CALIFORNIA LIFER NEWSLETTER

State and Federal Court Cases

by John E. Dannenberg

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

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

In re William Palmer ("Palmer I")

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

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

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

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

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

On January 18, 2019, the Court granted review and or-

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COURT CASES (in order)

REVIEWED IN THIS ISSUE:

In re Williams Palmer
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In re Melvin Thomass II

dered the lower court opinion depublished.

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

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

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

In re William Palmer ("Palmer II")

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

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

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

CA District Attorney's Association petitioned the CA Supreme Court Cont. pg 4…

PUBLISHER'S NOTE

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

CLN is published by Life Support Alliance Education Fund (LSAEF), a non-profit, 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 non-political 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.

WHERE ARE YOU?

Many of our readers receive Lifer-Line, CLN's monthly, free sister publication, through our mail tree, where volunteers will 'adopt' an inmate who doesn't have a friend or family member in the outside to receive the newsletter via email to print and mail to them. And we're happy to provide this service to those in-need inmates, and grateful to our many volunteers who give up their time and actual finances to provide this service (some of our volunteers mail to 20 or more inmates—at roughly 50 cents per letter for postage and supplies, that can add up). Which brings us to the current point.

We often receive newsletters returned from various institutions, when inmates have been transferred from that location. It happens, and we know your first priority when transferred isn't to let us know you're at a new spot but come on guys. We're providing you with a free service; the least you can do is let us know where to send that service without wasting OUR resources. So, here's the deal. If we receive 2 newsletters returned because an inmate has moved and said inmate hasn't bothered to let us know his new home—we'll remove that individual from the mail list. We have a waiting list for inclusion on the mail tree, so there will be someone ready to receive, and appreciative of, that newsletter. Two issues mean 2 months—surely in that time you'll have 5 minutes and a stamp to let us know where to send you your FREE newsletter.

Along those lines, if you've been receiving the newsletter via our volunteers and you do have a family member or friend who can provide that service for you, please reach out to that person and ask them to give you a hand. As noted, we currently have a waiting list and if you've got the resources to get the newsletter without our volunteers, please do so, making room for a truly indigent prisoner to receive the information.

An added benefit of asking family to help is that they have the chance to read the newsletter themselves, thus helping them keep up on the changes and information they need to know to be of real assistance to you. And, at the end of the day, not taking advantage of indigent services when you don't need to is part of being a pro-social community member.

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for an order depublishing this new case. On that same day, the CA Supreme Court issued an order extending time to consider reviewing the lower court decision.

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

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

> Our Supreme Court has recognized, however, that "even if sentenced to a life-maximum term, no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense. Such excessive confinement . . . violates the cruel or unusual punishment clause (art. I, § 17) of the California Constitution." (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1096 (*Dannenberg*).) "The proportionality of a sentence turns entirely on the culpability of the offender as measured by "circumstances existing *at the time of the offense*." (*Rodriguez, supra*, 14 Cal.3d at p. 652, italics added.) Where an inmate's sentence is disproportionate to his or her individual culpability for the offense, the Supreme Court has acknowledged, "section 3041, subdivision (b) cannot authorize such an inmate's retention, *even for reasons of public safety*, beyond the constitutional maximum period of confinement." (*Dannenberg*, at p. 1096, citing *Rodriguez*, at pp. 646-656, italics

added & *Wingo, supra*, 14 Cal.3d at pp. 175-183; accord, *Butler, supra*, 4 Cal.5th at p. 744.) "[I]nmates may bring their claims directly to court through petitions for habeas corpus if they 'believe, because of the particular circumstances of their crimes, that their confinements have become constitutionally excessive as a result.' " (*Butler*, at p. 745, quoting *Dannenberg* at p. 1098.) In this sort of challenge, deference to the legislatively prescribed penalty is no longer a relevant factor, as the actual term of years served is a function of the Board's parole decisions, not the Legislature's determination of the appropriate penalty in this particular case.

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

The new *Palmer* ruling appears to turn the concept of a "life" sentence on its head – keeping someone "too long" would justify a finding supporting their automatic release. While this ruling, if it stands, would have a dynamite effect on parole denials and put limits on the Board's authority, CLN is not yet publishing the details of this ruling until the CA Supreme Court decides whether to grant review on its own motion or not. If it does, that would automatically depublish and nullify the 1st DCA ruling. CLN will continue to monitor this case closely and report on any updates in the procedural steps involving the CA Supreme Court.

A BPH COMMISSIONER IS NOT AUTHORIZED TO CONDUCT PAROLE REVOCATION HEARINGS UNLESS THE PARTIES STIPULATE TO IT

P. v. Brandon Berch

--- CA5th ---; CA4(3); No. G055344
December 5, 2018

This published case covers a procedural question: may a BPH commissioner conduct a parole revocation hearing if the parties have not stipulated to his doing so? The Court of Appeal held that the answer is "no."

> Government Code section 71622.5 authorizes commissioners to conduct parole revocation hearings as a necessary part of the implementation of the Criminal Justice Realignment Act of 2011. However, article VI, sections 21 and 22 of the California Constitution limit commissioners to the performance of "subordinate judicial duties" in the absence of a stipulation by the parties.
>
> We hold that revoking parole and committing a defendant to jail for violation of parole are not subordinate judicial duties that may be performed by a commissioner in the absence of a stipulation by the parties. As has long been recognized: "the issuance of an order which can have the effect of placing the violator thereof in jail is not a 'subordinate judicial duty.'" (*In re Plotkin* (1976) 54 Cal.App.3d 1014, 1017.) Because defendant did not stipulate to the commissioner revoking his parole and committing him to jail, the postjudgment order must be reversed.

The facts surrounding Berch's parole revocation proceedings are straightforward, including his objection at the time to the Commissioner conducting the revocation hearing.

Defendant was convicted of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and carrying a concealed dirk or dagger (Pen. Code, § 21310). In June 2017, defendant was accused of violating his parole by failing to (1) enroll in and complete a drug treatment program; (2) participate in and complete a batterer's program; (3) report to and actively participate in a sex offender treatment program; and (4) charge his GPS device as instructed. The Department of Corrections and Rehabilitation petitioned for revocation of his parole.

