CALIFORNIA LIFER NEWSLETTER

State and Federal Court Cases

by John E. Dannenberg

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

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

In re William Palmer ("Palmer I")

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

This case was dismissed on 4/30/20 in light of newly adopted BPH regulations governing youth offender parole hearings.

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

In re William Palmer ("Palmer II")

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

This case is fully briefed, but no oral argument date has been set.

DISABLED LIFER WITH PERMANENT BRAIN DAMAGE WHO WAS DENIED PAROLE FOR LACK OF INSIGHT IS ORDERED TO HAVE NEW HEARING

In re Andrew Shelton

---Cal.App.5th---; CA 1(2) No. A154983
July 23, 2020

Following the granting of a petition for rehearing, the Court reissued its opinion and again published it. The only significant change is in the order for relief, where the 30 day hearing rescheduling order now carries an exception to allow for statutory notice of a hearing first, if requested.

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The Board shall conduct this hearing within 30 days of the issuance of the remittitur in this matter, unless notice of hearing is requested pursuant to Penal Code section 3043.

ON A HIGH NOTE: POSSESSION OF MARIJUANA BY PRISONER STILL UNLAWFUL AFTER PROP. 64

P. v. Artemis Whalum

---Cal.App.5th---; CA 4(1) No. D076384
June 5, 2020

An astute prisoner figured that Prop. 64's passage, making possession of marijuana in small amounts no longer a crime, would apply to him while yet incarcerated. The Court of Appeal disagreed.

> Artemis Whalum, who is serving a prison sentence for possessing cannabis in a correctional institution in violation of Penal Code section 4573.8, appeals from the trial court's denial of his petition to dismiss and recall his sentence. Whalum's petition was based on the fact that, after his conviction, the voters adopted Proposition 64, making it legal for persons at least 21 years of age to possess up to 28.5 grams of cannabis except in specifically identified circumstances, and giving persons currently serving a sentence for a cannabis-related crime that is no longer an offense after Proposition 64, the ability to petition for relief in the form of recall or dismissal of their sentence. (Prop. 64, § 4.4, approved Nov. 8, 2016; Health & Saf. Code, § 11361.8, subd. (a).)
>
> We conclude that the crime of possessing unauthorized cannabis in prison in violation of Penal Code section 4573.8 was not affected by Proposition 64. Accordingly, the trial court properly determined that Whalum was not entitled to relief. We therefore affirm the order denying Whalum's petition.

The facts are straightforward.

> On October 3, 2014, an indictment accused Whalum of possessing an illegal substance in prison in violation of Penal Code section 4573.6, along with alleging prior convictions, including one prior strike. The indictment was

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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

Hope ~ Help ~ Home
www.lifesupportalliance.org

WE'RE GOING QUARTERLY

Fewer but bigger issues

In the many years that CLN has been in existence it's gone from a few pages stapled together and published periodically, relating the disposition of numerous lifer writs and cases, to a 50-60 page bound edition, primarily bi-monthly, covering legal decisions, BPH rules and policies and legislation. Starting out at a subscription rate of $18 per year, as costs have risen, so has the subscription rate, though for the last 6 years we've held that cost at $35 per year for those still in prison and for those in their first year of parole.

That cost has been underwritten by the subscription rate for 'free worlders' and supplemented by advertising from selected sources, usually attorneys we have confidence in. And we're intent on keeping that subscription rate at the current level as long as possible.

But in addition to production and mailing costs there is the cost in time to write, format and proof each edition, costs that no can provide reimbursement for. Keeping to a bi-monthly schedule was increasingly difficult, a fact that was, like many things, brought to an hour of decision by the ripples from the restraints to business and people caused by CoVid.

After much deliberation and consideration, we've decided to change our publication schedule to quarterly, rather than bi-monthly. And while this CoVid-fraught year is not indicative of the publication schedule going forward, for the remainder of this year and continuing on our aim will be to get CLN in the hands of subscribers about mid-month in March, June, September and December.

We anticipate each issue will be larger than the bi-monthly issues of past years, as we'll be covering events and actions of 3 months. However, this year's publication schedule shakes out, and that remains to be seen, we will pick up coverage where the previous issue left off, so that no month and no changes or important issues will be missed.

…...cont. from pg. 2

based on Whalum's possession of 0.4 grams of cannabis in his prison cell in Centinela State Prison on September 18, 2013.

On August 11, 2015, Whalum pled no contest to unauthorized possession of drugs in prison in violation of Penal Code section 4573.8 and admitted a prior strike. The trial court imposed a sentence of two years, eight months, to run consecutive to the time he was currently serving in prison.

Importantly, this question is not final in the courts. However, this Court sided with precedent declining to adopt Prop. 64 in such instances, pending final review by the California Supreme Court (S262935).

The issue of whether Proposition 64 affected the existing prohibitions against the possession of cannabis in a correctional institution is currently pending before our Supreme Court. Specifically based on a disagreement between the First District in *Perry, supra*, 32 Cal.App.5th 885 and the Third District in *People v. Raybon* (2019) 36 Cal.App.5th 111 (*Raybon*), our Supreme Court granted review in *Raybon* to resolve the issue. (*People v. Raybon*, review granted Aug. 21, 2019, S256978.) As we will explain, we agree with *Perry* that Proposition 64 did not affect laws specifically directed at criminalizing the possession of cannabis as contraband in a correctional institution.

There are two California statutes governing such possession.

Two different statutes make it illegal to possess cannabis in a correctional institution, with the difference being that one of the statutes applies to all drugs and alcohol (Pen. Code, § 4573.8) and the other applies only to controlled substances, the possession of which is prohibited under Division 10 of the Health and Safety Code (Pen. Code, § 4573.6). As cannabis is a drug and a controlled substance regulated in Division 10 of the Health and Safety Code (§§ 11007, 11054, subd. (d)(13), 11357), both statutes have been used to convict prisoners who possesses cannabis.

Specifically, Penal Code section 4573.6, subdivision (a), which applies only to controlled substances, provides in pertinent part: "Any person who knowingly has in his or her possession in any state prison . . . any controlled substances, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, . . . without being authorized to so possess the same by the rules of the Department of Corrections, rules of the prison . . . or by the specific authorization of the warden, superintendent, jailer, or other person in charge of the prison . . . is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years." The defendants in *Raybon* and *Perry* were convicted under this statute (*Perry, supra*, 32 Cal.App.5th at p. 888; *Raybon, supra*, 36 Cal.App.5th at p. 113), and in our case, the indictment originally charged Whalum with a violation of this provision.

Penal Code section 4573.8, which applies to all drugs and alcohol, provides in relevant part: "Any person who knowingly has in his or her possession in any state prison . . . drugs in any manner, shape, form, dispenser, or container, any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming drugs, or alcoholic beverages, without being authorized to possess the same by rules of the Department of Corrections, rules of the prison or jail, institution, camp, farm, or place, or by the specific authorization of the warden, superintendent, jailer, or other person in charge of the prison, . . . is guilty of a felony." (Pen. Code, § 4573.8.)

Whalum pled no contest to a violation of this statute.

The California statutes do not expressly carve out marijuana as a banned substance, by name. This leaves such a determination to one of statutory construction by the courts.

We are unaware of any statute that explicitly states that it is a crime to use cannabis in prison. Instead, as case law has observed, although "[o]bviously, the ultimate evil with which the Legislature was concerned was drug use by prisoners," the Legislature " 'chose to take a prophylactic approach to the problem by attacking the very presence of drugs and drug paraphernalia in prisons and jails.' " (*People v. Harris* (2006) 145 Cal.App.4th 1456, 1461 (*Harris*), quoting *People v. Gutierrez* (1997) 52 Cal.App.4th 380, 386.) Accordingly, the Legislature enacted specific laws criminalizing the act of possessing drugs and drug paraphernalia in prison (Pen. Code, §§ 4573.6, 4573.8), and the acts of selling, furnishing or smuggling such items in prison (*id*., §§ 4573, 4573.5, 4573.9). As our Supreme Court has observed, the laws making it a crime to possess, smuggle, sell and furnish drugs in prison "flow from the assumption that drugs, weapons, and other contraband promote disruptive and violent acts in custody, including gang involvement in the drug trade. Hence, these provisions are viewed as ' "prophylactic" ' measures that attack the ' "very presence" ' of such items in the penal system." (*People v. Low* (2010) 49 Cal.4th 372, 388.)

The essence of Prop. 64 was recited by the Court.

In the November 8, 2016 election, the voters adopted Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act. (Prop. 64, § 1, approved by voters, Gen. Elec. (Nov. 8, 2016).) Among other things, the act included a provision legalizing certain activity involving 28.5 grams or less of cannabis by persons 21 years of age or older. (§ 11362.1, added by Prop. 64, § 4.4.) As relevant here that provision states,

"(a) Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to:

"(1) Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of cannabis not in the form of concentrated cannabis;

"(4) Smoke or ingest cannabis or cannabis products[.]" (§ 11362.1.)

Proposition 64 enacted a provision that Whalum relied upon in filing his petition.

"A person currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal . . . ." (§ 11361.8, subd. (a).)

Whalum contended that he should be granted relief under this provision.

According to Whalum, because Proposition 64 legalized adult possession of up to 28.5 grams of cannabis except in specifically identified cir-

cumstances, it is no longer a crime under Penal Code section 4573.8 to possess a drug in a correctional institution if that drug is cannabis. Further, although Whalum acknowledges that section 11362.45, subdivision (d) states that Proposition 64 did not affect "[l]aws pertaining to smoking or ingesting cannabis or cannabis products" in a correctional institution, he contends that this carve-out does not save laws criminalizing possession of cannabis in such a setting because it refers only to smoking or ingesting, not possession.

The Court proceeded with statutory construction of the relevant laws.

The gist of their analysis was as to the intended inclusion (or not) by voters of 'possession' when the statutes banned 'ingestion, consumption' of marijuana. The ultimate conclusion reached by the Court was that

> " 'We cannot presume that . . . the voters intended the initiative to effect a change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet.' " (*Valencia*, *supra*, 3 Cal.5th at p. 364.) Here, because neither the text of Proposition 64, nor the Voter Guide, strongly implies an intent to affect the laws criminalizing the possession of cannabis in correctional institutions, we conclude that those laws remain in effect after the voters adopted Proposition 64. Therefore, the trial court properly denied Whalum's petition because the law under which he was convicted was not affected by Proposition 64.

If the California Supreme Court grants review and hold on this opinion, CLN will let you know.

PEOPLE V. GALLARDO DOES NOT APPLY RETROACTIVELY TO FINAL CONVICTIONS

In re Steven L. Haden

---Cal.App.5th---; CA 1(4) No. A158376
June 5, 2020

In *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), the California Supreme Court held that a trial court considering whether to impose a sentence enhancement based on a defendant's prior conviction may not make factual findings about the defendant's conduct to impose the enhancement.

In the instant case, the Court of Appeal adopted the recent findings of a sister Court as to the separate question of retroactivity of *Gallardo*.

> Recently, in *In re Milton* (2019) 42 Cal.App.5th 977 (*Milton*), the Second District Court of Appeal, in a thorough analysis of the retroactivity issue, held Gallardo does not apply retroactively to final convictions. We agree with *Milton*.

The Court related the background of the case, factually and legally.

> In 1998, Haden pleaded no contest to infliction of corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)) and admitted a special allegation of personal use of a deadly weapon (former § 1192.7, subd. (c)(23)). After the plea, the trial court held a court trial on the special allegation that, under the Three Strikes Law (see §§ 667, 1170.12, subd. (c)(2)), petitioner suffered two prior strikes based on two robbery convictions in North Dakota. The court found the special allega-

tions true and sentenced petitioner to 25 years to life in prison.

Haden appealed, arguing the North Dakota robbery convictions could not constitute strikes for sentencing purposes. We rejected Haden's argument and affirmed the conviction. (*People v. Haden* (Jan. 25, 2000, A086575) [nonpub. opn.].) Although the elements of robbery under North Dakota law differed from those under California law, so that it could not be determined from mere fact of conviction that Haden had committed strikes under California law, we explained that it was reasonable for the trial court to determine from the record in Haden's North Dakota cases that the two robberies "were the equivalent of California robberies." (*Ibid.*) The Supreme Court denied Haden's petition for review (May 10, 2000, S086458).

Over the next 15 years, Haden sought habeas relief on several occasions, both in the trial court and in this court. He was denied relief each time.

In October 2015, Haden filed another habeas petition in this court (A146612), arguing that under the United States Supreme Court's then -recent decision in *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*), the trial court made improper factual findings when treating the North Dakota convictions as strikes. We denied the petition after concluding *Descamps* "does not apply retroactively to this case which has been final for more than a decade."

Haden then sought habeas relief in the Supreme Court (S230939), arguing that the North Dakota robbery convictions did not qualify as strikes under *Descamps.* In March of 2016, the Supreme Court denied the petition "without prejudice to any relief to which petitioner might be entitled after this court decides *People v. Gallardo*, S231260."

The important lesson of *Gallardo* was spelled out.

> The Supreme Court held a "court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction." (*Gallardo*, at p. 136.) Such an inquiry, the court explained, violates a defendant's Sixth Amendment right to a jury trial because it "invades the jury's province by permitting the court to make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' " (*Ibid.*) "The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Ibid.*)

In order to gain *Gallardo* relief, *Gallardo* would have to be applicable retroactively to Haden's now 20-year-old conviction. Although the Supreme Court ordered the Court of Appeal to answer the question of retroactivity, the Court's ruling was that *Gallardo* was <u>not</u> retroactive.

> Haden argues that *Gallardo* should apply retroactively even though his conviction was final at the time *Gallardo* was decided. The retroactivity issue was carefully considered in *Milton*, under circumstances similar in all relevant respects to the situation here. The Second Appellate District's recent opinion in that case analyzes the issue at length, and we see no reason to repeat that analysis here. Haden contends that *Milton* was wrongly decided and should not be followed, but each of his arguments was consid-

ered and rejected in that opinion. We agree with the analysis and conclusions of the Second Appellate District and, like the Fourth Appellate District, follow its lead in holding that *Gallardo* does not apply retroactively to final convictions. (See *In re Scott* (June 4, 2020, D076909) ___ Cal.App.5th ___ [2020 Cal.App. Lexis 486, at p. *2] [following *Milton* and holding *Gallardo* does not apply retroactively to final convictions].)

Milton considered both state and federal court precedents. First, as to federal precedents the Court found as follows.

The court began its analysis under the federal standard derived from *Teague v. Lane* (1989) 489 U.S. 288. Under *Teague*, " 'as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." ' " (*Milton, supra*, at p. 988.) " 'Teague and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew substantive rules generally apply retroactively." [Citations.] Second, new " 'watershed rules of criminal procedure,' " which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect.' " (*Id.* at p. 989.)

The *Milton* court then concluded Gallardo is not retroactive under the federal standard. The court began its analysis by explaining why Gallardo established a new rule under federal law and was not merely an extension of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*). (*Milton, supra*, 42 Cal.App.5th at p. 990.) *Gallardo* "did not merely apply the holding of *Apprendi* to the recidivist sentencing scheme in California." (*Milton*, at p. 991.) Instead, *Gallardo* "drew heavily on *Descamps[, supra*, 570 U.S. 254] and *Mathis [v. United States* (2016) ___ U.S. ___ [136 S.Ct. 2243] in holding a jury must find the facts that support increased punishment based on recidivism." (*Milton*, at p. 991.)

The *Haden* court then found that the determination was procedural, not substantive.

Next, the *Milton* court explained that the new rule from *Gallardo* is procedural, not substantive, "because it prescribes the manner of finding facts to increase the defendant's sentence." (*Milton, supra,* 42 Cal.App.5th at p. 992.) "Before *Gallardo*, the trial court, as authorized by *McGee*, could examine the entire record of conviction to determine the 'nature or basis' of the prior conviction based on its independent conclusion. [Citation.] After *Gallardo*, the trial court can only look at a subset of this record, namely, facts that 'the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea.' " (*Milton,* at p. 992.)

The Haden court also found that *Gallardo* was not a watershed rule of criminal procedure.

Finally, the *Milton* court determined that "*Gallardo*, though significant, was not a watershed rule of criminal procedure because limiting the role of the trial court and the scope of what the court may review and consider to impose an increased sentence is not a rule ' "without which the likelihood of an accurate conviction is seriously diminished." ' " (*Milton, supra,* 42 Cal.App.5th at p. 994.) "[T]he California Supreme Court did not reach this conclusion because a sentencing court's factfinding, or the kind of evidence sentencing courts used to consider in connection with that factfinding, was

somehow inaccurate or unreliable. Rather, the California Supreme Court in *Gallardo* limited the role of the sentencing court in imposing increased sentences and the materials the sentencing court can consider to protect the defendant's Sixth Amendment jury trial right." (*Milton,* at p. 995.) Having concluded that *Gallardo* announced a procedural rule that fell short of being a "watershed rule of criminal procedure," the court in *Milton* concluded that under the federal standard *Gallardo* does not apply retroactively to final convictions. (*Milton,* at p. 996.)

Next, the Court ruled on California precedent.

The *Milton* court then analyzed whether *Gallardo* applies retroactively to final convictions under the California standard established in *In re Johnson* (1970) 3 Cal.3d 404 (*Johnson*). The court explained that under *Johnson*, " '[f]ully retroactive decisions are seen as vindicating a right which is essential to a reliable determination of whether an accused should suffer a penal sanction. . . . [¶] On the other hand, decisions which have been denied retroactive effect are seen as vindicating interests which are collateral to or relatively far removed from the reliability of the fact-finding process at trial.' " (*Milton*, *supra*, 42 Cal.App.5th at p. 997.) " 'If the new rule aims . . . to define procedural rights merely incidental to a fair determination of guilt or innocence, it will generally not be given retroactive effect. [Citations.] On the other hand, if a decision goes to the integrity of the fact-finding process [citation] or "implicates questions of guilt and innocence" [citation], retroactivity is the norm.' " (*Ibid.*)

Applying *Johnson*'s state-law standard, the *Milton* court once again concluded *Gallardo* is not retroactive to final convictions. First, the court reiterated that *Gallardo* "established a new rule under state law because it 'disapproved' *McGee* and the practice of judicial factfinding to support an increased penalty." (*Milton*, *supra*, 42 Cal.App.5th at p. 997.) Next, the court explained why *Gallardo* did not vindicate a right essential to the reliability of a factfinding process: "[B]y limiting the sentencing court's role and limiting the evidence the court can consider in determining whether to increase the defendant's punishment, the California Supreme Court in *Gallardo* did not impugn the accuracy of factfinding by trial courts. The Supreme Court in *Gallardo* held that independent inquiry and factfinding by sentencing courts were problematic because such actions 'invaded[d] the jury's province. [Citation.] As discussed, however, judicial factfinding is not inherently unreliable or less reliable than jury factfinding." (*Milton,* at p. 998.) Finally, the court stated that even if the question of retroactivity were a close one, the disruption to courts caused by retroactive application of *Gallardo* weighed against retroactivity: "Applying *Gallardo* retroactively would cause significant disruption by requiring courts to reopen countless cases, conduct new sentencing hearings, and locate records of proceedings conducted long ago to ascertain 'what facts were necessarily found or admitted in the prior proceeding.' " (*Milton,* at p. 999.)

