideration of this approach. (*Id*. at p. 686.)

Defendant argues that day has now arrived. Specifically, she contends that the approach approved in *McGee* should be reconsidered in light of the high court's recent decisions in *Descamps v. United States* (2013) 570 U.S. ___ [133

S.Ct. 2276] (*Descamps*) and *Mathis v. United States* (2016) 579 U.S. ___ [136 S.Ct. 2243] (*Mathis*), which, in her view, make clear that the Sixth Amendment forbids a sentencing court from reviewing preliminary hearing testimony to determine what conduct likely (or "realistically") supported the defendant's conviction.

We agree that it is time to reconsider *McGee*. Although the holdings of *Descamps* and *Mathis* both concern the proper interpretation of a federal statute not at issue here, their discussions of background Sixth Amendment principles pointedly reveal the limits of a judge's authority to make the findings necessary to characterize a prior conviction as a serious felony. The cases make clear that when the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." (*Descamps, supra*, 133 S.Ct. at p. 2288.) While a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct "realistically" led to the defendant's conviction. Here, the trial court violated defendant's Sixth Amendment right to a jury trial when it found a disputed fact about the conduct underlying defendant's assault conviction that had not been established by virtue of the conviction itself. We disapprove *People v. McGee, supra*, 38 Cal.4th 682, insofar as it suggests that the trial court's factfinding was constitutionally permissible.

The Court recounted facts surrounding Gallardo's "armed" allegation.

In April 2014, a jury found defendant guilty of robbery (Pen. Code, § 211), being an accessory after the fact (id., § 32), and transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)). The jury also found true an allegation that a principal was armed with a firearm during the commission of the robbery (Pen. Code, § 12022, subd. (a)(1)).

The criminal information alleged that defendant had a 2005 conviction for assault with a deadly weapon or with force likely to produce great bodily injury (Pen. Code, former section § 245, subd. (a)(1)). It further alleged that this conviction qualified as a "serious felony" conviction for purposes of Penal Code section 667, subdivision (a)(1). Under that provision, a criminal defendant who commits a felony offense after a prior conviction for a "serious felony" is subject to a five-year sentence enhancement. A "serious felony" conviction is also a prior strike for purposes of the Three Strikes law, which requires a second-strike defendant to be sentenced to double the otherwise applicable prison term for his or her current felony conviction. (Pen. Code, §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d).) The term "serious felony" is defined to include "assault with a deadly weapon." (Pen. Code, § 1192.7, subd. (c)(31).) If defendant committed assault with a deadly weapon, the prior conviction counted as a strike; if she committed as-

sault by any means of force likely to produce great bodily injury, it did not. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.)

Courts, not juries, have historically made Strike determinations.

For some time, California cases have held that such determinations are to be made by the court, rather than by the jury, based on a review of the record of the prior criminal proceeding. (*McGee, supra*, 38 Cal.4th at p. 685; see id. at p. 691 [citing cases].) A defendant does, however, have a statutory right to a jury trial on "the question of whether or not the defendant has suffered the prior conviction"—though not "whether the defendant is the person who has suffered the prior conviction." (Pen. Code, § 1025, subds. (b) & (c); see also id., § 1158.) Defendant waived her right to a jury trial on prior convictions. She did not stipulate to the prior conviction, but she did stipulate to identity.

In this case, the Court did make the Strike determination, from the record.

To determine whether defendant's assault conviction qualified as a "serious felony," the trial court examined the preliminary hearing transcript from the underlying proceeding. At the hearing, the victim testified that defendant had "tried to scare me with the knife," "push[ed] me aggressively to get me away from the car," and "punched me on the face, on the forehead . . . ." Relying on this testimony, the trial court concluded that defendant had, in fact, been convicted of "assault with a deadly weapon; to wit, knife." The court sentenced defendant to the middle term of three years for the robbery conviction, which was doubled based on the strike, with a five-year enhancement for a prior serious felony conviction, for a total of 11 years. The court also imposed a one-year term for the marijuana transportation conviction, doubled based on the strike, and ordered it to run concurrent to the principal term. The court stayed the firearm enhancement.

The Court now agreed with the original dissenters in *McGee*.

"The Sixth Amendment contemplates that a jury—not a sentencing court—will find" the facts giving rise to a conviction, when those facts lead to the imposition of additional punishment under a recidivist sentencing scheme. (*Descamps*, 133 S.Ct. at p. 2288.) This means that a sentencing court may identify those facts it is "sure the jury . . . found" in rendering its guilty verdict, or those facts as to which the defendant waived the right of jury trial in entering a guilty plea. (*Ibid*.) But it may not "rely on its own finding" about the defendant's underlying conduct "to increase a defendant's maximum sentence." (*Id*. at p. 2289.)

The Court then summarized the harm embodied in Gallardo's court-made Strike determination.

Here, the trial court engaged in a form of factfinding that strayed beyond the bounds of the Sixth Amendment. Defendant had entered a plea of guilty to assault under a statute that, at the time, could be violated by committing assault either with a "deadly weapon" or "by any means of force likely to produce great bodily injury." (Pen. Code,

former § 245, subd. (a)(1).) Defendant did not specify that she used a deadly weapon when entering her guilty plea. The trial court's sole basis for concluding that defendant used a deadly weapon was a transcript from a preliminary hearing at which the victim testified that defendant had used a knife during their altercation. Nothing in the record shows that defendant adopted the preliminary hearing testimony as supplying the factual basis for her guilty plea.

The Court of Appeal concluded this was permissible under *Descamps* because that decision allows trial courts to "consult 'a limited class of documents, such as indictments and jury instructions,' " in order to identify which elements of the statute "formed the basis of the prior conviction." Because "nothing in *Descamps* excludes the preliminary hearing transcript from that class of documents," the court concluded that the sentencing court properly used the transcript to determine that defendant's conviction was based on assault with a deadly weapon and thus qualified as a serious felony within the meaning of the Three Strikes law.

While *Descamps* does permit courts to rely on certain documents to identify the precise statutory basis for a prior conviction, the documents listed in *Descamps*—"indictments and jury instructions" (*Descamps, supra*, 133 S.Ct. at p. 2279)—differ from the preliminary hearing transcript here in a meaningful way. An indictment or jury instructions might help identify what facts a jury necessarily found in the prior proceeding. (See Shepard, supra, 544 U.S. at pp. 20–21.) But defendant's preliminary hearing transcript can reveal no such thing. A sentencing court reviewing that preliminary transcript has no way of knowing whether a jury would have credited the victim's testimony had the case gone to trial. And at least in the absence of any pertinent admissions, the sentencing court can only guess at whether, by pleading guilty to a violation of Penal Code section 245, subd. (a)(1), defendant was also acknowledging the truth of the testimony indicating that she had committed the assault with a knife.

By relying on the preliminary hearing transcript to determine the "nature or basis" of defendant's prior conviction, the sentencing court engaged in an impermissible inquiry to determine " 'what the defendant and state judge must have understood as the factual basis of the prior plea.' " (*Descamps, supra*, 133 S.Ct. at p. 2284.) Because the relevant facts were neither found by a jury nor admitted by defendant when entering her guilty plea, they could not serve as the basis for defendant's increased sentence here.

Finally, the Court considered the appropriate remedy here. Because the case was so old, it was agreed that a new trial was not recommended. Rather, Gallardo's *admissions* on the earlier record available to the court should be the factual basis for a new Strike determination, on remand.

The final question concerns next steps. The Attorney General argues that we should remand the case to permit the trial court to conduct a new hearing on the prior conviction allegations. On remand, the Attorney General contends, the inquiry would be "confined to the

record of the prior plea proceedings," and the trial court would only "mak[e] a determination about what facts appellant necessarily admitted in entering her plea," without "relitigat[ing] the prior offense." In the alternative, the Attorney General argues that the case should be remanded for a jury trial on the prior conviction allegations. Defendant concedes the first remedy is appropriate; she vigorously opposes the jury trial alternative.

The Attorney General's request for a limited remand is reasonable, and we will grant it. We today hold that defendant's constitutional right to a jury trial sweeps more broadly than our case law previously recognized: While a trial court can determine the fact of a prior conviction without infringing on the defendant's Sixth Amendment rights, it cannot determine disputed facts about what conduct likely gave rise to the conviction. This is a development the parties apparently did not anticipate at the time this case was tried. (See pt. II, ante.)

