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.

REMITTITUR ISSUES IN *BUTLER*

In re Roy Thinnes Butler

CA Supreme Court No. S237014
CA1(2); A139411
May 16, 2018

A non-party request for rehearing was denied without comment on May 16, 2018, and remittitur issued that same date. This concludes all litigation on *Butler* in state court.

CA SUPREME COURT ESTABLISHES BURDENS OF PROOF IN SUPERIOR COURT AND APPELLATE COURT PROP. 36 INELIGIBIITY DETERMINATIONS WHEN BASED ON "ARMED WITH A DEADLY WEAPON"

P. v. Alfredo Perez

CA Supreme Ct. No. S238354
May 7, 2018

The State challenged Alfredo Perez' Prop. 36 resentencing eligibility determination in the superior court. That court had found that Perez had not been "armed with a deadly weapon," based on facts in the trial record, even though Perez had been convicted of "[a]ssault by means of [f]orce likely to produce [great bodily injury]."

The Court of Appeal reversed the superior court, finding that the facts of the case showed he drove a car in such a manner as to intentionally injure someone, and therefore he was plainly "armed with a deadly weapon."

Table of Contents

CALIFORNIA LIFER NEWSLETTER

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

COURT CASES (in order)

Reviewed in this issue:

IN RE ROY THINNES BUTLER
P. v. ALFREDO PEREZ
ARBBIE HODGE vs. CDCR

PROP 36.....
P. v. THOMAS THOMAS
P. v. WILLIE STEPHENS
P. v. ALAINE STEFFLRE
P. v. BRIAN SAWYERS
P. v. MARCOS SANTISTEVAN
P. v. BRYAN MAZZA
P. v. GILBERT LOYA

PROP 36 DENIALS

FLORIDA D.O.C. BAN ON PRISON MAGAZINE

The appellate court found Perez ineligible for Prop. 36 relief because he was "armed with a deadly weapon." Perez' petition to the Supreme Court argued that unless he were *convicted* of that offense, the superior court could not make an ineligibility ruling against him without giving him a trial on that issue.

The CA Supreme Court reviewed Perez' Court of Appeal decision, making three major findings. First, it found that evidence in the record plainly showed Perez had been armed with a deadly weapon – a car. Second, it held that proof of the necessary factual underpinning of the superior court's eligibility determination must be based on proof beyond a reasonable doubt, and that affirmance of that decision requires the Court of Appeal to find substantial evidence in the record supporting the superior court's reasoned decision. (The Supreme Court agreed here with the Court of Appeal's findings in both of these regards.) Third, the Supreme Court held that the Sixth Amendment did not confer a right to a jury trial on the underlying factual question.

The Supreme Court summarized the facts of the case.

> On March 17, 1994, Perez and an unidentified person wearing a Pendleton wool-type jacket entered an automotive store in Fresno. Fred Sanchez, a sales clerk in the store, saw the other person pick up a car anti-theft device called a "Club." Perez spoke briefly with Sanchez as the other person left the store and waited by a truck. Perez subsequently left the store, entered the driver's side of the truck, and drove away. Sanchez suspected that the person had stolen the anti-theft device while Perez was attempting to divert his attention, but Sanchez did not call the police or check whether any items were missing from the store. On the next day, March 18, 1994, Sanchez noticed the person enter the store again. He was wearing the same jacket even though the day was very hot, and he appeared nervous. The person did not purchase anything, and Sanchez followed him as he exited the store

Cont. on page 4……

PUBLISHER'S NOTE

***

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

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

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

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

EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility

www.lifesupportalliance.org

WHAT YOUR FAMILY REALLY CAN DO

We are often asked by lifer families what they can do to help their prisoner come home. There are, of course, things your family can help with, even aside from packages, money on your books, stamps and visits.

But one aspect often overlooked is the part prisoner families can play in passing or tanking laws that affect lifers and other prisoners. We continually report on new laws proposed in the state legislature, as well as ballot measurers for voters to consider. And so it is now, as we continue to update on these issues."

True, prisoners can do little through direct action in these areas, but we report this news for two reasons; first, we believe you have not only the right, but the need to be informed of possible changes that could impact you, and secondly, we hope you'll discuss these issues with your families, who can have an effect on what bills are passed and what ballot initiatives are voted in.

We often put out a call to those on our email list to weigh in with their state senators and assembly members on bills, letting their legislators know what they expect from them and that they are paying attention, ready to hold those politicians accountable for their actions. But it's pretty disheartening when the response we get from families is often, "Who's my senator? Feinstein or Harris?" "Can I write the President?" "Can you tell me who to call?"

No, actually, we can't. We're not running a fifth-grade civics class here, we expect people to know the difference between their state Senator and their federal Senators (Feinstein and Harris). Nor can we possibly research the name and contact info for the Assembly member for family member: there are 40 state senators and 80 assembly members serving over 39 million citizens in California.

And it is vitally important that those who can vote register and do vote. And it's equally important that voters understand, when asked at the grocery store, Wal-Mart or any other street corner, to sign a petition to get a proposition on the ballot what that proposition really proposes to do. That's been a real issue over the years, from the passage of Marsy's Law (which extended parole denial lengths dramatically, but sounded like a nice idea at the time) to, most recently, Prop. 57, which many expected to impact all inmates, but, for those who read the language, clearly did not have the intent to impact third strikers or lifers.

True, prisoners can't vote while incarcerated or on parole. But you can have an impact on these issues. Help educate your family. Talk with them about the bills and propositions we report on, encourage them to register to vote, educate themselves about the issues and impress on them that they are the custodian of your rights, while you're inside.

And when you come home and are discharged from parole, reclaim and exercise your right to vote and keep yourself up on the issues. Part of a pro-social lifestyle, which is what the parole board wants from you, is discharging your civic duty, and that includes helping make the laws we all must live by.

Cont. from page 2…….
and entered the passenger side of the same truck as the day before. Perez was in the driver's seat. Sanchez went to the window of the truck, observed a bulge protruding from the person's clothing, and told the person that he could leave if he returned the stolen merchandise. Sanchez then reached into the truck and grabbed a package from the person's jacket; Sanchez identified the object as the anti-theft device. Sanchez said, "Give it up," and Perez looked toward Sanchez and said, "Give it up."

Perez then drove the truck in reverse while the other person grabbed Sanchez's left arm and pushed it down, preventing Sanchez from pulling his arm out of the truck. Sanchez yelled, "Stop the vehicle," three times as he was dragged, and he tried to run to maintain balance as the truck moved in reverse. Perez then drove the truck forward, at which point Sanchez pulled his arm free; Sanchez thought he was going to be rolled under the tires and killed. Sanchez suffered a few scrapes but no injury warranting serious medical attention. Perez and the other person left the scene. A witness, Sanchez's co-worker, told the police that he saw Sanchez being dragged and "running for his life." Sanchez originally testified at a preliminary hearing that the truck started at 10 miles per hour and accelerated to around 15 miles per hour when he pulled his arm free, but he later estimated at trial that the speed was 20 miles per hour. Perez estimated the speed was one mile per hour in reverse and two or three miles per hour forward. Perez testified that he had not been at the store on the first day and that on the second day, he had been asked by a friend to give the unidentified person a ride to the store. Perez said that in moving the truck while Sanchez's arm was inside, he was only trying to escape because he thought Sanchez, whom he did not know was a store employee, was trying to rob the person. The parties do not dispute that Perez's movement of the truck backward and forward had the potential to seriously injure Sanchez.

Perez was charged with assault likely to produce great bodily injury, but not assault with a deadly weapon.

Perez was charged with assault by means of force likely to produce great bodily injury under former section 245 and for robbery under section 211; he was not charged with assault with a deadly weapon. On April 4, 1995, a jury convicted Perez under former section 245, subdivision (a)(1) for the crime of "[a]ssault by means of [f]orce likely to produce [great bodily injury]." Because Perez had two prior strike offenses, he was sentenced to an indeterminate term of 25 years to life plus two one-year enhancements under section 667.5, subdivision (b).

When Perez petitioned the trial court for Prop. 36 relief, the District Attorney opposed. The trial court disagreed, noting that failure to have been charged and convicted of "armed with a deadly weapon" tied the court's hands and it therefore had to find Perez eligible for relief consideration.

On August 16, 2013, after passage of Proposition 36, Perez petitioned the trial court for a recall of sentence and a new

sentencing hearing pursuant to section 1170.126. The district attorney opposed the petition on the ground that Perez had been armed with a deadly weapon during the commission of his current offense. The trial court found that Perez was not statutorily ineligible for resentencing on that ground. The court found it "significant[]" that "the case was not charged or convicted as assault with a motor vehicle. It was charged as force likely [to produce great bodily injury]." "The incidental use of the motor vehicle during the offense," the court said, did not make Perez statutorily ineligible for resentencing. Moreover, the trial court opined that the voters who enacted Proposition 36 were "informed that an individual would not be eligible [for resentencing] if the offense involved use of a firearm" but were not told that " 'if an individual uses something that is not in and of itself a deadly -- for that purpose a deadly weapon, that they would not be eligible.' "

The Court of Appeal disagreed.

The Court of Appeal reversed. (*People v. Perez* (2016) 3 Cal.App.5th 812, 816 (*Perez*).) The court observed that a deadly weapon under section 245, subdivision (a) is " ' "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." ' " (*Perez*, at p. 824, quoting *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 (*Aguilar*).) The court then reasoned that because the jury, by its verdict, necessarily found that Perez used force likely to produce great bodily injury when he assaulted Sanchez, and because the

vehicle was the sole means by which Perez applied this force, the record of conviction establishes that Perez used the vehicle as a deadly weapon. (*Perez*, at p. 825.) Justice Franson dissented on the ground that the trial court's finding that Perez did not use the vehicle as a deadly weapon was supported by substantial evidence and did not contradict the jury's verdict. (*Id*. at pp. 835–837 (dis. opn. of Franson, J.).)

In its analysis, the Supreme Court noted the "armed with a deadly weapon" legal basis for Three Strikes relief ineligibility.

The Three Strikes law was enacted in 1994 "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Former § 667, subd. (b), as amended by Stats. 1994, ch. 12, § 1, p. 72.) Under the law, defendants who commit a felony after two or more prior convictions for serious or violent felonies were sentenced to "an indeterminate term of life imprisonment with a minimum term of" at least 25 years. (Former § 1170.12, subd. (c)(2)(A), added by Prop. 184, § 1, as approved by voters, Gen. Elec. (Nov. 8, 1994).) In 2012, Proposition 36 narrowed the class of third-strike felonies for which an indeterminate sentence could be imposed. Now a defendant convicted of a felony outside of that class can receive at most a sentence enhancement of twice the term otherwise provided as punishment for that felony. (§ 1170.12, subd. (c)(2)(C); see *People v. Conley* (2016) 63 Cal.4th 646, 652.) But Proposition 36 makes a defendant ineligible for this limitation on third-strike sentencing if one of various grounds for ineligibility applies. (§ 1170.12, subd. (c)(2)(C).) One of those grounds is that "[d]uring the commission of the current offense, the defendant . . . was armed with a . . . deadly weapon . . . ." (§ 1170.12(c)(2)(C)(iii).)

The Court went on to note that *how* the trial court is to determine the "armed with a deadly weapon" allegation was open to interpretation.

Proposition 36 does not specify how the trial court is to determine whether a given criterion for resentencing ineligibility, such as whether the inmate was armed with a deadly weapon during his or her current offense, has been satisfied. We recently clarified that once an inmate has made an initial showing of eligibility for resentencing, the burden is on the prosecution to prove beyond a reasonable doubt that one of the grounds for ineligibility applies. (*Frierson, supra*, 4 Cal.5th at p. 230.) In this case, it was the prosecution's burden to prove beyond a reasonable doubt that Perez was "armed with a . . . deadly weapon" within the meaning of section 1170.12(c)(2)(C)(iii) during the commission of his aggravated assault against Sanchez.

The Court noted that there was an option to the prosecutor to charge assault with a deadly weapon in such circumstances, but it was not elected here.

At the time of Perez's offense, a defendant could be convicted of aggravated assault for "an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." (Former § 245, subd. (a)(1), as amended by Stats. 1993, ch. 369, § 1, p. 2168.) A judgment of conviction specifying that a defendant was convicted for "an assault upon the person of

> another with a deadly weapon" is undoubtedly sufficient to show that the defendant was armed with a deadly weapon during the commission of the offense and is therefore ineligible for resentencing. But Perez was convicted of aggravated assault upon proof that he committed "an assault . . . by means of force likely to produce great bodily injury." The jury was not asked to explicitly find that Perez was armed with a deadly weapon.

The operative question here, then, was: could the trial court substitute *its* finding of "armed with a deadly weapon" when the jury did not so find? While the CA Supreme Court had decided this question "yes" in a prior case, and to a standard of proof beyond a reasonable doubt, it had not considered Perez' new Constitutional question of denial of 6th Amendment right to a jury trial on the question.

> In *People v. Estrada* (2017) 3 Cal.5th 661, 672, we held that Proposition 36 permits a trial court to examine facts beyond the judgment of conviction in determining whether a resentencing ineligibility criterion applies. In reaching that statutory holding, we did not address any Sixth Amendment concern. (See *Estrada*, at p. 668.) We now hold that the Sixth Amendment does not bar a trial court from considering facts not found by a jury beyond a reasonable doubt when determining the applicability of a resentencing ineligibility criterion under Proposition 36.

The Court held that the language of Prop. 36 did not import a Sixth Amendment right to a jury trial on this question.

> Proposition 36 provides that if a petitioner satisfies the resentencing eligibility criteria, then "the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) By its terms, the statute does not create an entitlement to resentencing; the finding of a fact that renders a petitioner ineligible for resentencing deprives him or her of an opportunity to have the trial court make a discretionary determination as to whether he or she should be resentenced. Moreover, Proposition 36 does not automatically reduce, recall, or vacate any sentence by operation of law. It is up to the inmate to petition for recall of the sentence, and at all times prior to the trial court's resentencing determination, the petitioner's original third-strike sentence remains in effect. Under this scheme, a factual finding that results in resentencing ineligibility does not increase the petitioner's sentence; it simply leaves the original sentence intact. We hold that the Sixth Amendment does not prohibit trial courts from relying on facts not found by a jury in determining the applicability of Proposition 36's resentencing ineligibility criteria. (Accord, *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1059–1062; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 805; *People v. Guilford* (2014) 228 Cal.App.4th 651, 662–663; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1334–1336 (*Bradford*).)

In its analysis, the Court found no problem with including in the definition of "deadly weapon" instruments other than those commonly associated with this term.

> In this case, the Court of Appeal reversed

the trial court's determination that the evidence at trial did not show Perez was "armed with a . . . deadly weapon" within the meaning of section 1170.12(c)(2)(C)(iii). Perez contends that the trial court's determination was supported by substantial evidence and that the Court of Appeal erred by substituting its own view of the facts.

The parties do not dispute that the term "armed" means having a "weapon available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997, italics omitted.) In addition, our precedent makes clear that a "deadly weapon" under section 245, subdivision (a)(1) is " 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*Aguilar, supra*, 16 Cal.4th at pp. 1028–1029.) A similar definition of "deadly weapon" long predated *Aguilar*. (See, e.g., *People v. Leyba* (1887) 74 Cal. 407, 408; *People v. Fuqua* (1881) 58 Cal. 245, 247 [defining a "deadly weapon" as "one likely to produce death or great bodily injury"].) We see no reason why the term "deadly weapon" would mean anything different in section 1170.12(c)(2)(C)(iii) than what it means in section 245, subdivision (a). (See *Bradford, supra*, 227 Cal.App.4th at pp. 1341–1342.)