Accordingly, the Court denied Haden's writ petition. A dissenting Justice would have been more 'generous' in granting relief:

But federal law also leaves room for states to be more generous in retroactively applying new procedural rules, even where a new rule is based on federal constitutional principles. (*In re Gomez* (2009) 45 Cal.4th 650, 655, fn. 3 (*Gomez*).) Applying the approach to retroactivity that the California Supreme Court took in *In re Johnson* (1970) 3 Cal.3d 404 (*Johnson*), I conclude that *Gallardo* is fully retroactive to Haden's case.

However, this Justice looked into the facts of the case and decided Haden would not be entitled to relief on the merits.

> But applying *Gallardo* to the facts of this case, Haden is not entitled to relief.

If the California Supreme Court grants review and hold, CLN will advise in a future issue.

RULES FOR CCP § 170.6 MOTION FOR PEREMPTORY CHALLENGE OF JUDGE APPLY TO HABEAS PETITIONERS

Bontilao v. Superior Court

37 Cal.App.5th 980; CA 6 No. H046157
July 24, 2019

In any court action, prior to the judge making a ruling in the case, a litigant has the right to make one 'peremptory' challenge to have the judge disqualified, without cause. This is the essence of Code of Civil Procedure § 170.6. (Another section, § 170.3, provides for disqualification 'for cause' – such as demonstrated bias, personal involvement in the facts of the case, etc.) But there is no published case interpreting § 170.6 when used in a prisoner habeas corpus action. In the instant case, the Court of Appeal ruled that time limits which apply to all other §170.6 applicants also apply to those seeking habeas corpus relief challenging their denial of parole.

> In this case we consider the timeliness of a motion to disqualify a judge pursuant to Code of Civil Procedure section 170.6 filed in connection with a petition for a writ of habeas corpus. Petitioner Arprubertito Bontilao brought a petition for a writ of habeas corpus in the superior court challenging a decision by the Board of Parole Hearings (the Board) denying him parole. Pursuant to *Maas v. Superior Court* (2016) 1 Cal.5th 962 (*Maas*), Bontilao requested that the superior court inform him of the identity of the judge assigned to consider his petition. The superior court issued an order naming a judge assigned "for all purposes" to Bontilao's habeas petition. Twenty-four days later Bontilao brought a challenge under section 170.6 to the judge named in the order. The superior court struck Bontilao's challenge as untimely.
>
> Bontilao brought a petition for writ of mandate in this court challenging the superior court's order striking his section 170.6 challenge. For the reasons explained below, we conclude that the superior court's order naming the judge assigned to Bontilao's petition constituted an all purpose assignment within the meaning of section 170.6, subdivision (a)(2). As Bontilao's section 170.6 challenge was not timely filed under the statute's all purpose assignment rule, we deny Bontilao's petition for a writ of mandate.

CCP § 170.6 sets forth various timeframes to assess the timeliness of a challenge to an assigned judge (including the "all purpose assignment" rule), but no published decision has addressed the applicability of time limits of § 170.6 motions in habeas proceedings. Upon remand from the CA Supreme Court, and after analyzing § 170.6, its legislative history, and relevant case law, the Court of Appeal concluded that the "all purpose assignment" rule applies in habeas proceedings.

What this means to a prisoner seeking to challenge a judge at the outset of habeas action regarding denial of parole is that if the requirements of the "all purpose assignment" rule are otherwise met, the filing deadlines set forth in § 170.6, subdivision (a)(2) apply.

Here, even though Bontilao's case had been reassigned, the reassignment was "for all pur-

poses" and the "all purpose assignment" rule applied. The Court of Appeal also concluded that the *criminal* "all purpose assignment" rule (which has a 10-day deadline), as opposed to the *civil* "all purpose assignment" rule (which has a 15-day deadline), applies to habeas petitions. Bontilao's motion, filed after 24 days, was untimely under either the criminal or civil rule.

PRIOR GRANT OF CCP § 170.6 MOTION FOR PEREMPTORY CHALLENGE OF JUDGE APPLIES TO LIFER'S LATER HABEAS PETITON

P. v. Thomas Braley

--- Cal.App.5th ---; CA 2(3) No. B299905
July 27, 2020

While the *Bontilao* case above dealt with an initial § 170.6 challenge, this case deals with the situation where such a motion was granted at an earlier proceeding, but the judge failed to recuse himself upon a later separate litigation.

> Thomas Braley appeals from an order denying his petition for recall and resentencing on a prior serious or violent felony and to be considered for elderly parole. After his appellate counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436, we asked for supplemental briefing regarding whether the judge who ruled on the petition was disqualified from doing so. Because we conclude that the judge was disqualified from ruling on the petition, we reverse the order and remand.

The Court's factual summary identifies the two time periods where Braley appeared in the same Superior Court.

> In March 2007, a jury convicted Braley of second degree robbery (Pen. Code, § 211) and of petty theft with priors (Pen. Code, § 666). He was sentenced in April 2007 to 25 years to life plus two 5-year terms for prior convictions under section 667, subdivision (a)(1). On appeal, the conviction for petty theft with a prior was vacated, and the judgment was affirmed as modified. (*People v. Braley* (Aug. 14, 2008, B199140) [nonpub. opn.].) The California Supreme Court denied review that same year, and the United States Supreme Court denied certiorari in 2009.
>
> In March 2019, Braley filed a petition to dismiss the five-year priors under newly-enacted Senate Bill No. 1393 and to be considered for elderly parole under Penal Code section 3055. The Honorable William C. Ryan was assigned to hear the petition. Judge Ryan noted that in 2006 Braley had filed a motion to disqualify him under Code of Civil Procedure section 170.6 in the case underlying the petition. Being timely, Judge Ryan had granted the motion, and the case was reassigned. However, Judge Ryan found that he was not disqualified from now hearing the petition because it was "a new post-conviction proceeding assigned to" him by the director of the criminal writs center under the Superior Court of Los Angeles County, Local Rules, rule 8.33(a)(3), to which section 170.6 did not apply. In further support of his ability to hear the petition, Judge Ryan cited *Maas v. Superior Court* (2016) 1 Cal.5th 962. As to the substantive issues, Judge Ryan found that Senate Bill No. 1393 did not apply to Braley as Braley's case was final long before the bill became effective and denied the request for elderly parole without prejudice because Braley failed to show he had exhausted his administrative remedies.

The Court first summarized what § 170.6 means.

Disqualification of a judge helps ensure public confidence in the judiciary and protects litigants' rights to a fair and impartial adjudicator.

(*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1251 (*Peracchi*).) To that end, section 170.6, subdivision (a)(1) provides that a judge "shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it is established" that the judge is prejudiced against a party or attorney or the interest of a party or attorney in the action or proceeding. If the motion is properly and timely made, then the action shall be reassigned. (§ 170.6, subd. (a)(2), (3).) If "the motion is directed to a hearing, other than the trial of a cause, the motion shall be made not later than the commencement of the hearing." (§ 170.6, subd. (a)(2).) When a litigant meets the requirements of section 170.6, disqualification of the judge is mandatory, and there is no requirement it be shown the judge is actually prejudiced. (*Maas v. Superior Court*, *supra*, 1 Cal.5th at p. 972.) Section 170.6 must be liberally construed in favor of allowing a peremptory challenge, which should be denied only if the statute absolutely forbids it. (*Maas*, at p. 973.) We review a court's ruling on a section 170.6 issue de novo where, as here, the facts are undisputed. (*Andrew M. v. Superior Court* (2020) 43 Cal.App.5th 1116, 1124.)

> When a motion to disqualify is made in a subsequent proceeding, the motion's propriety and timing depend on whether the subsequent proceeding is a continuation of an earlier action or a separate and independent proceeding. " 'A peremptory challenge may not be made when the subsequent proceeding is a continuation of an earlier action.' " (*Manuel C. v. Superior Court* (2010) 181 Cal.App.4th 382, 385.) A subsequent proceeding is a continuation of an earlier action, so as to preclude a peremptory challenge to the judge, if the action involves substantially the same issues and matters necessarily relevant and material to the issues involved in the prior action. (*Ibid.*; *Yokley v. Superior Court* (1980) 108 Cal.App.3d 622, 626.)

Superior Court Judge Ryan's earlier recusal was not 'separate and independent' from Braley's habeas proceedings.

> Here, Judge Ryan was disqualified from presiding over Braley's 2007 criminal trial. If Braley's subsequent 2019 petition to dismiss his five-year priors and to be considered for elderly parole were a continuation of that original action, then Judge Ryan would have been disqualified from hearing the petition. But if the petition were a separate and independent action, Judge Ryan would not have been disqualified from hearing it, and Braley would have had to file a new motion to disqualify Judge Ryan.
>
> Judge Ryan determined that the petition was separate and independent from the criminal trial because the petition was a postconviction proceeding assigned to him by the director of the criminal writs center per the Superior Court of Los Angeles County, Local Rules, rule 8.33 (a)(3). However, that rule merely dictates assignment of certain petitions concerning, for example, parole matters. Even if Braley's petition were properly assigned to Judge Ryan under that rule, nothing in the rule states that section 170.6 is inapplicable to matters assigned to a judge thereunder. And if the rule did so state, then it would be invalid to the extent it conflicted with section 170.6. (See *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351–1352.)
>
> The procedural fact that the petition was a postconviction matter assigned per local rules does not answer the key question presented here: whether the petition involved substantially the same issues and matters necessarily relevant and material to the issues in Braley's prior criminal trial. As to that issue, Braley's petition raised sentencing issues, i.e., whether he was entitled to have priors stricken or dismissed and to be considered for elderly parole.

These issues are inextricably linked to what occurred at trial.

Accordingly, Judge Ryan should not have entertained Braley's Elderly Parole petition.

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Judge Ryan determined that the petition was separate and independent from the criminal trial because the petition was a postconviction proceeding assigned to him by the director of the criminal writs center per the Superior Court of Los Angeles County, Local Rules, rule 8.33(a)(3). However, that rule merely dictates assignment of certain petitions concerning, for example, parole matters. Even if Braley's petition were properly assigned to Judge Ryan under that rule, nothing in the rule states that section 170.6 is inapplicable to matters assigned to a judge thereunder. And if the rule did so state, then it would be invalid to the extent it conflicted with section 170.6. (See *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351–1352.)

The procedural fact that the petition was a postconviction matter assigned per local rules does not answer the key question presented here: whether the petition involved substantially the same issues and matters necessarily relevant and material to the issues in Braley's prior criminal trial. As to that issue, Braley's petition raised sentencing issues, i.e., whether he was entitled to have priors stricken or dismissed and to be considered for elderly parole. These issues are inextricably linked to what occurred at trial.

The Court of Appeal found that reversal was the proper remedy here.

The order is reversed with directions to reassign the petition to a different judge.

LIFER NOT ENTITLED TO YOUTH OFFENDER HEARING IF HE HAS ALREADY HAD A PRIOR HEARING

In re Terrence Brownlee

--- Cal.App.5th ---; CA 5 No. F077663
July 16, 2020

This case tackles the novel chicken-and-egg question as to whether a lifer who has already had a parole hearing is nonetheless entitled, under the later enacted youth offender hearing law, to that youth offender hearing. The facts of the case involve the initial hearing resulting in a ten -year denial, and the potential of having a youth offender hearing prior to ten years.

In 1980, Brownlee was sentenced to serve 17 years to life in prison for second degree murder with a firearm enhancement. He was 19 years old. Ten years later he received his first parole hearing. He received his most recent parole hearing in 2010. His next scheduled parole hearing is in August 2020.

In 2013, the Legislature enacted Penal Code section 3051 to grant youth offender parole hearings. (Sen. Bill No. 260; Stats. 2013, ch. 312 § 4.) As initially enacted, the youth offender parole process applied to prisoners who were juveniles when they committed their crimes.

In 2016, the age eligibility was increased to include prisoners who were less than 23 years

old when they committed their crimes. (Sen. Bill No. 261; Stats. 2015 ch. 471, § 1.) At the same time, the Legislature set a deadline by which to complete these hearings for eligible prisoners: January 1, 2018. (§ 3051.1, subd. (a); Sen. Bill No. 519; Stats. 2015, ch. 472, § 1.)

Despite meeting the age qualification, Brownlee never received a youth offender parole hearing. He filed this petition on June 20, 2018.

Brownlee's complaint was that the law is the law – he is entitled to a youth offender hearing, period. After construing the laws, the Court of Appeal disagreed.

Brownlee alleges the Board of Parole Hearings failed to afford him a youth offender parole hearing. As we shall explain, there is no failure because the statutory framework's plain language does not afford him a youth offender parole hearing.

…

Here, the youth offender parole statutory framework plainly does not entitle Brownlee to a youth offender parole hearing. The framework is found in sections 3051, 3051.1, and 4801.

As pertinent to Brownlee, the relevant statutes provide that "[a] youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger … at the time of the controlling offense." (§ 3051, subd. (a)(1).) "[Y]outh offenders are entitled to their initial youth offender parole hearing within six months of their youth parole eligible date, as determined in [section 3051,] subdivision (b), unless previously released or entitled to an earlier parole consideration hearing pursuant to any other law." (§ 3051, subd. (a)(2)(C).)

"A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole at a youth offender parole hearing during the person's 20th year of incarceration. The youth parole eligible date for a person eligible for a youth offender parole hearing under this paragraph shall be the first day of the person's 20th year of incarceration." (§ 3051, subd. (b)(2).)

"[T]he board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added subparagraph (A) of paragraph (2) of subdivision (i) of Section 3051 by January 1, 2018." (§ 3051.1, subd. (a).) "When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, when he or she was 25 years of age or younger, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

The Court found that an exclusion to a YOPH hearing (§ 3051, subd. (a)(2)(C)) applied to the facts of his case and foreclosed any relief.

Under these statutes, Brownlee would normally be "entitled to [his] youth offender parole hearing within six months of [his] youth parole eligible date …" (§ 3051, subd. (a)(2)(C).) But that subparagraph concludes with an excluding clause: "[U]nless previously released or entitled to an earlier parole consideration hearing pursuant to any other law." (*Ibid*.)

This excluding clause applies to Brownlee, who first received a parole hearing in 1990. Indeed, he continues to receive regular parole hearings with the next scheduled for July 2020.

Put simply, within this statutory framework, if a prisoner's first parole hearing is not a youth offender parole hearing, then the prisoner does not receive a youth offender parole hearing. Those prisoners are, however, still entitled to have "the board, in reviewing [the] prisoner's suitability for parole pursuant to Section 3041.5, … give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).) This is true because section 4801, subdivision (c) is not limited to youth offender parole hearings—it applies to all parole hearings.

In other words, a youth offender parole hearing is simply one type of parole hearing. For example, section 3055 provides "elderly parole hearing[s] …." In contrast to section 3051's youth offender parole hearings, section 3055 contains no exclusion for individuals previously entitled to earlier parole hearings. The reason is obvious.

The Court noted that a YOPH hearing is intended to be *earliest* parole hearing. Clearly, with an earlier regular hearing having been held, it could not now be the earliest hearing. By being already eligible for parole, YOPH provisions could not now provide earlier eligibility.

A youth offender parole hearing is designed to be the earliest and primary parole hearing for youth offenders due to "the diminished culpability of youth as compared to adults …." (§ 4801, subd. (c).) An expedited hearing is unnecessary when the prisoner is entitled to earlier parole consideration under other law. On the opposite end of the spectrum, an elderly parole hearing is designed to provide an additional opportunity to parole for aging prisoners. (§ 3055, subd. (c) ["special consideration to whether age, time served, and diminished physical condition, if any, have reduced the elderly inmate's risk for future violence."].)

In sum, Brownlee is not entitled to a youth offender parole hearing because he is already eligible for parole. (§ 3051, subd. (a)(1)(C).) Nonetheless, the Board of Parole Hearings shall apply "the diminished culpability of youth as compared to adults" criteria at his next parole hearing. (§ 4801, subd. (c).)

CDCR SEX OFFENDER EXCLUSION FROM PROP. 57 RELIEF IS OVERRULED

In re Chavez

--- Cal.App.5th ---; CA 6 No. H046921
June 30, 2020

Chavez, a Three-Striker, had been denied early parole consideration under Prop. 57 because he had a prior PC § 290 conviction. He petitioned successfully for habeas relief in the superior court, and CDCR appealed. Here, the Court of Appeal sided with Chavez and affirmed.

Appellant California Department of Corrections and Rehabilitation (CDCR) challenges the superior court's order granting respondent Chavez's habeas corpus petition and ordering the CDCR to grant early parole consideration to Chavez under Proposition 57. The CDCR contends that the superior court erred in ruling invalid the CDCR's regulation, which excluded from eligibility for early parole consideration under Proposition 57 any inmate who, like Chavez, had suffered a prior conviction for a sexual offense that required sex offender registration. The superior court, relying on *In re*

Gadlin (2019) 31 Cal.App.5th 784 (*Gadlin*), review granted May 15, 2019, S254599, concluded that the CDCR's regulation was inconsistent with Proposition 57 and therefore did not justify the CDCR's refusal to grant Chavez early parole consideration. The CDCR challenges that conclusion on appeal, but we agree with the superior court and affirm.

The Court first summarized the relevant portions of Prop. 57.

One of the provisions added by Proposition 57 was section 32 of Article I of the California Constitution. Section 32 provides: "(a) The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law:

[¶] (1) Parole Consideration: Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.

[¶] (A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.

[¶] (2) Credit Earning: The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements.

[¶] (b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety." (Cal. Const., Art. I, § 32.) Proposition 57 provided that "[t]his act shall be liberally construed to effectuate its purposes." (Voter Information Guide, *supra*, text of Prop. 57, § 9, p. 146; see also *id*. § 5, p. 145 ["This act shall be broadly construed to accomplish its purposes"].)

Next, the Court first summarized the relevant CDCR regulations created in response to Prop. 57.

After Proposition 57 took effect, the CDCR adopted regulations implementing early parole consideration for inmates under section 32. "When defining those inmates who will be eligible for early parole consideration, CDCR's rulemaking took a different approach than the constitutional provision—focusing less on the nature of an offense committed by a person (i.e., 'a nonviolent felony offense') and more on the person who commits one or more crimes." (*In re Mohammad* (2019) 42 Cal.App.5th 719, 723, review granted Feb. 19, 2020, S259999.) The CDCR's regulations provide that an indeterminately-sentenced inmate convicted of a nonviolent offense is eligible for early parole consideration under section 32 and generally is entitled to a parole consideration hearing within one year of January 1, 2019. (Cal. Code Regs., tit. 15, §§ 2449.32, 3496, 3497.) However, the CDCR's regulations also provide that "an inmate is not eligible for a parole consideration hearing by the Board of Parole Hearings under [Cal. Code Regs., tit. 15, § 2449.32 (early parole consideration under section 32)] if the inmate is convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in Sections 290 through 290.024 of the Penal Code." (Cal. Code Regs., tit. 15, § 3496, subd. (b).) The CDCR enacted this restrictive regulation because, in its view, " 'these sex offenses demonstrate a sufficient degree of violence and represent an unreasonable risk to public safety to require that sex of-

fenders be excluded from nonviolent parole consideration.' " (*Gadlin*, *supra*, 31 Cal.App.5th at p. 788.)

The Court then cited the important law which requires regulations to be consistent with their enabling statutes.

"Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.)

"In determining the proper interpretation of a statute and the validity of an administrative regulation, the administrative agency's construction is entitled to great weight, and if there appears to be a reasonable basis for it, a court will not substitute its judgment for that of the administrative body. . . . [¶] On the other hand, . . . '*there is no agency discretion to promulgate a regulation which is inconsistent with the governing statute*.' " (*Ontario Community Foundations*, *Inc*. *v*. *State Bd*. *of Equalization* (1984) 35 Cal.3d 811, 816.) "[T]he burden of proof is on the party challenging the regulation. 'The agency's action comes before the court with a presumption of correctness and regularity, which places the burden of demonstrating invalidity upon the assailant.'" (*Credit Ins*. *Gen*. *Agents Assn*. *v*. *Payne* (1976) 16 Cal.3d 651, 657.)