We also agree with the parties that the appropriate course is to remand to permit the trial court to make the relevant determinations about what facts defendant admitted in entering her plea. Our precedent instructs that determinations about the nature of prior convictions are to be made by the court, rather than a jury, based on the record of conviction. (See *McGee, supra*, 38 Cal.4th at p. 695.) We have explained that the purpose of the latter limitation is to avoid forcing the parties to relitigate long-ago events, threatening defendants with "harm akin to double jeopardy and denial of speedy trial." (*Guerrero, supra*, 44 Cal.3d at p. 355.) The Attorney General has not asked us to reconsider this aspect of our precedent. His primary contention, rather, is that the trial court on remand should review the record of conviction in order to determine what

facts were necessarily found or admitted in the prior proceeding. Such a procedure fully reconciles existing precedent with the requirements of the Sixth Amendment.

PROP. 36 RELIEF DENIED ON ONE GROUND, BUT GRANTED ON ANOTHER.

P. v. Warner Livingston

CA2(1); B281570
January 31, 2018

Appellant Warner Livingston challenges the trial court's order denying his petition for recall of his sentence pursuant to section 1170.126 (Proposition 36). The trial court found that he was ineligible for resentencing on his conviction of evading the police because he was armed during the commission of that offense. (See Pen. Code, §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).) Appellant argues that insufficient evidence supported the court's finding that he was armed. We disagree and affirm as to his evading conviction, but reverse and remand for the trial court to reconsider its order on the application of Proposition 36 to appellant's conviction for false imprisonment.

Livingston was convicted of numerous offenses, and all became consecutive life sentences under the Three Strikes law.

> In 1995, a jury convicted appellant of six counts of robbery (§ 211; counts 1, 2, 4, 5, 11, 12), second-degree commercial burglary (§ 459; count 6), grand theft of personal property (§ 487, subd. (a); count 9), each with the personal use of a firearm allegation (§ 12022.5, subd. (a)(1)). The jury also convicted appellant of attempted false imprisonment of a hostage (§§ 210.5, 664; count 7), evading an officer while driving recklessly (Veh. Code, § 2800.2; count 8), and possession of a firearm by a felon (§ 12021, subd. (a)(1); count 10). The court sentenced appellant under the "Three Strikes" law to an indeterminate term of 210 years to life, consisting of: eight consecutive terms of 25 years to life for the attempted false imprisonment of a hostage, evading an officer while driving recklessly, and six counts of robbery, as well as two consecutive five-year enhancements for the prior convictions under section 667.5, subdivision (a)(1). Pursuant to section 654, the court stayed imposition of sentence on the commercial burglary, grand theft, and being a felon in possession of a firearm convictions.

Livingston filed twice for relief under Prop. 36, based on intervening court rulings. He was denied both times, and appealed.

> In February 2013, appellant filed a petition for recall and resentencing under Proposition 36. The court denied the petition in March 2013 because the robbery convictions qualified as serious felonies.
>
> Thereafter, in July 2015, following the decision in *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), appellant filed another petition seeking recall of his convictions for attempted false imprisonment (count 7) and evading arrest (count 8). The trial court vacated the March 2013 order and issued an order to show cause why relief should not be granted. Following a hearing on the petition, the court determined that the conviction for attempted false imprisonment (count 7) was eligible for recall and resentencing pursuant to section 1170.126. The court, however, determined that appellant was ineligible for recall and resentencing on the conviction of felony evading arrest, finding that appellant was armed with a firearm during the commission of that offense.

The question of whether Livingston was entitled to a Prop. 36 hearing turned on whether the jury's finding that he did not *use* a gun was a de facto determination that he was *not armed*.

> With respect to the application of Proposition 36 to false imprisonment, respondent asserts that the trial court erred when it found appellant eligible for relief based on its conclusion that the jury's "not true" finding on a firearm use enhancement (§ 12022.5) related to count 7 precluded it as a matter of law from making a determination that appellant was armed with a firearm during the commission of that offense. As the Attorney General correctly points out, a jury's determination that a defendant did not use a firearm during an offense is distinct from a determination that a defendant was armed with a firearm during an offense for Proposition 36. A jury's "not true"

finding on a weapon use enhancement does not, as a matter of law, prohibit a subsequent determination that the defendant was armed with that same weapon for the eligibility determination under Proposition 36. (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1112 ["Because Proposition 36 looks to whether appellant was armed 'during' the false imprisonment rather than 'in the commission of it,' the not true finding on the weapon use enhancement does not render appellant eligible for resentencing"].)

The trial court concluded that the jury's "not true" finding on the firearm use enhancement made defendant eligible as a matter of law for resentencing on the false imprisonment count under Proposition 36. That conclusion, however, does not recognize that defendant could have been armed with a firearm—as opposed to having used a firearm—when he kidnapped McCarthy. A finding that defendant was armed with a firearm would make him ineligible for resenting under Proposition 36. Consequently, the trial court's order granting appellant's petition for recall and resentencing on his conviction for false imprisonment alleged in count 7 cannot stand.

Accordingly, the appellate court ordered a limited remand for the superior court to make the requisite determination as to being "armed."

The order granting appellant's petition for recall and resentencing for false imprisonment alleged in count 7 is conditionally reversed. On remand, the court is directed to reconsider appellant's eligibility for resentencing on this count, before proceeding with a suitability hearing under section 1170.126, subdivisions (f) and (g). If the court finds him ineligible, it shall vacate its order granting the petition for recall and resentencing on that count. The order is affirmed in all other respects.

SPITTING ON COURTROOM DEPUTY BRINGS THREE-STRIKES LIFE SENTENCE

P. v. Joshua Mills

CA3; C082095
June 6, 2017

Frustration during a courtroom dependency hearing brought an incredibly harsh result for determinately sentenced state prisoner Joshua Mills. Mills was doing 20 years at Pelican Bay, but was taken out to court for a dependency hearing. In that hearing, he spit on a deputy. Because of his past record, he was eligible for a Three-Strikes life sentence, which he received.

On September 24, 2008, defendant, who was serving a 20-year 4-month term at Pelican Bay State Prison, was in Placer County Juvenile Court for a dependency proceeding, when he spat in the eye of a bailiff who was trying to remove him from the courtroom for yelling obscenities at the judicial officer and all other participants. A jury convicted him of felony counts of gassing a peace officer (§ 4501.1, subd. (a)), resisting an officer (§ 69), and two misdemeanor counts of obstructing or delaying a peace officer (§ 148, subd. (a)). The trial court sustained two strike allegations and sentenced defendant to 25 years to life.

Relying on Prop. 36, Mills subsequently petitioned for resentencing. However, based on his past record, the court denied

relief. The Court of Appeal affirmed.

> Defendant, with the assistance of counsel, subsequently filed a petition for resentencing pursuant to section 1170.126. The trial court found defendant was eligible for resentencing, but denied the petition on the ground that resentencing him posed an unreasonable risk of danger to public safety. In support of its decision, the trial court noted defendant's extensive criminal record and his disciplinary record while incarcerated. Disputing some of the trial court's findings, defendant filed a request for rehearing, which the trial court denied.

CDC-115 HISTORY DOOMS PROP. 36 RELIEF

P. v. Darrell Morris

CA2(3); B271847
December 15, 2017

Darrell Morris was sentenced to 25-life for a third offense of drug sales. He petitioned for Prop. 36 relief, but was denied for his in-prison disciplinary history.

> Petitioner is serving a Three Strikes sentence of 25 years to life following his conviction by jury for selling a controlled substance (Health & Saf. Code, § 11352, subd. (a)), and having suffered two prior felony convictions for robbery and voluntary manslaughter (§ 667, subd. (d)). The conviction for selling a controlled substance is based on petitioner's sale of $10 worth of rock cocaine to an undercover Los Angeles police officer on January 8, 1997.

Morris was indisputably *eligible* for a Prop. 36 hearing. But his hearing was not successful. At the hearing, evidence both pro and con were presented to the trial court.

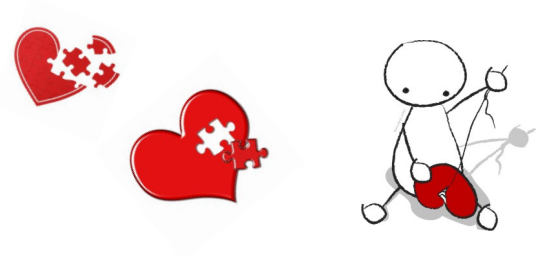
> On February 2, 2016, the court held a Proposition 36 suitability hearing with petitioner and the parties' counsel present. Voluminous exhibits filed by the People were admitted into evidence, including petitioner's criminal history records, probation reports, Rules Violation Reports (RVR's) from his places of incarceration, and his prison history records and security classification scores. The People called no witnesses.
>
> Numerous exhibits submitted by petitioner were admitted as well, including records and certificates of his completion of counseling, education, and programs in prison; information on reentry programs to which he had been accepted; laudatory "chronos" (custodial counseling chronology reports) from prison officials; an expert report from Richard Subia, a former California Department of Corrections and Rehabilitation warden; and letters of support from inmates and from Sister Mary Sean Hodges, the representative of one of the reentry programs. Subia, an "expert in . . . the workings of correctional facilities," testified for petitioner, and offered the opinion that petitioner would not pose an unreasonable risk to public safety if resentenced or released.