Nor did Perez' argument succeed that because assault with a deadly weapon is only a general intent crime, he could not be denied Prop. 36 relief - which requires specific intent.

> Perez argues that an object cannot be a deadly weapon unless the defendant intended to use the instrument as a weapon and not for some other purpose. But assault with a deadly weapon is a general intent crime; the required mens rea is "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790 (*Williams*).) Whether an object is a deadly weapon under section 245 does not turn on whether the defendant intended it to be used as a deadly weapon; a finding that he or she willfully used the object in a manner that he or she knew would probably and directly result in physical force against another is sufficient to establish the required mens rea.

The Supreme Court also upheld the Court of Appeal's use of the "substantial evidence" standard of proof here.

> The Court of Appeal correctly observed that the trial court's eligibility determination, to the extent it was "based on the evidence found in the record of conviction," is a factual determination reviewed on appeal for substantial evidence. (*Perez, supra*, 3 Cal.App.5th at

pp. 821–822.) That is, the reviewing court must determine if there was sufficient evidence for the trial court to conclude that the prosecutor did not prove that the petitioner is ineligible for resentencing beyond a reasonable doubt. Under this standard, the burden remains on the prosecutor to demonstrate the petitioner's ineligibility (*Frierson, supra*, 4 Cal.5th at p. 230); the burden never shifts to the petitioner, either in the trial court or on appeal, to provide any evidence once he or she has made an initial showing of eligibility. Further, the reviewing court does not reweigh the evidence; appellate review is limited to considering whether the trial court's finding of a reasonable doubt is supportable in light of the evidence. The district attorney argues that de novo review is more appropriate because trial courts do not have an advantage over appellate courts in determining eligibility based on the record of conviction. But even if the trial court is bound by and relies solely on the record of conviction to determine eligibility, the question whether a defendant was armed with a deadly weapon during his or her current offense remains a question of fact, and we see no reason to withhold the deference generally afforded to such factual findings.

Applying this standard, the Supreme Court agreed with the appellate court that there was *not* "substantial evidence" to find Perez was not "armed with a deadly weapon."

Applying this deferential standard, the Court of Appeal also correctly concluded that the trial court's determination of Perez's eligibility for resentencing is not supported by substantial evidence. As the Court of Appeal explained: "When the jury convicted [Perez] of assault by means of force likely to produce great bodily injury, they necessarily found the force used by [Perez] in assaulting Sanchez, the victim, was likely to produce great bodily injury. [Citation.] The sole means by which [Perez] applied this force was the vehicle he was driving. Thus, the record of conviction establishes [Perez] used the vehicle in a manner capable of producing, and likely to produce, at a minimum great bodily injury—i.e., as a deadly weapon. [Citations.]" (*Perez, supra*, 3 Cal.App.5th at p. 825.)

Nonetheless, the Court, in closing, noted that its decision here did not provide a "bright line" rule for all such inquiries, and offered a guideline as to relevant factors.

We caution that our reasoning in light of the facts here does not establish a categorical rule that a defendant is armed with a deadly weapon within the meaning of section 1170.12(c)(2)(C)(iii) whenever he or she uses an object in the course of committing an assault by means of force likely to produce great bodily injury. Factors such as the application of multiple forces or the use of multiple objects could raise a reasonable doubt about whether the defendant was armed with a deadly weapon during the commission of an aggravated assault. In this case, the record shows beyond a reasonable doubt that Perez used the vehicle as a deadly weapon; there is no substantial evidence to the contrary.

BPH IMMUNE FROM SUIT BY FORMER LIFER FOR EMOTIONAL DISTRESS ALLEGEDLY CAUSED BY FAILURE TO GRANT GOOD TIME CREDITS

Arbbie Hodge vs. CDCR

CA2(4); B284187
May 17, 2018

In a novel case seeking civil damages, former lifer Arbbie Hodge sued the BPH and CDCR for injury allegedly caused by not granting him good time credits during his 36 year stint in CDCR for a 1979 second degree murder conviction. The trial court had denied Hodge's claim based on governmental immunity from suit, under Government Code § 844.6, and Hodge appealed. The Court of Appeal now upheld the trial court's ruling.

Appellant Arbbie Hodge, a former inmate, brought suit against respondents California Department of Corrections and Rehabilitation (CDCR) and Board of Parole Hearings (the Board) contending that during his years of incarceration serving an indeterminate sentence, respondents had misled him concerning the effect of earning good-time credits, that he suffered emotionally as a result, and that he was entitled to monetary compensation for the credits he had amassed that were never applied to reduce his sentence. The trial court found respondents immune from suit under Government Code section 844.6, which confers immunity on public entities for injuries to prisoners except in certain limited circumstances. On appeal, Hodge contends the court erred in concluding that the immunity conferred

> by section 844.6 supersedes any potential liability for violation of a mandatory duty under section 815.6, and in further finding that the prison regulation cited by Hodge imposes no mandatory duty supporting Hodge's section 815.6 cause of action. In addition, Hodge contends for the first time on appeal that he should be permitted to amend to state a claim under Penal Code section 3500, et seq., addressing biomedical and behavioral research on prisoners. Finding no error or basis for amendment, we affirm.

Hodge, who was released onto parole in 2015, had twice been earlier granted parole where the Governor had then reversed the Board. Following his release, he sued the CDCR and BPH for monetary compensation for failure to have granted him good-time credits during his long incarceration.

To his credit, Hodge, whose conviction predated the statutory change that ended good time credits for (murder) lifers, was eligible for 1/3 time ("*Monigold*") credits for good behavior. That having been said, it has long been ruled that such credits apply to such a lifer's term only *after* they have first been found suitable by the BPH.

In a somewhat rambling and confusing statement of civil damage claim, Hodge nonetheless asserted that he had been emotionally damaged by the BPH's failure to hold hearings regularly to determine and grant such credits.

> After his release, Hodge filed a complaint against respondents for negligent misrepresentation, negligence and violation of the California Constitution. He subsequently filed an amended complaint, adding a claim for breach of a mandatory duty under section 815.6. Hodge contended that during his time in prison, he had "a good faith belief that he was accruing 'good-time credits' by maintaining a "'disciplinary-free' record, excelling in prison work placements, and participating in prison programming," and that his accrual of good-time credits "would eventually lead to an earlier suitability [for parole] finding by the Board." [fn. 1.] He further contended that he had acquired "twelve years worth of 'good-time credits,'" but "never received the benefit of [them]," as his release was based entirely on his age.

[Fn.1] Hodge contended this belief derived from section 2931 of the Penal Code and title 15, section 2410, subdivision (b) of the California Code of Regulations (CCR). Penal Code section 2931 provides for a reduction of a prison term for good behavior in any case in which a prisoner was sentenced "pursuant to [Penal Code] Section 1170," and is applicable to determinate sentences. (See Pen. Code, § 1170; *In re Dayan* (1991) 231 Cal.App.3d 184, 187; *In re Monigold* (1983) 139 Cal.App.3d 485, 494.) Prisoners like Hodge, serving indeterminate sentences or life terms, are subject to release only upon the Board's determination that they are suitable for parole, which is dependent on an assessment of a number of factors, of which institutional behavior is but one. (See Pen. Code, § 3041, subd. (b); CCR, tit. 15, § 2281; *In re Lawrence* (2008) 44 Cal.4th 1181, 1202 -1203.)

CCR title 15, section 2410, which applies to murders committed on or after November 8, 1978 (see CCR, tit. 15, § 2400), provides that "[l]ife prisoners may earn postconviction credit for each year spent in state prison from the date the life term starts"; that life prisoners "shall have documentation hearings" prior to the initial parole consideration; and that at the documentation hearings, "the board shall document the prisoner's performance, participation, behavior and other conduct . . . ." (CCR, tit. 15, § 2410, subdivision (a).) Section 2410, subdivision (c) lists three specific criteria the panel "shall consider" in determining the amount of postconviction credit to grant: "[p] erformance in [i]nstitutional [w]ork [a]ssignments," "[p] articipation in [s]elf-[h]elp and [r]ehabilitative [p]rograms," and "[b]ehavior in the [i]nstitutional [s]etting." As Hodge acknowledges in his brief, "[h]ow much credit a life prisoner can accrue and whether it ultimately serves to reduce the total amount of time served before release on parole is discretionary" under section 2410.

In his claims for negligence and negligent misrepresentation, Hodge alleged that respondents had a duty to hold status conferences or "documentation hearings" with inmates before each parole hearing, to "truthful[ly]" inform the inmates about their good-time credits, and to "provide a realistic assessment" of their likelihood of parole. He further alleged that respondents instead generated calculation sheets, which projected a "'[m]aximum DSL [determinative sentencing law] [r]elease [d]ate'" based on the prisoner's good-time credits. Hodge himself was allegedly provided calculation sheets indicating he would serve from 16 to 24 years in prison based on his good-time credits. He claimed he was never informed that the calculation sheets were "advisory document[s] and . . . not indicators of actual time the inmate can expect to serve due to 'good-time credits,'" nor that the Board "was not required to take into account his 'good-time credits.'" Hodge claimed to have relied on the calculation sheets by "maintaining a spotless record in prison," working hard to "keep[] out of trouble" and staying "'disciplinary-free,'" convinced he would "be released based on his performance," and that he "suffered as he was denied suitability again and again." Hodge contended that respondents deliberately deceived prisoners about the value of remaining discipline free and earning good-time credit, in order to "maintain an incentive for inmate good behavior based upon a false belief that good behavior will result in early release."

The claim for breach of mandatory duty was based on essentially the same allegations. Hodge contended that respondents had a duty to hold documentation hearings to apprise prisoners of their rights and their chances of being released; that at his hearings, Hodge was informed of the good-time credits he had acquired, but not told that he had little chance of being released despite accrual of good-time credits; that respondents used the promise of release for good behavior to maintain prison discipline; and that respondents breached a mandatory duty by not being truthful about the negligible effect good-time credits would have on his prospects for release. Hodge sought monetary compensation for the good-time credits he had earned, and injunctive relief.

Not surprisingly, the BPH denied liability, based on governmental immunity.

Respondents demurred. They contended they were statutorily immune from liability for the alleged injuries under various provisions of the Government Code, including section 844.6; that appellant suffered no injury; and that there was no statutory or other authority creating a mandatory duty of the kind alleged. They further contended that parole decisions, including whether to grant credit to life prisoners for years served, were entitled to immunity under section 845.8, applicable to "[a]ny injury resulting from determining whether to parole or release a prisoner . . . ."

Hodge rebutted, arguing his case was not controlled by this Government Code.

Hodge opposed, contending that his claims were based not on specific parole decisions or on the length of his prison term, but on "how he was informed and instructed about a 'good-time credits'

system while he was incarcerated . . . ." He claimed he was "harmed by having his reasonable expectation of an earlier date of parole simply ignored or, worse, used as a tool to incentivize his continuing good behavior and maintain overall prison discipline under false pretenses." He explained that he sought injunctive relief to "require [respondents] and their agents to inform life prisoners during documentation hearings that their good-time credits will not shorten their overall sentence . . . but merely reduce the minimum time they can expect to serve."

With respect to the claim that respondents violated a mandatory duty, Hodge argued that such duty arose from CCR title 15, section 2269.1. He contended "the mandatory duty imposed under Section 2269.1 must include the duty to inform life prisoners like [Hodge] of their realistic chances of parole, the value of their postconviction credits, if any, and how they operate to allow for an earlier MEPD [minimum eligible parole date] rather than reducing the overall time a prisoner can expect to be incarcerated." Hodge did not seek leave to amend.

The trial court found in favor of respondent BPH and CDCR.

The trial court sustained the demurrer without leave to amend. In a detailed order, the court found that section 844.6 provides broad immunity to public entities for injuries to prisoners; that section 815.6, imposing liability for failure to perform mandatory duties, was not an exception to the immunity of section 844.6; and that in any event, CCR, title 15, section 2269.1 did not impose a mandatory duty to communicate to pris-

oners the "'realistic chances of parole,'" or the "'value of their postconviction credits . . . .'" The court further found that Hodge was not entitled to injunctive relief because he had been released from prison, and "'[a]n inmate's release from prison while his claims are pending generally will moot any claims for injunctive relief relating to the prison's policies unless the suit has been certified as a class action.'" (Citing *Dilley v. Gunn* (9th Cir. 1995) 64 F.3d 1365, 1368.) With respect to its decision to deny leave to amend, the court stated: "[Hodge] does not explain how he could amend his pleading, nor did [he] request leave to amend. Further, . . . [respondents] . . . and their employees as public employees are immune from suit for the alleged failure to communicate. Therefore, [Hodge] did not meet his burden in demonstrating how he would amend the complaint. [Citations.]"

After first upholding the trial court's legal basis for denial of relief (immunity), the appellate court went on to reject Hodge's claims on the merits. [The Court also ordered Hodge to reimburse the state's legal defense costs.]

Contrary to Hodge's assertion, CCR, title 15, section 2269.1 does not impose a mandatory duty on respondents to "apprise life prisoners of the value and efficacy of [good-time] credits" or of their "realistic chances of parole," or to explain "how and if good-time credits are applied after a suitability determination." It requires the Board to hold hearings prior to a life prisoner's MEPD, at which the panel "shall review the prisoner's activities and conduct considering the criteria in §§ 2290 and 2410 and document activities and conduct pertinent to granting or withholding postconviction credit." (CCR, tit. 15, § 2269.1, subd. (a)(1).) According to his own allegations, Hodge had at least one pre-MEPD hearing at which his activities, conduct and credits were reviewed and documented, and multiple hearings thereafter. The regulation requires nothing more.

Moreover, Hodge fails to identify any injury that CCR title 15, section 2269.1 was designed to avoid. Section 2269.1 was designed to guide the Board with regard to the timing and conduct of pre-MEPD hearings for life prisoners. (See *In re Johnson* (2009) 176 Cal.App.4th 290, 297 ["Prison regulations . . . are primarily designed to guide prison officials in the administration of the prison[,] not . . . to confer basic rights upon the inmates"].) As demonstrated by Hodge's allegations, the Board does consider an inmate's institutional behavior in making its decisions. The fact that life prisoners, when provided with documentation of accumulated good-time credits, may be encouraged to engage in good behavior, is not an evident defect in the system that warrants correction.

Finally, Hodge's new complaint raised for the first time on appeal, that he was wrongfully subjected to "participation in biomedical or behavioral research," was quickly dismissed.

We do not view the possibility that prisoners may overestimate the influence of good conduct on the Board's decisions as an improper behavioral modification technique. Moreover, the remedies for violation of Penal Code section 3500 et seq. are limited. Under the chapter governing "Remedies," the sole provision is Penal Code section 3524, which provides

> in subdivision (a): "A prisoner may maintain an action for injury to such prisoner, including physical or mental injury, or both, caused by the wrongful or negligent act of a person during the course of the prisoner's participation in biomedical or behavioral research conducted pursuant to this title." (Italics added.) As Hodge does not contend he participated in biomedical or behavioral research, and none of the conduct attributed to respondents fits within the statutory definitions of biomedical or behavioral research, we discern no realistic potential for amending the complaint to assert a claim under Penal Code section 3500 et seq.