The preliminary hearing for defendant's parole revocation matter was set before Commissioner Edward W. Hall. Defendant refused to stipulate to a commissioner hearing the parole revocation matter. The preliminary hearing proceeded over defendant's objection. Commissioner Hall found sufficient probable cause that defendant had violated the conditions of his parole, and set a hearing on the petition for revocation of parole.

At the final revocation hearing on July 7, 2017, defendant admitted his parole violations and was committed by Commissioner Hall to 120 days in the Orange County jail with a total of 66 days credit for time served. Defendant filed a notice of appeal.

As an initial defense, the State argued that Berch's appeal was moot because he had already served the violation time and was no longer in custody. The Court of Appeal properly rejected this argument under the long-standing doctrine that it can hear any matter that is "capable of repetition, yet evading review" even when individual relief can no longer be granted because of the passage of time.

The issue raised by defendant "'is likely to recur, might otherwise evade appellate review, and is of continuing public interest.'" (*People v. DeLeon, supra*, 3 Cal.5th at p. 646 [addressing parole revocation hearings].)

The enabling statutes in the Penal Code and the Government Code for such revocation hearings were set forth.

Penal Code section 3000.08, subdivision (a), provides that "the court in the county . . . in which an alleged violation of supervision has occurred" shall hear a petition to revoke parole. For purposes of revocation of probation, "'Court' means a judge, magistrate, or revocation hearing officer described in Section 71622.5 of the Government Code." (Pen. Code, § 1203.2, subd. (f)(1).)

Government Code section 71622.5 provides, in relevant part: "(a) The Legislature hereby declares that due to the need to implement the 2011 Realignment Legislation addressing public safety (Chapter 15 of the Statutes of 2011), it is the intent of the Legislature to afford the courts the maximum flexibility to manage the caseload in the manner that is most appropriate to each court. [¶] (b) . . . [T]he superior court of any county may appoint as many hearing officers as deemed necessary to conduct parole revocation hearings pursuant to Sections 3000.08 and 3000.09 of the Penal Code and to determine violations of conditions of postrelease supervision pursuant to Section 3455 of the Penal Code, and to perform related duties as authorized by the court. A hearing officer appointed pursuant to this section has the authority to conduct these hearings and to make determinations at those hearings pursuant to applicable law. [¶] (c)(1) A person is eligible to be appointed a hear-

> ing officer pursuant to this section if the person meets one of the following criteria: [¶] (A) He or she has been an active member of the State Bar of California for at least 10 years continuously prior to appointment. [¶] (B) He or she is or was a judge of a court of record of California within the last five years, or is currently eligible for the assigned judge program. [¶] (C) He or she is or was a commissioner, magistrate, referee, or hearing officer authorized to perform the duties of a subordinate judicial officer of a court of record of California within the last five years."

The California Constitution limits the authority of Commissioners.

> The question before us is whether the Legislature was authorized by the California Constitution to delegate to commissioners the responsibility for conducting parole revocation hearings and committing parolees to jail without the stipulation of defendant. The California Constitution permits commissioners to perform some, but not all, judicial duties. "The Legislature may provide for the appointment by trial courts of record of officers such as commissioners *to perform subordinate judicial duties*." (Cal. Const., art. VI, § 22, italics added.) The Constitution also permits temporary judges to try a cause if the parties stipulate: "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." (Cal. Const., art. VI, § 21.)

Berch argued that unstipulated-to revocation hearings were outside the limits of "performing subordinate judicial duties."

> Our Supreme Court has explained: "[T]he power of a trial court to compel the parties to submit an aspect of a judicial proceeding to a subordinate judicial officer is derived from statute, and only those issues particularly described in the statute may be referred without the consent of the parties." (*People v. Superior Court (Laff*) (2001) 25 Cal.4th 703, 734.) "The scope of the subordinate judicial duties which may be constitutionally assigned to court commissioners should be examined in the context of the powers that court commissioners had and were exercising in 1966, when the present constitutional provision was adopted." (*Rooney v. Vermont Investment Corp*. (1973) 10 Cal.3d 351, 362.)

The Court went on to give many examples of where a commissioner *could* make a final determination, even in the absence of a stipulation by the parties. But the Court drew the line where the underlying issue was one's liberty.

> Our courts have routinely held that actions that may deprive an individual of his or her liberty are not subordinate judicial duties. One appellate court explained: "[T]he issuance of an order which can have the effect of placing the violator thereof in jail is not a 'subordinate judicial duty.' Before a commissioner may act as a judge the *parties litigant* must so stipulate. Since petitioner was not a party to the stipulation at either hearing . . . the commissioner's acts were null and void." (*In re Plotkin, supra*, 54 Cal.App.3d at p. 1017.) In *Nierenberg v. Superior Court* (1976) 59 Cal.App.3d 611, 620, the appellate court held that in the absence of a stipulation, a court commissioner does not have the authority to conduct a contempt proceeding, even if the parties

stipulated to the commissioner conducting the underlying trial.

Commissioner orders revoking probation also require stipulation by the parties.

In *People v. Tijerina, supra*, 1 Cal.3d 41, 48–49, a commissioner's order revoking probation was reversed because the defendant did not stipulate to the commissioner acting as a temporary judge. "When the parties have not stipulated that a commissioner may act as a temporary judge, the commissioner has only the authority to perform '"subordinate judicial [duties]"' which do not include the power to sentence a defendant." (*People v. Haendiges* (1983) 142 Cal.App.3d Supp. 9, 15.)

Accordingly, the Court found that Berch's parole revocation matter was analogous, and reversed the finding by the Commissioner below.

The published authorities clearly distinguish between limited duties that are subordinate judicial duties a commissioner may perform without a stipulation, and duties that involve the deprivation of an individual's liberty, which are not subordinate judicial duties. The parole revocation hearing in this case included the possibility of the deprivation of defendant's liberty. Our holding here is consistent with the longstanding authority of the California Supreme Court and other California courts. Therefore, we must reverse the July 7, 2017 postjudgment order revoking defendant's parole and committing him to 120 days in jail. …

The postjudgment order is reversed for further proceedings on defendant's parole revocation matter.