The court noted Morris' extensive criminal history, which included violent offenses. More troubling were his in-prison CDC -115s, which also included

violence. The court concluded, notwithstanding many chronos attesting his improved ways, that Morris yet displayed a "criminal mind set" – and accordingly found him a continuing danger if released, and denied Prop. 36 relief.

> In its concluding remarks, the court stated, "Petitioner has been involved in criminality his entire adult life. Petitioner continues to live with a criminal mindset, revealing that he is incapable of following institutional, and perhaps societal rules. Petitioner's criminal history and institutional record reflect[] that he has a strong propensity for violence and aggression. Although he is not a murderer, Petitioner has been convicted of taking a human life, and was found guilty of an RVR for attempting to take another human life. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, p. 53 [Proposition 36 was not intended to apply to murderers and other dangerous criminals].) The totality of the record demonstrates that resentencing Petitioner would pose an unreasonable risk of danger to public safety at this time. This conclusion comports with the electorate's intent to 'keep violent felons off the street' and 'prevent[] dangerous criminals from being released early'. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 171.)" The court found "in [its] discretion pursuant to section 1170.126(f), that resentencing Petitioner at this time would pose an unreasonable risk of danger to public safety."

Hopefully, Morris' demonstrated record of self-improvement in more recent years will eventually show the Board he has turned the corner, when he becomes eligible for parole.



BROWN CONTINUES TO GRANT COMMUTATIONS

Shortly before Christmas last year Gov. Jerry Brown released a number of pardons and commutations of prison sentences, notable in part for the total number of such actions he's taken in this, his second set of terms as Governor, but also for those who are realizing relief from his actions. The December actions bring the total number of commutations during the Governor's second round in office to over 35, 15 of those being LWOP inmates, now offered a chance at a second chance via parole.

Pardons, by in large, are granted to those former prisoners who have long-ago changed their lives and ways, show exemplary and positive lives since their encounter with the prison system and, for the most part, were convicted of relatively non-violent crimes. In this batch of pardons, one of interest was to Richard Pfeiffer, released in 1994 after serving a bit less than 2 years for robbery and burglary.

Why, in the 132 pardons issued, is this notable? Because Pfeiffer went on to become not only an attorney, but an attorney who represents lifers at parole hearings. Brown noted that since his release Pfeiffer has "lived an honest and upright life, exhibited good moral character and conducted himself as a

law-abiding citizen." The Governor also noted Pfeiffer has also provided pro bono assistance to several criminal justice organizations.

Current prisoners can request a commutation of sentence, to change the length and terms. Brown has been exceptionally open-handed with these requests. Several of the 9 LWOP inmates touched by the Governor in this current round of actions also fell under the umbrella of YOPH and 7 were women prisoners. The commutations also included one third-striker.

What is the Governor looking for in a likely candidate for commutation of sentence? In short, an exemplary inmate, who shows positive programming, exhibits a clean (but not necessarily spotless) disciplinary record and excellent insight and rehabilitation. Although a few of the recipients of the latest round of commutations had a handful of RVRs in their past, most of those actions were both far in the past and of minor nature.

Educational upgrades are important to the Governor, who more than once commented on the progress those commuted inmates had shown in this area. Prisoners who become involved while in prison in rehabilitative and pro-social activities also win favor, with the Governor commenting on the 'remarkable commitment to improving [himself]' exhibited by one commuted LWOP inmate and noting another had 'dedicated [her] life to rehabilitation and service.

And while many prisoners granted sentence relief had never earned an RVR and exhibited what Brown called "stellar behavior" and were "model prisoner[s]," some had a smattering of relatively minor RVRs well in the past. The Governor also acknowledged the part Intimate Partner Battering played in the crime and conviction of many female prisoners, and while always careful to note this aspect of their lives did not excuse their criminal acts, Brown did take note of the effects of repeated abuse as a causative factor in their behavior.

Commutations, while possible, are not a foregone conclusion, as most of those favored by the Governor had done substantial time in prison, often several decades. And Brown also acknowledged the part immaturity often played in criminal activity, citing the young age of several prisoners whose sentence he reduced.

Several determinate sentenced prisoners had their sentences reduced to time served by Brown, and virtually all of them have since been actually released from custody. LWOP inmates' sentence were modified to 15 to 25 to life and since many have already exceeded that custody time, BPH is now dropping them into parole hearing schedules as openings become available.

The message here is this: if you are an LWOP inmate, even one who received that sentence when you were an adult, do not give up hope. Change is possible and recent history has shown change does happen. The potential for commutation of sentence is there, it is real, as the most recent batch of commuted LWOP inmates can attest.

Take the opportunity for rehabilitation, introspection and self-awareness seriously. It's never too late or too early to change your perspective, your behavior, your life. It is important to position yourself so that when that change opportunity comes for you, you're fully ready to take advantage of that opportunity.

Will it be easy? Of course not, it isn't supposed to be easy or quick. But it is, now more than at any other time, possible, IF you put in the work and effort.

NEW OMBUDSMEN, NEW ASSIGNMENTS

The Ombudsman's Office is the first line of assistance to both inmates and families, from visiting problems, to filing of 602s and tracking those sometimes-elusive documents. We have long advocated any inmate filing a 602 send a copy of that appeal to the appropriate Ombudsman for his/her institution. Although not a sure-fire way to solve your issue, it the various 'ombuddies' should be a resource known and used by inmates and family.

While email and phone numbers for each ombudsman are available to friends and family on the CDCR website, inmates are restricted to regular mail. Below are the current Ombudsmen, and the institutions they review. All can be reached at CDCR Headquarters:

California Department of Corrections and Rehabilitation

Office of the Ombudsman

1515 S Street

Sacramento, CA 95811

Sara Malone, Chief Ombudsman: Central California Women's Facility (CCWF), California Institution for Women (CIW), Folsom Women's Facility (FWF).

Sara L. Smith; California Correctional Institution (CCI), California Institution for Men (CIM), San Quentin State Prison (SQ), Folsom State Prison (FSP).

Scott Jacobs; Pelican Bay State Prison (PBSP), High Desert State Prison (HDSP), California Correctional Center (CCC), Ironwood State Prison (ISP), Chuckawalla Valley State Prison (CVSP), Sierra Conservation Center (SCC).

Xina Bolden; California State Prison, Corcoran (COR), California Substance Abuse Treatment Facility and State Prison at Corcoran (SATF), Centinela State Prison (CEN), Calipatria State Prison (CAL),

Deuel Vocational Facility (DVI).

Tami Falconer; Salinas Valley State Prison (SVSP), Correctional Training Facility (CTF), California State Prison, Solano (SOL), California State Prison, Los Angeles County (LAC), California Men's Colony (CMC).

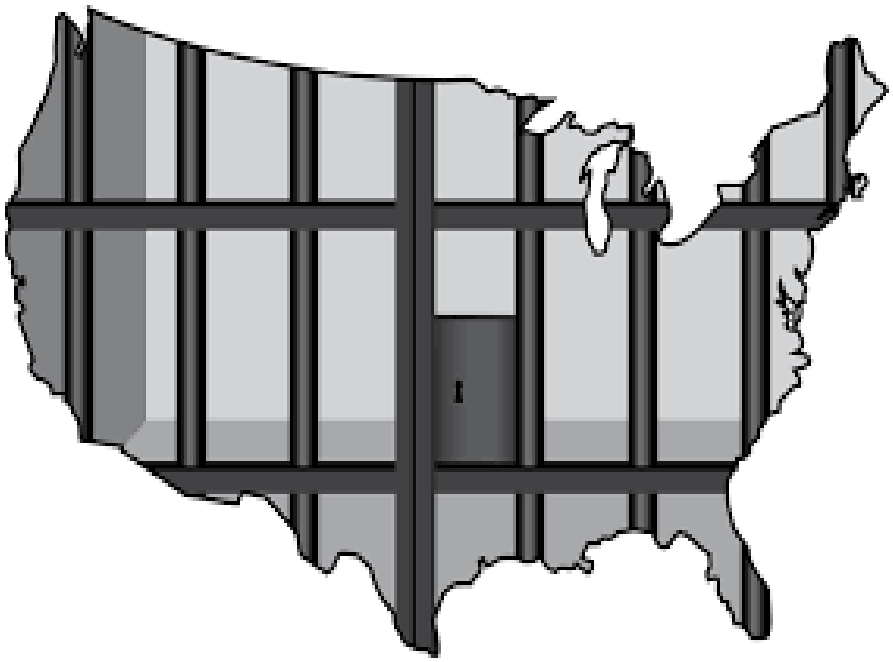
Larry Cupler; Kern Valley State Prison (KVSP), North Kern State Prison (NKSP), Avenal State Prison (ASP), Pleasant Valley State Prison (PVSP), Wasco State Prison (WSP), Valley State Prison (VSP).