At the end of the day, the message here for lifers is that good behavior will be considered by the BPH as a factor in finding you suitable; statutory good conduct credits will THEN be applied to your remaining time (if any) to hasten your actual release date.

LIFER PAROLE VIOLATION UPHELD AFTER SEXUAL ASSAULT VICTIM RECANTS UNDER PRESSURE FROM FAMILY

P. v. ---

CA2(5); B--------
November 2, 2017

This case involves a paroled lifer who was returned to custody after the trial court found probable cause, notwithstanding that the alleged violation behavior – sexual assault of a minor – was recanted by the victim under pressure from the family.

> Defendant [ ] appeals from an order revoking his parole. (Pen. Code, §§ 1203.2, 3000.08.) [ ] defendant was convicted of first degree murder and sentenced to 25 years to life in state prison. [ ] He was released on parole. A condition of his parole was that he "not engage in conduct prohibited by law." [Two years later], he was arrested after his 12-year-old nephew, [--], reported defendant had sodomized and sexually abused him. [--] subsequently recanted. [ ] Following a contested revocation hearing, the trial court found defendant in violation of his parole conditions and remanded him to the custody of the Department of Corrections and Rehabilitation for further parole consideration pursuant to Penal Code section 3000.08, subdivision (h).

Based on the absence of sworn evidence, following the recantation, the defendant moved for dismissal of the violation, but the court declined.

> Defendant argues the trial court abused its discretion because there was insufficient evidence of a parole violation. Defendant asserts the trial court's decision was based on speculation. Defendant's position is without merit.

The Court first summarized the law on parole revocation.

> We review the trial court's parole violation factual finding for substantial evidence. (Cf. *People v. Butcher* (2016) 247 Cal.App.4th 310, 318 [probation revocation]; see *In re Miller* (2006) 145 Cal.App.4th 1228, 1235 ["Parole revocation and probation revocation after the imposition of a sentence are constitutionally indistinguishable"].) "[W]e do not reweigh conflicting evidence or determine credibility on appeal. [Citations.]" (*People v. Butcher, supra*, 247 Cal.App.4th at p. 318.) We review the trial court's decision to revoke pa-

role for an abuse of discretion. (Cf. *People v. Lippner* (1933) 219 Cal. 395, 400; *People v. Butcher, supra*, 247 Cal.App.4th at p. 318.) When substantial evidence supports a parole violation finding, the trial court does not abuse its discretion in revoking parole. (Cf. *People v. Hawkins* (1975) 44 Cal.App.3d 958, 968.)

The facts related repeated sexual assaults.

> Substantial evidence supports the trial court's findings. [--] was reluctant to tell any authority figure about the abuse by defendant, his maternal uncle, until he realized that if he kept quiet one of his younger siblings might be victimized. Thereafter, [--] told a consistent and detailed story to several people—a friend, a teacher, his school principal, and a nurse. The details included the following: defendant and [--] shared a bed in [--]'s mother's home; defendant had been sodomizing [--] once a month for about a year; …

Before the revocation proceedings were heard in court, the victim recanted.

> [--] subsequently recanted. He said he was mad at defendant for disciplining him and making him do chores. He wanted defendant out of the house. But there was substantial evidence [--]'s family had pressured him to recant. [--] testified his mother told him the allegations were "tough" for the family. [--]'s teacher told the school principal that [--] "felt like his family was pressuring him into saying that he was just mad and it wasn't true." Both [--]'s mother and father denied having discussed the allegations with their son. [--] also did chores and was disciplined at his father's house, which undermined [--]'s claim that he was angry at defendant for those things occurring at defendant's house. Further, the parents and educators described [--] as a well-behaved, compliant, academically successful young man while defendant alone described [--] as rebellious.
>
> The trial court found [--]'s initial account of abuse credible because it was "very detailed" and it would be "very unusual to come up with that kind of detail" when a 12-year-old is making up a story. The trial court found it significant that [--] had admitted to an embarrassing fact …. The trial court observed that [--] made direct eye contact when discussing his abuse allegations but looked away when he denied they were true. When the court asked [--] how he would feel if defendant returned to the family home and shared a bed with [--]'s younger brother, [--] said no, he would not be okay with that. The trial court described [--]'s demeanor in that moment as adamant.

The question on appeal was whether, given the above record, and notwithstanding the recantation, the trial court abused its discretion in upholding the parole violation. The appellate court upheld the trial court.

> Given the foregoing evidence, the trial court had a substantial basis for concluding [--] told the truth initially but, under pressure from his family, lied when he recanted. This conclusion was sufficient to support defendant's parole revocation. And because substantial evidence supported the parole violation finding, the trial court did not abuse its discretion when it revoked defendant's parole.

PROP. 36 ELIGIBILITY FINDING REVERSED WHEN PETITIONER APPEALED DENIAL OF RELIEF ON THE MERITS

P. v. Thomas Thomas

CA4(3); G053450
March 14, 2018

Thomas Thomas was sentenced to 85-life as a Third-Strike defendant. He petitioned the trial court for Prop. 36 relief, and that court found him eligible for such consideration "by a razor's edge." The Court denied relief, however, on the merits. Thomas appealed.

On Thomas' appeal, the State countered that he was nonetheless ineligible for Prop. 36 consideration, because of his use of a gun in the crimes below, and that the trial court's finding of Prop. 36 eligibility below was erroneous.

> Following the electorate's passage of Proposition 36, defendant petitioned for recall of his sentence and for resentencing as a second-strike offender. The People opposed the petition, arguing defendant was ineligible for resentencing under the Act because he was armed with a firearm during his commitment offenses. The People in part relied on this court's opinion affirming the underlying convictions, the probation report prepared for initial sentencing, and the trial transcript. Certain prison disciplinary records were also presented for the court's consideration….
>
> In 2003, a jury convicted defendant of voluntary manslaughter as a lesser included offense of murder (§ 192, subd. (a)), later reduced by the court to involuntary manslaughter (§ 192, subd. (b), count 1), negligent discharge of a firearm (§ 246.3, count 2), and being a felon in possession of a firearm (former § 12021, subd. (a)(1), count 3). The jury found not true two firearm use enhancements attached to count 1. (§ 12022.53, subd. (b) (personal use) & § 12022.5, subd. (a)(1) (principle use).)…
>
> The court found that "technically [defendant was] not ineligible because of the offenses that he was convicted of." In the court's view, however, it was "by a razors [sic] edge that [defendant did not] get disqualified" for his gun related offenses. Having found defendant arguably eligible for resentencing, the court proceeded to determine whether defendant posed an unreasonable risk of danger to public safety.

Thomas' own statements demonstrated that during the convicted offenses, he both possessed a gun and fired it.

> While defendant admitted he pulled out the gun and fired it when Black and Gorman came out onto the porch, he denied pointing it at Gorman or threatening to kill him. Defendant claimed he only fired the gun in the air to scare the advancing Black and aid in escaping.

The Court of Appeal stated the law as to its jurisdiction to reconsider the trial court's finding of eligibility.

> We first consider the People's argument that the court erred in finding defendant eligible for resentencing "by a razors [sic] edge." As defendant recognizes in his reply brief, resolving this issue in the People's favor would moot defendant's

> remaining appellate contentions. (§ 1252 ["On an appeal by a defendant, the appellate court shall, in addition to the issues raised by the defendant, consider and pass upon all rulings of the trial court adverse to the State which it may be requested to pass upon by the Attorney General"]; see also *People v. Mendoza* (2011) 52 Cal.4th 1056, 1076.)

The State alleged the trial court abused its discretion in finding that gun use did not per se disqualify Thomas from Prop. 36 relief.

> Although the court acknowledged that defendant's offenses involved a firearm, the court nevertheless concluded that he was not per se disqualified from seeking resentencing under the Act. The People argue, like they did below, that defendant was ineligible because he was armed with a firearm during the commission of his current offenses. They also argue, for the first time on appeal, that defendant intended to commit great bodily injury when he killed Hillary, which likewise disqualifies him from resentencing on his involuntary manslaughter conviction.

The case law on unlawful possession/use of a firearm is well established.

> The People primarily contend that defendant was "armed" when he committed the current offenses, and, thus, he is disqualified from resentencing under section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii). (§ 1170.126, subd. (e)(2).) " '[A]rmed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*); see also *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312 [arming "requires only that the defendant is aware during the commission of the offense of the nearby presence of a gun available for use offensively or defensively, the presence of which is not a matter of happenstance"] (*Elder*).) "Where, as here, 'the language of a statute uses terms that have been judicially construed, " 'the presumption is almost irresistible' " that the terms have been used " 'in the precise and technical sense which had been placed upon them by the courts.' " [Citations.] This principle [likewise] applies to legislation adopted through the initiative process. [Citation.]' " (*Osuna, supra*, 225 Cal.App.4th at p. 1029.) Like in *Osuna* and *Elder*, we conclude the electorate intended "armed with a firearm," as that phrase is used in the Act, to mean having a firearm available for offensive or defensive use. (*Ibid*.; *Elder*, at pp. 1312-1313, fn. 6.)

The Court observed that Thomas' current convictions plainly involved such possession/use.

> In this case, defendant's current convictions include: unlawful possession of a firearm by a felon (former § 12021, subd. (a)(1)), negligent discharge of a firearm (§ 246.3), and involuntary manslaughter (§ 192, subd. (b)). The underlying facts support a finding that he had a firearm available for immediate offensive or defensive use when he committed these offenses.

Importantly here, the Court of Appeal also relied on the record of its own opinion on direct appeal of the conviction.

According to the appellate opinion affirming defendant's convictions, which we may properly consider (*People v. Woodell* (1998) 17 Cal.4th 448, 451 [the record of conviction includes an appellate opinion disposing of the appeal in the case]; *Osuna, supra*, 225 Cal.App.4th at p. 1030 [court considered prior appellate decision as part of record of conviction]), defendant admitted he went to his nephew's house and obtained the firearm. He carried the gun in case he encountered Gorman who might be armed. In other words, defendant obtained the gun to defend himself from a perceived threat. Thus, defendant was "armed with the firearm" while unlawfully possessing that firearm. (*Osuna, supra*, 225 Cal.App.4th at p. 1032 ["the literal language of the Act disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm"]; see also *Elder, supra*, 227 Cal.App.4th at p. 1312 [unlawful possession of a firearm can constitute being armed during an offense for purposes of section 1170.126].)

The jury's findings also supported the "armed" determination.

For defendant's negligent discharge of a firearm offense, defendant admitted firing the gun into the air to scare Gorman and Black away and to aid in his escape. Based on those facts, the jury found beyond a reasonable doubt that defendant had willfully discharged the firearm in a grossly negligent manner which could have resulted in injury or death. (§ 246.3.) These facts show that the firearm was available to use, and was in fact used, as a means of defense, one of the relevant inquiries for determining whether he was "armed" during the offense. (*Osuna, supra*, 225 Cal.App.4th at p. 1029.)

That Thomas' homicide conviction was reduced to involuntary manslaughter (which does not require intent to kill) did not help him.

That the jury ultimately found that defendant did not personally use the gun to kill Hillary does not dictate a different result for purposes of his involuntary manslaughter conviction. The language of section 1170.126, subdivision (e)(2) does not indicate an "intent to require . . . the pleading and proof of an enhancement . . . in order to trigger the disqualifying factors contained in subdivision (e)(2)(C)(iii) of section 667 and subdivision (c)(2)(C)(iii) of section 1170.12." (*Osuna, supra*, 225 Cal.App.4th at p. 1034; *Elder, supra*, 227 Cal.App.4th at pp. 1315-1316.)

Likewise, a "facilitative nexus" argument did not save Thomas here.

And, unlike defendant argues, a facilitative nexus between the arming and the underlying offense is not required under section 1170.126. (*Osuna, supra,* 225 Cal.App.4th at p. 1032.) As explained by the *Osuna* court, while there was no facilitative nexus between being armed with a firearm and unlawfully possessing it since "having the firearm available for use did not further [defendant's] illegal possession of it. There was, however, a temporal nexus. Since [Proposition 36] uses the phrase '[d]uring the commission of the current offense,' and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punish-

> ment but rather eligibility for reduced punishment, we conclude the literal language of [Proposition 36] disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm." (*Osuna, supra*, 225 Cal.App.4th at p. 1032; italics added.) We find *Osuna's* reasoning on this point persuasive.

Overall, the Court found Thomas' continuing possession of the gun during all phases of the crimes persuasive of being "in possession."

> The record of conviction, moreover, shows that defendant had the gun on his person from the time he left his nephew's house, to when he battered Hillary, to when he shot the gun into the air to scare Gorman and Black. The firearm was available for offensive and defensive use over the course of that entire period. Factually, then, defendant was "armed with a firearm" within the meaning of the Act even though the jury found the alleged firearm enhancements not true and there was a temporal rather than facilitative nexus between the firearm and the offense.

Importantly, the Court found that this record overall negated the trial court's finding of eligibility, and reversed it. However, since the trial court had denied relief on the merits, the Court of Appeal affirmed that result.

> Given our conclusion that defendant was not entitled to be resentenced because he did not satisfy the threshold eligibility requirements since he was armed when he committed the underlying offenses, we need not consider the People's alternative argument, raised for the first time on appeal, that defendant intended to commit great bodily injury when he killed Hillary. Nor do we need to consider defendant's contentions that the phrase " 'unreasonable risk of danger to public safety' " is unconstitutionally vague (a claim previously rejected by this court in *People v. Garcia* (2014) 230 Cal.App.4th 763, 768-769) or that the court abused its discretion in denying hispetition after finding him an unreasonable public safety risk. (*People v. Zapien* (1993) 4 Cal.4th 929, 976 [" ' "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]' ".)

The order denying defendant's petition for recall of sentence and for resentencing is affirmed.

PROP. 36 CASE REMANDED FOR DETERMINATION OF PROOF BEYOND A REASONABLE DOUBT

P. v. Willie Stephens

CA2(5); B283090
March 16, 2018

In 2000, a jury convicted defendant and appellant Willie Fred Stephens, Sr., of possession of a firearm by a felon (count 1; former Pen. Code, § 12021) and possession of a controlled substance (count 2; Health & Saf. Code, § 11350, subd. (a)). The jury also found defendant had two prior strike convictions. Defendant

received a 25 years-to-life term for the felon in possession of a firearm conviction and a concurrent 25 years to life for the drug conviction.

On appeal, the question whether the trial court had used the correct burden of proof in makings its ineligibility determination. Because the trial court had used a "preponderance of the evidence" standard instead of the recently mandated "proof beyond a reasonable doubt" standard, the trial court's ruling was reversed and remanded for such a new determination.

> Following the passage of Proposition 36 and enactment of section 1170.126, defendant sought a hearing to recall his sentence on the conviction for possession of a firearm. The superior court held a hearing, but agreed with the prosecution that defendant was ineligible for recall and resentencing. In so ruling, the superior court found the prosecution proved by a preponderance of the evidence that the firearm "was readily available" to defendant, rendering him ineligible for resentencing.
>
> Subsequently, the Supreme Court has held the "beyond a reasonable doubt" standard applies to determine resentencing eligibility. (*People v. Frierson* (2017) 4 Cal.5th 225, 239-240.) The Attorney General agrees with defendant that remand is appropriate for a new eligibility hearing under the appropriate legal standard. Accordingly, we reverse the order finding defendant ineligible for a recall and resentencing on count 1 and remand for a new hearing.