LWOP FELONY MURDER "SPECIAL CIRCUMSTANCE" FINDING REVERSED BECAUSE "RECKLESS INDIFFERENCE" FACTOR WAS RELATED ONLY TO EVENTS OCCURRING *AFTER* THE OFFENSE

In re Anthony Taylor

--- CA5th ---; CA1(1); No. A155328
April 19, 2019

This published case establishes that a person convicted earlier of LWOP where the "special circumstance" finding of "reckless indifference to human life" was related to events occurring *after* the killing involved, is entitled to habeas corpus relief and resentencing.

Petitioner Anthony Taylor participated in an attempted robbery at a Livermore liquor store during which one of his accomplices shot to death a store employee, 70-year-old Kathryn Cary. In 1994, a jury convicted Taylor of first degree felony murder and found that the killing occurred in the commission of an attempted robbery that he aided and abetted "as a major participant" and "with reckless indifference to human life," a special circumstance requiring a sentence of life in prison without the possibility of parole under Penal Code section 190.2, subdivision (d) (section 190.2(d)).

In 2018, Taylor filed the instant petition for a writ of habeas corpus seeking to have the special circumstance vacated under *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), which clarified "what it means for an aiding and abetting defendant to be a 'major participant' who acted with a 'reckless indifference to human life.' " (*In re Miller* (2017) 14 Cal.App.5th 960, 964 (*Miller*).) Under

this authority, a defendant acts with a reckless indifference to human life when he or she "knowingly creat[es] a 'grave risk of death.' " (*Banks*, at p. 808.) We hold that evidence of a defendant's actions after a murder betraying an indifference to the loss of life does not, standing alone, establish that the defendant knowingly created a grave risk of death. Because there is no other evidence that Taylor had such an intent when he participated in the attempted robbery, we grant his petition to vacate the special circumstance.

Because this ruling hinges on the facts of the case (which CLN readers might wish to compare with their own situations), we report the Court's factual findings from Taylor's record on direct appeal of his conviction.

"On the night of May 15, 1991, 70-year-old Kathryn Cary was shot and killed as she was making a night deposit of the receipts of the liquor store where she was employed. There was evidence that Marzett Davis, Anthony Taylor, Tyree Shackelfoot[,] and Theodore Lawless had planned to rob the store's receipts, and that Davis attempted the robbery and shot Cary while the other men waited in a car driven by Taylor. . . .

"At least one week before the crimes, Taylor and Shackelfoot were in the parking lot of Ernie's Liquor Store watching Ernie, an employee, walk with the store's receipts to a nearby bank. They discussed the fact that Ernie's did not seem to be taking any precautions to prevent theft of the receipts. On May 14, Taylor drove to Shackelfoot's house. Davis, with Lawless in the car, drove by. Taylor flagged Davis to follow him. They then drove to Ernie's. Davis joined Taylor and Shackelfoot in their car, where they told him about the lack of security at the liquor store. They planned a robbery, deciding where they would park the car, where the person who was to take the money would stand, and how they could get away after the robbery. They at first planned to commit the robbery over the weekend, but when they realized that the liquor store's take for May 15 would be swollen by Lotto receipts, they decided to commit the offense on that date. The plan was that Davis would grab the sack of receipts as a store employee was depositing it in a bank night [-]deposit box. He would then run to the car where the others were waiting, and they would make their escape. On the night of May 15 the men met at Taylor's apartment. Everyone but Davis got into Taylor's car. Davis went to his own car, opened the hood[,] and took out a gun, which he put in his waistband. He then got into Taylor's car. Davis was dressed all in black. With Taylor driving, they drove to Ernie's, parking on the street as planned. Davis got out of the car and moved to the corner of the bank building. After a[]while Davis returned to the car, saying they must have missed the deposit. Taylor told him to wait a little longer, and Davis returned to his post. About five or ten minutes later the men in the car saw Davis run in the direction of the bank. The others' view of the robbery was blocked by a corner of the building, but they heard gunshots, and heard a woman say, '[Y]ou shot me.' Davis ran back to the car but Taylor, noticing that a tan car or van had appeared, told Davis to keep going. The tan car attempted to follow Davis, but he jumped through some bushes and disappeared. The tan car went back to the parking lot where the victim lay. Taylor

then started his car and picked up Davis. The man who drove the tan car testified that he noticed a man and a woman fighting over something. He heard three shots and saw a flash after which the woman dropped to the ground. The man ran away and the witness attempted to follow. When he was unable to do so he returned, finding the woman lying in a pool of blood. The victim was Kathryn Cary, an employee of Ernie's [L]iquors. She died approximately one-half hour later. The store's deposits were in a bag that was discovered in the open night[-]deposit drawer. On the following day, Shackelfoot asked Taylor what they should do. Taylor responded, 'Fuck that old bitch,' telling Shackelfoot to keep quiet about the incident because they would be just as guilty as Davis. Davis testified [on] his own behalf. He admitted that he and Taylor planned an armed robbery, and that he had armed himself with a .380 on the night in question. Before he was able to commit the robbery, however, he heard voices and saw a man and a woman struggling. He saw the man swing at the woman, after which he heard two shots, and ran away."

From this factual predicate, the jury found Taylor guilty as follows.

> The jury found Taylor guilty of first degree murder as an aider and abettor of Davis in the attempted robbery and found true the allegation that Taylor or a principal was armed during the offense and aided and abetted the robbery as a major participant and with reckless indifference to human life. The jury also convicted Taylor of attempted robbery and found true that he or a principal was armed during the offense. He was sentenced to life without the possibility of parole for the murder, plus a one-year term for the arming enhancement, and an 18-month sentence for the attempted robbery was imposed and stayed.

Taylor's claims on direct appeal that he was not a "major participant" and that he had acted with "reckless indifference to human life" were rejected back then. However, upon Taylor's recent habeas petition, the CA Supreme Court later remanded the case back to the Court of Appeal to follow the intervening 2015 *Banks* ruling. It is from this remand that this new decision is grounded.

The all-important first finding here is that Taylor's claim today is not time or procedurally barred because of his older conviction and final appeal. The Court's analysis here is good case law for CLN readers to take note of when considering reopening their old cases based on newer CA Supreme Court holdings like *Banks*, and is fully reported here.