CDCR asserted that Prop. 57 gave it the authority to exclude sex offenders from relief.

The CDCR contends that its regulation excluding sex offenders is valid because it is consistent with the CDCR's understanding of the voters' intent in enacting section 32. The CDCR maintains that "subdivision (a)(1) of Section 32 has an undefined scope," and that, looking beyond section 32's "text alone" to the "ballot pamphlet," it could reasonably conclude that "the voters' intent" was "that sex offenders be excluded from Proposition 57's nonviolent parole process." The CDCR believes that "Proposition 57's intent was to implement parole reform for nonviolent inmates who are not sex offenders."

CDCR's argument was rejected by the Court of Appeal.

The CDCR claims that the words "[a]ny person convicted of a nonviolent felony offense" is ambiguous and that we should examine arguments in the Voter Information Guide for evidence of the voters' intent. It is true that, even where provisions are clear and unambiguous, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose. . . . Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] . . . . These rules apply as well to the interpretation of constitutional provisions." (*Lungren v*. *Deukmejian* (1988) 45 Cal.3d 727, 735.) The flaw in the CDCR's argument is that the voters expressly stated their intent: a broad mandate that they required to be liberally construed. This express intent precludes reliance on ballot arguments to support a restrictive interpretation of that broad mandate.

Rather, the Court followed precedent in *Gadlin*. [Note: *Gadlin* was granted review in the CA Supreme Court, and its outcome could affect *Chavez*, here.]

The Second District Court of Appeal rejected a similar argument in *Gadlin*.

It concluded that section 32's express references to "convicted," "sentenced," "felony offense," "primary offense," and "term" "make clear that early parole eligibility must be assessed based on the conviction for which an inmate is now serving a state prison sentence (the current offense), rather than prior criminal history." (*Gadlin*, *supra*, 31 Cal.App.5th at p. 789; see also *In re Schuster* (2019) 42 Cal.App.5th 943, review granted Feb. 19, 2020, S260024 [agreeing with *Gadlin*].) The Third District Court of Appeal in *Alliance* also rejected the CDCR's restrictive view of section 32's broad mandate. "Permitting the Department to restrict the number of eligible inmates due to perceived danger to public safety does not broadly construe the stated goals of the proposition. For example, restricting the number of inmates eligible for early parole consideration would not save money by reducing wasteful spending on prisons. Rather, it would require continued spending to house nonviolent sex offenders otherwise eligible for parole. The Department's regulation would also not help prevent federal courts from indiscriminately releasing prisoners due to state prisons' overcrowding; the Department's decision to render ineligible otherwise eligible inmates impedes the goal of reducing the prison population." (*Alliance*, *supra*, 45 Cal.App.5th at pp. 234-235.)

We conclude that section 32's broad mandate is inconsistent with the CDCR's restrictive regulation barring early parole consideration for those with prior convictions for sex offenses that require sex offender registration and that the CDCR could not have reasonably concluded that its restrictive regulation was "in furtherance" of a broad mandate that the voters had expressly required to be liberally construed. Consequently, the superior court correctly concluded that Chavez was entitled to early parole consideration under section 32.

GALLARDO DOES NOT APPLY RETROACTIVELY; ADMITTED FACTS AT TRIAL JUSTIFY DENIAL OF *GALLARDO* RELIEF

In re Scott

--- Cal.App.5th ---; CA 4(1) No. D076909
June 4, 2020

Scott is a 75-life Three-Striker, based on recent California convictions plus Minnesota priors. He petitioned for relief under *Gallardo* (*People v. Gallardo* (2017) 4 Cal.5th 120) claiming facts from his Minnesota priors were not proved in a California court. To succeed in his petition, he needed to establish two things: (1) that *Gallardo* was retroactive to final cases, and (2) that the facts to prove his Minnesota priors were not properly proven in a California court. In this appeal, Scott lost on both grounds.

In 1984, petitioner Scott pleaded guilty to third degree assault in Minnesota (Minn. Stat. Ann. § 609.223, subd. (1) ["assault[] . . . inflict [ing] substantial bodily harm"]), and admitted during his plea colloquy that he personally and intentionally pressed a warm or hot iron against his victim's face, inflicting a discernible burn mark that required medical treatment and was still somewhat visible four months later.

In 1999, Scott was convicted in California of several sex offenses. The sentencing court imposed a Three Strikes law sentence of 75 years to life based, in part, on the court's finding that Scott's earlier Minnesota conviction constituted a "serious felony" (and therefore a "strike") be-

cause Scott "personally used a deadly or dangerous weapon" (the iron) in the commission of the offense. (Pen. Code, § 1192.7, subd. (c)(23); further undesignated statutory references are to the Penal Code.) In making this finding, the trial court relied solely on the elements of the Minnesota offense and the plea colloquy establishing the factual basis for Scott's guilty plea.

Scott filed a habeas petition in the CA Supreme Court, which ordered the Court of Appeal to hear the case.

> In 2019, Scott filed a petition for writ of habeas corpus in the California Supreme Court arguing he was entitled to relief under that court's recent decision in *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), which held that a sentencing "court considering whether to impose an increased sentence based on a prior qualifying conviction may not"—consistent with a defendant's Sixth Amendment right to a jury trial—"make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' " (*Gallardo*, at p. 136.) Instead, "[t]he court's role is . . . limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Ibid*.) The Supreme Court issued an order to show cause, returnable to our court, directing the Department of Corrections and Rehabilitation to show cause "why [Scott] is not entitled to relief pursuant to [*Gallardo*], and why *Gallardo* should not apply retroactively on habeas corpus to final judgments of conviction."

At present, the Courts of Appeal are split on the retroactivity issue, and it is pending before the CA Supreme Court. But the Court of Appeal also found that the facts below barred Scott any relief here.

> The Courts of Appeal that have thus far considered Gallardo's retroactivity are split on the issue and the question is pending before the California Supreme Court. (See *In re Milton* (2019) 42 Cal.App.5th 977, 988-999 [holding *Gallardo* is not retroactive], review granted March 11, 2020, S259954 (*Milton*); *In re Brown* (2020) 45 Cal.App.5th 699, 716 [holding, with one dissent, that Gallardo is retroactive], petn. for review pending, petn. filed April 28, 2020, S261454 (*Brown*).) For reasons we will explain, pending further guidance from the Supreme Court, we are persuaded by the *Milton* court's reasoning and conclusion that *Gallardo* does not apply retroactively. Additionally, even were we to reach a contrary conclusion, we would conclude Scott is not entitled to relief under Gallardo because the sentencing court based its findings regarding Scott's Minnesota conviction on undisputed facts "admitted by [Scott] in entering [his] guilty plea" (*Gallardo, supra*, 4 Cal.5th at p. 124), a practice expressly permitted by *Gallardo*. Accordingly, we deny the petition.

The Court then reasoned why *Gallardo* is not retroactive under *State* law.

> As noted, thus far the Courts of Appeal are divided on whether *Gallardo* applies retroactively, and the issue is pending in the California Supreme Court. (See *Milton*, *supra*, 42 Cal.App.5th at pp. 988-999 [holding *Gallardo* is *not* retroactive under either the federal or state standard], rev. granted; *Brown*, *supra*, 45 Cal.App.5th at p. 716 [holding, with one dissent, that *Gallardo is* retroactive under the state standard].) For reasons we will explain, pending further guidance from the Supreme Court, we are persuaded by the *Milton* court's reasoning and conclusion that *Gallardo* does not apply retroactively.
>
> In general, only a new *substantive* rule can be applied retroactively; a new *procedural*

rule "cannot be applied retroactively unless it qualifies under either the state or federal retroactivity standard." (*Brown*, *supra*, 45 Cal.App.5th at p. 717.) Significantly, both *Milton* and *Brown* agree on the threshold retroactivity issue that *Gallardo* announced a new procedural rule. *Gallardo*'s rule is *new* because it disapproved of *McGee*, *supra*, 38 Cal.4th 682, and was not compelled by the earlier decision in *Apprendi* (as evidenced by the fact *McGee* distinguished *Apprendi*). (See *Milton*, *supra*, 42 Cal.App.5th at pp. 989, 997, rev. granted; *Brown*, at p. 716.)

And *Gallardo*'s rule is *procedural* because it merely imposed an evidentiary limitation on the materials a sentencing court may consider in determining whether a prior conviction qualifies as a strike. (*Milton*, *supra*, 42 Cal.App.5th at pp. 992-994, rev. granted; *id.* at p. 992 [" 'Procedural rules . . . "regulate only the *manner of determining* the defendant's culpability." ' "]; see *Brown*, *supra*, 45 Cal.App.5th at p. 717.) Stated conversely, *Gallardo*'s rule is not substantive because it does not " 'alter[] the range of conduct or the class of persons that the law punishes.' " (*Brown*, at p. 717; see *Milton*, at p. 992, *id.* at p. 993 [collecting cases holding that *Apprendi* stated a procedural rather than substantive rule]).

Thus, because *Gallardo* announced only a new procedural rule, it "cannot be applied retroactively unless it qualifies under either the state or federal retroactivity standard." (*Brown*, *supra*, 45 Cal.App.5th at p. 717.)

Following *Milton*, the Court next reasoned why *Gallardo* is not retroactive under *Federal* law. [Note: this is an excellent summary of the case law underpinning federal retroactivity analysis.]

Under the federal test established in *Teague v. Lane* (1989) 489 U.S. 288, new procedural rules generally will apply retroactively only if they are " ' "watershed" ' " rules that " 'implicat[e] the fundamental fairness and accuracy of the criminal proceeding.' " (*Milton*, *supra*, 42 Cal.App.5th at p. 989, rev. granted.) " 'In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent "an ' "impermissibly large risk" ' " of an inaccurate conviction. [Citations.] Second, the rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." ' " (*Id*. at p. 994.) As the *Milton* court explained, *Gallardo* meets neither of these requirements.

The *Milton* court observed that "*Gallardo*, though significant, was not a watershed rule of criminal procedure." (*Milton*, *supra*, 42 Cal.App.5th at p. 994, rev. granted.) "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.' " (*Schriro v. Summerlin* (2004) 542 U.S. 348, 352 (*Schriro*).) The *Gallardo* court adopted its new procedural rule based on general Sixth Amendment principles, not some overarching concern that "a sentencing court's factfinding . . . was somehow inaccurate or unreliable." (*Milton*, at p. 995.) As the United States Supreme Court has recognized, "[t]he evidence is simply too equivocal to support [the] conclusion" that "judicial factfinding so '*seriously* diminishe[s]' accuracy that there is an ' "impermissibly large risk" ' of punishing conduct the law does not reach." (*Schriro*, at pp. 355-356 [holding that an *Apprendi*-based invalidation of a state law authorizing trial courts to act as factfinders regarding death penalty special circumstance allegations did not apply retroactively].)

Nor did *Gallardo* establish a "bedrock procedural rule" because courts historically have set a very high bar for such status.

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> As the *Milton* court explained: " 'In applying this requirement, we . . . have looked to the example of *Gideon* [*v. Wainwright* (1963) 372 U.S. 335] and "we have not hesitated to hold that less sweeping and fundamental rules" do not qualify.' [Citations.] Indeed, *Apprendi* and *Blakely* [*v. Washington* (2004) 542 U.S. 296] (an extension of *Apprendi*) did not announce 'bedrock' rules. [Citations.]." (*Milton*, *supra*, 42 Cal.App.5th at p. 996, rev. granted; see *Schriro*, *supra*, 542 U.S. at p. 352 [the "class of [procedural] rules [given retroactive effect] is extremely narrow, and 'it is unlikely that any . . . "ha[s] yet to emerge" ' "].)
>
> We find the *Milton* court's reasoning persuasive and, therefore, agree that *Gallardo* is not retroactive under the federal standard.

Finally, the facts relied upon by the California sentencing court relied on *admitted* facts from the Minnesota record. Accordingly, Scott had no grounds upon which to complain that the record was insufficient without a new California proceeding.

> Scott admitted these facts by virtue of his Minnesota guilty plea. Specifically, he admitted he personally used an object (an iron) "in a way capable of causing and likely to cause" (and, indeed *actually* causing) *substantial* physical injury. Although the Minnesota offense refers to substantial *bodily harm* and the California enhancement refers to substantial *physical injury*, the statutes use the same operative modifier: *substantial*. We view this commonality as determinative.
>
> Because Scott *admitted* via his Minnesota guilty plea the facts on which the sentencing court based its conclusion that the conviction qualified as a strike under California law, the court did not engage in the type of judicial *factfinding* regarding *disputed* facts disapproved of by *Gallardo*. Rather, the court merely assumed its proper role of determining the legal characterization of the undisputed facts. (See *Gallardo*, *supra*, 4 Cal.5th at p. 139, fn. 6 ["questions about the proper characterization of a prior conviction are for a court to resolve"].)

As the Court of Appeal summarized:

> In sum, even if *Gallardo* applied retroactively, it would not entitle Scott to relief because the sentencing court considered only those undisputed facts expressly authorized by *Gallardo*.

LIFER SEEKING CYOP BENEFITS DENIED LATE PETITION FOR WITHDRAWAL OF PLEA

P. v. Marvin Ware

---Cal.App.5th---; CA 1(2) No. A155243
March 9, 2020

This case considers the narrow issue of a recently sentenced lifer who, upon rethinking his plea bargain that noted he would not be eligible for CYOP (Penal Code § 3051) youthful offender early parole consideration, later motioned the trial court to withdraw his plea. The Court of Appeal upheld the trial court's denial.

> Defendant Marvin Ware pleaded no contest to murder (Pen. Code, § 187, subd. (a)) and attempted murder (§§ 664, 187, subd. (a)) in exchange for a sentence of 60 years to life in state prison. About two months later Ware filed a motion to withdraw his plea on the ground that he entered it under the mistaken belief that he was eligible for the California Youthful Offender Program (CYOP) under section 3051. The trial court denied the motion after an evidentiary hearing, and the sole issue before us is the denial of the motion to withdraw plea. Because Ware fails to show an abuse of discretion by the trial court, we affirm.

Ware entered a plea before trial.

The first day of Ware's trial was February 5, 2018. Two days later, on February 7, before the trial court had reviewed and heard all the motions in limine and before jury selection began, Ware pleaded no contest to first degree murder and attempted murder (counts 43 and 6, respectively); admitted he acted in furtherance of a criminal street gang; and admitted a prior strike. In exchange, the remaining charges and allegations were dismissed, and Ware was to be sentenced to 60 years to life in state prison (25 years to life on the murder conviction, doubled to 50 years on account of the prior strike; and the low term of 5 years on the attempted murder charge, doubled to 10 years for the prior strike).

During the plea colloquy, the trial judge carefully explained why Ware would not qualify for youth offender early parole considerations.

"THE COURT: Sir, do you understand that by the language set forth in Penal Code section 3051, the youth parole statute, that in the court's opinion you are excluded from consideration of early parole under that statute? And that should not be a component or deemed to be any promise made or indication in order to get you to enter this plea. Do you understand that?

"THE DEFENDANT: Can you repeat that?

"THE COURT: Let me try it in better terms because I didn't say it very clearly. "3051 of the Penal Code is a recent Penal Code addition that allows the Department of Corrections and Board of Parole to consider early parole for certain defendants who are committed to the Department of Corrections who commit their offense when they are 25 years of age or younger.

"In my review of that statute, you would not qualify. You are excluded from consideration because of two factors. First, the fact that this sentence exceeds any sentence that that statute considers. That statute by its terms applies to defendants that are sentenced to sentences of 25 years to life or less. It does not by its terms include defendants who are sentenced to terms of 25 years or more, and you are going to be sentenced to a term in excess of 25 years.

"In this court's opinion, that is a factor that excludes you from consideration of early consideration for parole as a youthful offender, although you were 25 years – you were under 25 years of age when this offense was committed.

"The second factor that I believe excludes you from consideration of early consideration for parole under that statute is that you are admitting an allegation pursuant to 1170.12 of the Penal Code, and that statute specifically sets forth that defendants who admit an allegation under 1170.12 subsections B through H inclusive are excluded from consideration for early parole as a youthful offender. Do you understand that?

"([Discussion held off the record between [Ware and Jonathan McDougall, Ware's appointed attorney, who had represented him since 2013].)

"THE DEFENDANT: Yes.

In his hearing upon his motion to withdraw his plea, Ware cited to advice he alleged he received from two attorneys.

Ware testified that when he entered the no contest plea on February 7, he believed he was eligible for CYOP, based on what he had been told by Jonathan McDougall, who had been his appointed attorney for about five years, and by a consultant, "Mr. Carbone," and based on documents he had been given by McDougall on the morning of February 7.

Ware testified that on January 31, he met with Carbone, who told him about CYOP and told him that he was eligible for the program. Carbone told him that if he took the plea deal of 60 years to life, under CYOP he would be eligible for parole in about 20 years from the date of the change of plea, taking into account custody credit.

In fact, the issue had been discussed pre-sentencing with the District Attorney who expressly stated he would *not* agree to drop the prior strike *because* that would preclude early youth offender parole.

Until about January 31, McDougall thought that Ware might be eligible for CYOP, and told Ware that he might be eligible "but we had to take a look at his prior strike." McDougall then did further research and came to the opinion that Ware was not eligible for CYOP.

On January 31, Carbone met with Ware, and debriefed McDougall. McDougall spoke with Ware that same day. Ware and McDougall discussed McDougall's opinion that the prior strike made him *ineligible* for CYOP, and as a result, McDougall approached the district attorney's office asking for a sentence that would not require admission of a prior strike, but the district attorney refused. McDougall then explained to Ware that the prosecution would not accept a plea without the admission of a prior strike, and that the district attorney had researched CYOP and specifically did not want Ware to be eligible for it.

The trial court, on this record, found that Ware was cognizant of his ineligibility for CYOP.

The trial court took judicial notice of the transcript of the February 7 change of plea hearing, and after hearing argument from counsel, denied Ware's motion. The court found that at the February 7 hearing "Mr. Ware understood and communicated his understanding of the status of the law and that he doesn't qualify for the relief [under section 3051] as the law stands now," and concluding that Ware made his plea "in an intelligent manner with the solid advice of counsel with all issues related to the California Youth Offender Program addressed and sufficiently explained." The trial court elaborated:

"I think even Mr. Ware's testimony corroborates Mr. McDougall's testimony in this hearing that Mr. McDougall provided him with proposed legislation and . . . it would never rise to the level in my opinion of clear and convincing evidence for someone to say that based upon proposed changes, that that was sufficient evidence to warrant withdrawing a plea.

"After I asked Mr. Ware if he understood that 3051 did not apply to him because of his admission of the strike, I asked Mr. McDougall if he joined in his client's waiver. That immediately followed the explanation of the basis for Mr. Ware's lack of eligibility in which the court quoted portions of 3051 of the Penal Code, and Mr. McDougall stated yes, he joined in his client's waiver.

"So there is no question in my mind that Mr. McDougall adequately apprised Mr. Ware of the present status of the law, and the further discussion that Mr. McDougall memorialized on the record was that by virtue of entering this plea, Mr. Ware did not give up any right to potentially be eligible in the future should the law change."