PROP. 36 RELIEF DENIED BASED ON FINDING THAT POSSESSION OF FIXED BLADE KNIFE MEANS "BEING ARMED"

P. v. Alaine Stefflre

CA2(4); B267915
May 16, 2018

The California Court of Appeal affirmed a denial by the superior court to resentence Alaine Stefflre from his Three-Strikes life term. The ground for ineligibility was a determination that Stefflre had a 7" fixed blade double-edged knife on him, which he threw away when running on foot from the police, after flipping his car.'

As the Court recounted from the record on direct appeal of the conviction:

> [O]ur review of the trial transcripts reveals the following pertinent facts: During trial, California Highway Patrol officer David Derczo testified regarding his pursuit of defendant on June 22, 1994. After defendant's vehicle flipped over, Officer Derczo saw defendant exit the vehicle and begin to run on foot. Defendant dropped a knife as he was running. Officer Derczo testified that the knife appeared to be attached to defendant's pants in some fashion; he saw defendant "grab[] at his pants" and then the knife fell from the same "general area." After Officer Derczo caught and detained defendant, he walked defendant back to the crash scene, retrieving the knife from the sidewalk along the way. The knife blade was fixed, approximately seven inches long, and sharpened on both sides. During questioning after his arrest, defendant denied any knowledge of a knife.

Stefflre was ultimately sentenced to 25-life for his auto theft conviction. In his Prop. 36 petition for resentencing, he alleged that there was no "facilitative nexus" between his conviction and the knife. Although he admitted that such an argument fails in *gun* possession, it did not apply to his alleged *knife* possession.

> "Armed" with a firearm or other deadly weapon "has been statutorily defined and judicially construed to mean having a [weapon] available for use, either offensively or defensively." (*Osuna, supra*, 225 Cal.App.4th at p. 1029, citing § 1203.06, subd. (b)(3); Health & Saf. Code, § 11370.1, subd. (a); *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*) [construing arming enhancement in § 12022].) We presume the electorate intended "armed" with a deadly weapon to have this meaning under Proposition 36. (*Osuna, supra*, 225 Cal.App.4th at p. 1029, citing *People v. Weidert* (1985) 39 Cal.3d 836, 844 ["'The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted' . . . [and] [t]his principle applies to legislation enacted by initiative."].) Following this construction, courts uniformly have held that the armed-with-a-firearm exclusion applies where there is a "temporal nexus between the arming and the underlying felony, not a facilitative one," in other words, where the record indicates the defendant was in actual physical possession of the weapon. (*Osuna, supra*, 225 Cal.App.4th at p. 1032 [record showed fleeing defendant was observed holding handgun that was discovered during subsequent search of nearby house from which he emerged]; see also *White, supra*, 223 Cal.App.4th at p. 524 [record showed defendant was observed tossing away pair of rolled-up sweatpants containing handgun during police pursuit]; *Brimmer, supra*, 230 Cal.App.4th at p. 796 [record showed defendant was personally armed with unloaded shotgun while arguing with his girlfriend].)

Stefflre lost.

> Here, the record showed that defendant dropped a knife from his person as he ran from a police officer. Shortly thereafter, the officer retrieved a knife from the location where he had seen defendant drop it. Based on this record, it is clear that defendant had the knife "available for use, either offensively or defensively" and was therefore "armed with a deadly weapon" within the meaning of section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii). (See Osuna, supra, 225 Cal.App.4th at pp. 1029-1032.)

THREE-STRIKES SENTENCE DISALLOWED ON APPEAL BECAUSE OF FAILURE TO GIVE NOTICE AT TRIAL OF THE EXPOSURE TO THREE-STRIKES LIABILITY

P. v. Brian Sawyers

---Cal.App. 5th---; CA2(3); B266897
September 26, 2017

Brian Sawyers was convicted of new offenses and sentenced as a Third-Strike offender. The only problem was that he was never noticed that upon entering his pleas, he would be exposing himself to Three-Strikes sentencing. In this case, on his direct appeal, the Court of Appeal upheld Sawyer's claim, and ordered him resentenced without a Three-Strikes law application.

A jury convicted defendant and appellant Brian Alonzo Sawyers of first degree murder, three counts of attempted premeditated murder, and two counts of shooting at an occupied dwelling. The offenses all arose from an incident in which Sawyers and one or more companions fired numerous shots into a house occupied by rival gang members and their family. The trial court sentenced Sawyers to 75 years to life in prison pursuant to the "Three Strikes" law. Sawyers contends sentencing under the Three Strikes law was unauthorized because the information failed to allege his prior offense was a strike. In the published portion of the opinion, we conclude that because the information failed to give Sawyers notice that he faced sentencing under the Three Strikes law, and because the "informal amendment" doctrine does not apply, his sentence must be vacated. In the unpublished portion, we reject Sawyers's contention that the evidence was insufficient to support two of the attempted murder charges. We also agree with the People that the trial court erred by awarding conduct credits. We therefore vacate the sentence, remand for resentencing, and otherwise affirm.

The charging of priors, and its relationship to ultimate sentencing, was where the error lay.

Sawyers asserts that the trial court improperly sentenced him under the Three Strikes law because the information did not allege his prior burglary conviction was a strike, and he did not admit the conviction constituted a strike within

the meaning of the Three Strikes law. This contention has merit.

A summary of the proceedings in this regard sets the background for the Court's decision.

> An information filed on January 22, 2015, alleged Sawyers had suffered two prior convictions, one for first degree burglary and one for receiving stolen property. First, the information alleged Sawyers had served a prior prison term for both prior convictions within the meaning of section 667.5, subdivision (b), and stated that if proven, these convictions could each add a one-year term to Sawyers's sentence. Second, the information alleged, as to the first degree burglary: "as to count(s) 1, 2, 3, 4 and 5 . . . an executed sentence for a felony pursuant to this subdivision shall be served in state prison pursuant to Penal Code section 1170(h)(3) *in that* the defendant(s), Brian Alonzo Sawyers, has suffered the following prior conviction(s) of a serious felony described in Penal Code section 1192.7 or a violent felony described in Penal Code section 667.5(c) or is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Penal Code section 290) of Title 9 of Part 1." (Italics added, capitalization omitted.) Nowhere did the information expressly reference the Three Strikes law and its alternative sentencing scheme. (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d).)
>
> On June 5, 2015, prior to trial, over a defense objection, the People were permitted to amend the information to add section 12022.53, subdivision (d) and (e)(1) firearm allegations. The prosecutor did not state that the information was being amended to add an allegation that the prior burglary was a strike, nor did the parties or the trial court discuss such an amendment. The trial court's minute order merely states the information was amended "to add special allegations." During the same colloquy, the trial court discussed the prior convictions alleged and referred to them as "two one-year prior allegations." It queried whether Sawyers wished to bifurcate the priors, and Sawyers said he did.
>
> On June 18, 2015, immediately after the jury retired for deliberations, the trial court and the parties discussed the amendments to the section 12022.53 allegations, in the context of the final verdict forms. The prosecutor confirmed that she had made amendments at the start of the trial, "to add (d)" to the section 12022.53 allegations. The trial court then asked defense counsel how he wished to handle the "bifurcated priors," and counsel stated he expected defendant to admit the priors if convicted. The trial court stated that the information "also alleged some priors," and specifically referred to page 8 of the information (the page that contained the section 667.5, subdivision (b) and the section 1170, subdivision (h)(3) allegations). The trial court stated that the information alleged "a prior strike in the VA case, that was the 459 from August 2013 and in addition to that there's another prior conviction of a 496, a non-strike. They were bifurcated." The trial court advised Sawyers of his *Boykin/Tahl* rights and his option to choose a bench trial. Sawyers was not informed of any possible punishment under the Three Strikes law. After the trial court confirmed that Sawyers had conferred with

his attorney, Sawyers waived jury trial and agreed to a court trial as to the bifurcated priors.

After the jury rendered its verdict on June 19, 2015, defense counsel stated he anticipated a waiver on the prior conviction allegations. At the request of the defense, the matter was continued until August 6, 2015. On July 9, 2015, the People filed a sentencing memorandum requesting that Sawyers's sentence be doubled pursuant to the Three Strikes law. Sawyers filed a sentencing memorandum requesting concurrent terms. He did not object to application of the Three Strikes law.

On August 6, 2015, Sawyers indicated he wished to admit the prior conviction allegations. The trial court obtained Sawyers's waivers and then accepted Sawyers's admission, as follows: "[D]o you . . . admit that you suffered a prior conviction in case VA130808 and that was for P.C. 459 in the first degree and that was on or about August 16th, 2013?" Sawyers replied, "Yes." The minute order states that Sawyers admitted "prior conviction on VA130808 and TA129036 pursuant to Penal Code section 667.5(b)." The trial court sentenced Sawyers as set forth above, including doubling the terms on all counts pursuant to the Three Strikes law. At no point did the defense object to Three Strikes sentencing. The trial court did not address, strike or stay any of the allegations that had been alleged pursuant to section 667.5, subdivision (b).

The Court recounted the applicable law on such notification.

The Three Strikes law requires that prior felony convictions be pleaded and proved. (§§ 667, subd. (c), 1170.12, subd. (a); *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1525–1526.) In addition to this statutory requirement, a defendant "has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747 (*Mancebo*); see *People v. Houston* (2012) 54 Cal.4th 1186, 1227 (*Houston*); *People v. Robinson* (2004) 122 Cal.App.4th 275, 282 ["Due process requires the pleading apprise the defendant of the potential for an enhanced penalty and allege every fact and circumstance necessary to establish the increased penalty"].) Thus, "except for lesser included offenses, an accused cannot be convicted of an offense of which he has not been charged, regardless of whether there was evidence at his trial to show he committed the offense. [Citation.] An exception exists if the accused expressly or impliedly consents or acquiesces in having the trier of fact consider a substituted, uncharged offense. [Citations.] The same rules apply to enhancement allegations." (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438.)

The "Penal Code permits accusatory pleadings to be amended at any stage of the proceedings 'for any defect or insufficiency' (§ 1009), and bars reversal of a criminal judgment 'by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits' (§ 960)." (*People v. Whitmer* (2014) 230 Cal.App.4th 906, 919 (*Whitmer*);

People v. Sandoval (2006) 140 Cal.App.4th 111, 132.) "Section 969a authorizes amendments to an accusatory pleading for the purpose of alleging a prior felony conviction '[w]henever it shall be discovered' " that the pleading does not charge all prior felonies, up to the time the jury is discharged. (See *People v. Sandoval, supra*, at p. 132; *People v. Tindall* (2000) 24 Cal.4th 767, 776, 782.) A pleading may be amended orally. (*People v. Sandoval, supra*, at pp. 132 –133 ["California law does not attach any talismanic significance to the existence of a written information"]; *Whitmer, supra*, at p. 919 ["an information may be amended without written alterations to it"].) Additionally, under the "informal amendment" doctrine, a defendant may, by his conduct, impliedly consent to amendment of a pleading. The " 'proceedings in the trial court may constitute an informal amendment of the accusatory pleading, when the defendant's conduct or circumstances created by him amount to an implied consent to the amendment.' " (*Whitmer, supra*, at p. 919.)

The People countered Sawyer's argument of inadequate notice.

Sawyers argues that he cannot be sentenced under the Three Strikes law despite his admission of the prior conviction, because he lacked adequate notice that he was subject to the Three Strikes sentencing scheme. The People, on the other hand, suggest we can infer from the record that "the amended information added a Three Strikes allegation as to the prior burglary conviction," and therefore it was not deficient. They point out that during the discussion in which Sawyers agreed to a bench trial on the prior conviction allegations, the trial court stated that one of the priors alleged was a strike. In the People's view, because there was no objection at that point, or later when the trial court imposed sentence pursuant to the Three Strikes law, the amended information must have included the Three Strikes allegation. Alternatively, they contend that even if the information was not so amended, Sawyers had fair notice the prior would be treated as a strike. They point out that the information alleged the prior burglary was a serious or violent felony within the meaning of sections 667.5 and 1192.7, and first degree burglary is a strike as a matter of law; at the June 18 proceeding the trial court stated that the burglary was a strike; and the failure to specify a statute by number can be overcome by factual allegations adequately informing the defendant of the sentencing allegation charged. (See *People v. Haskin, supra*, 4 Cal.App.4th at p. 1439 [a reference to an incorrect penal statute "can be overcome by factual allegations adequate to inform the defendant of the crime charged"]; *People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1117-1118.)

The Court found Sawyer's position persuasive.

In our view, Sawyers's argument carries the day. Given the record, we cannot infer the information was actually amended to allege that the burglary was a strike. The fact the court file does not contain an amended information and the People failed to produce one in response to the superior court clerk's inquiry suggests no written amended information was prepared. The record likewise does not suggest the prosecutor orally amended the information to allege the burglary was a strike. The only amend-

ment discussed on the record at the June 5 proceeding was the addition of section 12022.53, subdivision (d) and (e)(1) allegations. Defense counsel objected to that addition, but not to any other amendment, suggesting no other amendment was offered. The prosecutor never stated that she was amending to allege a strike. At the same proceeding, the trial court observed that the information contained two "one-year prior allegations," that is, the section 667.5, subdivision (b) prior prison term allegations; it did not mention a strike allegation. The trial court's statement was consistent with the original information – which contained only the section 667.5, subdivision (b) and section 1170, subdivision (h)(3) allegations – rather than with a purported amendment to add a strike allegation. The failure to reference an amendment or state Sawyers was subject to Three Strikes sentencing suggests no amendment was contemplated.

Nor can we conclude the informal amendment doctrine applies. As noted, under that doctrine "a defendant's conduct may effect an informal amendment of an information without the People having formally filed a written amendment to the information." (*People v. Sandoval, supra,* 140 Cal.App.4th at p. 133.)

Reviewing all of the above proceedings, the Court concluded that Sawyer's sentencing under Three Strikes was impermissible, and reversed for resentencing.

Thus, lacking a written, oral, or informal amendment, Three Strikes sentencing was impermissible. … As we have explained, Sawyers was not notified, before waiving his right to a jury trial, that he potentially faced a Three Strikes sentence. Accordingly, we order the sentence vacated and remand the matter for resentencing.

PROP. 36 DENIAL REMANDED TO SUPERIOR COURT TO USE PROPER BURDEN OF PROOF

P. v. Marcos Santistevan

CA2(1); B281265
February 15, 2018

The sole issue in this case is the use of the now incorrect burden of proof in deciding Prop. 36 relief cases.

The trial court denied Marco Santistevan's petition for recall of his sentence under the Three Strikes Reform Act, finding under the preponderance of the evidence standard that Santistevan was ineligible for relief because he acted with the intent to cause great bodily harm during the commission of the offenses for which he was convicted. Santistevan appeals, and we reverse and remand with instructions.

In 2013, Santistevan petitioned to recall his sentence under the Three Strikes Reform Act of 2012, commonly known as Proposition 36 (§ 1170.126). The trial court held an eligibility hearing. On December 12, 2016, in a written memorandum of decision, the court found by a preponderance of the evidence that Santistevan was ineligible for relief, because while resisting the officer he " 'intended to cause great bodily injury to another person.' " (§ 1170.12, subd. (c)(2)(C)(iii);1170.126, subd. (e)(2).)