> Before reaching the merits of Taylor's claim, we address the Attorney General's contentions that it is procedurally barred because (1) it was raised and rejected on appeal; (2) substantial-evidence claims are not cognizable in habeas proceedings; and (3) the petition is untimely. We do so "out of an abundance of caution," as "[w]ere there a valid procedural bar, we would have expected [our state] Supreme Court to deny the petition rather than issuing an order to show cause returnable before this court." (*Ramirez, supra*, 32 Cal.App.5th at p. 406, fn. 11.)

The Attorney General begins by invoking the same two procedural rules that he relied on in *Miller* and *Ramirez*. (*Ramirez, supra*, 32 Cal.App.5th at pp. 407-408; *Miller, supra*, 14 Cal.App.5th at pp. 977-979.) First, under *In re Waltreus* (1965) 62 Cal.2d 218 (*Waltreus*), " 'legal claims that have previous-

ly been raised and rejected on direct appeal ordinarily cannot be reraised in a collateral attack by filing a petition for a writ of habeas corpus.' " (*Miller*, at p. 978.) And second, under *In re Lindley* (1947) 29 Cal.2d 709 (*Lindley*), " 'routine claims that the evidence presented at trial was insufficient' " cannot be raised in a habeas petition. (*Miller*, at p. 979.)

In concluding these rules did not bar the petitioner's claim in *Miller*, the Second District Court of Appeal "beg[a]n with an overarching, dispositive point: Federal due process guarantees require reversal of [a] special circumstance finding [that is not supported by substantial evidence] regardless of the Attorney General's California-law-based procedural arguments." (*Miller, supra*, 14 Cal.App.5th at p. 977; accord *Ramirez, supra*, 32 Cal.App.5th at pp. 406-407.) As *Miller* explained, in *Fiore v. White* (2001) 531 U.S. 225 (*Fiore*), the United States Supreme Court held that where, as here, a state high court's decision " ' "did not announce a new rule of law" ' but rather ' "merely clarified the plain language of the statute," ' " the Due Process Clause of the Fourteenth Amendment forbids the state from convicting a defendant " 'for conduct that its criminal statute, as properly interpreted, does not prohibit.' " (*Miller*, at pp. 977-978, quoting *Fiore*, at p. 228; accord *Ramirez, supra*, 32 Cal.App.5th at pp. 406-408.) And although the federal Constitution therefore required overturning the special circumstance, regardless of the California habeas procedural requirements relied on by the Attorney General, *Miller* went further and concluded that those requirements "in fact stand[] in harmony with federal due process principles." (*Miller*, at p. 978.)

In urging us not to follow *Miller* (and by extension, *Ramirez*), the Attorney General ignores *Miller's* conclusion that a special circumstance that lacks substantial evidence cannot stand under *Fiore*. Instead, he claims that *Miller's* reasoning "cannot be squared with *Waltreus* or *Lindley*." We fully agree with *Miller's* explanation of why, even apart from federal law, these rules do not bar claims such as Taylor's, and we find it unnecessary to reiterate that reasoning here. (*Miller, supra*, 14 Cal.App.5th at p. 978; accord *Ramirez, supra*, 32 Cal.App.5th at p. 408.)

The Attorney General also raises a potential procedural bar not considered in either *Miller* or *Ramirez*: that the petition is untimely because of Taylor's "[u]njustified delay" in bringing it. "A criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner. 'It has long been required that a petitioner explain and justify any significant delay in seeking habeas corpus relief.' " (*In re Reno* (2012) 55 Cal.4th 428, 459.) In determining whether a petition is timely, the basic issue is whether it was " ' "filed as promptly as the circumstances allow." ' " (*Id*. at p. 460.)

The Attorney General suggests that the petition was brought after substantial delay because it was "filed over 20 years after the finality of direct review." But substantial delay is " ' "measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." ' " (*In re Reno, supra*, 55 Cal.4th at p. 460.) *Banks* and *Clark* significantly affected the interpretation of section 190.2 (d), and we conclude that any delay can be measured only from the dates of those decisions, not the disposition of Taylor's substantial-evidence claim on direct appeal. *Banks* was decided on July 9, 2015, and became final when the time for petitioning for a writ of certiorari in the United States Supreme Court expired, on October 7, 2015. (See *In*

re Lucero (2011) 200 Cal.App.4th 38, 44; 28 U.S.C. § 2101(b); U.S. Supreme Ct. Rules, rules 13(1), (3).) *Clark* was decided on June 27, 2016, and four days later Taylor filed his first habeas petition in the superior court. Even putting aside *Clark*, we cannot say that Taylor's filing of a petition less than a year after *Banks* became final constituted a substantial delay. (See, e.g., *Lucero*, at pp. 44-45 [no substantial delay where petition based on new state Supreme Court authority filed 10 months after decision became final].)

> In short, we conclude that Taylor's claim is not barred by California habeas procedural rules, and we turn to address it on the merits.

The Court then expounded on why, under the facts of this case, there was not substantial evidence to support a "reckless indifference" finding.

> We start with the general proposition that "felony murderers . . . who simply had awareness their confederates were armed and armed robberies carried a risk of death . . . lack the requisite reckless indifference to human life" because "only knowingly creating a 'grave risk of death' satisfies the constitutional minimum." (*Banks, supra*, 61 Cal.4th at pp. 808-809.) Thus, where, as here, a defendant's "culpability for [the] murder resides in his [or her] role as planner and organizer, or as the one who set the crime in motion, rather than in his [or her] actions on the ground in the immediate events leading up to [the] murder," the plan must have some aspect "that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Clark, supra*, 63 Cal.4th at p. 623.)

Here, Taylor did not supply Davis with the murder weapon, and the evidence was inconclusive as to whether Taylor knew Davis had a gun that night. The jury could have reasonably inferred that Taylor was aware Davis had ready access to guns, but it was unclear whether Taylor actually saw Davis retrieve the weapon. While the previous opinion referred to Davis's testimony "that he and Taylor planned an armed robbery," that testimony established only that Davis planned an armed robbery. Davis testified that he brought the gun intending only to scare the victim, but there was no evidence he and Taylor talked beforehand about the use of a gun. Nor did Taylor have or use his own weapon during the crime. Thus, even assuming there was substantial evidence that Taylor knew Davis was armed, there is little about Taylor's use or knowledge of firearms that suggests he appreciated the planned robbery posed a heightened risk of death.