Lastly, Ware pled on appeal for the first time a defense of 'extreme stress.' The facts alleged therein called into question his credibility, upon his admission that he had 'faked' a fainting spell earlier.

Ware argues for the first time on appeal that apart from his supposed misunderstanding of his

eligibility for youth offender parole, he was under "incredible stress" at the time the plea was entered, which overcame the exercise of his free judgment. As evidence of this stress, he cites his testimony that he was "stressed out" when his lawyer recommended that he take the plea deal instead of going to trial, and that he faked his fainting spell to gain more time: "Appellant was so unsure of whether to accept the plea deal that he faked a fainting spell to gain more time."

This argument is unpersuasive. Although it is appellant's burden to show good cause to withdraw his plea by clear and convincing evidence (*Perez*, *supra*, 233 Cal.App.4th at p. 741), Ware points to"[n]othing in the record [that] indicates he was any under any more or less pressure than every other defendant faced with serious felony charges and the offer of a plea bargain." (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208 [holding trial court did not err in denying motion to withdraw no contest plea].) Further, the cases he cites to support his argument are inapt: in none of them was stress about whether to accept a plea found to overcome the exercise of appellant's free judgment. Particularly inapt is *People v. Urfer* (1979) 94 Cal.App.3d 887, which Ware quotes in arguing that "[t]he evidence of the stress under which appellant was operating is a 'factor overreaching [his] free and clear judgment' [citation to *Urfer*, *supra*, at p. 892] and thus justified the granting of his motion." In *Urfer*, the Court of Appeal affirmed the trial court's denial of defendant's motion to withdraw his guilty plea. (*Id.* at p. 894.) The Court of Appeal observed that even if a defendant is "reluctant or 'unwilling' to change his plea [to guilty], such state of mind is not synonymous with an involuntary act. Lawyers . . . often persuade clients to act upon advice which is unwillingly or reluctantly accepted. And the fact that such advice is unwillingly or reluctantly acted upon is *not* a '. . . factor overreaching defendant's free and clear judgment' . . . ." (*Id.* at p. 892, fn. omitted, italics added.) Finally, in conceding that he faked his fainting spell, Ware admits that he testified falsely at the motion hearing, where he stated that he truly lost consciousness, thus casting doubt on his credibility with respect to his stress.

> We conclude that Ware has not shown the trial court abused its discretion in denying his motion to withdraw his no contest pleas.

The lesson here is that a plea made with full advice and counsel is not subject to late withdrawal. Ware was fully advised on COYP ineligibility. If CYOP law does change in the future, retroactivity will need to be decided.

UPON RECEIVING AN SB 1437 PETITION, THE TRIAL COURT MUST ISSUE AN ORDER TO SHOW CAUSE UNLESS FACTS CLEARLY INDICATE OTHERWISE

P. v. John Drayton

--- Cal.App.5th ---; CA 6 No. H046928
April 17, 2020

This case establishes the presumption of regular issuance of an order to show cause in an SB1437 resentencing petition, absent a determination that the underlying facts do not support an OSC.

> Senate Bill No. 1437, which took effect on January 1, 2019, restricted the circumstances under which a person can be liable for felony murder. It also enacted Penal Code section 1170.95, which allows an individual who was previously convicted of felony murder to petition to have his or her murder conviction vacated and to be resentenced. In this appeal, we consider how the trial court should assess whether a petitioner has made a prima facie showing of entitlement to relief under section 1170.95, subdivision (c), such that it must issue an order to show cause. We conclude the

> trial court should accept the assertions in the petition as true unless facts in the record conclusively refute them as a matter of law. If, accepting the petitioner's asserted facts as true, he or she meets the requirements for relief listed in section 1170.95, subdivision (a), then the trial court must issue an order to show cause. In assessing the petitioner's prima facie showing, the trial court should not weigh evidence or make credibility determinations.

Accordingly, summary denial is then inappropriate.

> Appellant John Lewis Drayton appeals from the trial court's summary denial of his petition filed pursuant to section 1170.95 to vacate his 1992 murder conviction and resentence him. He contends, and the Attorney General concurs, that the trial court failed to follow the procedural requirements of the statute. We agree, reverse the trial court's order, and remand the matter with directions to issue an order to show cause under section 1179.95, subdivision (c) and hold a hearing pursuant to section 1170.95, subdivision (d).

Following CLN's frequent advice, Drayton filed a petition for resentencing.

> In January 2019, Drayton filed on his own behalf a petition for resentencing pursuant to section 1170.95. In the petition, Drayton filed a declaration in which he checked a number of pre-printed boxes that collectively indicated he was eligible for resentencing pursuant to section 1170.95, subdivision (d)(2). Among other assertions, Drayton declared that he "was not a major participant in the felony or [he] did not act with reckless indifference to human life during the course of the crime or felony." The trial court appointed counsel for Drayton.

The District Attorney opposed Drayton's motion.

> On March 18, 2019, the Monterey County District Attorney's Office (district attorney) filed an opposition to Drayton's petition to recall his sentence. The district attorney acknowledged that Drayton was neither the actual killer of Mr. Ward, nor had he been found to have intentionally aided and abetted the murder. The district attorney implicitly acknowledged that Drayton had been convicted of murder on a theory of felony murder.
>
> Although individuals convicted of murder on a felony-murder theory are potentially eligible for relief under section 1170.95, the district attorney argued that Drayton's murder conviction should not be vacated. The district attorney contended Drayton could still be convicted of murder as a "major participant in the underlying felonies of robbery and burglary" who showed reckless indifference to human life under the principles set out by the California Supreme Court in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*).

The trial court, upon reviewing the serious facts from the record, summarily denied Drayton's petition.

> On May 17, 2019, the trial court held a hearing on Drayton's petition and denied it without hearing argument or taking evidence. In its oral ruling the trial court stated, "The court agrees with the People's position that petitioner is not eligible for resentencing. . . . [¶] The facts of this case are particularly egregious. Petitioner and other armed co-conspirators or individuals entered an inhabited residence in the middle of the night with the intention of stealing money from a safe. [¶] The occupants, Mr. and Mrs. Ward and their 17-year-old daughter, were inside. Mr. and Mrs. Ward were in bed in the master bedroom when confronted by two of the individuals and ordered onto the floor. One of the individuals put a gun in Mr. Ward's mouth demanding to know the

location of the safe. The couple's 17-year-old daughter was brought into the master bedroom. [¶] Petitioner, who had entered the residence also with a firearm, hit Mrs. Ward on the head with the firearm, placed his foot on her back, pinning her to the floor. Ordered her not to move, restrained her in that position for approximately 20 minutes. [¶] During this home invasion or burglary/robbery, a gun was placed in the vagina of the 17-year-old girl apparently in an effort to get Mr. Ward to reveal the location of the safe. One individual also threatened to rape the 17-year-old girl in front her parents. [¶] Mr. Ward was taken into a closet, presumably in search of this safe. A struggle ensued, and he was shot and killed. [¶] The armed individuals were inside the residence approximately 48 minutes. [¶] Petitioner pleaded guilty to first degree murder, admitted an enhancement for personal use of a firearm. [¶] This court finds that petitioner was a major participant in the underlying felony, both the burglary and the robbery. Additionally, the court further finds that he acted with reckless indifference to human life, which I think is blatantly apparent by his conduct, being armed and his participation in this event, as well as the conduct of his co-conspirators, the other individuals. [¶] Petitioner would be eligible to be charged with felony murder under the current state of the law. Petitioner has failed to state a prima facie showing for release. The petition is respectfully denied."

The Attorney General agreed with Drayton that he was eligible for a section 1170.95 determination.

Drayton and the Attorney General agree the trial court erred in finding that Drayton had not made a prima facie case for relief under section 1170.95 and in not issuing an order to show cause. In arguing the trial court used the wrong standard when assessing whether he had established a prima facie case, Drayton asserts that there is "room for debate" whether he acted with reckless indifference to human life, which is "all that was required to be established" for the order to show cause to issue.

With respect to the showing required under section 1170.95, subdivision (c), the Attorney General states, "[w]here, as here, petitioner has averred facts, which if true, render him eligible for resentencing and the record does not indisputably show petitioner is ineligible, an order to show [cause] must issue, whereupon the parties litigate the question of his eligibility at an evidentiary hearing." For the reasons explained below, we largely agree with the Attorney General's position.

After a lengthy legal analysis, the Court of Appeal found that summary judgment, as here, was in error, and ordered relief.

If, accepting the facts asserted in the petition as true, the petitioner would be entitled to relief because he or she has met the requirements of section 1170.95(a), then the trial court should issue an order to show cause. (§ 1170.95(c).) Once the trial court issues the order to show cause under section 1170.95(c), it must then conduct a hearing pursuant to the procedures and burden of proof set out in section 1170.95, subd. (d) unless the parties waive the hearing or the petitioner's entitlement to relief is established as a matter of law by the record. (§ 1170.95, subd. (d)(2).) Notably, following the issuance of an order to show cause, the burden of proof will shift to the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).) …

The order denying Drayton's petition to vacate his murder conviction and for resentencing is reversed. The matter is remanded to the superior court with directions to issue an order to show cause (Pen. Code, § 1170.95, subd.

(c)) and hold a hearing to determine whether to vacate Drayton's murder conviction and recall his sentence and resentence him (Pen. Code, § 1170.95, subd. (d)).

SB 1437 RESENTENING PETITION PROPERLY DENIED WHERE PETITIONER WAS ONLY CONVICTED OF *ATTEMPTED* MURDER

P. v. Paul Devlin

CA 2(1) No. B297848
May 29, 2020

In this unpublished opinion, Paul Devlin was denied SB 1437 resentencing because his conviction was only for *attempted* murder, not murder.

Paul Devlin filed a petition in the superior court for resentencing under Penal Code section 1170.95 and requested the appointment of counsel. The court found that he failed to allege facts necessary for relief under that statute and was not eligible for relief as a matter of law because he had not been convicted of murder. The court therefore denied the petition without appointing counsel or holding an evidentiary hearing. Devlin contends that section 1170.95 should apply to convictions for attempted murder, and that holding otherwise violates due process and his right to be free from cruel and unusual punishment.

We affirm.

The Court of Appeal found considerable precedent for rejecting Devlin's resentencing petition.

Devlin contends section 1170.95 should apply to convictions for attempted murder. Every court that has considered this issue has rejected it. (See *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1105, review granted Nov. 13, 2019, S258175; *People v. Munoz* (2019) 39 Cal.App.5th 738, 754, review granted Nov. 26, 2019, S258234; *People v. Larios* (2019) 42 Cal.App.5th 956, 970, review granted Feb. 26, 2020, S259983; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1017-1018, review granted Mar. 11, 2020, S259948.) We agree with these decisions on this point and therefore reject the argument.

Devlin further contends that the exclusion of attempted murder from eligibility for relief under section 1170.95 violates due process and the state and federal proscriptions against cruel and unusual punishments. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17.) This is so, he argues, because a punishment scheme that treats similarly situated individuals differently based on arbitrary or capricious factors violates due process and constitutes cruel and unusual punishment. (Devlin raises no Equal Protection concern.) The argument is without merit.

A statutory scheme that might in some circumstances levy greater punishment on a lesser offense, such as attempted murder, than on a greater offense, such as murder, is not necessarily arbitrary or irrational. " 'A classification is not arbitrary or irrational simply because there is an "imperfect fit between means and ends" ' [citations], or 'because it may be "to some extent both underinclusive and overinclusive." ' " (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 887.) "Under the laws then in effect, defendant received a valid indeterminate sentence. There was nothing unusual about his sentence, as it was not one 'that in the ordinary course of events is not inflicted.' " (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1468 [affirming denial of a petition for resentencing under Proposition 36].) The Legislature's passage of a law making a procedure for resentencing available to other defendants that is not available to Devlin "does not retroactively convert defendant's oth-

erwise lawful sentence into a constitutionally 'unusual' one." (*Ibid*.)

Devlin contends the court erred by denying him counsel and a hearing on his petition. The right to counsel under section 1170.95, however, does not attach until the petitioner makes a prima facie showing of eligibility under the statute (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1139-1140, review granted Mar. 18, 2020, S260598; cf. *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328, review granted Mar. 18, 2020, S260493). Devlin failed to demonstrate eligibility under the statute.

SB 1437 RESENTENING PETITION PROPERLY DENIED WHERE FACTS CLEARLY SUPPORTED SPECIAL CIRCUMSTANCES MURDER

P. v. Rebecca Cleland

CA 2(7) No. B298451
March 9, 2020

Rebecca Cleland appeals from a postjudgment order summarily denying her petition for resentencing under Penal Code section 1170.95. No meritorious issues have been identified by Cleland's appointed counsel following her review of the record or by our own independent review of the record. We affirm.

A jury on retrial found Cleland guilty of both charges and found the special circumstances allegations true. Cleland was again sentenced to life in prison without the possibility of parole. We affirmed her conviction in 2008.

On March 6, 2019 Cleland, representing herself, filed a petition in superior court to vacate her convictions and to be resentenced in accordance with recent statutory changes relating to accomplice liability for murder. Cleland also requested the appointment of counsel.

Cleland's petition was denied in the Superior Court.

Cleland's petition was considered by the sentencing court—the same trial judge who had presided at Cleland's second trial and sentenced her to life in prison without the possibility of parole. After reviewing the petition and this court's 2008 opinion affirming Cleland's conviction (*People v. Cleland* (July 21, 2008, B196885) [nonpub. opn.]), the superior court summarily denied the petition without appointing counsel. The court found Cleland "clearly acted with an intent to kill when she conspired to have her husband murdered for financial gain and by lying in wait" and, as a consequence, was precluded from sentencing relief under section 1170.95

The Court of Appeal summarized the elements of SB 1437.

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1015) (Senate Bill 1437), effective January 1, 2019, amended the felony murder rule and eliminated the natural and probable consequences doctrine as it relates to murder through amendments to sections 188 and 189. New section 188, subdivision (a)(3), provides, "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime."

New section 189, subdivision (e), in turn, provides with respect to a participant in the perpetration or attempted perpetration of a felony listed in section 189, subdivision (a), in which a death occurs—that is, as to those crimes that provide the basis for the charge of first degree felony murder—that the individual is liable for murder "only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, request-

ed, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

Senate Bill 1437 also permits, through new section 1170.95, an individual convicted of felony murder or murder under a natural and probable consequences theory to petition the sentencing court to vacate the conviction and be resentenced on any remaining counts if he or she could not have been convicted of murder because of Senate Bill 1437's changes to the definition of the crime. Section 1170.95, subdivision (c), requires the sentencing court to review the petition; determine if it makes a prima facie showing the petitioner falls within the provisions of section 1170.95; and, if the petitioner has requested counsel, to appoint counsel to represent the petitioner. After counsel has been appointed, the prosecutor is to file and serve a response to the petition; and the petitioner may file a reply. If at this point the court finds the petitioner has made a prima facie showing he or she is entitled to relief, the court must issue an order to show cause (§ 1170.95, subd. (c)) and conduct a hearing to determine whether to vacate the murder conviction and resentence the petitioner on any remaining counts (§ 1170.95, subd. (d)(1)).

The superior court must then determine if a prima facie case has been made, and if so, issue an order to show cause.

In *People v. Verdugo* (2020) 44 Cal.App.5th 320 this court held, after receiving a facially sufficient petition but before appointing counsel for the petitioner, the superior court may examine the readily available portions of the record of conviction, including any appellate opinion affirming the conviction, to determine whether the petitioner has made a prima facie showing that he or she could not be convicted of first or second degree murder following the changes made to sections 188 and 189 and thus falls within the provisions of section 1170.95. (*Verdugo*, at pp. 329-330, 332.) We cautioned, however, because at this stage the court is only evaluating whether there is a prima facie showing the petition falls within the provisions of the statute, "if the petitioner's ineligibility for resentencing under section 1170.95 is not established as a matter of law by the record of conviction, the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Id.* at p. 330.)

Here, the Court of Appeal found that the superior court's evaluation below was proper, and affirmed its decision for summary denial.

As discussed, based on Cleland's petition and our prior decision affirming her conviction following retrial, the superior court determined Cleland had acted with an intent to kill (express malice) in connection with the murder of her husband and was ineligible for relief under section 1170.95 as a matter of law. That ruling was unquestionably correct.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. 01-cv-01351-JST

ORDER REGARDING STAFF TESTING FOR COVID-19

United States District Court
Northern District of California

The joint case management conference statement filed by the parties on June 8, 2020, states that 194 medically high-risk patients were transferred from the California Institution for Men (CIM) to San Quentin State Prison (SQ) and California State Prison, Corcoran (CSP-COR) between May 28 and May 30. *See* ECF No. 3345 at 9-10. The patients who were transferred had previously tested negative for COVID-19, but in many cases the tests were done two to three weeks before the transfer. *Id.* Unfortunately, some of those people tested positive shortly after their arrival at SQ and CSP-COR. *Id.* Prior to the transfer, SQ had no confirmed cases of COVID-19 in the incarcerated population. *Id.* at 10. The Receiver has since ordered the suspension of all transfers from CIM and is reconsidering a testing strategy for all transfers. *Id.* at 9-10.

The Receiver has also identified prison staff as the main vector for spreading COVID-19 in the state prisons and has recommended that all staff at all institutions be tested for COVID-19. *Id.* at 3. According to the parties' statement, "Defendants agree that staff testing is critical, and are developing a staff-testing plan with assistance and guidance from the California Department of Public Health." *Id.*

Given the urgency of this issue, this Court issued the following order regarding staff

testing for COVID-19 from the bench during the June 9 case management conference. This written order is issued to memorialize that bench order.

IT IS HEREBY ORDERED that:

1. All custodial and medical staff who had contact during the transfer process with any incarcerated person who transferred from the California Institution for Men (CIM) and into San Quentin State Prison (SQ) or California State Prison, Corcoran (CSP-COR) between May 28, 2020, and May 30, 2020, shall be tested for COVID-19 by June 11, 2020.

2. All remaining staff at SQ and CSP-COR shall be tested by June 15, 2020.

3. Defendants shall produce a comprehensive plan for testing staff at all prisons in the California Department of Corrections and Rehabilitation to Plaintiffs by June 16, 2020.[1]

IT IS SO ORDERED.

Dated: June 11, 2020

JON S. TIGAR
United States District Judge

United States District Court
Northern District of California

[1] The Court does not engage at this time with the parties' dispute over whether an "interim" plan would be sufficient. However, the Court notes that all plans of this nature will, in some sense, necessarily be "interim" because they remain subject to modification as additional information becomes available.