The decision was straightforward, because the CA Supreme Court had recently ruled on this issue, resolving a prior split

among the Courts of Appeal.

> In *People v. Frierson* (2017) 4 Cal.5th 225, our Supreme Court recently held that the People are required to establish beyond a reasonable doubt that a petitioner is ineligible for resentencing. (*Id*. at p. 230.) In reaching its decision, the Supreme Court expressly disapproved of *People v. Osuna, supra*, 225 Cal.App.4th 1020, and similar cases, and expressly approved of *People v. Arevalo, supra*, 244 Cal.App.4th 836. (*Frierson*, at pp. 234–238.)
>
> In light of *People v. Frierson, supra*, 4 Cal.5th 225, we reverse the trial court's order denying Santistevan's petition and direct the trial court to reconsider the petition under the [beyond a] reasonable doubt standard.

PROP. 36 RELIEF DENIAL REVERSED AND REMANDED TO USE NEW BEYOND-A-REASONABLE -DOUBT STANDARD OF PROOF

P. v. Bryan Mazza

CA1(4); A143933
February 18, 2018

The issue in this case is straightforward. Bryan Mazza challenged his Prop. 36 relief denial because the trial court failed to determine its conclusion using the beyond-a-reasonable-doubt standard recently announced by the California Supreme Court.

> Appellant Bryan Mazza appeals from the trial court's denial of his petition for resentencing under Proposition 36, the Three Strikes Reform Act of 2012 (Proposition 36 or the Act). (Pen. Code, § 1170.126.) The court found Mazza was not eligible because his conviction for being a felon in possession of a firearm brought him within the provisions of section 1170.126, subdivision (e)(2), which makes defendants who were armed during the commission of their current offenses ineligible for resentencing under the Act. We reverse and remand for the trial court to consider whether Mazza is eligible for resentencing under the standards set forth in *People v. Frierson* (2017) 4 Cal.5th 225 (*Frierson*).)

In 2006, Massa was convicted of possession of a firearm by a felon in violation of former section 12021, subdivision (a)(1) (Count One), carrying a switchblade knife in violation of former section 653k (see Stats. 2010, ch. 711, §§ 2, 6, No. 10 West's Cal. Legis. Service, pp. 4138, 4146, 4180) (Count Three), and possession of methamphetamine, a controlled substance, in violation of Health and Safety Code section 11377, subdivision (a) (Count Four). The information also alleged Mazza had suffered two prior strike convictions within the meaning of the Three Strikes law (§§ 1170.12, subds. (a)–(d) & 667, subds. (b)–(i)): a 1991 conviction for violation of section 212.5 (robbery) and a 1996 conviction for violation of section 245, subdivision (c), assault with a deadly weapon on a peace officer.

In September, 2006, the court denied Mazza's *Romero* motion and sentenced him to 25 years to life in state prison on count one (felon in possession of a firearm) and a concurrent term of 25 years to life in state prison on count four (possession of methamphetamine).

In September, 2014, Mazza filed a petition under the Prop. 36 asking the trial court to recall his 2006 sentence of 25 years to life

in state prison and resentence him to the reduced penalties available. The People opposed Mazza's petition. After hearing argument, the trial court denied Mazza's petition. Mazza filed a timely notice of appeal.

> Mazza argues he is entitled to remand for a new hearing on his petition to reduce his sentence because the trial court erroneously believed that Mazza's conviction for possessing a firearm as a felon categorically disqualified him from obtaining relief under Proposition 36. Mazza also argues we should depart from a consistent line of Court of Appeal decisions holding that one whose conviction was for being a felon in possession of a firearm is ineligible for Proposition 36 relief when the record of conviction shows the defendant was armed with a firearm; he urges us to hold that the disqualification for one who is armed in the commission of his current offense does not apply to firearms possession offenses. In the alternative, Mazza argues he was not disqualified because his firearms possession conviction was based on evidence of constructive possession, rather than actual or direct possession, and that, under the same case law, a felon who possessed a firearm only constructively is eligible for Proposition 36 relief.

The People agreed that the court erred in part, but urged the appellate court to disregard that, based on the record.

> The People concede the trial court erroneously believed that any conviction for possessing a firearm as a felon automatically disqualified the defendant from relief. They urge us, nevertheless, to review the record of conviction, find by a preponderance of the evidence that Mazza actually was armed in the commission of his offenses, and affirm the denial of Mazza's petition.

The Court concluded that the proper remedy was to remand to the trial court to see if the People could meet their new beyond-a-reasonable-doubt burden recently announced in *Frierson*.

> Mazza argues the record of his conviction suggests his possession of a firearm in this case was merely constructive possession, so he was not "armed" for purposes of disqualification under section 1170.126, subdivision (e). The People, on the other hand, urge us to review Mazza's record of conviction and find that Mazza was in fact "armed," that is, that his post-arrest conversations in the jail provided sufficient evidence that Mazza actually possessed the firearm when he carried the pack containing the gun and drugs to the construction site to hide them.
>
> After briefing was completed in this case, the California Supreme Court decided in Frierson that the prosecution bears the burden of proving beyond a reasonable doubt that a defendant otherwise eligible for resentencing under section 1170.126 is disqualified based on one of the factors listed in section 1170.126, subdivision (e). (*Frierson, supra*, 4 Cal.5th at pp. 235–236.)

We conclude the appropriate disposition is to remand to the trial court so it can in the first instance review the record of Mazza's conviction and make findings as to whether Mazza was armed for purposes of disqualification under section 1170.126, subdivision (e) when he possessed the firearm. (See *Frierson, supra*, 4 Cal.5th at p. 240 [Supreme Court remands case

to the Court of Appeal with directions to return the case to the trial court for further proceedings on defendant's petition for resentencing]; *People v. Cook* (2017) 8 Cal.App.5th 309, 315–316 [case remanded to trial court to reconsider under the correct standards whether defendant's prior conviction was for one of the enumerated offenses that would disqualify him from Proposition 36 relief].) On remand, the trial court shall review the entire record of Mazza's conviction (see *Estrada, supra*, 3 Cal.5th at p. 670), including the trial testimony and exhibits and this court's opinion affirming Mazza's conviction, but not evidence outside the record. (See *Cruz, supra*, 15 Cal.App.5th at p. 1110; *Cook, supra*, 8 Cal.App.5th at pp. 315–316; *Hicks, supra*, 231 Cal.App.4th at p. 286; cf. *Frierson, supra*, 4 Cal.5th at p. 238, fn. 6 [Supreme Court declined to comment on what evidence the trial court may consider when making an eligibility determination under § 1170.126, subd. (e)(2)]; *Estrada, supra*, 3 Cal.5th at p. 676, fn. 7 [same].) The trial court shall determine whether the People can prove beyond a reasonable doubt (*Frierson, supra*, 4 Cal.5th at pp. 235–236) that Mazza was armed when he possessed the firearm underlying count one. If the trial court concludes the People have failed to meet this burden, then it must decide whether resentencing on that count would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f); *Frierson, supra*, 4 Cal.5th at pp. 238–239.)

PROP. 36 RELIEF DENIAL AFFIRMED BECAUSE TRIAL COURT PROPERLY USED NEW BEYOND-A-REASONABLE-DOUBT STANDARD OF PROOF

P. v. Gilbert Loya

CA2(8); B281261
May 25, 2018

Sometimes, the trial courts do get it right! In this new (i.e., post-*Frierson*) case, the trial court applied and found proof beyond a reasonable doubt, to support its denial of Prop. 36 relief.

> Defendant Gilbert Neverez Loya appeals the trial court's order denying his petition for resentencing under the Three Strikes Reform Act of 2012 (hereafter Proposition 36 or the Act; Pen. Code, § 1170.126). Defendant's only contention on appeal is that the trial court used the incorrect standard of proof when it considered his petition, finding him disqualified from resentencing by a preponderance of the evidence instead of beyond a reasonable doubt. Because the trial court found the disqualifying factors beyond a reasonable doubt, we affirm the order below.

Loya's major faux pas in his Third Strike case was ramming his friend's car.

> On January 11, 2002, defendant followed Ms. Flores and her friend as they were driving, and rammed his car into their car several times. The last time the victims' car was hit, it was hit with such force that it spun out and ended up facing the opposite direction.

From the factual records available to the trial court, it found that either under the preponderance or beyond a reasonable doubt standard, Loya should be denied Prop. 36 relief.

> The trial court agreed with the People, finding that during the commission of the stalking offense, defendant "repeatedly and violently rammed [the victims'] car with his car." The trial court's memorandum of decision stated that disqualifying factors for resentencing should be found by a preponderance of the evidence. The memorandum also acknowledged that there was a split of authority regarding the

appropriate standard of proof, and that "regardless of whether the correct standard of proof is beyond a reasonable doubt or by a preponderance of the evidence, the Court finds after an evidentiary hearing that the [defendant] was armed with a deadly weapon, a vehicle, and also intended to cause great bodily injury . . . when he was convicted of the one count of stalking." The court found defendant ineligible for resentencing under section 1170.126, subdivision (e)(2), and denied defendant's petition with prejudice.

On appeal, Loya contended that the trial court used the wrong standard. The Court of Appeal found otherwise, and denied relief.

Defendant contends the trial court applied the wrong standard of proof, because the trial court's memorandum of decision recites the preponderance of the evidence standard. We are not persuaded. After stating that the standard for determining the existence of a disqualifying factor is a preponderance of the evidence, the court acknowledged that there was a split of authority on this issue, and that under either the preponderance of the evidence or beyond a reasonable doubt standard, defendant was disqualified. It is plain that the trial court found the disqualifying factors beyond a reasonable doubt, and defendant does not contend there was insufficient evidence in the record to support a finding that he was disqualified beyond a reasonable doubt.

GANG MEMBERSHIP IS A COMMON DENOMINATOR IN PROP. 36 DENIALS

(Numerous Cases)

There have been a flurry of recent Prop. 36 relief denials on the merits, where the reasons used by the trial court included the factor of gang membership. While those cases usually also involved long criminal histories, and poor prison "adjustment," the unmistakable fear of courts shows in their constant expressions of denial of recognition of rehabilitative programming when continuing gang membership is alleged. Ultimately, Prop. 36 relief, as well as parole suitability determinations, hang their hats on growing past a prior gang lifestyle. 'Nuff said!

FLORIA D.O.C. BAN ON PRISON MAGAZINE DUE TO UNACCEPTABLE ADVERTISEMENTS UPHELD BY 11TH CIRCUIT U.S. COURT OF APPEALS

Prison Legal News v. Secretary, Florida Department of Corrections

U.S. Court of Appeals, 11th Cir.; No. 15-14220
May 17, 2018

In an important published case challenging the Florida DOC's banning of *Prison Legal News* (PLN) magazines from being delivered to its prisoners with mail subscriptions, the Eleventh Circuit US Court of Appeals laid down a gauntlet that could affect prison publications in other jurisdictions.

PLN, a monthly publication of approximately 74 pages, with a national subscribership of 7000 readers (70% prisoners), has grown considerably from its modest beginnings in a Washington State Penitentiary by two inmates wanting to write about conditions of confinement. Today, with 15 employees, including three full-time attorneys, it is a juggernaut of critical reviews of the incarceral world. It's magazine reports regularly on prison conditions, prisoner mistreatment, high telephone rates, racial bias, gender bias, and privati-

zation issues with respect to prison ownership/operation.

Understandably, corrections officials whose facilities come under PLN's written scrutiny are unhappy with PLN's reporting. There have been numerous bans on the magazine over the years throughout the country, alleging such concerns as amount of personal property one can have and staples used to bind the magazine. PLN's attorneys have regularly sued, under the First Amendment, claiming that such bans in truth amount to squelching of the media, and are unconstitutional. PLN has won many such cases, gaining both punitive damages and awards to cover attorney fees.

But the Florida DOC ban was not based on content per se, but on the assertedly security-challenging advertisements that PLN carries. Such ads, the DOC complained, permit clever prisoners to run moneyed criminal activities within the prison walls from the flow of cash gained from selling stamps to a third party advertiser; permit unmonitored phone calls through DOC-banned "third party" phone hookups, and the like.

Florida's ban on PLN has gone on for some years. A settlement was reached earlier, but when PLN's suit was mooted based on the settlement, Florida DOC immediately restored its ban.

PLN sued Florida's DOC in the US District Court (D.C. Docket No. 4:12-cv-00239-MW-CAS), and lost. It appealed to the Eleventh Circuit, which recently unanimously upheld the lower court's decision in its entirety.

The appellate ruling began:

> Prison officials have the duty to reduce the temptation for prisoners to commit more crimes and to curtail their access to the means of committing them. The Constitution does place some limits on the measures that corrections officials may use to carry out that duty, which is what this case is about.
>
> The Florida Department of Corrections has rules aimed at preventing fraud schemes and other criminal activity originating from behind bars, but inmates continually attempt to circumvent measures in place to enforce those rules. The Department, for its part, continually strives to limit sources of temptation and the means that inmates can use to commit crimes. One way it does that is by preventing inmates from receiving publications with prominent or prevalent advertisements for prohibited services, such as three-way calling and pen pal solicitation, that threaten other inmates and the public. In the Department's experience, those ads not only tempt inmates to violate the rules and commit crimes, but also enable them to do so.
>
> One publication the Department impounds based on its ad content is plaintiff Prison Legal News (PLN)'s monthly magazine, Prison Legal News. PLN contends that the Department's impoundments of its magazine violate the First and Fourteenth Amendments. After a bench trial, the district court ruled that the impoundments do not violate the First Amendment but the failure to give proper notice of them does violate the Fourteenth Amendment. We agree.

The Court recited relevant facts.

> Florida law requires the Department of Corrections to "protect the public through the incarceration and supervision of offenders," to protect offenders "from victimization within the institution," and to rehabilitate offenders. Fla. Stat. § 20.315(1), (1)(d). The Department strives to balance those mandates of public safety, prison security, and rehabilitation. That is no small task. It employs 16,700 officers to oversee 100,000 inmates in 123 facilities throughout Florida. Those officers enforce a multitude of rules to ensure prison security and public safety. See, e.g., Fla. Admin. Code rr. 33-602.101, .201, .203 (rules governing inmate care, property, and control of contraband).
>
> To promote its rehabilitation mandate, the Department grants inmates phone, pen pal, and correspondence privileges so that they can stay in touch with family and friends. *Id*. r. 33-210.101(9) (allowing inmates to correspond with pen pals); *id*. r. 33-602.201 app. 1 (authorizing inmates to keep up to 40 stamps for correspondence); *id*. r. 33-602.205(1) (granting telephone privileges). Those and similar privileges pose problems in Florida prisons and elsewhere. Inmates have the time, talent, and tendency to use their phone, pen pal, and correspondence privileges to conduct criminal activity, thwarting efforts to protect inmates and the public. The record is heavy with evidence of that unfortunate reality.