Eric Joe; California Health Care Facility (CHCF), California State Prison, Sacramento (SAC), Richard J. Donovan Correctional Facility (RJD), Mule Creek State Prison (MCSP), California Medical Facility (CMF).

CALIFORNIA NOW RANKS 18TH
IN STATE INCARCERATION RATES

Recently released statistics from the federal Bureau of Justice Statistics show California, despite still being under federal supervision to be sure the prison population remains below a judicially set level, ranks 18th for incarceration rates by state. In 2016 California's incarceration rate, per 100,000 residents was 331, compared with 137 per 100,000 population for Maine (the lowest) and 760 per 100,000 population for Louisiana, the top jailer in the nation.

Overall, the United States still is the prime incarcerator of it's citizens in the world, but the Bureau of Justice Statistics reports overall incarceration rates in the country decreased by about 1% in 2016. But in California, the total incarceration numbers went up slightly in 2017, from a total of 127, 291 at the end of January 2016, to 129,092 at the same time in 2017.



In a more recent comparison, CDCR's reports by the Division of Internal Oversight and Research, reported that as of the end of January 2018, the number of total incarcerations persons was 129, 623, an increase over last year of .4%. However, experts note, the incarceration rates published do not reflect those individuals held in custody awaiting sentencing, nor those not in formal custody, but on parole or probation.

The reported figures break down further to a total of 125, 342 housed in institutions within the state, and some 4,821 California inmates housed in Mississippi and Arizona. By gender, some 5,816 women were incarcerated at the end of January, 2018, along with 119, 526 men.

According to CDCR stats, the cost to house the average inmate in a state prison for the 2016-2017 fiscal year was $70,836. Roughly ten years ago, the cost per 'average' inmate was just over $51,000. And although no definition was ever provided, then or now, for what constitutes an 'average' inmate, CDCR does note as prisoners age, the cost of incarceration increases due to health and medical concerns.

Currently the facilities housing the most prisoners are SATF, with 5, 637 prisoners; CTF topping out at 5,130 and Wasco, housing 4,974 men. Top of the population list for female institutions was CCWF, where 2,941 women are housed.

And while the federal oversight agreement sets the overall population cap at 137.5% of design capacity, it appears the department reaches that level only by averaging all institutions, as the three most populated prisons named above come it at 164.6%, 154.9% and 166.7% respectively. CCWF stands at 146.8% of capacity.

NEW FAMILY VISITING REGS: SOME CLAIRTY NEEDED

In late December of last year, CDCR finally released the proposed changes in regulations governing family visiting, a change avidly anticipated by lifers and families, who recently saw those visits restored after more than 2 decades of denial. And while the proposed regs do change the limitations on who will be allowed to participate in family visiting, as initially presented, the language is confusing, cloudy and creates almost as many questions as answers.

Major concerns under the old regulations were the permanent screening out of family visits of those prisoners:

- With a minor victim
- With old domestic violence allegations/ convictions
- With distribution charges garnered while in custody

Under existing regs prisoners with one of these factors were permanently excluded from family visit participation, with no real appeal options. And while the new regs address, in one fashion or another, these issues, the vague and rather obscurely worded changes have provided few clear answers. In summary the news regs provide the following, in relation to the concerns listed above:

- Prisoners convicted when they were a minor of an offense where the victim was a minor or a family member must be free of any serious rules violations for 5 years and have documented participation in self-help groups
- Prisoners convicted they were an adult of an offense where the victim was a minor or family member must be free of any serious rules violations for 10 years and have documented participation in self-help groups
- Prisoners convicted of distribution of a controlled substance must be free of any similar charge for 12 months.

The waiting period, or 'clean time,' required for consideration under the new proposed regs begins from the time of the event, not from the implementation of the new regs. Quick example: an inmate who was 17 at the time of his crime, a crime in which the victim was also 17 years of age, would need to be clean of serious misconduct, RVRs, violence, etc. and show documented participation in self-help and positive programming for 5 years after the crime.

And in the chance (what are the odds?) that said inmate had not been able to keep a totally spotless record since he first entered the system, he must show 5 years clean time from his last violation. That's for those who were minors at the time of the crime. If the prisoner was an adult and his victim a minor, he/she must exhibit 10 years 'clean time' before consideration for family visits.

In another major change, under current (and soon to be former regs), those prisoners with a conviction for distribution of a controlled substance were permanently banned from family visits, regardless of their crime or victim. Under the current proposal, they need only be free of similar activity and charges for 12 months before being considered participate.

Additionally, the proposed regs place the decision on allowing individual inmates to participate in family visiting not in the hands of an individual, but with the classification committee, after review of the inmate's file and interview with the inmate. And the decision is appealable, via the 602 process. The proposed changes, however, still prohibit sex offenders and condemned inmates from receiving family visits.

The regs are currently in the public comment phase, the department was taking comments/ suggestions and complaints from the public until Feb. 22, 2018, when a public hearing on the pro-

posed regs was held in Sacramento. After consideration of the comments the language may be amended.

As noted at the beginning, the wording and explanation offered in the regs is less than stellar. There are several areas of contention, not the least of which is the definition of 'minor.' CDCR is currently employing the straight legal definition of minor, someone under 18 years of age at the time of his/her crime.

The wording in the regs, referencing a victim who was a 'family member,' provides relief for those with old domestic violence convictions/allegations. The difference in the clean time requirement for those who were minors at the time of their crime and those who were adults reflects the department's concession that youth offenders are more readily rehabilitated than those committing crimes at older ages.

And some have questioned the department's use of the strict legal definition of a minor as being under 18 years of age, given the changes and considerations given to youth offenders. If, under the series of YOPH laws enacted, those under the age of 26 are less culpable than their 'adult' counterparts, why should this lesser culpability not continue to consideration for family visits? Perhaps an area to address in public comments on the regs.

The 12-month clean time requirement for those with distribution charges caught while in prison provides a path for those inmates, now permanently barred from family visiting, to once again participate in this important privilege.

Many have asked when the 'clean' time for being free of RVRs begins; after the last RVR, or from the date of the adoption of the regs, still some weeks off. CDCR's answer to that one is that the clean time begins from the last RVR, not adoption of the regs.

However, questions remain and, yet another new controversy has erupted. A great deal of chatter and drama has sprung up regarding the provisions in the regulations exacting punishment for cell phone, including possible long-term loss of family visiting for those receiving a 'third strike' cell phone write up. While many maintain the new regs outline 'new' punishment for cell phone possession, including 'constructive possession,' the fact is that cell phones, rightly or wrongly, have long been considered contraband by CDCR, and in the category of potentially dangerous contraband.

So, it should come as no surprise that the department would use every weapon available to it to combat this 'menace,' including loss of privileges, up to and including visiting and family visiting. Is this an over-reaction? Possibly. But that, too, should be no surprise.

The reality is that CDCR is not going to consider cell phones as a minor violation of rules and, given that the privilege of family visiting is earned via good conduct and positive activity, it follows the pattern that this privilege would be considered a prime tool in the 'carrot and stick' school of thought. Cell phones have always been a difficult topic, prisoners and families balancing the importance of family contact against the possible penalties of a write up, CDCR regarding the phones as potentially criminogenic tools and always a bit paranoid about any possible threat to the 'safety and security' issue.

Bottom line is this: CDCR will exact a price for any rules violation, and currently cell phone possession

is a rules violation. And the department is making no secret of the reason for this, quoting form their own Statement of Reasons, "The inclusion of loss of family visits for being found guilty of possession of dangerous contraband and/or any component or accessory of any cellular telephone or wireless communication device is to encourage an inmate to refrain from participating in the introduction of contraband."