Board's Information Technology System

Commissioners Summary
All Institutions
April 01, 2020 to April 30, 2020

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	GUTIERREZ	LONG	MINOR	ROBERTS	RUFF	SAN JUAN	SCHNEIDER	SHARRIEFF	TAIRA	THORNTON	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**24**	**19**	**22**	**20**	**26**	**27**	**24**	**18**	**17**	**16**	**24**	**24**	**30**	**22**	**25**	**24**	**26**	**334**	**722**	**12**	**710**
Grants	6	5	4	8	1	5	6	2	9	4	4	5	7	4	6	5	4	0	85	0	85
Denials	14	7	13	8	12	16	10	5	4	6	11	18	12	12	10	15	15	0	188	10	178
Stipulations	0	1	2	1	1	1	2	11	1	1	0	0	2	2	2	0	0	0	27	0	27
Waivers	0	1	0	0	1	1	2	0	0	0	5	0	0	0	4	1	0	71	86	0	86
Postponements	4	5	3	3	11	3	4	0	3	4	4	1	9	4	3	3	6	247	317	2	315
Continuances	0	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	1	0	3	0	3
Tie Vote	0	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	0	16	16	0	16

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

Subtotal (Deny+Stip)	**14**	**8**	**15**	**9**	**13**	**17**	**12**	**16**	**5**	**7**	**11**	**18**	**14**	**14**	**12**	**15**	**15**	**0**	**215**	**10**	**205**
1 year	0	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	0
3 years	4	5	7	7	6	15	9	11	2	7	5	6	11	13	12	14	10	0	144	6	138
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	7	3	6	2	6	1	3	5	2	0	4	12	1	1	0	1	3	0	57	4	53
7 years	1	0	1	0	1	1	0	0	1	0	2	0	2	0	0	0	1	0	10	0	10
10 years	2	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	4	0	4
15 years	0	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**	**1**	**0**	**0**	**1**	**1**	**2**	**0**	**0**	**0**	**5**	**0**	**0**	**0**	**4**	**1**	**0**	**71**	**86**	**0**	**86**
1 year	0	1	0	0	1	1	1	0	0	0	3	0	0	0	4	0	0	49	60	0	60
2 years	0	0	0	0	0	0	1	0	0	0	2	0	0	0	0	1	0	9	13	0	13
3 years	0	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	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	4	0	4

Postponement Analysis per Commissioner

Subtotal (Postpone)	**4**	**5**	**3**	**3**	**11**	**3**	**4**	**0**	**3**	**4**	**4**	**1**	**9**	**4**	**3**	**3**	**6**	**247**	**317**	**2**	**315**
Within State Control	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	1	153	156	0	156
Exigent Circumstance	2	2	0	1	2	2	2	0	0	1	3	0	1	1	2	2	2	76	99	2	97
Prisoner Postpone	2	3	3	2	9	1	2	0	3	2	1	1	8	2	1	1	3	19	63	0	63

Board's Information Technology System

Commissioners Summary
All Institutions
May 01, 2020 to May 31, 2020

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	GUTIERREZ	LONG	MINOR	ROBERTS	RUFF	SAN JUAN	SCHNEIDER	SHARRIEFF	TAIRA	THORNTON	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	19	21	26	20	19	12	18	25	20	20	25	26	25	23	21	15	19	153	507	19	488
Grants	2	5	8	7	3	7	2	11	7	4	5	9	9	9	3	5	6	0	102	2	100
Denials	12	6	11	9	10	5	11	5	6	11	12	11	6	10	12	10	10	0	157	9	148
Stipulations	1	1	1	0	1	0	4	7	3	1	5	1	3	0	1	0	2	0	31	1	30
Waivers	1	2	0	0	0	0	0	0	0	0	0	1	2	2	3	0	0	51	62	1	61
Postponements	2	7	6	4	4	0	1	2	4	3	3	4	5	2	2	0	1	81	131	6	125
Continuances	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	2
Tie Vote	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	21	21	0	21

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

Subtotal (Deny+Stip)	13	7	12	9	11	5	15	12	9	12	17	12	9	10	13	10	12	0	188	10	178
1 year	0	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	0
3 years	4	6	9	7	7	5	9	8	7	7	12	8	3	3	10	10	8	0	123	3	120
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	7	1	2	1	3	0	5	2	2	5	4	3	6	4	3	0	2	0	50	6	44
7 years	2	0	0	1	0	0	1	2	0	0	0	1	0	2	0	0	2	0	11	0	11
10 years	0	0	1	0	1	0	0	0	0	0	1	0	0	1	0	0	0	0	4	1	3
15 years	0	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)	1	2	0	0	0	0	0	0	0	0	0	1	2	2	3	0	0	51	62	1	61
1 year	1	1	0	0	0	0	0	0	0	0	0	1	2	0	3	0	0	28	36	1	35
2 years	0	1	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	13	15	0	15
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	9	10	0	10
4 years	0	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	0	0	0	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	2	7	6	4	4	0	1	2	4	3	3	4	5	2	2	0	1	81	131	6	125
Within State Control	0	0	0	0	0	0	0	0	0	0	1	1	0	0	0	0	1	51	54	0	54
Exigent Circumstance	0	0	2	3	0	0	0	0	3	0	0	0	1	1	0	0	0	12	22	1	21
Prisoner Postpone	2	7	4	1	4	0	1	2	1	3	2	3	4	1	2	0	0	18	55	5	50

Board's Information Technology System

Commissioners Summary
All Institutions
June 01, 2020 to June 30, 2020

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DE LA TORRE	DOBBS	GROUNDS	GUTIERREZ	LONG	MINOR	ROBERTS	RUFF	SAN JUAN	SCHNEIDER	SHARRIEFF	TAIRA	THORNTON	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**22**	**28**	**28**	**22**	**32**	**0**	**29**	**29**	**30**	**19**	**32**	**31**	**26**	**29**	**27**	**23**	**24**	**36**	**188**	**655**	**23**	**632**
Grants	8	5	6	3	10	0	10	3	12	6	6	5	8	6	7	4	1	8	0	108	4	104
Denials	9	9	15	15	11	0	17	14	14	12	17	15	10	16	16	9	18	12	0	229	17	212
Stipulations	0	1	0	1	1	0	0	5	0	0	2	6	1	2	0	3	1	3	0	26	0	26
Waivers	0	8	0	0	2	0	0	1	0	1	2	0	6	0	2	3	0	2	64	91	0	91
Postponements	5	5	7	3	7	0	2	6	3	0	4	5	1	5	1	4	4	11	104	177	2	175
Continuances	0	0	0	0	0	0	0	0	1	0	1	0	0	0	1	0	0	0	0	3	0	3
Tie Vote	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	20	20	0	20

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

Subtotal (Deny+Stip)	**9**	**10**	**15**	**16**	**12**	**0**	**17**	**19**	**14**	**12**	**19**	**21**	**11**	**18**	**16**	**12**	**19**	**15**	**0**	**255**	**17**	**238**
1 year	0	0	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	0	0
3 years	4	8	11	12	11	0	11	9	3	3	13	13	6	12	12	10	15	11	0	164	9	155
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	4	2	2	4	1	0	3	8	8	6	5	8	4	5	4	2	3	3	0	72	5	67
7 years	1	0	2	0	0	0	1	1	3	3	1	0	1	1	0	0	1	1	0	16	3	13
10 years	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	2	0	2
15 years	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**8**	**0**	**0**	**2**	**0**	**0**	**1**	**0**	**1**	**2**	**0**	**6**	**0**	**2**	**3**	**0**	**2**	**64**	**91**	**0**	**91**
1 year	0	4	0	0	2	0	0	1	0	1	1	0	5	0	2	3	0	2	46	67	0	67
2 years	0	4	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	10	16	0	16
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	5	0	5
4 years	0	0	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	0	0	2	2	0	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	**5**	**5**	**7**	**3**	**7**	**0**	**2**	**6**	**3**	**0**	**4**	**5**	**1**	**5**	**1**	**4**	**4**	**11**	**104**	**177**	**2**	**175**
Within State Control	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	71	72	0	72
Exigent Circumstance	4	0	3	2	4	0	1	2	2	0	1	0	0	3	0	1	0	6	6	35	1	34
Prisoner Postpone	1	5	3	1	3	0	1	4	1	0	3	5	1	2	1	3	4	5	27	70	1	69

Board's Information Technology System

Commissioners Summary
All Institutions
July 01, 2020 to July 31, 2020

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DE LA TORRE	DOBIES	GROUNDS	GUTIERREZ	LONG	MINOR	NERI	ROBERTS	RUFF	SAN JUAN	SCHNEIDER	SHARRIEFF	TAIRA	THORNTON	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	37	22	32	39	30	14	27	34	29	27	32	0	15	33	24	29	18	34	33	274	783	10	773
Grants	12	2	7	7	5	5	3	12	5	8	6	0	2	10	6	8	9	6	3	0	116	4	112
Denials	18	9	20	19	21	7	22	13	12	11	21	0	7	19	9	14	5	24	12	0	263	4	259
Stipulations	0	1	1	4	0	1	0	1	5	3	2	0	2	1	2	1	2	0	5	0	31	1	30
Waivers	1	4	1	5	0	0	0	4	2	0	0	0	0	0	3	2	0	2	4	73	101	0	101
Postponements	5	6	3	4	3	1	2	4	5	4	3	0	4	3	4	3	1	2	8	170	235	1	234
Continuances	1	0	0	0	1	0	0	0	0	1	0	0	0	0	0	1	0	0	1	0	5	0	5
Tie Vote	0	0	0	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	1	0	0	31	32	0	32

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

Subtotal (Deny+Stip)	18	10	21	23	21	8	22	14	17	14	23	0	9	20	11	15	7	24	17	0	294	5	289
1 year	0	0	0	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	0	0	0
3 years	9	6	8	18	11	5	8	8	10	8	12	0	5	10	7	14	7	18	10	0	174	4	170
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	8	3	10	4	7	3	12	3	7	3	9	0	3	6	1	1	0	6	5	0	91	1	90
7 years	1	1	3	1	3	0	2	2	0	2	2	0	0	4	3	0	0	0	1	0	25	0	25
10 years	0	0	0	0	0	0	0	1	0	1	0	0	1	0	0	0	0	0	1	0	4	0	4
15 years	0	0	0	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)	1	4	1	5	0	0	0	4	2	0	0	0	0	0	3	2	0	2	4	73	101	0	101
1 year	0	4	1	4	0	0	0	1	2	0	0	0	0	0	3	1	0	0	2	47	65	0	65
2 years	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	14	16	0	16
3 years	1	0	0	0	0	0	0	3	0	0	0	0	0	0	0	1	0	2	1	12	20	0	20
4 years	0	0	0	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	0	0	0	0	0	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	5	6	3	4	3	1	2	4	5	4	3	0	4	3	4	3	1	2	8	170	235	1	234
Within State Control	1	0	0	1	0	0	0	0	0	1	0	0	1	1	0	0	0	0	1	114	120	0	120
Exigent Circumstance	2	0	1	2	0	0	0	1	4	3	2	0	2	1	0	0	1	2	1	23	45	1	44
Prisoner Postpone	2	6	2	1	3	1	2	3	1	0	1	0	1	1	4	3	0	0	6	33	70	0	70

BOARD BUSINESS AND EN BANC

While the BPH announced prior to the CoVid pandemic adaptions that changes to the Executive Board meeting agendas were in the works, no one anticipated that the business handled at the monthly business meetings would be virtually abandoned, with the twin exceptions of closed sessions and en banc considerations. This change began with the March meeting, while although still, at that date, open to limited public attendance. But since that time, all business as been conducted by teleconference, and while commissioners relate that video conferenced parole hearings take no longer than those held in person, we can attest that teleconference en banc hearings are substantially longer than those held in person. But we digress.

Other than en banc considerations, board business in the months of May, June and July consisted of reports from Executive Director Jennifer Shaffer noting the extensions of Gov. Newsom's Executive Order mandating such teleconference meetings and patiently explaining to those multitudinous and mostly first time participants calling in how the process would work. Usually to no avail.

In fact, both Shaffer and Commissioner Arthur Anderson (who for many years, since Gov. Brown declined to officially appoint a Board Chairman has, by virtue of seniority as a commissioner, acted as the de-facto Chair), must be commended for their unfailing politeness and patience with participants in the en banc process who, not understanding the pattern of discussion, jump the line, chime in at inopportune times and out of sequence. Both Shaffer, Anderson and frequently BPH Chief Counsel Jessica Blonien are patient and unruffled in restoring some semblance of logical progression and order to the distance proceedings. But we digress, again.

Shaffer also, in each meeting, brings the board and those on the call up to date on the results of hearings held via video conference on a running basis. To date, the parole grant rate has remained steady, at 34%, the same per centage as the board reached overall in 2019.

Exact figures are these, for the 1,101 hearing held between April 1 and July 24:

369 resulted in grants (34 percent)
732 resulted in denials (66 percent
75 incarcerated people waived their hearing,
234 hearings were postponed, 106 stipulated to unsuitability, and 12 were continued

Shaffer has also updated the board on possible plans to return to in-person hearings, passing along the information that at present there is no time-frame on the table, but that any return to those pre-CoVid practices will be gradual and done in stages, with perhaps allowing inmate attorneys to be present in the hearing room at the institution with their client. How attorneys may respond to that possibility remains to be seen.

EN BANC RESULTS

One consistent that has continued even in the face of CoVid complications, is Governor Newsom's extensive use of en banc referral. There are some patterns emerging, a situation we're studying and will shortly be ready to put forth some conclusions on what factors seem to 'trigger' this Governor. But a glance at the agendas for en banc hearings since Newsom's arrival in the Governor's seat shows, if he is not referral-happy, he is certainly referral inclined.

And while there are several intrinsic problems and issues related to this process, the most obvious concern is extended time needed to accommodate all the referrals and their related participants, pro or con. And the inherent confusion from multi-person phone conversations. And considering the extensive number of speakers on person on the en banc agenda, it begs the question, are there more participants/speakers, on both sides, now

that those comments can be delivered via phone rather than the process requiring their in-person appearance in Sacramento? Of course, it's always been the practice of the board to accept and review written comments on each en banc consideration, but somehow, in the minds of some, letters pale in comparison to that 'personal touch' of 'being there,' even if only by voice.

Of the four individuals considered by the board for 1170 (e), compassionate release, 3 of the four were successful in those appeals. Recall of sentence was recommended for **James Roybal** in May, **Matthew Carroll** and **Maurice McGee** in July, while **Jonathan Franklin** saw his request denied.

A request in May from **Eugene Arnold** for a recommendation for a pardon was approved, as were similar requests from **Gene Baker** in June and **Jeffrey Smith** in July. June requests for commutation recommendations were approved for **Jose Barajas, David Diaz, Gregory Fletcher, Carlos Guerrero, Tyrone Hammond, George Hughes, Tracey Pabon, Mary Reeves** and **Omar Walker** were also approved.

In May BPH Counsel referred parole decisions for **Robert Manez** and **Kenneth Vernon** for en banc consideration, Manez for alleged misconduct after the decision and Vernon for the decision's compliance with the Lawrence decision. Manez saw his grant vacated on the strength of the allegation, while Vernon saw his denial also reversed, and a new hearing ordered. In June a similar referral of the denial, for compliance with the Lawrence decision, for **Rocky Glover** was also vacated in favor of a new hearing, while the counsel referral of the grant for **Albert Olmeda** for consideration of new confidential information was rescinded and a new hearing ordered.

In the months of May, June and July the Governor referred a total of 28 grants of parole for en banc consideration, the end result being slightly more positive than negative. In May **Bobby Bunderson, Michael Ingram, Henry Poe, Steven Red** and **Nailah White** saw their grants of parole confirmed, but May also saw grants to **David Cubbuck, Ronald Glover** and **Lester Pamilton** were rescinded and new hearings ordered.

In June the Governor referred 11 grants for consideration, with the grants of **Jeffrey Gibson, Ceasar McDowell, Eric Post, Woodrow Quarles** and **Felipe Rod**riguez were affirmed, but those for **Michael Brambles, Michael Cowles, John Daniel, Mark Fitzpatrick, Oscar Mayorga** and **Daryl Thompson** were ordered to rescission hearing.

July saw another 9 Governor referrals, with grants for **Clarence Burch, Loida Cruz, William Harwood, Daniel Luna, Justin Miller** and **Frank Serrano** affirmed, and those for **Michael Cooper, Charles Hudson** and **Kareen Starks** rescinded. Hudson, in particular, seemed to pose a conundrum for commissioners, who first voted to affirm his grant, then to vacate that en banc decision and subsequently the majority voted to rescind the grant.

In July a panel member requested en banc consideration of the grant to **Charles Jones** and the entire board decided to rescind the grant. June saw two tie votes, for **Elio Castro** and **Jonathan High** decided, affirming a grant for Castro but denying High. **Gregory Hamilton** suffered a similar fate in July, when his tie vote was decided in favor of parole denial.

NEW PAROLE COMMISSIONER AND REAPPOINTMENTS

On July 14 Governor Gavin Newsom appointed Minerva de la Torre to a commissioner seat on the Board of Parole Hearings. De la Torre has previously served as a parole board commissioner for the State of Nevada Board of Parole Commissioners since 2018 and has been a licensed social worker since 2017.

She was a licensed clinical social worker supervisor and veteran justice outreach coordinator at the U.S. Department of Veterans Affairs from 2013 to 2017. She also served as a parole agent I for the Division of Adult Parole Operations at the California Department of Corrections and Rehabilitation from 2008 to 2012. Prior to her involvement in the corrections system she was a mental health therapist at the Children's Bureau in 2009, a foster care social worker at Niños Latinos Unidos from 2002 to 2008 and an eligibility worker at the Los Angeles County Department of Public Social Services from 2000 to 2002.

She earned a Master of Social Work degree from California State University, Long Beach. Ms. de la Torre has yet to make her first public appearance, given that the BPH meetings are currently held by audio conference. She apparently (no official announcement, but absence says much) replaces Commissioner Brian Roberts, who had reportedly been planning on retirement.

Newsom also reappointed the following commissioners:

Robert A. Barton, 58, of Fair Oaks, first appointed in 2017. Previously Barton had served as California's Inspector General from 2005 to 2017. He was supervising deputy district attorney in the Kern County District Attorney's Office from 2000 to 2005, where he served as a deputy district attorney from 1988 to 2000.

Kevin Chappell, 55, of Elk Grove, was reappointed, having served as a commissioner since 2015. Chappell was a retired annuitant correctional administrator at California Correctional Health Care Services in 2015, warden at San Quentin State Prison from 2012 to 2014, and served in several positions at Folsom State Prison from 2010 to 2012, including chief deputy warden and associate warden. Chappell was chief of the Classification Services Unit at the California Department of Corrections and Rehabilitation from 2009 to 2010, where he was facility captain from 2006 to 2008. He served in several positions within CDCR since 1995.

Neil Schneider, 60, of Sacramento, has been reappointed to the Board of Parole Hearings, where he has served since 2018. Schneider was an adjunct assistant professor in the Administration of Justice Department at Los Rios Community College District in 2018 and in several positions at the Sacramento Police Department from 1983 to 2017, including captain, lieutenant, sergeant and officer.

PAROLE HEARINGS BY DISTANCE CONTINUE

And other matters related to parole hearings

Because the CoVid outbreak shows no signs of going away, BPH will continue to hold parole hearings by video conference, at least through the end of August, by extension of an executive order from Governor Newsom. And while the continued distance hearing appear to be impacting the number of those who wish to put their hearing off until it can be done in person, the video hearings do not seem to be impacting the grants resulting from those hearings.

Since the teleconferenced hearings began, on April 1, BPH has been releasing overall hearing results on a monthly basis, in part in an effort to reassure those going to hearings that their chances of being granted remain based on their suitability, not how the hearing is held.

At the end of July BPH issued the following information:

The Board of Parole Hearing held 1,101 parole suitability hearings by video and telephone conference between April 1 and July 24.

369 resulted in grants (34 percent); for all of 2019, BPH's at-hearing grant rate was 34 percent

732 resulted in denials (66 percent); for all of 2019, BPH's at-hearing denial rate was 66 percent

75 incarcerated people waived their hearing, 234 hearings were postponed, 106 stipulated to unsuitability, and 12 were continued

In short sentences, the grant rate for the nearly 4 months of video hearings so far has been the same as the grant rate for last year under the in person hearing process. Your chances for a grant are not, statistically, negatively impacted by the video process.