James Upchurch, the Department's Assistant Secretary for Institutions and Re-entry, testified that "[g]iven uncontrolled and unverifiable telephone access, inmates have been found to use such opportunities to harass the general public, [D]epartment employees, their victims[,] and to search for new victims." He cited the example of incarcerated Mexican mafia members in California who used a network of prison phones to sell drugs and conduct other illegal activity. Prison Legal News itself has reported on instances of inmates abusing their phone privileges. See News in Brief: Florida, Prison Legal News, Nov. 2011, at 50 (reporting how an inmate discovered that the county jail's phone system provided double refunds each time a call did not go through, prompting the inmate to make calls and then hang up until he had made the $1,250 he needed for bail); Mark Wilson, Reach Out and Defraud Someone: Oregon Jail Prisoners Commit Phone Scams, Prison Legal News, Nov. 2010, at 24–25 (reporting on inmates' use of prison phones to conduct identity theft scams, one of which resulted in the indictment of an inmate on 35 counts of identity theft); News in Brief: Florida, Prison Legal News, Sept. 2010, at 50 (reporting how a county inmate used the prison phones to call in bomb threats).

Like phone privileges, pen pal privileges may open doors to criminal activity. Inmates abuse pen pal privileges by soliciting kind-hearted but gullible people and then defrauding them. Pen pal scams are so common that the United States Postal Service warns customers that pen pal ads have "proliferated in recent years" and that "many ads placed by prisoners are part of a sophisticated mail fraud scheme that misuses postal money orders to bilk consumers out of their hard earned savings."

Inmates also abuse correspondence privileges. For instance, one Florida inmate sent threatening letters to a federal magistrate judge, one of which informed the judge that someone would "stick a curling iron up [the judge's] twat and plug that sucker in," while another stated that the inmate was coming to kill her. See *United States v. Adamson*, No. 4:00cr52, 2007 WL 2121923, at *1 (N.D. Fla. July 23, 2007) (unpublished). Another way inmates abuse correspondence privileges is by using their stamps as a currency in the underground prison economy to buy drugs, sexual favors, and anything else

they can bargain for. See *United States v. Becker*, 196 F. App'x 762, 763 & n.1 (11th Cir. 2006) (unpublished) (noting how one inmate ran a prison gambling operation where inmates paid him with stamps and another inmate used stamps to pay for heroin); *United States v. Martin*, 178 F. App'x 910, 911 (11th Cir. 2006) (unpublished) (stating how an inmate used letters with hidden compartments to smuggle heroin into the prison, which he then gave to another inmate in exchange for stamps). The problems associated with stamps increase when inmates can send their stamps to "cash-for-stamps" companies that will exchange the stamps for cash at a percentage of the stamps' face value. Inmates can use the cash to purchase goods and services outside prison walls, which facilitates contraband smuggling and the corruption of prison guards.

> Recognizing that when inmates abuse their privileges it threatens other inmates and the public, the Department has sought to prevent that abuse. First, it has prohibited three-way calling, which includes any type of call transferring. Fla. Admin. Code r. 33-602.205 (2)(a). Three-way calling allows inmates to circumvent the regulations the Department has in place to stop them from using prison phones to harass the public, arrange contraband smuggling, and conduct other criminal activity. The Department's regulations restrict inmates to calling no more than ten people on a pre-approved list and require each outgoing call to begin with an automated message informing the recipient that the call is coming from a Department prison. *Id*. r. 33-602.205(2)(a), (g). The Department also monitors and records some inmate calls. *Id*. r. 33-602.205(1).

Second, the Department does not allow inmates to "solicit or otherwise commercially advertise for money, goods, or services," which includes "advertising for pen-pals" and "plac[ing] ads soliciting pen-pals" on social media and inmate pen pal websites. *Id*. r. 33-210.101(9). Third, inmates cannot use "postage stamps as currency to pay for products or services." *Id*. r. 33-210.101(22). Fourth, inmates cannot conduct a business while confined, which includes "any activity in which the inmate engages with the objective of generating revenue or profit while incarcerated." *Id*. r. 33-602.207(1)–(2). That rule exists because inmate businesses increase the risk of fraud and burden Department staff with monitoring more mail and phone activity. *Id*. r. 33-602.207(2).

Just as some inmates abuse their privileges, some also evade or break the rules restricting their privileges. For example, the Department's telephone security vendor can detect three-way call attempts by the clicking noise that occurs when a call is transferred, but inmates will blow into the receiver when transferring a call to mask that clicking noise. There are nearly 700,000 three-way call attempts each year in Department prisons, leading officials to believe that inmates would not make so many attempts if some were not succeeding. Disciplinary reports confirm that some attempts do succeed. Despite the rule prohibiting pen pal solicitation, some inmates manage to post profiles on pen pal solicitation websites. Inmates also succeed in exchanging stamps for cash — one cash-for-stamps company deposited over $50,000 into inmates' accounts over several years. And as for the prohibition against conducting a business, one inmate, a jailhouse lawyer known as "H&R Block," lived up to his nickname by running a tax filing business where he would file tax returns on behalf of other inmates. See News in Brief: Florida, Prison Legal News, Apr. 2010, at 50. Of course, those tax returns were false, and the inmate faced up to 90 years in prison for his scheme. *Id*.

The Court then went on to review Florida DOC's mechanism for controlling what

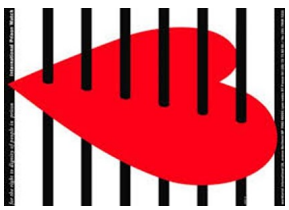
reading material gets into prisoners' hands.

> One of the ways the Department tries to stay a step ahead of inmates is to screen all incoming publications for content that might enable them to break prison rules. See Fla. Admin. Code r. 33-501.401(3). Under the Department's Admissible Reading Material Rule, inmates can "receive and possess publications . . . unless the publication is found to be detrimental to the security, order or disciplinary or rehabilitative interests of any institution of the [D]epartment . . . or when it is determined that the publication might facilitate criminal activity." *Id*. For example, to bolster the Department's ban on inmates possessing firearms or other dangerous weapons, *id*. r. 33-602.203(2), the rule prohibits inmates from receiving publications that "describe[ ] procedures for the construction of or use of weapons," *id*. r. 33-501.401(3)(a).
>
> The Admissible Reading Material Rule applies that same logic to ads for prohibited services. A publication is impounded if it contains ads for three-way calling services, pen pal solicitation services, cash-for-stamps exchange services, or for conducting a business, but only "where the advertisement is the focus of, rather than being incidental to, the publication[,] or the advertising is prominent or prevalent throughout the publication." *Id*. r. 33-501.401(3)(l). The Department can also impound any publication that "otherwise presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person." *Id*. r. 33-501.401(3)(m). Once mailroom staff impound an issue of a magazine for violation of the rules, it is withheld from inmates until the Department's Literature Review Committee makes a final decision about whether the issue does violate the Admissible Reading Material Rule. *Id*. rr. 33-501.401(5), (8), (14)(a).4 Mailroom staff cannot impound all issues of an entire publication in advance; instead, they must separately review and decide whether each issue of a publication violates the Admissible Reading Material Rule. Id. r. 33 -501.401(5).

The case is too long to quote more extensively here, but suffice it to say that the Eleventh Circuit had no difficulty finding that all four *Turner* factors had been met in its analysis.

> Upchurch summed up the relationship between the impoundment of Prison Legal News and the Department's prison security and public safety interests by stating that those rules "certainly help[ ]" advance those interests. And that's the point. The impoundment of Prison Legal News is not a silver bullet guaranteeing that inmates will not break the rules and commit crimes while incarcerated. But the record shows that a "reasonable relationship" does exist between the Department's decision to impound the magazine and its prison security and public safety interests. *Turner*, 482 U.S. at 91, 107 S. Ct. at 2262. That is all *Turner* requires. *Id*. at 90–91, 107 S. Ct. at 2262. Because all four Turner factors favor the Department, we hold that the impoundments of Prison Legal News under Rules (3)(l) and (3)(m) do not violate the First Amendment.

At this stage, PLN can petition the full Eleventh Circuit for rehearing, and can petition the U.S. Supreme Court for certiorari review.



Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	MONTES	PECK	ROBERTS	RUFF	TURNER	BPH HQ	Total CMR Hrg
Suitability Hrg Total	**18**	**19**	**22**	**18**	**19**	**13**	**9**	**10**	**17**	**13**	**14**	**17**	**17**	**15**	**16**	**109**	**346**
Grants	4	6	5	6	3	4	1	2	7	3	4	4	0	2	8	0	59
Denials	9	8	15	9	11	3	3	7	6	7	5	8	6	12	7	0	116
Stipulations	1	2	2	1	1	6	5	1	3	0	5	3	6	1	0	0	37
Waivers	1	1	0	0	2	0	0	0	0	0	0	0	3	0	0	25	32
Postponements	1	1	0	1	1	0	0	0	1	2	0	1	1	0	1	75	85
Continuances	2	1	0	1	1	0	0	0	0	1	0	1	1	0	0	0	8
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9	9

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

Subtotal (Deny+Stip)	**10**	**10**	**17**	**10**	**12**	**9**	**8**	**8**	**9**	**7**	**10**	**11**	**12**	**13**	**7**	**0**	**153**
1 year	0	1	0	0	0	0	0	0	0	0	0	0	1	0	0	0	2
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	8	7	7	6	8	8	3	2	8	7	5	9	5	11	4	0	98
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	2	1	7	4	3	1	4	3	0	0	4	2	5	2	1	0	39
7 years	0	1	3	0	1	0	1	1	1	0	1	0	1	0	2	0	12
10 years	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	2
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**1**	**0**	**0**	**2**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**3**	**0**	**0**	**25**	**32**
1 year	0	1	0	0	2	0	0	0	0	0	0	0	2	0	0	12	17
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	5
3 years	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	7	8
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	**1**	**1**	**0**	**1**	**1**	**0**	**0**	**0**	**1**	**2**	**0**	**1**	**1**	**0**	**1**	**75**	**85**
Within State Control	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	69	71
Exigent Circumstance	1	0	0	0	1	0	0	0	1	2	0	0	0	0	1	6	12
Prisoner Postpone	0	1	0	0	0	0	0	0	0	0	0	0	1	0	0	0	2

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	MONTES	PECK	ROBERTS	RUFF	TURNER	BPH HQ	Total CMR Hrg
Suitability Hrg Total	**26**	**30**	**17**	**21**	**30**	**17**	**6**	**32**	**28**	**15**	**27**	**27**	**37**	**30**	**28**	**195**	**566**
Grants	8	7	4	7	4	11	1	5	13	8	3	5	12	7	6	0	101
Denials	12	20	9	12	20	5	5	19	12	4	12	15	14	16	19	0	194
Stipulations	2	2	0	0	3	1	0	7	2	2	8	2	6	5	0	0	40
Waivers	1	0	1	1	1	0	0	0	0	0	3	0	0	0	1	36	44
Postponements	1	1	2	0	2	0	0	0	1	0	1	5	3	2	2	144	164
Continuances	2	0	1	0	0	0	0	1	0	1	0	0	2	0	0	0	7
Tie Vote	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	15	15

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

Subtotal (Deny+Stip)	**14**	**22**	**9**	**12**	**23**	**6**	**5**	**26**	**14**	**6**	**20**	**17**	**20**	**21**	**19**	**0**	**234**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	12	14	5	10	13	5	3	13	10	5	12	9	13	12	10	0	146
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	2	5	4	2	8	1	2	8	3	1	6	4	5	6	6	0	63
7 years	0	3	0	0	2	0	0	4	1	0	2	1	1	1	3	0	18
10 years	0	0	0	0	0	0	0	0	0	0	0	3	1	1	0	0	5
15 years	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	2

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**0**	**1**	**1**	**1**	**0**	**0**	**0**	**0**	**0**	**3**	**0**	**0**	**0**	**1**	**36**	**44**
1 year	1	0	1	1	1	0	0	0	0	0	3	0	0	0	1	24	32
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	4
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8	8
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**1**	**1**	**2**	**0**	**2**	**0**	**0**	**0**	**1**	**0**	**1**	**5**	**3**	**2**	**2**	**144**	**164**
Within State Control	0	1	0	0	0	0	0	0	1	0	0	2	2	1	0	126	133
Exigent Circumstance	1	0	0	0	2	0	0	0	0	0	1	3	1	0	1	17	26
Prisoner Postpone	0	0	2	0	0	0	0	0	0	0	0	0	0	1	1	1	5

BOARD BUSINESS

April and May Executive Board meetings at the BPH followed a trending pattern of brevity…so much so that in April, the normally two-day meeting was accomplished in a single, rather rapid day, with the business, including en banc consideration being completed in a scant hour and 8 minutes. Absent the en banc hearings, detailed elsewhere in this issue, April's meeting consisted solely of updates on various regulations and court decisions.

The May meeting was measurably longer, primarily comprised of reports from Executive Officer Jennifer Shaffer on issues, including the Significant Events Report, also detailed elsewhere in this issue, and the Non-Violent Second Striker (NVSS) review process. Also noted was the implementation of the final version of Prop. 57 regulations, done after CDCR received some 41,000 public comments. The new regs became effective May 1, 2018.

The May meeting also saw the formal announcement of the retirement of commissioner John Peck, after some 9 years as a commissioner. Peck, who Director Shaffer noted had presided over some 2,500 parole hearings during his tenure on the board, received well wishes from a variety of stakeholders on all sides.

EN BANC HEARINGS

En banc hearings at the BPH Executive Board meeting in April and May evidenced a new trend, with more individuals being reviewed for commutation and pardon requests than other issue bringing them to the board. With Governor Brown's increasing willingness to consider and grant both pardons and commutations, applications for both forms of relief have sky rocked and the resultant number of hearings before the BPH have likewise escalated.

In the two aforementioned months commissioners were asked to consider 9 commutation requests and one pardon application. Along with those questions commissioners also considered 5 compassionate release requests, 3 reconsiderations of grants after revelation of new information and 3 individuals referred for consideration by the Governor.

Regarding the commutation and pardon requests, it was a clean sweep; the board sent all applications to the Governor with a recommendation that he grant the requests. Thus, the following inmates, currently serving LWOP sentences, will now be considered by the Governor for commutation of that sentence: **William Smith, Brandita Taliano, Elaine Wong, Belinda Anderson, Thomas Yackley and Larry Martinez.** In addition, three other prisoners, **Julian Blouin**, with an MEPD of 2032, **Manuel Delgado**, MEPD 2021 and **Earlonne Woods**, MEPD of 2023, may also receive earlier parole hearings. And **David Drew**, seeking a pardon, also received a favorable recommendation from the board to the Governor.

It appears from anecdotal observation, watching the number of commutation applications considered by the board increase over the past few months, that this method of sentence reduction is not only gaining traction with the prisoner population, but is also receiving increasing notice from other parties in the equation, namely, DAs and victims' groups as well as families of the prisoners. While en banc hearings on these requests have, in the past, been sparsely attended, of late that has changed, with parades of supporters, and, increasingly, opposition speakers for many of the individuals.

And true to form, the DAs universally oppose any change or reduction in sentence. As, in most cases, do the victims; again, not a surprise and largely in line with the situation exhibited in parole hear-

ings. As Brown's term nears its end, it appears there will continue to be a slate of commutation and pardon applications for the BPH to consider in those remaining months.