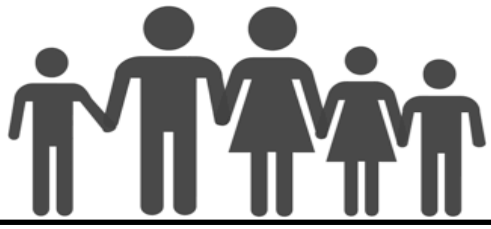
And the regs do differentiate between penalties for introduction of contraband (cell phones in particular) and distribution of controlled substances (drugs). A third conviction for distribution can result in permanent loss of family visits, while a third conviction for cell phone possession carries a hefty, but not permanent, 5-year loss of family visiting.

The newly proposed regs are now in the public comment phase, a timeframe that will culminate in a late February public hearing. After that event the department has the opportunity to amend the proposed regs—and hopefully clean up and clarify the language—before allowing comment again if there are substantial changes, and then ultimately submission to the Office of Administrative Law for review and ultimate approval, and implementation. All of this could take an additional month or so.

For those who have been screened out of family visiting participation under the existing criteria but fall under one of the areas seeing change, be patient a bit longer. Once the new regs are in place and in motion, you can once again apply for family visiting consideration, even if you were specifically denied on your first attempt, and even if you appealed that decision and that appeal was denied. The new regs mean the playing field has been resurfaced, so you have another shot.

But CDCR and visiting staff isn't going to go looking for you to right the wrong. It's up to you to reapply and make your case.

In all, it pays to remember, like it or not, family visits, which so many fought for so long to restore, are and always have been considered not a right, but an earned privilege. Again, quoting from the new regs: "CDCR reiterates that family visits are a privilege, and not a right afforded to inmates."



TRANSITIONAL HOUSING: A GOOD BET FOR LIFERS

Reprinted from previous issues of CLN and Lifer-Line. These considerations are still valid and relevant for all long-term inmates who will appear before the parole board.

In a nutshell, the word on transitional housing is YES. While not a requirement to be found suitable, plans by a lifer to enter a transitional residence when first released on parole are very favorably viewed by the BPH. And for good reason.

Not only does a lifer's willingness to make transitional housing his first stop after prison give the parole panel indications that he takes rehabilitation and reentry seriously, it also give them a bit of confidence that in those stressful and busy first few months that newly-freed ex-lifer will be in the middle of a support system to help him navigate the challenges of freedom. And those challenges can be numerous and unexpected.

Transitional housing can provide a stable base, especially for those long-serving lifers who have either lost family or lost touch with family and have no specific 'home' to parole to. It is also very useful even for those long-timers who do have family, as the shock of finally having a lifer come home is felt on both sides—by the former prisoner and his family, whether that family be Mom and Dad or wife. The change, the stress and the day-to-day of

getting back into life are a huge challenge and oft times a bit of help from someone else who has walked that path is very helpful. And that help can be found in the fellowship of transitional living.

And keep in mind, even if the BPH does not require a stint in transitional housing, the Division of Adult Parole Operations (DAPO), through your parole agent, can impose that condition separate and apart from the BPH. In fact, DAPO now finds transitional housing such a good idea the agency is starting to create their own facilities….not that we recommend those. So do your homework, check out what programs are available in the area you plan to live in on parole and find one that suits your needs.

More and more transitional facilities are being created for and filled by paroling lifers, so that we no longer find across the board lifers being forced into the old substance abuse programming model. Many facilities are now lifer-friendly and welcoming.

The changed nature of relationships with friends and families is one of the biggest challenges returning lifers face, not to mention the changed world and the ever-present use of technology in everything. Transitional housing, geared to lifers, is a tremendous help to both returning lifers and their families, and lifers are the best mentors for other lifers.

Good programs will also help with re-establishing your identity (driver's license, social security cards), money and budgeting, navigating technology, and social skills. All things lifers sequestered from society for decades will need help in mastering.

Be sure to ask about costs, the length of the program required, religious expectations, job help, can your stay be extended, will the state help pay for the costs. But if you don't have a program lined up at your hearing, simply acknowledging that you're ready to go to transitional housing on release will give the BPH an indication that you're ready to do what it takes to succeed-and DAPO will find a program for you.

If you're paroling to a less urban county, where transitional housing is not as readily available, you can get your societal land-legs back by entering a transitional facility in a larger county (LA, San Diego, Sacramento and SF have many transitional facilities) before transferring your parole back to your home area. Yes, it's not only possible to do so, it happens frequently. Remember, you are not required to parole back to your county of commitment or last residence; the parole panel will recommend your parole to any area where they feel you have the best chance for success, and that means good parole plans and support.

Know something about the facility you're asking to enter. Take a look at the introductory material they'll send you, figure out if it's a good fit for you and be able to discuss with the board why this facility will be helpful to you and you've chosen it. If the parole panel asks you why you want to be paroled to any location, don't meet that question with a blank stare. Be able to articulate why this facility will be of help to you on reentry.

Most transitional facilities will send you a letter of acceptance for inclusion in your parole plans, but don't wait until the last minute to request inclusion. And have a back-up facility, in case no beds are available once you're ready to be released. And even if you think you've got this, that reentry will be a smooth ride for someone as rehabilitated and prepared as you are, be advised you're going to come up against some surprises once you're home again, and not all of them will be easy to overcome. It helps to have the advice and support of those who have been down this path ahead of you.

If you don't know where to begin in seeking transitional housing, write to LSA (and please send a stamp) and we'll send you a list of possible locations, listed by geographical area. Consider signing on for transitional housing—it's a good step before the board, and an even better step once you're back in the world.

BOARD BUSINESS

For parole commissioners, monthly business meetings, increasingly short as 2017 proceeded, 2018 began much as 2017 ended, with short business meetings. December, the last Executive Board meeting of the year, lasted just over an hour, the majority of that time consumed by a presentation to the board regarding the reintegration into society of older adults with serious mental illnesses. How many potential lifer parolees would be included in this cohort was not included in other information provided.

In other business in December BPH Director Jennifer Shaffer introduced Diane Dobbs, at that time newest commissioner appointee, who replaced former Commissioner Cynthia Fritz following her resignation. Dobbs, however, didn't remain the newest commissioner for long.

As the new year began, at the first meeting of 2018 in January one of the few items of business at the meeting was Shaffer's introduction of yet another new commissioner, David Long, appointed by Brown to fill the vacancy created when Commission Troy Tiara resigned in December. Also at the January meeting Chief Legal Counsel Jennifer Neill noted oral arguments in the Butler case were held January 4 before the California Supreme Court, with the justices due to release a decision on or before April 4, 2018.

Regarding implementation of new laws taking effect on January 1, 2018, Shaffer noted AB 1308 extended the provisions of YOPH to those under 26 years of age at the time of the crime, and a few hearings have been postponed in order to allow the FAD time to prepare CRAs for these individuals, CRAs that take into account YOPH factors. Those who have a hearing already scheduled but now qualify for YOPH consideration may choose whether to have that hearing postponed in order to receive the new YOPH attuned CRA or proceed with the hearing, with the parole panel aware of the situation.

As for SB 394, which brings those given an LWOP sentence for crimes committed before they were 18 years of age to an automatic parole hearing after 25 years of incarceration, Shaffer reported the board will begin feeding those inmates into the hearing schedule and the consultation schedule. Shaffer noted CDCR has determined there are just over 260 current LWOP inmates impacted by this new law, and many have not as yet reached their 24 year of incarceration, when a parole hearing would normally be scheduled. In this situation the bill is expected to have relatively minimal impact on the immediate hearing schedule.

EN BANC DECISIONS

December and January Executive Board meetings at the BPH were notable for the increase in commutation of sentence referrals from the Governor's office, a phenomenon the board is increasingly considering. In December the Governor referred a single such request, but the January meeting saw four such referrals; in fact, the entire calendar of en banc considerations in January were for commutation consideration.

The December commutation referral, **Ronnie Mohammed**, was predictably opposed by the LA County DAs office and a letter from the victim. Nonetheless, the majority of commissioners voted to send the referral for commutation back to the Governor with a recommendation in favor of commutation.

The January group of commutation considerations fared well also, with 3 of the 4 applicants receiving a positive recommendation for commutation consideration. **Michael Divincino**, **Gregory Gibson**, and

Joaquin Jordan all received positive referrals. Gibson and Jordon enjoyed speakers endorsing their sentence change, while Divincino and **Carlos Tevenal**, also up for commutation referral, saw no speakers. Tevanal alone was denied the board's support for commutation.

In an interesting performance, Alameda County DA Jill Klinge, acting for her fellow DAs from LA County, stepped in to voice her and their opposition to all the commutation petitions, and requested the board defer consideration of the requests until the LA county officials could be at a meeting to speak to each inmate's situation. Apparently, the LA County DAs were confused that the board had condensed the January Executive meeting from two days to one day and were not available to appear in person.