The Board has worked out a method for private consultations with attorneys during the hearings that appears to work, from reports by those attorneys. While there is no indication as yet about timelines for resumption of in-person hearings, it's important to note that most court proceedings are now being done by video conferencing and no jurisdiction seems in a hurry to be the guinea pig who opens first.

As to whether or not to go through with your hearing, that's a decision only you, in conjunction with your attorney, can make. But it does bear remembering that the video conferencing has not impacted the overall grant percentage.

Other new considerations in parole hearings is the following information, again, directly from the BPH:

Expedited Review of Parole Grants

As a result of COVID-19 and CDCR's on-going efforts to promote the health and safety of CDCR staff and inmates, the Board and Governor's Office are expediting review of parole grants. Under Penal Code section 3041(b)(2), decisions made by parole panels finding an inmate suitable for parole are final within 120 days. During this time period the Board reviews the parole grant and parole plans are confirmed for each inmate. The Board's legal department is regularly screening the list of inmates granted parole to prioritize review of grants for inmates who face the greatest risk due to COVID-19. Review periods are generally about 90 days, with those at institutions with COVID-19 outbreaks being completed even faster. The purpose of the Board's review is to ensure parole decisions comply with the law, that there is no error of fact, and that there is no new information that would have a substantial likelihood of resulting in a substantially different decision.

Parole Plans and Transitional Housing

We understand that the first few weeks after an inmate is released after a long period of incarceration can be particularly stressful and difficult. To ease this adjustment the Board generally imposes a condition that inmates participate in transitional housing. The Board will continue to do so. However, given the potential impact of COVID-19 on group living environments, the Board is working with the Division of Adult Parole Operations to evaluate alternative placements, when warranted. Specifically, the Board will consider placing some parolees in a residence with a pro-social friend or relative. Parolees already living in a transitional housing environment should notify their parole agent if they have COVID-19-related concerns and would like to request to live in an available alternative residence with a pro-social family member or friend. Inmates who have been granted parole and are waiting to be released can write to the Board to request consideration of alternative parole plans (address above). As always, inmates with an upcoming parole hearing are encouraged to bring parole plans and support letters to their parole hearings for discussion, which may include plans to live in a transitional housing facility or a private residence with a pro-social family or friend. "

NEWSOM COMMUTES 21 IN JUNE

Gov. Gavin Newsom issued 21 commutation of sentence and 13 pardons late in June. Pardons are available to those who have completed their prison term and are seeking to clear their record of incarceration. Commutations, used increasingly by former Gov. Brown and now Newsom, can modify and cut short the sentence of those still imprisoned.

In this batch of 21 commutations Newsom displayed again some patterns in how he views his power to commute sentences and impact the justice system. Of the 21 who received commutations, 8 had received a Life Without Parole (LWOP) sentence, 2 were determinate sentenced inmates and the rest were lifers, sentenced to terms from 40 to life to 25 to life. The majority, 15, were YOPH candidates, having committed their crime before the age of 16, one at the age of 14.

Most, 14 of the 21, were convicted of murder, three were women and while in no cases in this group of commutations did the Governor order immediate release of the individual, in 6 cases he ordered immediate parole consideration, meaning those men and women will see a parole hearing probably within 6 months.

In several other instances the Governor's actions mean many individuals will find themselves at parole hearings anywhere from 1-5 years in the future, often when there was no future parole hearing possible. Commonalities in those Newsom chose to commute were exemplary behavior while incarcerated, full participation in programs and, expression of remorse and acceptance of responsibility for their crimes and actions.

Always noted in the Governor's letter of commutation is his recognition that commutation does not equate with wiping out the effects or responsibility of the crime. In each letter the Governor notes, "The act of clemency for does not minimize or forgive the conduct or the harm it caused. It does recognize the work e/he has done since to transform [him/her] self"

Herewith are the names of those who received a commutation, their original sentence in parenthesis () and the new sentence:

Andrew Aradoz, (24-L) eligible for immediate parole hearing; Carl Banks (40-L) 15-L; Isaac Belmontez (45-L) 10-L; Louis Calvin (32-L) eligible for immediate parole hearing; Yu Chen (35-L) 25-L.

Frank Marquez (33 years) eligible for immediate parole hearing; Jose Martinez (40-L) 20-L; Jered Pillsbury (13 years) eligible for immediate parole hearing; Adolfo Quiroz (32-L) 14-L; Issa Wijell (50 -L) 15-L.

The following individuals were originally sentenced to LWOP, their commuted sentence follows name: Dwayne Allen 41-L; Paris Dixon 38-L; James Heard 25-L; Duncan Martinez 25-L; David Phillips 25-L; Richard Ponce 19-L; Miguel Ruiz 29-L and Thomas Waterbury 39-L

Three women were also included in the commutations: Kathy Baker (31-L) eligible for immediate parole hearing; Yesica Cambero (32-L) eligible for immediate parole hearing and Cindy Thao (26-L) 15-L.

STATE OF CALIFORNIA — DEPARTMENT OF CORRECTIONS AND REHABILITATION GAVIN NEWSOM, GOVERNOR

OFFICE OF THE SECRETARY
PO Box 942883
Sacramento, CA 94283-0001

May 29, 2020

Dear CDCR Employees Statewide:

We are living in times of heightened tensions pertaining to law enforcement and criminal justice. The California Department of Corrections and Rehabilitation is constantly under scrutiny, from media, community members, lawmakers and our law enforcement partners.

I am honored to lead what I firmly believe is the finest correctional department in this country. However, there are times when we fall short and it is my duty in these times to ensure you are all aware of my expectations.

In the aftermath of the tragic death of George Floyd in Minneapolis, it has come to my attention that some employees of this Department have taken to social media to make distasteful jokes and comments that denigrate Mr. Floyd and are extremely hurtful and disrespectful to his family and members of the community, based solely on who they are. In addition to racist remarks, a religious group was also singled out for disparagement. To say I was upset to learn of these comments would be an understatement – those who engaged in such behavior have brought dishonor to this Department and cast a shadow on the fine work we do.

Let me be very clear: I will not tolerate unethical or racist conduct by staff, whether on or off duty. As soon as these comments were reported, this Department immediately elevated them to the staff members' hiring authorities for investigation. We will enforce our code of conduct regulations to the fullest extent.

Whether you are sworn or non-sworn, your status as an employee of CDCR makes you a role model for correctional excellence. I expect each and every one of you to comport yourselves with professionalism, respect, and compassion at all times. This includes respecting people of all races, religious beliefs, and diverse life experiences.

The Law Enforcement Code of Ethics states: "I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department."

Whether or not you have read the Code of Ethics recently, I strongly suggest that each employee do so, and take its message to heart so that we may return to the business of serving our communities.

Sincerely,

RALPH M. DIAZ
Secretary

Governor Gavin Newsom · State Capitol ·Sacramento, California 95814

APPLICATION FOR A COMMUTATION OF SENTENCE

Complete this application to request a commutation of sentence (a reduction of sentence/punishment) from the Governor. If you have submitted a commutation application in the last three years, please complete the re-application form. The Governor's Office and/or the Board of Parole Hearings may contact you for additional information relating to this application. If the Governor grants you a commutation, some information from your application will appear in an annual public report about clemency the Governor is required to submit to the California Legislature. Learn more about commutation application at www.gov.ca.gov/clemency or mail a request for information to: **Office of the Governor, State Capitol, Attn: Legal Affairs/Clemency, Sacramento, CA 95814**.

APPLICANT INFORMATION
(Attach additional pages as necessary.)

Name (Last/First/Middle): _____ Date of Birth: _____

CDCR Number: _____ Social Security Number: _____

Name of Facility/Prison: _____ Facility/Prison Address: _____

1. Conviction Summary (*Note: The Governor's Office will review a complete copy of your criminal history report.)*

List conviction(s) for which you are requesting a commutation of sentence.			
Crime(s):	Date(s) of conviction:	County of conviction(s):	Sentence(s):

Were you under 26 years of age at the time of the crime(s) for which you are seeking a commutation of sentence? ☐YES ☐NO

List all prior conviction(s) in California, any other state or country, or in federal court.			
Crime(s):	Date(s) of conviction:	Location of conviction(s):	Sentence(s):

2. Describe the circumstances of your crime(s).

3. Describe how a commutation of sentence may impact your life.

4. Describe your life since your conviction (e.g., efforts in self-development, including identifying and addressing treatment needs, professional and educational achievement; any set-backs, conduct violations, or new convictions; insight about past conduct; and future goals).

5. If you have paid any money or given any gift to anyone to assist you in preparing this application, you are required by law to list their name, address, phone number, email address, the nature of your relationship, and amount paid or gift given.

APPLICANT DECLARATION

Complete the following statement after you have served your Notice of Intent

I, _____, declare under penalty of perjury under the laws of the State of
(Print Applicant Full Name)

California that the information I have provided on this application is true and correct. I further declare that I have served (mailed or delivered) my notice of intent to apply for clemency on the District Attorney of the County of _____.
(Name of County or Counties)

_____ _____
Applicant Signature Date

Submit this completed 2-page form to the **Office of the Governor, State Capitol, Attn: Legal Affairs/Clemency, Sacramento, CA 95814**. You may, but are not required to, include copies of relevant documents that support your application (e.g., certificates of achievement, photographs, letters of support, etc.). Do not send original documents, as application documents cannot be returned. Please update the Governor's Office promptly if your contact information changes. Submit a completed Notice of Intent to Apply for Clemency to the district attorney in the county of your convictions for which you are seeking a commutation of sentence.

THE CHATTER ON ELDELRY PAROLE AND MORE

Several changes to are in the offing in the lifer parole arena, although just how they will be implemented yet remains to be clearly defined. Both are the result of budget trailer bills, which codify the budgetary changes for CDCR in the coming year.

Two major developments, changes in the length of parole 'tail' for lifers (and all parolees) and changes in elderly parole, were once contained in a single bill, but late in the bill's life the elderly parole changes were dropped from the bill—only t be picked up in another budget trailer bill that, as we go to press, has not been passed. Yet.

Senate Bill 118, passed and signed, did, however, contain language that changes the parole length for all determinate sentenced prisoners to 24 months, with reviews for discharge starting at 12 months, post release. Parole for lifers—indeterminately sentenced inmates, is capped at 36 months, again with discharge reviews starting at 12 months.

And while these changes exempt those convicted of a sex offense, the change is nonetheless dramatic—most lifers now on parole face 3-year parole 'tail' for many life offenses, 5 years from second degree murder and 7 years for first degree murder, with the prospect (often emphasized by parole agents) as 'lifetime parole,' more a threat than a reality. Now, all those would be reduced to 3 years, possibly less.

But—always a but—these changes apply ONLY to those released on parole on July 1, 2020 or AFTER. Nothing about retroactive application. However, scuttlebutt says that is in the works, via regulations and application of the current 'earned discharge' process to lifers as well. How? No info yet, but that's top of the list to find out. Please be patient, this is a huge change, we're aware of that, and we're on it, but answers are not going to be immediate. And by the way, this bill passed, was signed and is now law. Done deal.

The other major change, to elderly parole, is not yet law. While SB 118 originally contained language that would change qualifications from 60 years of age and 25 years incarceration, to 50 years of age and 20 years of incarceration, that provision was dropped from SB 118 late in consideration, but picked up by a second trailer bill, AB3234. As of press time, SB 3234 has not completed the legislative process, but the change in elderly parole remains in the bill and the bill is expected, by those 'in the know,' to pass.

However, with passage there will still be questions. The changes in elderly parole refer to changes to 'current law,' that would be 2017's AB 1448, which codified the elderly parole process, already in place for a few years under agreement between the BPH and the federal 3-judge panel overseeing CDCR. Under that agreement, Third Strike lifers were included in the elderly parole process; under the terms of AB 1148, and under the current bill under consideration, third strikers were excluded.

However, because the 3 judges were, and still are, sitting in oversight of CDCR, BPH continues to include strikers in elderly parole process. Will that change, under the new age and time considerations, should the current AB 3234 pass? Yet to be determined.

The current bill also excludes LWOP, condemned and those whose victim was a peace officer from consideration for elderly parole consideration. Additionally, passage of AB 3234 "would also require that by December 31, 2022, the BPH complete all elderly parole hearings for individuals who, on the effective date of this bill, are or will be entitled to have their parole suitability considered before January 1, 2023."

The changes are expected to impact less than 250 inmates. Interestingly, but unsurprisingly, the California District Attorneys' Association is opposed to the passage of the bill, noting, as part of their opposition argument, ""If given a little more time than has been available under the dramatically accelerated hearing of this bill, CDAA could cite hundreds of ex-

amples of dangerous and violent criminals who committed heinous crimes after age 50." Yeah.

Other changes in the passed and in-place SB 118:

Removes BPH consideration and input into the 1170 (e), compassionate release process. Instead, for those prisoners who have been diagnosed with a terminal illness and are seeking release on that basis, the sentencing court would make that determination and extends the time line for those who qualify from 6 months to 12 months to live.

Removes the psychological services available at parole offices for those on parole (POC, Parolee Outpatient Clinic), and contract for those services. This is an important development for those who had hoped to include participation in POC services as part of their parole/relapse prevention plan, as those services will no longer be available.

And AB 118 changed current law to authorize a person convicted of certain sex crimes and required to register as a sex offender, to file a petition in the superior court for termination from the sex offender registry on or after their birthday following the expiration of their mandated minimum registration period.

Behold, we give you "Bacteria Bear!" Bacteria Bear (not his real name) is a life-size sculpture of a California Grizzly bear, plunked down outside the Governor's office by former Governator Arnold Schwarznegger, and passed down to every Gov (all 2 of them) since Ah-nold departed. This lovely Ursa got the name Bacteria Bear long before CoVid, due to the countless school children petting, touching, canoodling, kissing, sneezing on and just generally depositing, well, bacteria, on the bear. Capitol denizens DO NOT pat Bacteria Bear. And now, in these CoVid ridden times—he's been declared totally off limits. Just another California denizen in isolation because of CoVid.

OUR KIND AND CREATIVE MEMBERS ARE THE BEST!

We appreciate all our members and supporters, who make it possible for us to continue work for lifers and their families. And we love sharing with everyone just how thoughtful and caring they are.

Long-time members and supporter Pam C. is as creative and skilled as she is caring. She created two beautiful quilts for LSA Director Vanessa Nelson-Sloane and Board Member and former lifer David Sloane, and we just had to share everyone.

The quilts are in a Log Cabin pattern, a pattern long associated with freedom and home. And she went even further—around the border of each quilt she embroidered words related to our work. These are truly one of a kind creations and we love them. And truly appreciate the time and work that went into each one.

We're almost looking forward to winter, when we can put these works of art to their intended use! Thank you, Pam,—for your support and help in our mission and for your personal consideration as well!

Dave Sloane with quilt

Left: front of quilt

Bottom: back of quilt

Vanessa Nelson-Sloane with quilt

Above: front of quilt

Right: back of quilt

CHANGES AT LSA

New location, same mission, distance learning

We're on the move. Literally. To bigger offices. To accommodate our bigger mission, growing volunteer cadre and massive amounts of printing and programs!

In 10 years, we've accumulated some pretty substantial files and archives of issues, more correspondence than we can count and more ideas for projects going forward than one room can contain. So, we're moving, still in Rancho Cordova, mailing address, phone and email won't change. We're in our new digs, helped by a group of paroled lifers who did the 'heavy lifting' for us. Thanks guys!

Also changing—since we can't get into the institutions to present our workshops, we've converted both Connecting the Dots and The Amends Project into correspondence courses…for info, write and ask us. Yes, certificates are available for those who complete the courses.

Also—a word on the mental health projects we first discussed a couple of newsletters ago. After our suggestion that inmates ask mental health at their location for the programs, dozens, dozens and dozens did. And for the most part, the reaction from MH was 'ho-hum.' We didn't stop there but reached out to the top of health care in CDCR, Drs. Diane Toche (Undersecretary of Health Care Services) and Joseph Bick (Acting Director of the Division of Health Care Services).

Dr. Toche never bothered to answer, passing us off to Dr. Bick, whose main concern was how we acquired the program curriculum and later, a nice verbal pat on the head, thanking us for our 'advocacy,' and a nice, 'go away, kid, ya bother me.' Indeed, we intend to.

True to our word, we aren't walking away. We're making these courses, Anger Management and Depression, available to all who want them. And, we'll add a workbook on CoVid stress to boot. As a plus, the psychologists and clinical social workers who volunteer with us, professionals in their own right, will vet responses to these programs (yep, there's homework—these are real courses) and issue certificates of completion to those who do the work.

It's a daunting task for a volunteer organization—the entire packet is close to 100 pages in length and engenders not just time, but substantial expense in print and postage. So we've reached out, started a GoFundMe account to underwrite this effort, and made a way for friends and family to contribute the cost of the packet to get it to their loved one. The cost? $10. The GoFundMe account is doing well, and friends and family have stepped up to the plate to get these worthy programs to those they care about.

Tell your family to check out our website, www.lifesupportalliance.org for the path to get the programs for you, and if you're indigent—send us your info and you'll be included too. The first 200 packets have already been mailed and more are going out this week.

So far we've raised enough funds to cover completely packets to 600 prisoners, and as the orders keep coming in, it looks like the number of requests will exceed that figure—and we'll keep going.

CDCR dropped the ball on this, but we've picked it up, and its Game On.

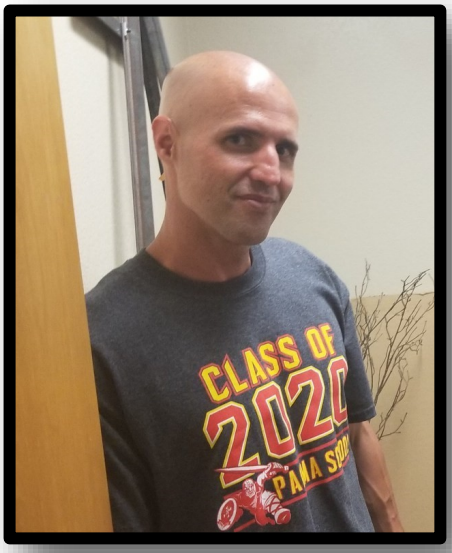
LIFERS ON THE MOVE

Lifers on parole are on the move-in this case, they're moving, us, LSA, to our new offices. Our great thanks and appreciation to the crew from CROP (Creating Restorative Opportunities and Programs) from their help (and muscle power) in getting us from one office to the other, and everything in the right place!

Ted Gray, Richard Mireles, Jason Bryant and Matt Braden made quick work of most of the move, along with Keith Chandler, former lifer and LSA Board member. And while we don't yet have pictures, former lifers Jeff DePue and Tommy DeLuna wrapped it all up the next day and even helped organize the storeroom.

They were quick, efficient, and hard-working. And we didn't have to use our secret motivation trigger--stand in the door and yell "Roll it up!"

Thanks guys, you made a daunting task possible and when CoVid ends, please come back and enjoy our hospitality at an open house to celebrate our new offices.



The Movers

Left: **Matt Braden**

Below from left to right:

Jason Bryant, Ted Gray, and **Richard Mireles**

CoVID—THERE ARE NO BEST PRACTICES

"By the time you read this, things will have changed"

CoVid 19. Corona virus. Pandemic. And panic. In California prisons.

Over 8,000 positive cases since March. 47 deaths. At the end of July still over 1,300 positive cases of CoVid inside the prisons and only 2 prisons had escaped the virus. And by the time you read this, all that will have changed.