The Board also maintained it's dubious record regarding PC 1170 (e), compassionate release, requests, which historically have hovered just under 50% approval. Compassionate release requires an inmate be certified by CDCR medicos to be within 6 months or less of dying, due to a terminal illness. In April and May the board considered 5 such requests, approving 2 and denying 3. **Valaria Garnett** and **Roy Turner** will be referred back to sentencing court for consideration of recall of sentence under 1170 (e). However, **Harvey Johnson, Wayne Snelgro** and **Robert Frescas** were denied that possible relief.

Several lifers granted parole in preceding months now must face new hearings, after their grants were vacated or rescinded following incidents of institutional behavior or new information forthcoming after the hearing. Vacated were grants for **Johnny Phillips** and **Edward Saragosa**, while **Elyse Lopez**' November grant will be referred for rescission. Lopez' grant will be reconsidered, in large part, because legally required notification of her parole hearing to victims was inadvertently not sent, thus not allowing them the opportunity to attend the hearing.

The Commissioners apparently felt they were on firmer ground in sustaining the grants made by their fellow commissioners, affirming two of three grants referred to them by the Governor for further scurrility. Thus, **Eugene McCann** and **David Ramirez** saw their grants preserved, but **Shelley Maul**'s January grant will be considered for rescission. Maul's release was opposed by the victim and the San Diego DA.

CONSULT MEANS ADVICE

When lifers go to a consultation 'hearing,' that's what they'll get; advice. Not a decision on parole, not an attorney-aided presentation. It's you, Mr. Lifer, and a parole commissioner or deputy commissioner, looking at your prospects for that parole decision a few years in the future.

Ideally scheduled for the six years before a lifer's initial hearing (though due to changes in laws some consultation hearings are held with shorter lead time), is intended to, in the board's words, "to review and document your activities and conduct pertinent to parole eligibility. The Board shall provide you with information about the parole hearing process, legal factors relevant to your suitability or unsuitability for parole and provide you with individualized recommendations regarding your work assignments, rehabilitative programs, and institutional behavior."

During the consultation hearing, prisoners have a right to be present, ask questions and speak on your own behalf if you choose to do so. There is no requirement for you to attend. Since no decision regarding release, no attorneys will be present, no witnesses will be called, and neither DAs nor victims will be present. However, if the prisoner needs accommodation in terms of interpreters, or other ADA assistance, that will be provided.

Basically, the commissioner or deputy commissioner will review the contents of an inmate's C-file and offer up suggestions on what areas of rehabilitation the prisoner should focus his/her attention on for the

next few years, to be as prepared as possible for the upcoming hearing. A written report of those recommendations will be provided within 30 days of the consultation.

A consultation hearing does not take the place of an actual parole suitability hearing, will not change the timing of that hearing and is not a hearing in the usual, legal sense of the word. It is a step toward getting ready for that real hearing, something to be taken seriously and the recommendations from that meeting used wisely.

CONSULTATION HEARING SURVEY

*About 6 years before a MEPD, those prisoners who are seeking release via the Board of Parole Hearings, will receive a "Consultation Hearing," more of an interview between the inmate and an parole commissioner or Deputy Commissioner. The purpose is to advise the prisoner of what areas he/she needs to address prior to a parole hearing to have maximum potential for parole. These meetings can be productive and helpful, or just a time filler. The purpose of this survey is to allow prisoners to provide input into how helpful these meetings have been. The results, including names of participating Commissioners/DCs, but not the names of the inmates, will be shared with the BPH in an effort to help consultation hearings become more helpful to prisoners. * Notes required information.*

*NAME_____ *CDCR#_____

*CONSULTATION DATE_____ *MEPD_____

*COMM/DC NAME_____ PRISON_____

*CIRCLE ONE: YOPH/LWOP ELDERLY PAROLE LIFER 3 STRIKER

Did the consultor appear to have read your file and be aware of your institutional record? _____

Were specific recommendations as to programming/education made, if so, what?_____

_____

_____

_____

_____

Did you feel the consultation was helpful, why/why not?_____

_____

_____

_____

_____

A WORD ABOUT OUR SURVEYS

An article in this month's Lifer-Line deals with reports and statistics presented by the BPH regarding what went on last year. These reports are always interesting, informative and helpful, as we assess how things are going and what are areas of concern.

We try to provide CDCR/BPH our own feedback, always based not on emotion or feeling, but on facts. And so we often ask for help from you, the end user of CDCR 'services.'

Surveys are the way we gather factual information, specific facts and instances of interest and importance. If you've had a parole hearing in the last year or two and had the services of a state appointed attorney, please consider filling out these surveys and sending it to us.

We do make use of this information, without using your name, to let BPH know how the appointed attorneys are doing, who needs 'special attention,' and what areas of training for these attorneys could be improved.

Be real, be detailed and be fair. No attorney is going to get you a date, but if someone was really a help, put forth their best effort, or even failed to meet basic expectations, we want to know. Thanks for your help!

ATTORNEY SURVEY

Life Support Alliance is seeking information on the performance and reliability of state appointed attorneys in the lifer parole hearing process. Please fill out the form below in as much detail as possible, use extra sheets if needed. Please include your name, CDC number and date of hearing, as this will allow us to request and review actual transcripts; your name will be kept confidential if you desire. Details and facts are vital; simple yes or no answers are not particularly helpful. Mail to PO Box 277, Rancho Cordova, CA. 95741. We appreciate your help in addressing these issues.

NAME*_____ CDC _____ HEARING DATE*_____

COMMISSIONER_____ GRANTED/DENIED(YRS)_____

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

ATTORNEY_____ PRISON _____

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

TIME SPENT CONSULTING_____ OBJECT TO PSYCH EVAL?_____

LANGUAGE PROBLEMS?_____ WAS ATTORNEY PREPARED?_____

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

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

*required

THE HIGH COSTS OF HIGH INCARCERATION RATES

In the spring of 2010, when LSA was the new kid on the block, just finding our way through the maze of CDCR and BPH, we were fortunate, and brash, enough to convince the Assembly Public Safety Committee to hold a public hearing on the lifer situation. In preparation for that hearing we delved into the average cost to house an inmate in California. At that time, May of 2010, it was about $51,000 per year, per inmate.

Fast forward 8 years, to May of 2018. LSA is still around, still speaking out (though now more loudly, more often and better recognized) and still looking at the cost of housing inmates. And, it appears, just as we have continued to grow, so has the cost of housing California inmates. That price is now estimated at $75,000 per year. Per inmate. For the average inmate, not those older and ill prisoners, who may cost the state as much as three times the average expense to house.

And while the increase in cost is perhaps predictable, as nearly everything has increased in price in the intervening years, the inmate population in California prisons has decreased by about 25%, from a near high of 167,000 in 2011 to today's just over 129,000. But the cost to house those fewer prisoners has risen by about 30%. Why the increase? Certainly, the housing for the inmate population remains in the same luxurious state as before. The cuisine is still at the negative-star level and the fashion sense of duds provided hasn't improved.

We're not alone in wondering why, with a decreasing prison population, the budget for CDCR in this year's state budget is an eye-popping $12 billion (yes, with a B). What's up? Well, salaries, for one thing. Even with fewer inmates to watch over (the ratio of prisoner to guard is now about 2 to 1, down from 2.24 to 1 before the population drop), prison staff salaries have continued to rise, along with the costs of benefits and pensions. The average CCPOA guard's salary is now about $70,000 per year.

The other major expense that continues is simply to keep all 35 state prisons open, up and running and staffed. Despite reduction in prisoner population levels, the state's penal system remains over design capacity, at 131.5% of that level, with more than a dozen individual institutions housing more prisoners than the official, overall, average population cap of 132.7%. And thus, the state can't close any facilities, for to do so would create greater overcrowding in more prisons.

Other contributing costs are the increasing age of state inmates. In 2005 the average age of a California inmate was 36; in 2016 that average had risen to nearly 40 years of age. And aging inmates can cost as much as 3 times the average cost to incarcerate. In fact, health care costs for inmates is now at about $20,000 per year, about twice what health care costs for outside citizens.

As more than one pundit has noted, it now costs about as much to house a California prison inmate as it does to provide a California student with a Stanford University education.

A BIG DOUBLE THANK YOU!

Thanks two times over to generous and supportive men at two far-flung prisons, Folsom State Prison (FSP) and Chuckawalla Valley State Prison (CVSP) for their recent contributions to Life Support Alliance! We are always appreciative of donations to help support our work, but those donations that come from inmates are especially meaningful to us.

We've been fortunate enough to present workshops at FSP several times in the past and have more scheduled for coming months. CVSP, however, considerably further, even as the crow flies, from our base is somewhere we haven't yet visited. But a remedy to that is in the works.

And while none of us at LSA receives a salary, it still takes funds to run the operation, including travel expenses and monies to provide the information packets handed out to all participants at workshops. The men at FSP and CVSP just made sure we can provide those packets, book that travel and make those events happen.

Folsom, we'll see you again in a couple of months. CVSP, we're working on scheduling dates right now to bring everything we can offer to lifers there, and looking forward to meeting our clients, supporters and benefactors.

Thanks again and again. You make our work possible.

KERNAN TO STEP DOWN AHEAD OF BROWN'S DEPARTURE

As CLN was headed to press for the May/June issue, Secretary of Corrections Scott Kernan announced he will step down from his position in August. Kernan had indicated in private and semi-public meeting since the first of the year that he would retire, again, after Governor Brown left office. He had also indicated he expected to stay on until a replacement was found.

Kernan, who first left the department in 2015, was appointed Secretary of the department in by Brown in 2016, and in the following years oversaw the realignment of corrections bringing down the population of prisons and providing new hope to long-term inmates about their chances to gain both rehabilitation and freedom. Kernan supported increased rehabilitative programming in the prisons, following Brown's lead in various propositions, legislation and legal agreements.

Acknowledging the changes in CDCR under his watch, Kernan, in a letter to employees, noted the department that has "dramatically changed how we incarcerate" and "now provides hope" to inmates. As we go to press, a replacement has not yet been announced.

BPH DIRECTOR ON 'ESSENCE OF A PAROLE HEARING'

In February, BPH Executive Director Jennifer Shaffer spoke at a Life Support Alliance seminar for lifer families, discussing a variety of subjects on parole suitability and taking questions from the audience. Ms. Shaffer spoke for over an hour and remained at the event even longer, taking individual questions and concerns from family members.

LSA fortunate enough to capture Ms. Shaffer's remarks on video, so that other family members at other seminars can hear from her, but we've also plucked a few pearls of wisdom from those remarks to share with the end user, those inmates who will be facing a parole hearing. Her topics ranged from what she termed the 'essence' of a parole hearing to philosophy of the board. Herewith, a few nuggets from Ms. Shaffer's remarks.

Shaffer reiterated, as she has at past appearances, that the philosophy of the board, under her watch, is to "follow the law." She noted the board does not make the law, buty is charged with implementing the laws passed by the legislature and/or voters. She also noted the current board strives for more transparency in its proceedings, noting she personally approves all individuals who appear at parole hearings as observers (this does not include victims' and victim representatives, whose attendance is regulated and mandated by law).

Citing statics on parole grants, she noted the grant rate has remained relatively stable for the last few years and confirmed more hearings (about 31%) now are initial hearings, the result of the implementation of YOPH laws. Shaffer confirmed that it was possible to be granted a date at an initial parole hearing, also noting that in the past, that was not the situation. Now, she noted "we have beat it into everyone's head" that suitable is suitable, whether at first or subsequent hearings, "the law is the law, there is no difference."

As to crux of a parole hearing, that, according to Shaffer, is "who was that person then, who is that person now, and what's the difference. That, she maintained, "is the essence of a parole hearing." And how is that determined? How have you been spending your time while in prison, how do you behave, how are your relationships and interpersonal skills now, do you now your triggers, have a realistic parole plan? What is your RVR and chrono history?

Regarding those chronos, Shaffer noted "nobody ever got a grant based on paper…they just didn't." Meaning, it's not the stack of certificates presented, but how the prisoner can respond to the board when asked what they've learned from those classes and groups, to exhibit the difference between who you were then, and who you are now.

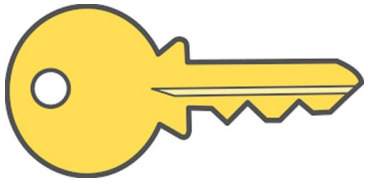
As to the process of the hearing itself, Shaffer recounted that some paroled prisoners have recounted they felt "tremendous pressure" not to be complexly honest at hearings, not wanting their families to fully know the extent of their behavior while in custody. And she stressed the importance of 'brutal honesty' at hearings, noting that commissioners, most of whom have considerable experience, "have very sensitive BS meters" when it comes to minimization.

And the need to be totally forthcoming, even in the face of family, is one reason Shaffer noted, that inmate family members, absent also being classified as a victim of the life crime, are not cleared to attend parole hearings. That could, Shaffer explained, put an inmate in the position of choosing between family and freedom, "a very difficult position for any human being to be in." Commissioners do, however, pay particular attention to support letters from family members.

Regarding gang involvement, she reaffirmed prisoners are not required to debrief to be found suitable but noted parole panels are looking for signs of involvement. Such things as how is an inmate spending his time, who is he associating with, what is his conduct if a fight breaks out? Is that inmate still feeling the need to protect someone, basically sticking to the code of gang allegiance, but maybe 'doing a little programming on the side;" has that person really left that lifestyle behind?

And she warned about the serious manner in which the board views substance abuse, noting, relapse into substance abuse is "the number one reason" paroled lifers return to prison. The Board, she stressed, takes substance abuse "very seriously."

Shaffer noted parole decisions were a very human process and that while "we don't always get it right, and when we don't, someone sues us, and we change," she stressed all parole panels "work very hard to make good decisions."



BPH REPORTS SIGNIFICANT EVENTS OF 2017

Once again, as for the last several years, the Board of Parole Hearings has released a multi-page report providing statistics and additional information on the work, both volume and type, done by BPH team members, from commissioners to staffers. It's an impressive report, in terms of sheer numbers, from hearings scheduled to pieces of correspondence answered.

Probably the most anticipated information deals with parole hearings—how many hearings and, most importantly, how many grants. According to the report, the BPH scheduled 5,334 parole hearings in 2017, a number up about 5% from the number of hearings scheduled in 2016. As for grants, numerical grant rate depends on how the math is done, but what isn't in dispute is the raw number of grants issued. Last year, that number was 915.

As to the math, using the official BPH method, the entire number of hearings scheduled is tallied against the number of grants given to reach an official grant rate of about 17%. And while that sounds rather low, the alternate method of calculation (and no, these are not 'alternative facts') is to use not the number of hearings scheduled, but the number of hearings actually held, in relation to the number of grants given. This makes a difference because of those 5,000 plus hearings scheduled, some 2,202, almost 42 percent, were not held to completion, instead falling to waivers, postponements, stipulations or continuances.

It seems to many, including those of us here, no math wizards among us, that it makes little sense to include hearings that had no chance of ending in a grant, because they were never held, when calculating the rate at which lifers are granted parole. Using the numbers of hearings held to completion paired with the actual number of grants, yields a grant rate of about 29%.

Digging deeper into the report shows nearly a third of those scheduled hearings were initial hearing, and 48% were YOPH considerations. The YOPH hearings were primarily, 94%, for youth lifers, with a small number, of 151 hearings, held for long-term determinate sentence length (DSL) inmates. And on the other end, 20% of scheduled hearings were for those who qualified for elderly parole, and by contrast, most of those individuals were DSL inmates.