In addition, and as was true of the *Banks* petitioner, "nothing in the record reflects that [Taylor] knew there would be a likelihood of resistance and the need to meet that resistance with lethal force." (*Banks, supra*, 61 Cal.4th at p. 811.) The evidence showed that Taylor and the other men planned for Davis to quickly grab the money from a lone employee late at night after the liquor store had closed, reducing the risk of violence. (See *Clark, supra*, 63 Cal.4th at p. 622 ["a defendant's apparent efforts to minimize the risk of violence can be relevant to the reckless indifference to human life analysis"].)

Moreover, the planned duration of the snatch-and-grab robbery was short. Although Davis had to wait some time for Cary to emerge from the store, nothing about his actions while doing so would have indicated to Taylor that he might become violent. (See *Clark, supra*, 63 Cal.4th at p. 621.) And

once Davis confronted Cary, the struggle and ensuing shooting happened almost immediately. Thus, as in other decisions overturning special circumstances, including *Banks* and *Clark*, the evidence tended to show that the shooting was a "somewhat impulsive" response to the victim's unexpected resistance, as opposed to the culmination of a prolonged interaction that increased the opportunity for violence. (*Miller, supra*, 14 Cal.App.5th at p. 975; see *Clark*, at p. 539; *Banks, supra*, 61 Cal.4th at pp. 795, 805; *Ramirez, supra*, 32 Cal.App.5th at p. 404; compare *Tison, supra*, 481 U.S. at pp. 151-152; *Clark*, at p. 620 [discussing *Tison*].)

Nor was there any evidence that Davis had killed before or that Taylor was aware of previous violent behavior on Davis's part. (See *Clark, supra*, 63 Cal.4th at p. 621; *Banks, supra*, 61 Cal.4th at pp. 810-811; *Miller, supra*, 14 Cal.App.5th at p. 976.) The two men were good friends, and Taylor was likely aware of Davis's involvement in various illegal activity, including drug sales, but other decisions have refused to attribute significance to prior criminal activity that did not involve deadly violence. (*Banks*, at p. 810-811 [defendant member of same gang as killer, but no evidence they "ever participated in shootings, murder, or attempted murder"]; *Ramirez, supra*, 32 Cal.App.5th at p. 405 [petitioner's knowledge that shooter was gang member and "had a history of delinquency" did not support inference that petitioner could expect shooter would use deadly force]; *Miller*, at p. 976 [insufficient that defendant and killer were in same gang and had committed other robberies together].)

Taylor's physical position during the crime also weighs in his favor. Although Taylor was parked on the street near where the killing occurred, he never got out of the car and had no opportunity to prevent the shooting. Indeed, it appears that Taylor could not even see Davis's interaction with Cary. Rather, Taylor's primary role was to be the getaway driver, and he had no direct involvement in the shooting. In this respect, his actions were more akin to those of offenders in cases overturning special circumstances. (See, e.g., *Clark, supra*, 63 Cal.4th at pp. 620-621 [defendant who was in store parking lot did not direct shooter to use lethal force or have chance to intervene]; *Ramirez, supra*, 32 Cal.App.5th at pp. 404-405 [petitioner may have been able to see and hear what was happening, but was not "close enough to exercise a restraining effect on the crime or his colleagues"]; compare, e.g., *Tison, supra*, 481 U.S. at pp. 140, 158 [petitioners "actively involved in every element of the kidnaping-robbery and physically present during the entire sequence of criminal activity," including when killer voiced intention to kill]; *In re Loza* (2017) 10 Cal.App.5th 38, 51, 53 [petitioner who was also in store where killing occurred had "time to observe and react before the murder" because he heard killer threaten to shoot store clerk and count to five before doing so].)

Indeed, the evidence most *unfavorable* to Taylor was of his actions *after* the shooting.

> But as we explain, given the lack of evidence that Taylor planned anything more dangerous than "a garden-variety armed robbery" (*Banks, supra*, 61 Cal.4th at p. 802), his behavior after the fact revealing an indifference to Cary's death, while reprehensible, does not show he acted with reckless disregard to the risk to human life posed by the planned robbery.

First, both the superior court and this division emphasized that Taylor made no attempt to help Cary after he knew she was shot, instead helping Davis to flee the scene. But there is no evidence that Taylor appreciated

how badly Cary was wounded. (See *Bennett, supra*, 26 Cal.App.5th at p. 1026 [petitioner's flight "[did] not support an inference [he] necessarily understood a killing had occurred"].) And it appears Taylor knew help was arriving: He told Davis not to get in the car when he saw another vehicle, and he did not drive away with Davis until after that vehicle headed toward Cary's location. In fact, help reached her almost immediately, and there was no evidence that she might have survived had Taylor acted differently. (See *Clark, supra*, 63 Cal.4th at p. 620.)

Second, both courts also focused on testimony by Shackelfoot that when he asked Taylor the following day what they should do, Taylor said, "Fuck that old bitch," and advised Shackelfoot not to tell anyone what had happened. This division's prior opinion suggested that this comment was evidence that Taylor was not just "recklessly indifferent" to human life, "but callously indifferent." The superior court similarly remarked that the comment exemplified a "callous indifference to human life."

We agree that the remark was abhorrent, but the governing standard as explained in *Banks* and *Clark* is not satisfied with evidence of a general indifference to human life, but instead with evidence of a reckless indifference, which is shown when the defendant knowingly creates a serious risk of death. (*Banks, supra*, 61 Cal.4th at pp. 808-809.) Thus, even if a defendant is unconcerned that a planned felony resulted in death, as Taylor was, there must also be evidence that the defendant's participation in planning or carrying out the crime contributed to a heightened risk to human life. While Taylor's behavior after the murder may be relevant to whether he acted with the requisite mind state, under *Banks* and *Clark* it is insufficient, standing alone, to constitute substantial evidence that he acted with reckless indifference to human life in participating in the attempted robbery.

The Court then turned to what Taylor should now do. It concluded that Taylor should seek relief in the Superior Court below, including a request for relief under recently enacted Senate Bill 1437.