Klinge indicated the LA contingent contacted her at the last minute, pressing her into service in their common cause to oppose release. Despite her salvage efforts, the board declined to defer consideration, perhaps realizing the change was publicly noticed well in advance of the meeting date and other members of the public figured it out.

The remaining en banc considerations from the December meeting were of decidedly mixed results**. William Lawrence**, seeking recall of sentence under the compassionate release statue, was granted that recall recommendation. Brian Brownley, referred by the Chief Counsel due to alleged misconduct post-parole grant, saw that grant vacated and a new hearing ordered.

Jeffrey Daniels, referred for en banc consideration by the Governor, and unopposed by anyone else, saw that grant confirmed. The final en banc item, for **Thomas Spychala**, referred by a hearing panel member, was not considered, due to the death of the inmate.

PROPOSITIONS: WHERE TO FIND OUT MORE

Amid the tensions of a volatile election year and talk of expanding on legislation passed last year impacting prisoners, several new ballot measurers have been proposed, all trying to secure a place on the November ballot and win favor with the voters. And while we listed those proposals in the last issue of CLN, we continue to receive queries about what proposal does what, when they will go into effect, what happens next and what can prisoners do.

First, we want to reiterate the numerous conversations we've had with political and administrative officials about the prospect for more progress in prison reform this year, via either legislation or ballot. And overwhelmingly, what we've heard is cautiousness. Most in the political, legislative and reform communities are keenly aware of the vicissitudes in play during an election year, especially one as partisan as the 2018 campaign promises to be. Virtually all have urged caution against expecting large gains and have counseled this may be a year of protecting those gains achieved in prior years.

Indeed, many in all areas are attuned to codifying recent changes in laws and policies, to make those progressive steps permanent and not subject to the whim of future administrations. So, the ballot measures now in the signature gathering stage have an uncertain future, perhaps more uncertain than ballot measures in most years.

Currently, while incarcerated persons or those on parole cannot vote in California (though one of the proposed ballot measures addresses that issue), potential changes in law and policy remain of intense interest to prisoners. While, due to work load and fiscal constraints, CLN cannot provide copies of all ballot proposals, we offer, again, the following summaries of those proposals that most directly impact prisoners and prisons, as well as contact information for the individuals or organizations

sponsoring the propositions.

All ballot proposals must garner a specific number of registered voters' signatures to qualify for inclusion on the ballot. Those signatures must be obtained by a specific date.

The **"Voter Restoration and Democracy Act of 2018,"** sponsored by Initiate Justice, perhaps the simplest of the proposals, would amend the state Constitution to allow those individuals currently in prison or on parole for a felony conviction to register and vote in elections. Currently listed as number 17 -0023 in the Secretary of State's Active Initiatives list, this proposal would simply remove from certain sections of the California Constitution language that prohibit individuals who are both currently incarcerated or on parole for felony convictions from registering to vote and voting.

This measure would remove that definitive language and re-write the requirements to allow all legal residents who are 18 years of age or older to vote. California is among several states that currently restricts voting privileges of those in prison and on parole. Only 2 states, Maine and Vermont, allow incarcerated persons to vote, while in 3 states, Florida, Iowa and Virginia, those convicted of a felony lose their voting rights forever. The remaining states provide various restrictions and methods of voting rights restoration.

At first glance, some officials have speculated that, if passed, this measure would mean prisoners now incarcerated could register (or update their registration) to vote, with the actual voting process being accomplished by mail-in ballot. In what precinct potential prisoner-voters would be registered is largely left undefined. Under current law, voters are entitled to vote only in the precinct where they have legal residence.

Would prisoners be allowed to register and vote for candidates and issues in their county of last legal residence, prior to incarceration, or only in the county where they currently reside, courtesy of CDCR?

If you would like more information or a copy of this ballot proposal, contact Initiate Justice, PO Box 4962, Oakland, CA 94605.

Another ballot initiative, # 17-006, the **"Elderly Inmate Parole Initiative**," offers a constitutional change that would enshrine an elderly parole process within the Constitution (thus making it difficult for the legislature to change) but would affect a very narrow slice of the inmate population. The proposal would provide parole consideration for inmates who are 80 years and older, after serving 10 years of their sentence, either a life sentence or a determinate sentence. It excludes LWOP and condemned inmates, or those whose release is "prohibited by any initiative statute," thus perhaps excluding third strikers from inclusion under this proposal.

Initial estimates of the number of current inmates who would be eligible for parole under this measure are only in the double digits. While the legislature passed an elderly parole bill last session, that went into effect on January 1, 2018, that bill defined elderly parole as applying to those 60 years and older, with 25 years or more of straight incarceration time and would specifically exclude third strikers.

However, the BPH has signaled its intention to continue scheduling elderly parole hearings for third strikers, under the existing agreement with the three federal judges overseeing CDCR efforts to maintain the population cap. This agreement, because it is federal in nature, will supersede state laws until the judges return oversight to the CDCR, a prospect that does not seem on the foreseeable horizon. This new take on elderly parole is sponsored by a Pasadena attorney, Charles Funaro, 221 E. Walnut Street, Suite 255, Pasadena, California 91101.

Also gathering signatures is the latest version of the Second Chance Initiative, #17-0009, **"Second Chance for Youth Second Strikers."** This measure would require parole hearings for "any prisoner

who was under 23 years of age at the time of his or her controlling offense." The guidelines would be hearings after 15 years for determinately sentenced prisoners; those with a to life term of less than 25 years would see hearings after 20 years and lifers sentenced to more than 25 years, after the 25th year. The current language excludes condemned and LWOP inmates, and those who, subsequent to the age of 23, committed a crime with malice aforethought or for which they received a life sentence. Basically, the same perimeters of YOPH laws.

According to the Secretary of State, this initiative was filed by one Amy Davis, apparently as an individual. Attempts by many to contact Davis and become involved in signature-gathering efforts have met with very limited success, as there appears to be a lack of coordinated planning and staff behind this effort. However, those who would wish to inquire about the status of the process, Davis lists the following contact information with the SOS; 1100 N Lemon St. #B3, Fullerton, Ca 92832.

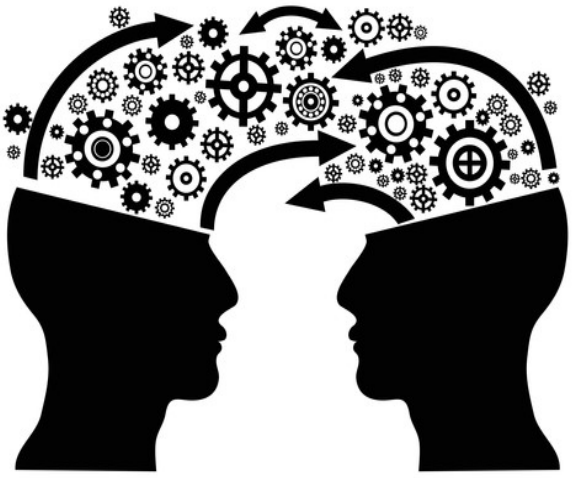
"The People's Fair Sentencing and Public Safety Act of 2018," sponsored by We the People, is perhaps the most complex and potentially the most controversial. It would, in a nutshell, change penal code to "ensure that (a) "nonviolent" property offenders will no longer be classified in the same category as dangerous criminals, and (b) certain violent offenses do not qualify for relief…(5) Require resentencing as second strikers for all third strikers whose current conviction is not a violent felony within the meaning of the amended provisions of Penal Code 667.5(c)." And it hopes to apply these changes retroactively.

The proposal seems to suggest changes in penal code based on the 'use' of a firearm or deadly weapon in commission of a crime, rather than the current wording, referencing simply being 'armed' with such weapons or causing as opposed to intending to cause harm while committing a crime in Penal Code Sections 667.5 [though it does not appear to suggest change in 667.5 (c) (7)], 1170.12 and small changes in Section 1192.7. It would also add a new PC section, 1170.24.

The new proposed section would provide for petitions for recall of sentence under provisions in the new proposal, should it be voted in, thus perhaps providing a vehicle for retroactive implementation. Changes in 1192.7, defining serious felonies, appear to be limited to removing making criminal threats from that list, but this a complex proposal and will undoubtedly create as many questions as it answers.

It proposes to create a new budgetary fund, filled by financial savings from lower incarceration rates, which will be doled out equally among several areas, including education and programs for crime prevention. That, in itself, is a daunting task. While We the People does not provide an official mailing address, the ballot summary for this proposal was signed by one Thomas Loversky, an attorney, who provided the follow address to the state bar association: 2711 N Sepulveda Blvd # 246, Manhattan Beach, CA 90266.