Where are we now, over 4 months into the crisis? As we've watched the overall numbers rise and fall, the cumulative number of positive cases in the inmate population reached 8,234, with a trio of prisons each accounting for over 1,000 each, one courting a total of 3,000 cases, no one has been able to predict or chart the course of the Corona virus, either in the prison system or the outside world.

San Quentin, Chuckawalla, CIM and Avenal have, at one time or another shared the dubious distinction of being at the top of the positive cases list. And while Lancaster kicked off first, on March 24, with a single case, that and several subsequent prison outbreaks managed to remain relatively managed, until CIM, the first location where the virus truly got the upper hand and raged through the prison, eventually causing (as of press time) 1,072 positive cases and the first death, on April 19 when the number of positive cases at CIM numbered only 60.

As the numbers at CIM continued to rise, as well as outbreaks in other prisons, Chuckawalla and Avenal took turns rocketing to the top of the list, positions that were inevitably followed by deaths. To date, CVSP has tallied 1,054 positive cases and ASP's total count is 1,375.

And then there is San Quentin. At the end of May, with the infection rate at CIM racing out of control, officials made the decision to move medically fragile inmates from CIM to other locations, primarily SQ, which, until then, had no Corona cases. The moves, both to SQ and to Corcoran, turned out to be a case of 'out of the frying pan, into the fire,' as many of those transported were ticking time bombs of asymptomatic CoVid virus.

While all levels of those supervising CoVid protocols in the prisons signed off on the moves (CDCR, CCHCS and legal authorities) and those filling the buses had been 'tested,' but as for the most part from 3 weeks to 7 days prior to the moves. Plenty of time, between testing and traveling, to catch the virus and be able to transmit it as well.

Once CoVid entered SQ all the dire predictions of those who knew the aged prison's structural foibles became all too true and SQ became not only the hottest of virus hot-beds, but a cause celebre as well. The public outcry that was not present (other than from family and friends) when CoVid was savaging CIM, CVSP and ASP swelled when SQ's numbers skyrocketed, prompting legislative hearings, editorials and hand-wringing all around. And of course, the number of positive testing inmates at SQ dwarfs all others, at 2,184.

The numbers at San Quentin mean that as of now, August, about 69% of the population has contracted the virus. At CVSP, half the population has tested positive, 71% of CIM and 36% of the population of ASP. Herd immunity? Only SQ might qualify, as the level for herd immunity is widely regarded as being 70% of the population.

In most of the prisons the outbreaks seem to be slowing, but there are some disturbing trends. Avenal is trending up again, today showing 349 cases, all appearing within the last 14 days. Two weeks ago, Avenal's positive case load stood at 12—then over a weekend the total went to over 100, increasing daily. CIW, currently with 150 cases, and been at zero, 14 days ago. Other prisons showing increases in the critical 14-day window include CCI, WSP, CRC ISP, COR and CRC, all with at least 2/3 of the present cases presenting in the past 2 weeks.

LAC, where it all started so long ago, has been CoVid free for weeks, before seeing a few cases in

the last 2 weeks, now standing at 5.

The worst toll of CoVid is undoubtedly the deaths caused by the virus. Of the 48 total, both SQ suffering 20 and CIM 19, with 5 at Avenal, 2 at CVSP and one each at CIW and COR. Of the 20 deaths at SQ, at least half were of condemned inmates. SQ, certainly the hardest hit of any institution, has now administered nearly 3,500 tests for CoVid, to a prison population of 3,178, at last official count.

CDCR, working with the California Correctional Health Care Services (the federal medical receiver's office), is trying to figure out social distancing, quarantine, cleaning and mask wearing within a congregate and custodial environment—not easy tasks. And not made easier by the refusal of some staff, and inmates, to wear masks in their interactions. As to cleaning, most lifers will attest, it's always been up to the person wanting to use whatever facility or item is in question to make sure that area is clean before they begin. Nothing has changed. Don't expect staff or others to clean up after themselves, to the point you feel safe. Do it your own self.

And a word on rumors. In the past several weeks the always active rumor mill inside has been on steroids. We've had 'hot tips' about 'hidden cases' in every prison from PBSP to RJD, most of those 'tips' coming from the 'I heard it from an officer or I heard it from a guy on the yard.' Please. Do yourselves and us a favor and don't buy into every rumor. News flash here, the COs, and even the guys on the yard, don't know nearly as much as they'd like you to think they do, though they are usually happy to share their ideas and thoughts.

As to hiding cases of CoVid—not so much. Test results from CoVid tests are sent to the county health department in whatever county the prison is located, to be tabulated in the county's chart, and reported to CDCR. Nothing works quickly and in CoVid times, with staggered shifts, things like updating sites are often slower. But those positive results will be counted, not hidden. The various counites in California have no loyalty to CDCR, nothing to gain by 'hiding' results and everything to gain by accurately reporting the situation. And they do. Plus, be aware that the courts are carefully watching CDCR's response to the pandemic and no one is looking to court the ire of the federal courts by being nefarious in reporting.

CDCR has undertaken a plethora of plans and guidelines to facilitate early releases, and the department is now eyeing those with a year or less to serve in efforts to push some out early. These efforts, so far, have not impacted the lifer population to any great degree, but there are some efforts underway to examine those in that cohort as well—see story elsewhere in this issue.

And don't let anyone, staff or otherwise, tell you that the requirement to wear masks when inside and/or interacting with others has been lifted. On July 1 the department sent out a memo that noted, in part:

"The intent of this memorandum is to clarify the expectations outlined in the June 11, 2020, memorandum authored by Ralph M. Diaz, Secretary, and J. Clark Kelso, Receiver, California Correctional Health Care Services, regarding the wearing of face barrier coverings. It is vital that staff adherence to that directive is necessary to protect the health of the staff, their families, the inmate population, and the public.

For individuals who do not adhere to this directive, it is expected that supervisors and managers utilize the progressive discipline process as outlined in the Department Operations Manual (DOM), Article 22,

Employee Discipline policy, in addressing staff who fail to comply with the June 11, 2020, directive. Supervisors and managers must also be cognizant that staff may have a medical condition that precludes

the wearing of facial coverings. In those cases, staff should be directed to the Return to Work Coordinator for consideration of a Reasonable Accommodation."

DOWN YES, BUT ARE THE POPULATION NUMBERS A SHELL GAME?

Late last week CDCR announced what, seemingly, was a major landmark in the long and fraught battle to reduce the population of California's prisons. For the first time in three decades, the incarcerated population inside California state prisons, according to CDCR, is below 100,000 persons.

On July 30, the Department announced the in-prison population was 99,929. "The last time that number was below 100,000 was in 1990, when California's overall population was almost 10 million less than it is today.

"Since March, CDCR has taken extraordinary measures to directly address the COVID-19 pandemic in its institutions, including one of the largest reductions in state prison population in recent history.

In that timeframe, CDCR has reduced its total incarcerated population by more than 16,000 through the suspension of county jail intake, the expedited release of approximately 3,500 people in April, and more than 6,700 in July as a result of those eligible under the series of release actions announced July 10, and those being released naturally after having served their full term as defined by the law."

That was on July 30. On July 31, CDCR released a population report to the 3-judge federal panel, which oversees the population and other aspects of Corrections in California. And interestingly, that report showed the population count at 101,523; that's 9,594 more than the number announced just the day before.

And intake from county has been suspended for some time, and not scheduled to begin again until August 9 (at last report, which can and does change almost daily). Soooo, where did these 10K new bodies come from? Where were they the day before, when the 'count' was made?

And why, in the July 31 report, was California City Correctional Facility (CAC) not on the report? Is it not a California prison? We're pretty sure the men incarcerated there think it is, as does CCPOA, who staff that somewhat hybrid facility. CAC, officially owned by private prison firm CoreCivic, is leased by CDCR and staffed by CDCR (CCPOA), which, one would think, would mean those souls were included in the population count---but if so, we're not seeing it.

Was the population CAC, which is March, the last month for which we can find figures, was 2,070, included in that 99K+ figure? Can't tell but doesn't seem to be. And how do we make sense of CDCR's changing numbers from July 30 to July 31? Questions. We have questions. We have loads and loads of questions.

Clearly, the population is down, due to all the factors enumerated in the CDCR press release of July 30, but—and this could be a game changer, there have been no new incoming inmates for several weeks and the intake process has not been at full capacity in months. It is slated to begin again in a few days, albeit on a slow start, to gauge the impact of new incoming individuals on the CoVid situation.

When intake was tentatively started a few months ago at a slow pace in only a few reception centers, those locations did see an uptick in CoVid cases. In part because it appears there is no standardized practice for CoVid testing among the counties—it's pretty much a hit and miss affair. It does not appear much has changed on that front, but intake will and, at some point, must begin.

County lockups are burgeoning, and the counties are screaming for relief. So while CDCR has been able to reduce the population during the pandemic shutdown, though by how much remains a question, the looming reopening of intake will certainly make major changes in whatever the true number is.

At the same time, CDCR's release efforts are be-

ing closely scrutinized by the 'law 'n' order' forces, looking for the inevitable slip-ups that can fuel their efforts to stop the releases and double-down on lock ups. The Yolo County DA, in fact, has released their tally of 'new crimes' committed by those released under the new Zero Dollar Bail, mandated for most misdemeanor cases and some felonies in an effort to significantly reduce the population of jails.

Since the implementation of the program Yolo County reports 213 individuals have been released a total of 235 times on Zero Dollar Bail, with 157 new crimes committed by those individuals after being released. The new crimes resulted in 76 new felonies and 81 new misdemeanors. Some of those released, 55 in fact, individuals have been rearrested a total of 85 times after being released and an additional 31 were arrested on bench warrants / outside agency warrants. And while these are not state prison release, if the DA is tracking local arrests and releases this carefully, you can be sure they've got the same watchdogs on those returning to the county after release from CDCR's tender mercies.

HOW IS THIS HAPPENING?

A way to release lifers in the time of CoVid?

"Cal. Gov't. Code §8658.

In any case in which an emergency endangering the lives of inmates of a state, county, or city penal or correctional institution has occurred or is imminent, the person in charge of the institution may remove the inmates from the institution. He shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to avoid the danger, or, if that is not possible, may release them. Such person shall not be held liable, civilly or criminally, for acts performed pursuant to this section."

On the books since 1970, but so obscure that even the tentacles of omni-present Marsy's Law didn't touch it, G.C. 8658 has recently been resurrected as a means to provide both population 'decompression' and protection from CoVid for those prisoners who are particularly medically vulnerable both to contracting the virus and devastating effects that illness. And note, the above code does not exclude any prisoner cohort.

To be sure, it has been used sparingly, and Sacramento sources emphasize this will only be used sparingly, and only for those inmates for whom there appears to be no other timely and effective way to protect them from possible, if not probable, contracting CoVid. One of the most recent applications of 8658 was in the case of a 3-striker, sentenced to 125 years to life and with severe medical co-morbidity issues in relation to the virus. The man was released, the victim professed fear, the DA yelled foul and the ensuing publicity brought forth the revelation of 8658.

As most lifers know, many laws preclude them, and other inmates with violent crimes, from being considered for incarceration relief programs. Marsy's Law, in particular, imposed additional burdens on lifers seeking suitability, including the possibility of long denials, few options and increasing participation from victims and victim families (VNOK, victims' next of kin). One of the primary sticking points for DAs and VNOK in the use of 8658 is that the provision of Marsy's Law, requiring notification of VNOK 90 days prior to any action related to release (parole hearings included), does not apply to 8658.

VNOK and DAs are notified, but reportedly those notifications have come only shortly before the releases under 8658 are accomplished and no input from either of those sources is requested or required under the code. Thus, the outcry.

However, those agencies, ranging from the Governor's office to CDCR and the BPH, are reviewing a staggering number of individuals to assess both that prisoner's risk to succumbing from CoVid, the need to reduce the population and the over-arching

requirement to protect public safety. It's a delicate balance in many cases and the risk for both events is being carefully weighed.

So far these releases have only been applied to a handful of cases and very few lifers, but sources say that does not preclude the continued use, should that lifer be judged especially vulnerable to fatal complications from the Corona virus. Can this code by applied to LWOP inmates, or even condemned? Sources say it's unlikely as the intent of both those sentences (vicious though they may be) is that the so-sentenced individual will, indeed, breath their last in prison, naturally or otherwise.

But currently, for lifers, including 3 strikers, 8658 remains a possibility. To reiterate, it will be used exceedingly sparingly, only for those who are severely medically compromised and thus desperately vulnerable to CoVid and for whom other legal avenues of relief might not be concluded in time and who risk evaluators can reasonably believe will not wreck havoc in the outside world, in spite of their medical issues.

And to answer the verbalized question, how do I seek consideration under this code? The answer is, you can't initiate it—but if you are among the cohorts considered for early release under the ever-evolving criteria, it is a possibility. As for how to get yourself in view of those considerations, see story elsewhere in this issue.

EARLY RELEASE? GET YOUR NAME IN THE RIGHT BUCKET

As the plans, criteria and how to tap into the early releases actually happening in the wake of CoVid, it's important to make yourself seen. As those criteria keep changing—almost daily, how do you bring yourself to the attention of those making these decisions?

Because the ravages of CoVid have made the complications of severe overcrowding in prisons scream even louder for remedial action the prospect of looking at a select group of lifers for release sans a formal parole board hearing is becoming feasible. How? Via an obscure Government Code section rarely used and long overlooked, but now controversially brought to service in these clearly extraordinary times. For more on that see article on previous page.

The best way—file a Commutation request with the Governor. For decades commutations were a long shot, until about mid-way through former Gov. Edmund G. Brown's term, when Brown began to use the commutation power to right some of the wrongs of sentencing. Current Gov. Gavin Newsom has continued that path, to some degree, and now, under the pressure of CoVid and overcrowding, commutation applications can provide a new avenue to at least consideration for release.

Information provided on the commutation application can be used by CDCR's statistical and research division to identify those individuals who qualify for consideration under release criteria, such as those with less than 5 years to serve, over the age of 65, with CoVid-sensitive medical needs, low CRA (or CSRA) scores, and more. As CDCR and the Governor look at various cohorts to find individuals within those groups who seem likely candidates for early release, those data points can place you in the 'bucket' of those being considered.

Best advice from those in the know in Sacramento—put in a commutation petition, knowing it will be for reasons other than the Governor's scrutiny for commutation. On that petition—which can be found on the Governor's website, in the law library, probably from counselors and worst-case scenario, from LSA, present the factors of your situation that make you vulnerable to CoVid complications or a good candidate for release for 'population decom-

pression,' the latest semantic iteration of reducing overcrowding in the prisons.

Are you over 65? Underlying medical conditions that make you ripe for CoVid complications (high blood pressure, COPED, diabetes, cancer, other ailments)? What's your disciplinary history? What's your CRA risk rating? How long have you been in?

Are you up for consideration for 1170 (d) but the court hasn't acted on your case yet? If you're a DSL, do you have less than 12 months to serve? If you're a lifer with a 3-year denial and an AR already approved but the hearing date not yet arrived, point that out. Are you seeking compassionate release, but the process hasn't been completed? Have you received a terminal diagnosis, and been given a 12-month life expectancy from medical? Are you eligible to seek medical parole consideration?

All of these are factors that might put you in the spotlight for early release consideration. Make CDCR aware of them—sure, they can eventually work their way down to you, but cut to the chase, give them the info up front. No guarantee, but in these uncertain times, it pays to try everything.

THE OFFICIAL WORD—STRAIGHT FROM CDCR

The following information is taken directly from the CDCR website regarding precautions related to stopping the spread of the CoVid 10 virus. We are printing this to counteract all the rumors being floated in various institutions by various individuals and groups regarding the wearing of masks and other precautions.

CLOTH FACE COVERING

Staff and the incarcerated population are required to wear a facial barrier once a supply of five CALPIA reusable cloth barrier masks are distributed to each member of the incarcerated population and three per correctional staff member has been delivered to the institution. Staff working or performing duties on institutional grounds shall wear a facial barrier at a minimum. In addition, maintaining physical distancing requirements when moving about the institution for routine tasks is still recommended. These masks are not intended for direct patient care scenarios.

Once masks are delivered at their institution, the incarcerated population will be required to wear the CALPIA masks during the following activities:

Any situation that requires movement outside of cell or while in a dorm setting.

During interactions with other members of the incarcerated population such as yard time and canteen services.

Movement to/from health care appointments.

Movement to/from medication administration areas.

The incarcerated population are permitted to keep their CALPIA masks upon their scheduled release.

MASKS ARE YOUR FIRST LINE OF DEFENSE AGAINST COVID

Like it or not, even if your homeboys and COs aren't wearing them, masks can provide your first and perhaps best line of defense against spread of the Corona virus. And it may be all you have. Hot? Sure. Uncomfortable? Often. A hassle? Sometimes. But we hear CoVid is all of those things, and deadly as well.

It's also important to wear it properly—wearing a mask below your nose is like wearing your underwear outside your pants. Around your chin? Your beard doesn't need a hammock. Dangling from one ear? Tacky earring.

The directions below are from the CDC—no, not the CDCR, the real CDC, Center for Disease Control.

How to put on and remove a face mask

Disposable face masks should be used once and then thrown in the trash. You should also remove and replace masks when they become moist. Cloth masks should be changed daily, the used mask laundered and dried before wearing again.

How to put on a face mask

Clean your hands with soap and water or hand sanitizer before touching the mask.
Remove a mask from the box and make sure there are no obvious tears or holes in either side of the mask.
Determine which side of the mask is the top. If the mask that has a stiff bendable edge that is the top and is meant to mold to the shape of your nose.
Determine which side of the mask is the front. The colored side of the mask is usually the front and should face away from you, while the white side touches your face.
Follow the instructions below for the type of mask you are using.
Face Mask with Ear loops: Hold the mask by the ear loops. Place a loop around each ear.
Face Mask with Ties: Bring the mask to your nose level and place the ties over the crown of your head and secure with a bow.
Face Mask with Bands: Hold the mask in your hand with the nosepiece or top of the mask at fingertips, allowing the headbands to hang freely below hands. Bring the mask to your nose level and pull the top strap over your head so that it rests over the crown of your head. Pull the bottom strap over your head so that it rests at the nape of your neck.
Mold or pinch the stiff edge to the shape of your nose.
If using a face mask with ties: Then take the bottom ties, one in each hand, and secure with a bow at the nape of your neck.
Make sure the mask is completely secure. Make sure it covers your nose and mouth so that the bottom edge is under your chin.
Pull the bottom of the mask over your mouth and chin.
Wash your hands.

While Wearing the Mask

Do not touch the front of the mask with your hands; this transfers any virus on the mask to your hands
Do not reach under the mask to touch your face
Be sure the mask covers your nose and mouth

How to remove a face mask

Clean your hands with soap and water or hand sanitizer before touching the mask.

Avoid touching the front of the mask. The front of the mask is contaminated. Only touch the ear loops/ties/band. Follow the instructions below for the type of mask you are using.

Face Mask with Ear loops: Hold both of the ear loops and gently lift and remove the mask.

Face Mask with Ties: Untie the bottom bow first then untie the top bow and pull the mask away from you as the ties are loosened.