Taylor argues that if we vacate the special circumstance we must also vacate the felony-murder conviction under Senate Bill No. 1437. Although we recognize that the new legislation may entitle him to such relief, we conclude that he must seek it in the trial court in the first instance.

As noted above, Senate Bill No. 1437 amended section 189 to provide that a defendant, like Taylor, who was not the actual killer or did not have an intent to kill is not liable for felony murder unless he or she "was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e)(3); Stats. 2018, ch. 1015, § 3.) We agree with him that the standard under section 189, subdivision (e)(3) for holding such a defendant liable for felony murder is the same as the standard for finding a special circumstance under section 190.2(d), as the former provision expressly incorporates the latter.

Senate Bill No. 1437 applies to defendants, like Taylor, whose convictions are final. It added section 1170.95, which allows those "convicted of felony murder . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts." (§ 1170.95, subd. (a).) Before such a petition may be filed, the following three conditions must be met: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder . . . . [¶] (2) The petitioner was convict-

ed of first degree murder or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted of first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(1)-(3).)

Upon receiving a petition that is supported by the petitioner's declaration that all three conditions are met and that makes a "prima facie showing that the petitioner falls within the provisions of [section 1170.95]," the sentencing court must issue an order to show cause. (§ 1170.95, subd. (c).) It must then "hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts." (§ 1170.95, subd. (d)(1).) Should they wish, "[t]he parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner." (§ 1170.95, subd. (d)(2).) If, however, a hearing occurs, "the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. . . . The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).)

Two recent Court of Appeal decisions have held that defendants cannot seek relief under Senate Bill No. 1437 in direct appeals but instead must file petitions under section 1170.95. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 727-729; accord *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1148, 1153.) We need not decide whether the same reasoning applies to preclude the seeking of such relief in a habeas petition. (See § 1170.95, subd. (f) ["This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner"].)

> Here, Taylor mentioned Senate Bill No. 1437 in passing in his habeas petition, which was filed in the Supreme Court before the new legislation took effect. But he did not brief the issue of his entitlement to have the murder conviction itself vacated until he filed his traverse, and the Attorney General did not address the issue. Indeed, the Court issued an order to show cause "why petitioner is not entitled [to] relief under [*Banks*]," a decision that does not directly implicate Senate Bill No. 1437. Under these circumstances, we conclude that the more efficient course is for Taylor to seek to overturn his murder conviction by filing a section 1170.95 petition in the superior court. Once any such petition is filed, the parties will have the opportunity to address the effect of our holding on Taylor's entitlement to relief under Senate Bill No. 1437, an issue on which we express no opinion.

Accordingly, the Court granted Taylor's petition, and remanded to the lower court for resolution.

> The petition for a writ of habeas corpus is granted. The true finding on the robbery-murder special circumstance is vacated, and the matter is remanded with directions to resentence Taylor accordingly.

CDCR'S ATTEMPT TO DENY PROP. 57 PAROLE HEARINGS TO NON-VIOLENT OFFENDERS BECAUSE OF IN-PRISON RVRS REJECTED BY COURT OF APPEAL

In re Tijue McGhee

--- CA5th ---; CA1(4); No. A153721
April 29, 2019

Proposition 57, The Public Safety and Rehabilitation Act of 2016, added a provision to California's Constitution stating: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (Cal. Const., art. I, § 32, subd. (a)(1).)

Since that time, CDCR has been trying to carve out exceptions to that rule. In *In re Edwards* (2018) 26 Cal.App.5th 1181, Division Five of the Second Appellate District struck down a department regulation that excluded nonviolent third strike offenders sentenced to indeterminate terms from parole consideration. The court rejected the department's explanation that "parole eligibility only applies to determinately sentenced inmates and, furthermore, public safety requires their exclusion" (*id*. at p. 1188), finding the argument "at war with the straightforward textual conclusion" (*id*. at p. 1190) that eligible inmates sentenced to indeterminate terms are entitled to parole consideration.

Later, In *In re Gadlin* (2019) 31 Cal.App.5th 784, the same court held that a revised regulation adopted following the Edwards decision could not validly exclude from parole consideration inmates previously convicted of an offense requiring registration as a sex offender but who are currently serving time for a nonviolent felony. In response to the department's argument that "registrable inmates represent an unreasonable risk to public safety," the court ruled "[t]hese policy considerations . . . do not trump the plain text of section 32, subdivision (a)(1)." (31 Cal.App.5th at p.789.)

In *McGhee*, the court now took up the same concern for CDCR exclusions based on in-prison misbehavior.

> We now hold that the department's creation of a screening and referral process that excludes from parole consideration more than a third of otherwise eligible inmates based on their in-prison conduct is at odds with the clear language of the constitutional amendment. Despite the policy considerations advanced by the department, section 32, subdivision (a)(1) mandates that these prisoners receive parole consideration if they have been convicted of a nonviolent felony and have served the full term of their primary offense.

McGhee's criminal record is pretty typical of many CDCR clients.

> Petitioner Tijue Adolphus McGhee pleaded guilty in 2012 to first degree burglary (Pen. Code, §§ 459, 460, subd. (a)). He received a four-year prison sentence for the burglary, plus five additional years for a prior felony conviction (Pen. Code, § 667, subd. (a)(1)).

The People of the State of California passed Prop. 57, which aimed at reducing time spent in prison by non-violent offenders.

> In November 2016, the electorate passed Proposition 57, The Public Safety and Rehabilitation Act of 2016. Proposition 57 added section 32 to article I of

the state Constitution. Subdivision (a) of section 32 states that its provisions are "enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law."

Under subdivision (a)(1) of section 32, "[a]ny person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." For that purpose, "the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." (§ 32, subd. (a)(1)(A).) Subdivision (b) of section 32 directs the department to "adopt regulations in furtherance of these provisions."

CDCR responded by promulgating new regulations to comport with Prop. 57.