And finally, there is the **"Reducing Crime and Keeping California Safe Act of 2018,"** the proposed ballot initiative is put forth by a coalition of police and DAs masquerading as the "California Public Safety Partnership." This is proposal, well-funded and with significant and experienced organizational backing, currently poses the most serious threat to reversing the gains of the past few years, realized through Propositions 47 and 57 and even AB 109.



This proposed initiative purports to lay out three goals:

> *"A. Reform the parole system so violent felons are not released early from prison, strengthen oversight of parolees and tighten penalties for violations of term of parole;*
>
> *B. Reform the theft laws to restore accountability for serial thieves and theft rings; and*
>
> *C. Expand DNA collection from persons convicted of drug, theft and domestic violence related crimes to help solve violent crimes and exonerate the innocent."*

- Toward those expressed ends, the constitutional change, if passed would:
- add 15 crimes to the list of violent crimes, which would preclude early release
- allow DNA collection for certain crimes, including drug offenses, that were reduced to misdemeanors under Proposition 47 and for which mandatory DNA collection is not enforceable
- make serial theft, one or more prior convictions for shoplifting or a felony.
- Adds a penal code section defining serial theft and listing 15 specific crimes
- mandates a parole revocation hearing for anyone who violates the terms of their parole three times.

At least one CDCR official has speculated passage of this initiative could be 'disastrous' for the prison system, which could, given the number of new felony convictions possible under the language, see the population again swell to pre-cap levels. This initiative also probably has the best chance of actually making it onto the November ballot, given the professional and deep-pocket backing of signature gathering and promotional efforts.

For now, none of these proposals has yet secured a place on the November ballot, but we're keeping tabs on these and other legislative efforts and will continue to provide updates in coming months. Again, we at CLN can't provide copies of the initiatives and promotional literature and suggest interested parties contact the sponsors.

As new legislative bills are proposed in the just-getting-under-way legislative session, we'll monitor those as well and provide bill numbers and summaries to our readers. For copies of specific bills, contact the Legislative Bill Room, State Capitol, 10th St, Room B32, Sacramento, California

'NON-DESIGNATED' OR MIXED YARDS—DON'T PANIC

As is often the case when CDCR changes direction and begins to implement change, rumors often outpace factual information and the thought process gets left in the dust by assumption and speculation. And usually with a deleterious result.

And so it appears it may be with the 'Non-designated Programming Facilities' approach, currently in progress at a scant handful of prisons in the system. A lot of sound, a lot of turbulence and more than a little fear-mongering. And a big, gapping void of facts.

Here's what we know, from information directly from CDCR sources.

- There is no plan, either in current or future, to mix, on a mass level, inmates currently on SNY yards and those on GP yards.
- This is no plan to flip, on a wholesale level, any yard from either GP to SNY, or SNY to GP.
- Not all prisons will eventually be participating in this new policy that mixes populations from previously specially designated yards to housing all populations together.

- Busloads of inmates are not being shipped across the state to other institutions, where they will be unceremoniously dumped into a yard of a different character than they left.
- There is a policy to provide inmates both the opportunity and responsibility to prove they can interact safely and positively with all segments of the population.
- Those inmates to be assigned to Non-Designated Programming Facilities are individually selected.

According to sources, the Non-Designated Programming Facility process will mean a few, carefully selected yards in a handful of prisons, will see new inmates housed there, and those inmates themselves will be individually considered by classification committees to decide if they meet the programming and behavioral criteria to participate. Sources confirm, selection for the move is considered by CDCR, and the department hopes will be seen by prisoners, as a positive affirmation of their progress and continuing success in rehabilitation.

Quietly acknowledging the long-time effort to blunt prison politics and resulting violence by offering to separate those who wanted to program removed from the drama via the creation of Sensitive Needs Yards (SNY) have resulted not in a reduction of gang activity and security issues, but in many cases only led to the creation of a whole new range of gangs (Security Threat Groups, or STGs) native to the SNYs, CDCR has decided what perhaps many suspected: you can't solve a societal problem by isolating it. The Non-Designated Programming Facility program is the department's answer to the old Rodney King question, "Can't we all just get along?"

Planned only for Level I and II prisons, and, in most cases, only on selected yards in those prisons, the NDPF yards will house all pedigree of inmates, who "have demonstrated positive programming efforts and a desire to refrain from violence." The roll-out of the program began at RJD some months ago and is now largely complete. Officials express themselves to be satisfied with the results, noting initial problems and mis-understandings have been worked out and programming is now running smoothly.

Also planned for NDPF are CHCF in Stockton and San Quentin. In both these facilities the entire institution will be designated as NDPFs, due to the nature of the physical plant. Other yards in Level I and II prisons will be considered, but for now, the department apparently plans to let the newly created yards settle into normalcy.

Rather than a flood of new inmates, CDCR emphasizes the change will be done more along the lines of a trickle, a few selected inmates at a time. And those inmates who, for their own safety, must remain in specialized yards will do so. No mass clearing of SNYs.

The changes apply to lifers and determinately sentenced inmates, because, as CDCR notes, about 90% of all current inmates will eventually be released back into society and it would behoove the department to help those returning citizens experience the variety of normal life experiences, including interaction with all variety of flora and fauna.

So the message here is take a breath and stand down. SNYs are not being cleared or invaded by general population inmates or being forced on a wholesale basis to transfer to yards where their lives will be in danger. For those selected for transfers to NDPF and who don't want to go, the old 602 process is the recourse, because, as we've all known for some time, CDCR moves prisoners around much like canned peas on the market shelf.

FIRST LEGAL CHALLENGE TO PROP. 57 SUCCESSFUL

In a harbinger of what may be things to come, an early February decision by a Sacramento County Superior Court judge in Sacramento sided with plaintiffs in the first of what may be many challenges to who is and is not included in the early release considerations under Prop. 57. In this case, the exclusion of all sex offenders for this consideration, under the regulations currently in effect, was ruled to have gone too far in this exclusion. And other groups who have been dissatisfied with the implementation of Prop. 57 are eyeing the decision, weighing the decision to challenge those regs on behalf of their constituents on the same basis.

The suit, brought by the Alliance for Constitutional Sex Offense Laws, challenged the CDCR's version of who can be considered for early release, arguing the regulations excluded more inmates from this possibility than the proposition, and the voters, intended. Judge Allen Sumner rejected the state's argument that the proposition allowed the department broad discretion in who qualified for early release consideration. Instead, Sumner said, the scope of the regulations laying out those exclusions must be narrowed, to exclude only those currently serving time for a violent sex offense.

Those who are currently in prison on a new crime, regardless of whether or not they have previously been convicted of a violent sex offense and served that sentence, must be included in consideration for early release under Prop. 57, according to the judge's ruling. "If the voters had intended to exclude all registered sex offenders from early parole consideration under Proposition 57, they presumably would have said so," Sumner said.

And while Sumner agreed CDCR can make the case for excluding all those who must register as a sex offender from consideration release under Prop. 57 when the current version of regulations is re-written, the attorney for the plaintiff has promised additional litigation if it appears those exclusions go too far. And while CDCR has, at press time, not yet commented on the ruling or any possible appeals, such action would certainly be within CDCR's usual pattern.

The focus of this litigation, and potentially other challenges to who is and isn't considered a 'non-violent' prisoner, hinges on the definition of 'non-violent.' In the current case, the use of that term. And while the petitioners in this case argued for non-violent being defined by PC 667.5, the judge did not order that, deciding there was not enough evidence that the voters intended non-violent to be defined by this penal code section, just as, in his opinion, there was not enough evidence that the voters intended to exclude all sex offenders, serving either past or current terms for those crimes, from consideration for early release.

What makes this case of intense interest to other inmates, now excluded from early release consideration or other provisions of Prop. 57, is the potential argument being used for the inclusion of Third Strikers under Prop. 57. Current regs specifically exclude that cohort, in part relying on that same statue, PC 667.5 (c), including 667.5 (c) 7. The successful suit also uses this penal code, noting under the strict definition under this statue only 9 of 100 identified sex crimes would be excluded from Prop. 57 considerations.