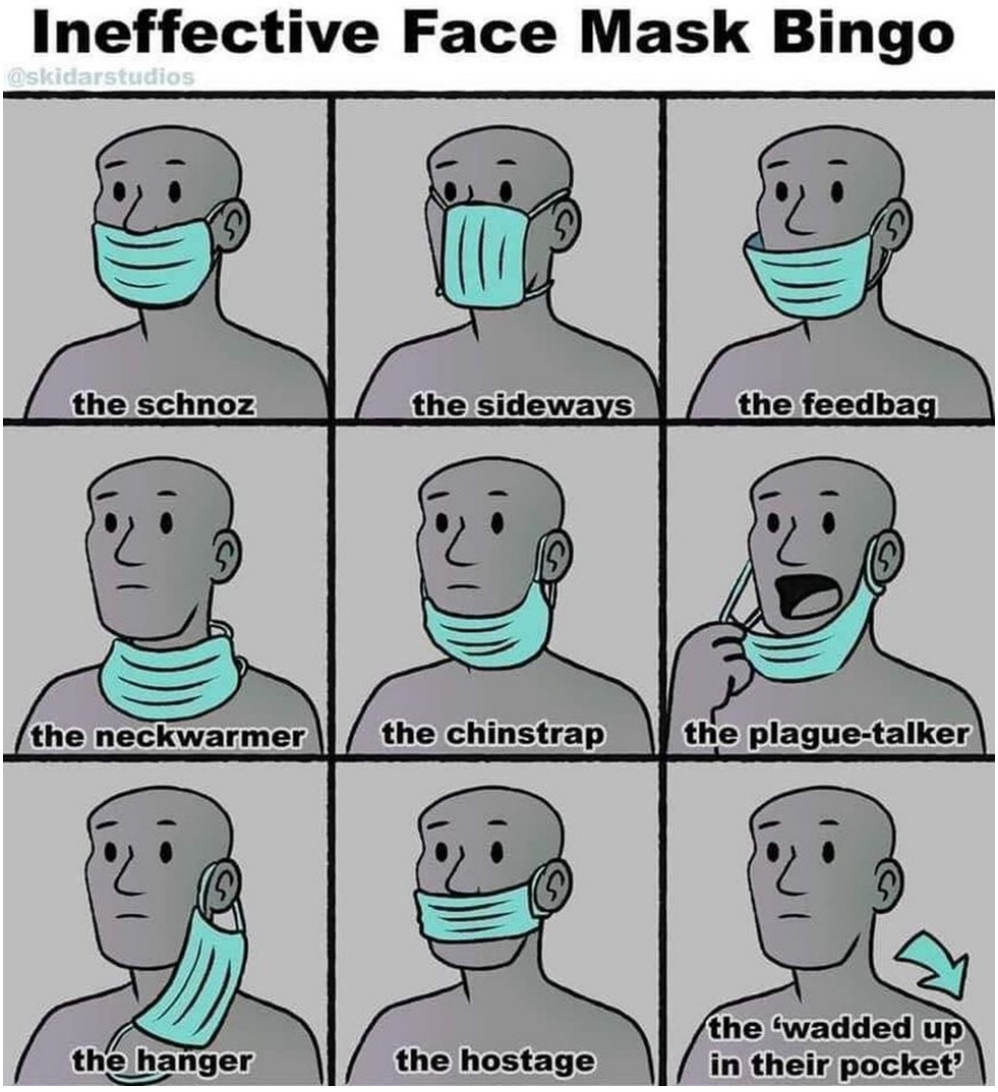
Face Mask with Bands: Lift the bottom strap over your head first then pull the top strap over your head.

If you are using a reusable cloth mask, at the end of the day, take the mask off from the straps (not touching the front

Fold the mask with the front touching itself; do not shake the mask as this could shed any virus particles into the air.

Wash the cloth mask thoroughly and allow to dry. Do not add to the prison laundry as masks could be lost or cross-contaminate other items.

Clean your hands with soap and water or hand sanitizer.



STATE OF CALIFORNIA
AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION
CDCR 7385 (Rev. 10/19)

DEPARTMENT OF CORRECTIONS AND REHABILITATION
Form: Page 1 of 2
Instructions: Pages 3 & 4

All sections must be completed for the authorization to be honored. Use "N/A" if not applicable.

I. Patient Information

Last Name: _____ First Name: _____ Middle Name: _____

CDCR# _____ Date of Birth: _____

Street Address: _____ City/State/Zip: _____

II. Individual/Organization Authorized to Release Personal Health Records if Other Than CDCR

Name: _____

Address: _____ City/State/Zip: _____

III. Individual/Organization to Receive the Information

[45 C.F.R. § 164.508(c)(1)(ii), (iii) & Civ. Code § 56.11(e), (f)]

The undersigned hereby authorizes CDCR's Health Information Management to release the health information pursuant to this authorization.

Name: _____

Relationship to Patient: _____ Phone: _____ Fax: _____

Address: _____ City/State/Zip: _____

IV. Authorization Expiration Event or Expiration Date for Release of Verbal Information/ Written Correspondence

[45 C.F.R. § 164.508(c)(1)(v) & Civ. Code § 56.11(h)]

Unless otherwise revoked by the patient, this authorization for the release of health care information to the above-named individual/organization will expire on the date specified below, event identified, or 12 months from the date signed in Section IX, whichever occurs first:

Date of Expiration: _____ Event: _____

From (mm/dd/yyyy): _____ To (mm/dd/yyyy): _____

V. Health Care Records to be Released - General

[45 C.F.R. § 164.508(c)(1)(i) & Civ. Code § 56.11(d), (g)]

I authorize records for the following period of time to be released (must be completed to receive records):

From (mm/dd/yyyy): _____ To (mm/dd/yyyy): _____

☐ Medical Services ☐ Dental Services ☐ Other: _____

NOTE: Health records released as part of this authorization may contain references related to mental health, substance use disorder, medication assisted treatment, genetic testing, communicable disease, and HIV medical conditions.

VI. Health Records to be Released - Specify

[45 C.F.R. § 164.508(c)(1)(i) & Civ. Code § 56.11(d), (g)]

☐ Communicable Disease Records	from _____ to _____	Signature: _____	Date: _____
☐ Genetic Testing Records	from _____ to _____	Signature: _____	Date: _____
☐ HIV Test Results	from _____ to _____	Signature: _____	Date: _____
☐ Medication Assisted Treatment Records	from _____ to _____	Signature: _____	Date: _____
☐ Mental Health Treatment Records	from _____ to _____	Signature: _____	Date: _____
☐ **Substance Use Disorder Records**	from _____ to _____	Signature: _____	Date: _____

NOTE: Health records released as part of this authorization may contain references related to dental, medical, mental health, substance use disorder, medication assisted treatment, genetic testing, communicable disease, and HIV conditions.

Requests for psychotherapy notes require a separate CDCR 7385 and may not be combined with any other request for health records.

☐ Psychotherapy Notes

Unauthorized collection, creation, use, disclosure, modification or destruction of personally identifiable information and/or protected health information may subject individuals to civil liability under applicable federal and state laws.

STATE OF CALIFORNIA
AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION
CDCR 7385 (Rev. 10/19)

DEPARTMENT OF CORRECTIONS AND REHABILITATION
Form: Page 2 of 2
Instructions: Pages 3 & 4

All sections must be completed for the authorization to be honored. Use "N/A" if not applicable.

VII. Purpose for the Release or Use of the Information
[45 C.F.R. § 164.508(c)(1)(iv)]

☐ Health Care ☐ Personal Use ☐ Legal ☐ Other (please specify): _____

VIII. Authorization Information

I understand the following:

1. I authorize the use or disclosure of my individually identifiable protected health information as described above for the purpose listed. I understand this authorization is voluntary.

2. I have the right to revoke this authorization. To do so I understand I can submit my request in writing to my current institution's Health Information Management (health records). The authorization will stop further release of my protected health information on the date my valid revocation request is received by Health Information Management. [45 C.F.R. § 164.508(c)(2)(i)]

3. I am signing this authorization voluntarily and understand that my health care treatment will not be affected if I do not sign this authorization. [45 C.F.R. § 164.508(c)(2)(ii)]

4. Under California law, the recipient of the protected health information under the authorization is prohibited from re-disclosing the protected health information, except with a written authorization or as specifically required or permitted by law. [Civ. Code § 56.13]

5. If the organization or person I have authorized to receive the protected health information is not a health plan or health care provider, the released information may no longer be protected by federal and state privacy regulations.[45 C.F.R. § 164.524(a)(2)(v)]

6. I have the right to receive a copy of this authorization. [45 C.F.R. § 164.508(c)(4) & Civ. Code § 56.11(i)]

7. Reasonable fees may be charged to cover the cost of copying and postage related to releasing this protected health information. [45 C.F.R. § 164.524(c)(4) et seq. & California Health and Safety Code § 123110, et seq.]

8. I understand that my substance use disorder records are protected under the federal regulations governing Confidentiality and Substance Use Disorder Patient Records, 42 C.F.R., Part 2, and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 C.F.R. pts 160 & 164, and cannot be redisclosed without my written consent unless otherwise provided for by the regulations.

IX. Patient Signature
[45 C.F.R. § 164.508(c)(1)(vi) & Civ. Code § 56.11(c)(1)]

Name: (Print): _____

Signature: _____ Date: _____
If no expiration date is specified in section IV, this authorization will expire 12 months from this date.

Name of person signing form, if not patient (Print): _____

Signature: _____ Date: _____

Describe authority to sign form on behalf of patient: _____

Name of translator/interpreter assisting patient, if applicable (Print): _____

Signature of translator/interpreter: _____ Date: _____

Unauthorized collection, creation, use, disclosure, modification or destruction of personally identifiable information and/or protected health information may subject individuals to civil liability under applicable federal and state laws.

STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION

AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION

CDCR 7385 (Rev. 10/19)

Instructions

Note: Part IV is the request for release of verbal health care information or health care information as part of written correspondence, and Part V is the request for release of health care records.

Part I - "Patient Information": Records the patient's full name (last, first, and middle), CDCR number, date of birth, and address if he/she is paroled or released (incarcerated patients do not need to provide an address).

Part II - "Individual/Organization Authorized to Release Personal Health Records if Other Than CDCR": Records the name and address of the individual or organization authorized to release personal health records if other than CDCR.

Part III - "Individual/Organization to Receive the Information": Records who is to receive the information.

Part IV - "Authorization Expiration Event or Expiration Date for Release of Verbal Information/Written Correspondence": Used by the patient to limit the time period during which information may be shared.

- The patient may enter the date he/she wants the authorization to expire.
- The patient may enter an expiration event.
- The patient may enter a date range of information to be shared.
- If no expiration date is specified, this authorization is good for 12 months from the date signed in Section IX.

Part V - "Health Care Records to be Released - General": Contains a designated line for the date range of health care records to be released.

- **"Medical Services"** is checked when the patient wishes to have information released related to medical care.
- **"Dental Services"** is checked when the patient wishes to have information released related to dental treatment.
- **"Other"** is checked when the patient wishes to further restrict or further authorize the release of his/her medical information, and he/she is to write those wishes on the line provided.

Part VI - "Health Records to be Released - Specify": Health care information in this section requires a date range, additional signature, and signature date.

- **"Communicable Disease"** is checked when the patient wishes to have information released related to communicable disease testing and treatment. Communicable disease includes sexually transmitted infections.
- **"Genetic Testing"** is checked when the patient wishes to have information released related to genetic testing.
- **"HIV Test Results"** is checked when the patient wishes to have HIV test results released.
- **"Medication Assisted Treatment Records"** is checked when the patient wishes to have information related to medication assisted treatment released.
- **"Mental Health Treatment Records"** is checked when the patient wishes to have information released related to mental health treatment.
- **"Substance Use Disorder Records"** is checked when the patient wishes to have information related to substance use disorder treatment released.
- **"Psychotherapy Notes"** is checked when the patient wishes to have psychotherapy notes released. Requests for psychotherapy notes require a separate CDCR 7385 and **may not be combined with any other request for health care records.**

Under HIPAA, there is a difference between regular personal health information and psychotherapy notes. The following is HIPAA's definition of psychotherapy notes (§164.501):

Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

Unauthorized collection, creation, use, disclosure, modification or destruction of personally identifiable information and/or protected health information may subject individuals to civil liability under applicable federal and state laws.

STATE OF CALIFORNIA
AUTHORIZATION FOR RELEASE OF PROTECTED HEALTH INFORMATION
CDCR 7385 (Rev. 10/19)

DEPARTMENT OF CORRECTIONS AND REHABILITATION

Instructions (continued)

Part VII - "Purpose for the Release or Use of the Information": Should have at least one box checked. The patient may utilize this section to check the provided boxes or select "Other" and describe the reason(s) he/she wants to have the information released. If the patient does not want to designate a purpose, he/she may check the "Other" and state "At the request of the individual authorizing the release."

Part VIII - "Authorization Information": Below this section are eight points which detail patient rights in regards to authorizing release of information.

1. Tells the patient that he/she is giving authorization voluntarily.
2. Explains how to stop this authorization. The patient may revoke the authorization by submitting his/her request in writing to his/her institution's Health Information Management. The authorization will be removed from the patient's medical record when the revocation is received by Health Information Management.
3. Explains that signing this authorization is voluntary and will not affect treatment.
4. Explains that the recipient of the protected health care information under the authorization is prohibited from re- disclosing the information, except with a written authorization from the patient or as specifically required under law.
5. Explains that the released information may no longer be protected by federal privacy regulations depending on the intended recipient of the released information.
6. Explains that the patient has the right to receive a copy of this authorization. This will be sent to the patient by Health Information Management.
7. Explains that reasonable fees may be charged to cover copying and postage costs related to releasing the patient's health information.
8. Explains that substance use disorder records are protected and cannot be disclosed without the patient's written consent unless otherwise provided for by the regulations.

Part IX - "Patient Signature": The bottom of page two is for the patient's, his/her representative's, or the translator/interpreter's signature. The patient's printed name, signature, and date are to be entered in the boxes provided. If this authorization is completed by a patient representative (e.g., power of attorney, estate representative, next of kin), his/her printed name, relationship to patient, signature, and date are to be entered in the boxes provided. Also attached must be a copy of either the Power of Attorney, letters issued in estate proceeding, or declaration of next of kin. If an interpreter/translator assisted the patient in filling out this form, his/her printed name, signature, and date are to be entered in the boxes provided.

Unauthorized collection, creation, use, disclosure, modification or destruction of personally identifiable information and/or protected health information may subject individuals to civil liability under applicable federal and state laws.

A LOSS FOR THE LIFER COMMUNITY

Pioneer lifer attorney Michael Satris dies at 70.

In late July the lifer legal community suffered a great loss with the passing of long-time lifer attorney and champion Michael Satris. Satris, a founder of Prison Law Office and prolific litigator of writs in state courts, died suddenly on July 29 at his home in Bolinas.

The Bolinas Hearsay News, the unconventional newspaper in his town, notes some highlights of his career included forming the Prison Law Office in 1976 and working to ensure continuing funding for that entity. In 1984 he opened a private practice specializing in appellate practice usually for parole and parole-related issues.

Satris took on difficult cases in a difficult time for lifers, mentored other parole attorneys, and won landmark cases. One of the last cases LSA worked with Satris on was regarding effective assistance of counsel for inmates with state appointed attorneys. Satris, in his documentation, faulted not the attorneys, but CDCR for not providing sufficient time for those attorneys to counsel with their clients.

An unorthodox but interesting personality, Satris was an avid surfer, biker (pedal, not motor), gardener and poet. Reportedly, one of his last acts, a few hours before death, was the filing of papers with the California Supreme Court.

Other lifer attorneys, noting his influence both on cases and other attorneys are noting his influence in lifer issues.

Michael Satris was an unsung hero for prisoners. He fought and won MANY legal victories in the courts and in parole board hearing rooms for decades.

On top of it, he was humble, approachable, kind, and fiercely intelligent. I was proud to know him, and to call him a friend and colleague.

There is no doubt that if there is any one in prison in the afterlife, he is filing a writ right now on their behalf. RIP to a true freedom fighter. " Charles Carbone

"I am so upset at this GREAT GREAT loss.... MAJOR IMPACT in our legal community" Diane LeTarte

"A mentor to me." Marc Norton

"A great mentor and I will miss our talks. He was the master of oral arguments." Tracy Lum

"A great mentor. He helped free so many. He always had time to talk and answer questions. A true mensch!" Michelle Garfinkle

"Very sad to hear that. I knew him for about twenty years. He was a great attorney and advocate. He aided in the release of many a deserving soul. Always ready to help and assist. He will be greatly missed." John Stringer

MICHAEL SATRIS: THE BEST JAILHOUSE LAWYER, EVER

No, Michael Satris was never *sent* to prison – but he *went* to prison every day of his professional career, fighting the never-ending legal battle for the rights of lifers. Coming from a career in the storied Prison Law Office, Michael eventually went out on his own. A humble and unassuming man, Michael earned the respect not just of his prisoner clients, but of the courts, who, to this year, had regularly been appointing him to handle lifer appellate cases. Time and time again, Michael won these legal assignments – making the case for lifers' rights more than any other attorney I know.

I remember Michael in a special way. We sat next to each other at a lifer attorney training seminar in Fresno years ago – a day after he had *lost* a lifer case in a published decision. Normally talkative in such group meetings, Michael was uncharacteristically silent. After driving hundreds of miles to collaborate professionally with fellow lifer attorneys, the only thing he said that day was, "Your client isn't going to get a date unless they establish a 'warm and fuzzy' with the Board." This giant of a lifer attorney knew, deep in his heart, that being suitable for release from prison was ultimately a human – not a legal – determination.

To this day, I always think of Michael's counsel, when I share it now in helping lifers understand 'how to get out.' Thank you, Michael, for giving me such lifelong insight!

John Dannenberg

THE ROADMAP TO 'NORMAL'—AND VISITS

CDCR is releasing what they hope will be a path to whatever will pass for normal operations once the CoVid pandemic slows down. "Institutional Roadmap to Reopening," set for release at the end of August, lays out a 4-phase path back to business as usual in the prisons, based largely on what individual institutions are in the scope of CoVid infection.

Phase 1, where we are all now, is the most restrictive, with most all activities and grounds closed. Each phase thereafter eases into more open and available activities, driven by the situation and decided on by the administrations at the various prisons. Each, phase, however, bears the caveat that if things go south, they are to backup and return to the previous phase. And yes, the roadmap speaks to the resumption of visiting, though probably much changed from the cluster fest of past decades.

When the plan is officially out, we'll print the entirety, but for now, a peak tells us that the 4 phases are these:

Phase 1-2: no new cases of Covid on a rolling 14-day cumulative new case rate.
Phase 2-3: No new cases on a rolling 60-day cumulative new case rate.
Phase 3-4 No positive or new cases for 90 days
Phase 4: Reopening to normal operations, with the provision that some measures such as face masks, may be retained.

Preliminary suggestions are that visiting, one visitor per inmate for a one hour visit once a month, with tables 6 feel apart, staggered schedules and masks can begin in Phase 2, but no family visits. Limited day room activities will continue.

In Phase 3, visiting may expand to 2 visitors for one hour per inmate, twice a month, other restrictions as in Phase 2. In Phase 3 family visits may be reinstated, one family visit per week per family visiting unit.

The draft roadmap also notes 'movement between phases will be at the discretion of the warden and Chief Executive Officer who shall report daily to the Department Operations Center their current phase, and any plans to move to different phases on subsequent days." This allows for prisons to move at various paces in reopening, depending on their individual situation, moving to less or more restrictive operations as those individual factors indicate.

If a new outbreak occurs, administration is expected to put more restrictive measurers in place. A new outbreak is defined as 3 or more CoVid positive cases. The roadmap also allows for various areas within each prison to be held to more restrictive requirements, if needed.

However, this is the first glimmer of light at the end of the CoVid tunnel. Stay tuned, more as we know it.

CLN

California Lifer Newsletter

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