And ahead of future parole hearings, BPH commissioners and deputy commissioners held nearly 4,000 consultation 'hearings,' which, as we have noted before, are not hearings in the usual sense of the word, but more along the lines of consultation interviews. In 2017 the BPH legal team reviewed, under the Administrative Review process, the status of some1,120 inmates who received a 3-year denial in the previous 12 months; of those, 82% were approved for an advanced hearing.

And even more interesting was the grant rate of that group of individuals; 34% of inmates granted and advanced hearing via Administrative Review after a 3-year denial won a grant at their next hearing. That's the highest grant rate for any prisoner cohort in parole hearings. So, clearly, if you receive an advanced hearing under the Administrative Review process, your chances of success are 'enhanced.'

The other avenue for advanced hearings after a denial, Petitions to Advance (PTAs), also saw a higher grant rate, with some 28% of those who were successful in advancing their next hearing via this route were granted at that advanced hearing. A total of 733 PTAs were submitted to the BPH in 2017, nearly the same number as the previous year.

Other figures of note in the report was the rather insignificant number of habaes corpus writs filed by inmates last year to which courts required the BPH to respond, and the even smaller number of court-ordered hearings as a result of those writs. The board was required by federal or state courts to respond to only 160 writs and held only 10 court ordered hearings. This is a vast change from years ago, when prisoners were filing writs at a blizzard pace and BPH was swamped with responses.

On the FAD front, clinicians completed 3,266 risk

assessments, down slightly from the year before. Exact numbers receiving low, moderate or high-risk assessments were not given, but we'd like to receive that information, and we'll be asking FAD director Dr. Kusaj. And while we at LSA often feel overwhelmed with our 250 or so letters each month from inmates (we don't even try to count the number of phone calls and emails from family members) BPH reported staffs responded to over 39,500 pieces of correspondence. Our hats off to them—but they do have a larger staff.

In other areas, the numbers are less settling. In 2017 the BPH held 83 Parole Reconsideration hearing—those hearings held for lifers, once granted parole, and now back in CDCR custody. And while 83 may not seem a large number, that number is up considerably from the 66 such hearings held in 2016. Nearly half, 40, were first time reconsideration hearings, the reaming 43 were subsequent.

By way of explanation, and in the hope of deterring lifers who are granted parole from performing any acts that could put them in a reconsideration hearing situation, it is worth noting that once a lifer is returned to custody after a grant of parole, his life term can be reinstated, should the parole panel feel his new transgression be serious enough to cast him (or her) as an unreasonable risk of danger to public safety.

The noted 40 initial reconsideration hearings were just that—lifers who found themselves back in custody and facing the parole board once again, this time to determine of their life term would be reinstated. The remaining 43 individuals at reconsideration hearings last year had already suffered that fate, and, as per law, were being reconsidered for parole on an annual basis, meaning all 43 had already been found unsuitable for re-release at least once.

As informative as the Significant Events of 2017 report is, we still have a few more questions, such as, of those 83 reconsideration hearing, how many re-cycled lifers were given a second, second chance? The report also noted the BPH considered nearly 17,000 parolees for discharge from parole; we'd like to know how many of that number were paroled lifers, and how many of those discharged from parole, ending their entanglement with CDCR?

The board also held 25 medical parole hearings and considered 10 requests for compassionate release. And while grant rates for these categories were not announced, we've asked. By our inexpert and unscientific count, only about half of compassionate release requests are granted, with some inmates expiring before their situation can be considered and acted on. We've inquired about that as well.

The take-aways? The number of parole hearings scheduled and/or held by the BPH appears to remain fairly steady in recent years, as does the grant rate, no matter how it is calculated. And while we continue to believe that grant rate could safely be expanded, we are ever mindful of the not-too-distant years, when the numbers were much more depressing.

In 1978, one inmate was granted parole. The board also had a 100% grant rate that year, as they held only one hearing. A decade later, in 1988, 28 lifers were granted parole, but 10 years later, in 1998, only 27 were granted. In 2008 we begin to see the beginning of change, when 293 were given the green light by the board. Of course, those were also the days when roughly 80% of parole grants were nixed by various governors-in-residence, so while nearly 300 were granted parole, most didn't leave prison grounds.

It helps to keep statistics in perspective. Is this the best of all possible worlds? Hardly. But have things improved for lifers in their quest to be free? Undisputedly.

HOW TO PARTICIPATE IN LSA'S PROGRAMS

Currently Life Support Alliance offers two workshop programs for lifers and other long-serving inmates, both aimed at helping our constituents understand and achieve the goals to be found suitable for parole. Although we'd like to say we'll go anywhere, the reality is, we must be invited, usually by an ILTAG or self-help groups, as guest speakers.

Connecting the Dots, a 2-part workshop designed to help prisoners identify the causative factors in their life (their 'dots') that helped lead to their criminal behavior and how to understand and overcome those tendencies (the connecting part). Held about a month apart, each session of Connecting the Dots is designed to help build understanding of past decisions and develop insight, two crucial factors in parole suitability.

The Amends Project, helping lifers and others, understand how to write an appropriate and impactful letter of apology and amends to their victims and victims' family, has been underway for just over two years now. We've conducted the workshop for hundreds of prisoners and issued a few hundred certificates of accomplishment as well.

Some of the by-products of The Amends Project, aside from letters of real amends to victims, is an increased understanding of what making amends means, the deeper and less obvious consequences and impact of crime on those on both victim and perpetrator sides and how to try to heal those wounds.

Lately, we've received several letters from prisoners, asking us to review their apology letters and send them our certificate, and even from some group sponsors at some institutions, asking us how to get certificates for the inmates they're working with. And while many victim impact groups and classes have an apology writing component, you'll forgive us if we think ours is pretty special and offers more insight into the process, benefitting the prisoner as much as the victim.

In terms of which program comes first, it's beneficial to participate in Connecting the Dots, to achieve a deeper understanding of causative factors, before moving on the writing that important, and healing apology letter. As part of both workshops, Connecting the Dots and the Amends Project, LSA staff comes to you (yeah, it would be nice if you could come to us, but it is what it is), bringing tips, insight and resource materials to help you surmount the obstacles of insight and understand making amends.

And while we'll go to any institution, the key is getting an ILTAG or self-help group to sponsor our clearance. If you are currently participating in a group that you feel would benefit from the information and insight LSA can bring, let us know. Better yet, ask the group sponsor to contact us. We're also happy to present to informal groups of lifers, often arranged through the CRM at various institutions and open to all lifers and other DSL inmates who will eventually appear before the BPH.

We'll be happy to provide information about either or both workshops to any sponsor of facilitator who is interested and set a date when we can present. Alternately, you can send us the name and contact information of your sponsor, and we'll start the ball rolling. But it's important that you send the contact information as well as the name, so we can reach out right away.

THE PARTISAN SIDE OF NON-PARTISAN COURTS

Judges and courts are, in theory and by law, supposed to be non-partisan, that is, not tipped toward any political party. In fact, the most recent Supreme Court justice, Neil Gorsuch, noted in his Senate Confirmation that there "is no such thing as a Republican judge or a Democratic judge. We only have judges in this country."

That's the theory anyway, but a new study from Harvard University casts a bit of shade on the practice of that theory. The study followed the decisions of more than a 14,000 federal judges over a 15-year period, during which time they dealt with nearly a half million cases—you read that right, nearly a half million criminal cases.

Federal judges are appointed to the bench by the sitting president; the study followed judges who had been appointed by both Republican and Democratic presidents. The study followed only decisions made by federal judges regarding individuals accused of federal crimes and facing time in the federal penal system, focusing on gender and racial disparities.

The results were, by all accounts, not surprising. Overall, black defendants received sentences that were 4.8 months longer than white defendants convicted of similar crimes. Women, on average, received sentences 12.1 months shorter than male defendants.

In terms of partisan affect, the Harvard study revealed Republican appointed judges ended to give sentences 2.4 months longer than their counterparts appointed by Democratic presidents, and specifically, black defendants appearing before Republican appointed judges received sentences that were 3 months longer. The judges followed were themselves both black and white and the study results showed black judges tended to exhibit less gender disparity than their white counterparts and that the 'unconscious bias in judges regarding race and gender tended to fade as the judges spent longer time on the bench.

The study also confirmed what those in the prison reform movement have long known, there is an 'over-representation' of minorities in the prison population. Specifically, blacks compose 37.9% of the federal prison population, while making up only 13.3% of the country's population. In California prisons, black inmates comprise 28.9% of the overall population, with whites making up 22.2% and those of Hispanic background at 41.5% of the prison population.

By contrast, the overall population of California is 39.7% white, 37.4% Hispanic and 6% black, according to available figures. For the last several decades about 34% of sitting federal judges had been appointed by Democratic presidents. However, recent national political developments lead insiders to estimate that by 2020, 50% of federal judges will have been appointed by a Republican president. Buckle up.

COMMISSIONERS BY THE NUMBERS

Numbers don't always tell the complete story, but they can provide some interesting snapshots. And as spreadsheets go, the one detailing by commissioner all the figures relative to parole hearings, denials, grants, denial lengths and other minutia in a calendar year keeps getting larger and more complicated as the number of commissioners increases. The yearly recap spreadsheet from 2017 now exceeds normal, 8 X 11-page size.

While we've parsed through it and harvested some interesting items, it's important to understand that many factors contribute to the numerical sum of hearings, grants, etc. For example, there were several changes in commissioners last year, with half a dozen commissioners either resigning before the end of the year or being appointed sometime during that year. Thus, those coming-and-going commissioners served for less than a full year. And a shorter time on the board will automatically impact the raw numbers, and thus skew percentages.

This is a lead up to noting that numbers are interesting, but not a sole basis for any decision. Commissioners are not better or worse, based solely on their grant numbers. Commissioners who hold court at lower level prisons tend to give more grants, because the inmates they are seeing are, by-in-large, more ready for parole. A myriad of facts and issues go into each decision and each compilation of figures.

The grant rates of most commissioners are within 10 percentage points each other. There are a couple of 'out-liers,' whose percentage of grants are significantly higher or lower than the average, but in at least one case, there appears to be a statistical significant reason for that. As noted in past stories, not all hearings scheduled by the board are held to completion; nearly half of all scheduled hearings are waived, stipulated, postponed or cancelled.

The figures reflect a total of 17 individual commissioners. The current BPH panel numbers 15, the extra two reflect commissioners appointed during the year to replace those who resigned or retired. For clarity, Commissioners Garner, Fritz and Taira left the board, and Commissioners Barton, Castro, Dobbs and Ruff joined the troop.

In terms of sheer numbers of hearings presided, top spot goes to Commissioner Randolph Grounds, who presided in 256 hearings last year, handing out 66 grants of parole, which works out to a grant rate of about 25.7%. By sheer number of grants, the top spot goes to (former, and now once again new, see stories elsewhere in this issue) Commissioner Troy Taira, who gave 82 grants in 2017, having presided at 248 hearings, for an overall grant rate of 33%.

On the other end, the commissioner who presided over the fewest number of hearings (49) in 2017 was Robert Barton, appointed later in the year. And here is where the numerical aberrations show up. Since Barton headed the smallest number of hearings, he thus gave the

smallest number of grants (25), yet recorded the highest overall grant percentage rate, 51%. And, lest anyone think Barton is a pushover, better take a look at the numbers for the first few months of 2018 before jumping to conclusions. And the lowest percentage nod goes to Commissioner Kevin Chappell, at 18.5%

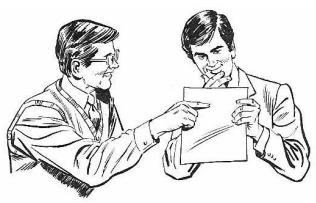
As evident from the figures below, most commissioner grant rates hovered in the 25-35% range, with only a few lower or higher, and only the top and bottom percentages showing really significant differences.

So, with the above caveats, herewith are the figures for 2017, relative to individual commissioners, grant rates, denial lengths and other hearing tidbits. As meaningless as it is, in terms of individual considerations, we have used the over-all grant rate percentage as a way to tabulate and list the information, from highest to lowest.

Commissioner	# Hearings	# Grants	% Ranking
Barton*	49	25	51%
Turner	238	94	39.4%
Taira*	248	82	33%
LaBahn	213	70	32.8%
Anderson	224	73	32.5%
Garner*	120	32	32.5%
Cassady	216	61	31%
Dobbs*	80	25	31%
Ruff	196	58	29.5%
Montes	215	62	28.2%
Peck	236	66	27.9%
Roberts	212	56	26%
Grounds	256	66	25.7%
Fritz *	247	63	25.5%
Minor	225	54	24%
Castro*	145	34	23.4%
Chappell	226	42	18.2%

Always scary is the possibility of receiving a 15-year denial. The report on that front is encouraging. In 2017 the entire BPH panel handed down only 5 15-year denials, compared with a total of 14 in 2016. The same holds true for 10-year denials, with a total of 66 in 2017, down from 73 in 2016.

Minimum, 3-year denials clearly outpaced any other denial length, comprising about 80% of all denials. Nearly all commissioners racked up 3-year denials at a pace usually twice the number of longer denials, though it is notable that Commissioners Montes and Taira pegged a full 10 10-year denials each last year, those two commissioners alone accounting for nearly a third of those long-term denials. In terms of the most drastic denials, 15 years, Commissioners LaBahn, Montes, Roberts, Ruff and Taira each counted for one such decision.



**Commissioners who served less than a full year, due to resignation, retirement or mid-year appointment.*

COMMISSIONER THE SECOND TIME AROUND

As previously reported, Commissioner John Peck resigned late in May, after some 8 years as a parole commissioner. And before the seat at the board was even cold, on May 30, 2018 Governor Brown filled it, quite quickly and conveniently, it appears.

Appointed (again) as a parole commissioner was Troy Taira, late of the board, who resigned less than 6 months ago after a mere year as a commissioner. After serving in various state legal positions Taira was first appointed to the BPH in 2016, serving for a year before resigning to become an Administrative Law Judge at the California Public Utilities Commission at the beginning of 2018.

Reportedly, one of the reasons Taira initially resigned was the rigorous travel schedule required of commissioners. That doesn't appear to have changed, so it remains to be seen how Taira will accommodate those concerns the second time around. Two immediate benefits to the board that leap out of a Taira re-appointment deal with logistics.

Apparently Taira is available to fill the spot immediately, and, given his recent stint as a commissioner, the normal 6-week training time for new commissioners may not be entirely required, thus allowing the board to continue scheduling hearings in a smooth manner. In most cases, new commissioners don't 'fly solo' for several weeks, thus requiring a modest curtailment in the number of hearings scheduled. Taira's experience and possibly quick up-take, could make the transition relatively seamless.

Taira still, however, must be confirmed as a commissioner sometime within the next year. For information on Taira's past performance, see the article on individual commissioner grant rates elsewhere in this issue.

CLN Subscription Price will Change January 2017 TO $35-one year (inmate cost) SEE PAGE 46 THIS ISSUE FOR DETAILS
ALL SUBSCRIPTIONS PAID PRIOR TO THIS INCREASE WILL BE HONORED AT PRE-2017 PRICE.

CLN

California Lifer Newsletter

P.O. Box 277
Rancho Cordova, CA 95741

WHEN DOES YOUR SUBSCRIPTION TO *CLN* EXPIRE?

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