In response, the department created a "new parole consideration process for nonviolent offenders" (see "The Initial Statement of Reasons in Support of Regulations to Be Adopted in Compliance with New Section 32 of Article I of the California Constitution"), patterned largely after the procedures that it had previously adopted to screen nonviolent second-strikers for parole consideration to comply with a federal court mandate to reduce California's prison population. (See, e.g., *Coleman v. Brown* (E.D. Cal. Feb. 10, 2014, No. 2:90-cv-0520 LKK DAD (PC)) 2014 U.S.Dist. Lexis 17913.) The department promulgated in division 3 of title 15 of the California Code of Regulations a new subchapter 5.5, titled "Parole Consideration." Section 3491 of the new subchapter specifies those inmates who are deemed nonviolent offenders and thus become "eligible" for parole consideration. The provisions of section 3491 are not challenged in the present action.

However, CDCR also added its own set of "qualifications" to receive the benefit of Prop. 57. It is those restrictions, embodied in 15 CCR § 3492, that the Court of Appeal takes issue with here.

[S]ection 3492, titled "Public Safety Screening and Referral," provides that eligible inmates will first be screened by the department and referred to the board "for parole consideration under [the regulations concerning hearings before the board]" only if the inmates satisfy eight criteria, all of which require the absence of serious or multiple disciplinary violations while in prison. According to the statement of reasons, "Under these criteria, nonviolent offenders will automatically be screened out if their prison records establish they have recently committed serious misconduct indicating they pose an unreasonable risk of violence." (Statement of Reasons, p. 17.)

CDCR laid out its case against McGhee.

On July 1, 2017, McGhee was advised that although he is "eligible," he would not be referred to the board for parole consideration because he did not satisfy two of the criteria. First, McGhee had "served a Security Housing Unit term in the past five years" that was not assessed "solely for the inmate's safety" (Cal. Code Regs., tit. 15, § 3492, subd. (c)(3).) According to the state-

ment of reasons, "[p]lacement in a Security Housing Unit is reserved for the most serious offenses committed in prison." Second, McGhee had "been found guilty of a serious rule violation for a Division A-1 or Division A-2 offense . . . within the past five years." (Cal. Code Regs., tit. 15, § 3492, subd. (c)(4).) The A-1 and A-2 offenses are considered by the department to be tantamount to "in-prison felony offenses" (Statement of Reasons, p. 18) and range from murder to distribution of a controlled substance. (Cal. Code Regs., tit. 15, § 3323, subds. (b), (c).) McGhee's underlying offense under both criteria was possession of an inmate-manufactured weapon, to which he pleaded guilty in August 2015.

McGhee's administrative appeal of his parole hearing denial was denied, and the Court then accepted his habeas petition challenging it.

McGhee challenged CDCR's regulations as being inconsistent with the enabling statute of Prop. 57.

> McGhee contends the regulations are invalid because they are inconsistent with the mandate in section 32, subdivision (a)(1) that "[a]ny person convicted of a nonviolent felony and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." McGhee argues that the term "parole consideration" means consideration for release by the board. Because the challenged regulations preclude consideration by the board for otherwise eligible inmates who have committed certain in-prison offenses, McGhee contends the regulations conflict with section 32 and must be stricken.

CDCR attempted to explain away its self-determined regulations.

> The department defends the regulations, claiming they are part of a "two-tiered" process that is "consistent with the term 'parole consideration.' " The department describes the process as follows: "The first phase of the process objectively evaluates whether the inmate's file contains one or more of the eight criteria [the department] has identified as categorical proof the inmate being reviewed 'pose[s] an unreasonable risk of violence' based on he or she having 'recently committed serious [in-prison] misconduct.' . . . If none of the eight criteria are present, the inmate's file is next reviewed holistically by a board official to determine whether the inmate's release poses an unreasonable risk of future violence and/or risk of significant criminal activity." The department contends that inmates who "fail to advance to the second phase of the parole-review process are not deprived of parole consideration." Rather, "those inmates are considered but denied parole during the first stage of the process."

The Court stated the legal standard for testing such regulations, particularly as to Sec. 32.

> The standard of review in evaluating the validity of the department's regulations was explained in *In re Edwards, supra*, 26 Cal.App.5th at page 1189: " 'In order for a regulation to be valid, it must be (1) consistent with and not in conflict with the enabling statute and (2) reasonably necessary to effectuate the purpose of the statute. (Gov. Code, § 11342.2).' [Citations.] Therefore, 'the rulemaking authority of the agency is

circumscribed by the substantive provisions of the law governing the agency.' [Citation.] ' "The task of the reviewing court in such a case is to decide whether the [agency] reasonably interpreted [its] legislative mandate. . . . Such a limited scope of review constitutes no judicial interference with the administrative discretion in that aspect of the rulemaking function which requires a high degree of technical skill and expertise. . . . [T]here is no agency discretion to promulgate a regulation which is inconsistent with the governing statute. . . . Whatever the force of administrative construction . . . final responsibility for the interpretation of the law rests with the courts. . . . Administrative regulations that alter or amend the statute or enlarge or impair its scope are void." ' "

In construing section 32, subdivision (a)(1), we apply normal standards governing the interpretation of constitutional provisions. " '[O]ur primary concern is giving effect to the intended purpose of the provisions at issue. [Citation.] In doing so, we first analyze provisions' text in their relevant context, which is typically the best and most reliable indicator of purpose. [Citations.] We start by ascribing to words their ordinary meaning, while taking account of related provisions and the structure of the relevant statutory and constitutional scheme. [Citations.] If the provisions' intended purpose nonetheless remains opaque, we may consider extrinsic sources, such as an initiative's ballot materials. [Citation.] Moreover, when construing initiatives, we generally presume electors are aware of existing law. [Citation.] Finally, we apply independent judgment when construing constitutional and statutory provisions.' " (*In re Edwards, supra*, 26 Cal.App.5th at p. 1189)

CDCR argued that there were some parole hearings that would come before the Board, and others not. The Court rejected this two-tier approach.

> Applying these well-settled principles, the process the department has created in section 3492 of its regulations, by which the department screens out otherwise eligible inmates from parole consideration by the board, cannot be upheld. The permissibility of the "two-tiered" process is based on the premise that the "parole consideration" mandated by section 32, subdivision (a)(1), need not necessarily be conducted by the board, and that the department itself may determine that an inmate is unsuitable for parole. This premise is unsupportable.

Relying on the seminal parole case of *In re Lawrence*, the Court found that only the Board had power to hear parole applications.