Similarly, those arguing for inclusion of Third Strikers, note many in that group are serving a current sentence for a non-violent crime, not listed in the state's short (relatively) list of 23 crimes identified as violent, and are instead being screened out of Prop. 57 benefits, in part via the use of PC 667.5 (c) 7, a position they maintain was never intended by the voters who passed the proposition in 2016. It's an argument that until now has been largely academic, as the department has relied on the 7th item in 667.5 (c), which included "Any felony punishable by death or imprisonment in the state pris-

on for life," under the heading "c) For the purpose of this section, "violent felony" shall mean any of the following:"

For their part, the opponents of this interpretation hold it's only the enhancements of third strikes that put prisoners in this category, not the primary crime itself, and thus is outside the scope of the department's authority to decide the voters' intention. What is specifically provided for in Prop. 57, what the department can and can't infer as to voter intent and how that impacts who can benefit from Prop. 57 and who will be excluded, was the basis of the successful suit regarding sex offenders. The same tactic may yet be used on behalf of third strikers.

As yet, no litigation has been filed, but conversation in many legal and advocacy circles is buzzing.

CONFUSION STILL REIGNS

In the course of presenting programs to various self-help groups in several prisons over the last few months (Connecting the Dots and The Amends Project), we've noticed there still seems to be considerable confusion on a few issues. These are the most Frequently Asked Questions we've heard over the past 4 months.

SCR 48—was a Senate Concurrent Resolution (hence the SCR), which basically articulated the intent of the state Senate and Assembly to do something about convictions under the felony murder rule. Quoting from the language of the resolution, "This measure would recognize the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime…. It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability; reform is needed in California to limit convictions and subsequent sentencing in both felony murder cases and aider and abettor matters prosecuted under "natural and probable consequences" doctrine".

Yes, this means the legislature acknowledges change in needed in this sentencing practice, but no, it does not mean that the felony murder rule has changed. After the above statement of concern, and some two dozen 'whereas' later, the authors finally get to the point, blunt though it may be: "…. the Legislature recognizes the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime." So, the need for modification of the felony murder law has been officially recognized, and intent to do so expressed~but as yet, no such bill has been introduced.

In mid-February a bill, SB1427, was introduced that would actually cause change in the law, with provisions for retrospection. As this bill progresses through the legislative process we'll keep you informed.

AB 1448, Elderly Parole: passed last legislative session and signed into law by the Governor, AB 1448 codified the elderly parole process of the Board of Parole Hearings. However, the language in the bill exempts third strikers from being considered for this process. And to make matters more confusing, because the current BPH elderly parole hearings, promulgated under the state's agreement with the three federal judge panel (3JP), does include third strikers.

In legal matters, federal laws superseded state laws, meaning that so long as the 3JP agreement is in effect, third strikers WILL be included in the elderly parole process. All parties agree, federal oversight of the CDCR seems likely to be in place for some considerable future time. Currently the BPH is scheduling elderly parole hearings for third strikers.

SB 620—which allows judges to waive the firearm enhancement sentencing requirements on specific crimes. However, this bill, passed and signed into law and effective as of January 1, 2018, is not retro-active, applying only to those who are still awaiting sentencing, or resentencing.

Therefore, it will not impact those currently serving prison time, unless individuals are, in some fashion, brought back to court for resentencing. And the passage of this new law is not, in itself, cause for resen-tencing.

Consultation hearings: not so much as hearing as an interview or conversation, these meetings are held roughly six hears before a prisoner's initial parole hearings. Formerly called 'Documentation Hearings,' these consultations, conducted by a Deputy Commissioner, are to give prisoners a first hint as to where they are in their quest for suitability.

Unfortunately, it appears that often other personnel in CDCR, including counselors, don't totally under-stand the difference between a consultation 'hearing' and a suitability hearing. Perhaps some of this confusion could be alleviated if consultation 'hearings' were called by another name, say simply consul-tations, or interviews, or conversations. Anything but hearings, because hearings they are not. And we've suggested this to the BPH.

So, if you are called for your consultation 'hearing,' don't have an attorney, a parole plan, all your ducks in a row, don't panic. The Deputy Commissioner will review your file, let you know where you need to concentrate your efforts and provide you with suggestions on how to increase your suitability chances. That's it. Your actual suitability hearing will come a few years later.

DON'T ASK

We take on many tasks on behalf of lifers, LWOP and long-term prisoners, some that we discover need exploring, some that prisoners alert us to. Usually those areas we delve into have the propensity to affect large swaths of those populations or address some glaring inconsistency. And we're happy to consider any systemic issue brought to our attention.

But increasingly we're being asked to perform what amounts legal research for individual inmates, relevant to their specific cases, applicable only to their situation and often esoteric in nature. Or to create a relapse plan for individuals, relevant to their specific needs. Or contact family and friends to provide information on the prisoner's situation, case or parole status.

In the words of one lifer, 'miss me with that.'

- We aren't attorneys, don't have attorneys on staff, on retainer or hanging around to do our bidding.
- We are a pretty small staff, working with a pretty large population of prisoners, so personnel-wise, we don't even have time for our own research.
- Concentrating on the individual 'you' takes away from our efforts to assist the larger 'everyone'
- And, really, you do realize we don't draw a salary, and why would you expect someone to do a professional job for you for nothing?

So, if you want to alert us to a problem, an issue, ask a question or clarification, great, happy to help, if we have that information and knowledge. And we may.

But if you're looking for someone to help you individually fight your battle, your case, your RVR or do what your family seems to busy to do for you, sorry. Please don't even ask. It takes time to read and respond to your letter, as well as resources in the form of paper, ink and postage to respond.

We'll do all we can for the lifer cause, but those individuals who want to take advantage of that commitment for their own rather selfish benefit, probably won't even receive a response. Help us help you.

NO LEGAL MAIL, PLEASE

Just a reminder—LSA/CLN covers many areas, we're many things, including a pain in the neck to CDCR sometimes. But one very important thing we are not, is an attorney firm. We aren't attorneys, don't employ attorneys, can't give legal advice.

As part of that restriction, we are not entitled, under law, to engage in correspondence under the label of "Legal Mail." Those sending us letters under that banner should understand their mail to us is not protected in the manner it would be when sent to a legal firm. Nor can we return mail under that protection.

A respectful request to our readers and constituents: please don't send us mail marked legal mail. While we know we're not a legal firm, and we try to make that very plain, we want no confusion on the part of CDCR, either as a department or as an individual prison, that we are portraying ourselves as such. That could lead to unpleasantries for us, and for our communicants.

Thank you for your support.

...AND ANOTHER ONE BITES THE DUST

Since the parole board commissioners have been increased to a hefty 15 individuals (hefty numbers-wise, not hefty individuals), Governor Brown is having a hard time keeping those seats filled. Last month we reported on the departure of Commissioner Fritz, replaced by quickly-appointed Dianne Dobbs. And now comes confirmation that another sitting commissioner has left, and, once again, been swiftly replaced.

Troy Taira, a full commissioner for barely a year, resigned in early January, again apparently due to the extensive travel requirements for the position. That was, reportedly, also a major factor in Fritz' resignation, as well as that of former Commissioner Ali Zarrinam a couple of years ago and other commissioners in previous years.

To fill Taira's recently vacated seat, Brown has tapped David Long, of Tehachapi. Long has been vice president of prison engagement at Defy Ventures since 2017. He was also warden at California City Correctional Facility and at Ironwood State Prison from 2008 to 2014 and associate warden at Mule Creek State Prison and also served at Chuckawalla Valley State Prison from 1989 to 1995.

New Commissioners

David Long

Dianne Dobbs

ATTORNEY SURVEY

Life Support Alliance is seeking information on the performance and reliability of state appointed attorneys in the lifer parole hearing process. Please fill out the form below in as much detail as possible, use extra sheets if needed. Please include your name, CDC number and date of hearing, as this will allow us to request and review actual transcripts; your name will be kept confidential if you desire. Details and facts are vital; simple yes or no answers are not particularly helpful.

Mail to **PO Box 277, Rancho Cordova, CA. 95741**. We appreciate your help in addressing these issues.

NAME*_____ CDC #*_____ HEARING DATE*_____

COMMISSIONER_____ GRANTED/DENIED(YRS)_____

INITIAL/SUBSEQUENT (how many)_____EVER FOUND SUITABLE/WHEN_____

ATTORNEY_____ PRISON _____

MEET BEFORE HRG?_____ HOW FAR IN ADVANCE OF HRG? _____

TIME SPENT CONSULTING_____ OBJECT TO PSYCH EVAL?_____

LANGUAGE PROBLEMS?_____ WAS ATTORNEY PREPARED?_____

DID S/HE BRING ANY DOCS NEEDED?_____ SUGGEST STIP/WAIVE?_____

Please provide details regarding attorney's performance, or lack of, including interaction with parole panel and/or any DAs and VNOK present. Was attorney attentive during pre-hearing meeting and hearing, did s/he provide support/advice to you? Was s/he knowledgeable re: your case and/or parole process? Had s/he read your C-file before meeting with you?

*required

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