> The reference to parole consideration in the constitutional amendment can only be understood to mean parole consideration by the board. The board is "the administrative agency within the executive branch that generally is authorized to grant parole and set release dates." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1201.) In every statute and regulation concerning the subject of parole, "parole consideration" refers to consideration for parole by the board. Within title 7 of the Penal Code, governing administration of the state correctional

system, chapter 3, commencing at section 5075, creates the board and specifies its authority. The board is empowered to, among other duties, "[c]onduct parole consideration hearings" for adults under the department's jurisdiction. (Pen. Code, § 5075.1, subd. (a).) Within title 15 of the California Code of Regulations, Division 2 addresses the role and procedures of the board. Section 2000, subdivision (b)(10) of the regulations defines the board as "[t]he administrative board responsible for setting parole dates, establishing parole length and conditions, . . . granting, rescinding, suspending, postponing or revoking paroles . . . ." The board's regulations are replete with references to "parole consideration," referring always to consideration by the board alone. (E.g., Cal. Code Regs., tit. 15, § 2152 [administrative review to determine whether to advance date of inmate's "next parole consideration hearing"]; Cal. Code Regs., tit. 15, art. 5, § 2280 et seq. ["Parole Consideration Criteria and Guidelines for Life Prisoners"]; Cal. Code Regs., tit. 15, § 2280 ["life prisoner shall be considered for parole for the first time at the initial parole consideration hearing"]; Cal. Code Regs., tit. 15, § 2304 ["Initial Parole Hearing: [¶] (a) . . . At this hearing the prisoner shall be considered for parole for the first time. The hearing panel shall first determine whether the prisoner is unsuitable for parole under the criteria in Section 2316."]; Cal. Code Regs., tit. 15, art. 7, § 2315 et seq. ["Parole Consideration Criteria and Guidelines for [Indeterminate Sentence Law] Prisoners"]; Cal. Code Regs., tit. 15, art. 11, § 2400 et seq. ["Parole Consideration Criteria and Guidelines for Murders . . . and Specified Attempted Murders"]; Cal. Code Regs., tit. 15, art. 12, § 2420 et seq. ["Parole Consideration Criteria and Guidelines for Habitual Offenders Sentenced to Life Terms under Penal Code Section 667.7"].) Under these regulations, the board conducts a "parole consideration hearing" for inmates at which it reviews "[a]ll relevant, reliable information available" and first determines whether the inmate will pose an unreasonable risk of danger to society if released from prison. (E.g., Cal. Code Regs., tit. 15, §§ 2281, subds. (a), (b); 2402, subd. (a), (b); 2422, subds. (a), (b).) "Title 15, section 2281 of the California Code of Regulations sets forth the factors to be *considered by the Board* in carrying out the mandate of the statute. The regulation is designed to guide *the Board's assessment* of whether the inmate poses 'an unreasonable risk of danger to society if released from prison.' " (*In re Lawrence, supra*, 44 Cal.4th at p. 1202, italics added.)

Rejecting CDCR's arguments to the contrary, the Court held that only the Board had power to hear parole applications.

Deeming the department's newly created screening process consistent with, much less a part of, the parole consideration mandated by section 32, subdivision (a)(1) is a misconstruction of the language of the constitutional provision and is contrary to the intent of section 32, subdivision (a)(1). The parole consideration process defined in division 2 of title 15 specifies that the board shall determine whether an inmate is or is not suitable for parole. While the criteria under the department's new screening process undoubtedly bear on whether an inmate is suitable for parole, that ultimate determination is to be made by the

board, not the department.

The Court came down particularly hard on CDCR's claim that rejecting its internal screening would endanger public safety.

> We unequivocally reject the assertion that compliance with Proposition 57 will undermine public safety. Before granting parole the board will continue to review the record of an eligible inmate to determine whether the inmate presents a risk to public safety. (Cal. Code Regs., tit. 15, § 2449.4, subd. (b).) In doing so, the board must consider "all relevant and reliable information." (*Ibid*.) There is no reason to assume that the board will be insensitive to the concern for public safety or will grant parole to those who present a public danger. By enforcing the mandate of section 32, subdivision (a)(1), we hold that McGhee and similar inmates are entitled to parole consideration, not that they are necessarily entitled to release.

The Court granted McGhee's writ, noting that his success on gaining parole from the Board would still go through the Board's process of denying parole to candidates they deem a danger to public safety. CDCR's section 3492 was ordered voided and repealed.

> The petition for habeas corpus is granted. The department is directed to treat as void and repeal the portions of section 3492 of title 15 of the California Code of Regulations challenged in this proceeding, and to make any further conforming changes necessary to render the regulations consistent with section 32, subdivision (a)(1) of article I of the California Constitution and this opinion. McGhee shall be referred to the board for parole consideration within 60 days after this court issues its remittitur, and the department shall thereafter proceed as required by law.

AFTER *CHIU* RELIEF REDUCED CRIME TO SECOND-DEGREE MURDER, DEFENDANT WAS NOT ELIGIBLE FOR FURTHER SB 1437 RELIEF, BECAUSE FACTS SHOW HE WAS DIRECT AIDER AND ABETTOR

P. v. Joseph Gentile, Jr.

--- CA5th ---; CA4(2); No. E069088
May 30, 2019

A jury convicted Joseph Robert Gentile of first degree murder in connection with the 2014 beating death of Guillermo Saavedra by means of using a golf club, wooden chair, and a beer bottle. The prosecution's main witness testified upon a grant of use immunity, but, depending on which statements the jury believed, she may have actively participated in the beating using those implements. The jury found untrue an allegation that defendant used a deadly or dangerous weapon, and he was sentenced to 25 years to life.

That sentence was reduced to 15 years to life for second degree murder, pursuant to *P. v. Chiu*, because the jury could have found Gentile guilty based on the now-outlawed "natural and probable consequences theory" of felony murder.

> Defendant appealed again, raising the issues we had left undecided in the first appeal, affirming the judgment as modified by reducing court facilities assessments. (*People v. Gentile* (Nov. 15, 2018, E069088 [nonpub. opn.](*Gentile II*).) Defendant then petitioned for review arguing that he was entitled to a reversal of his murder conviction pursuant to Senate Bill No. 1437.

The California Supreme Court granted review and transferred the case back to us with directions to vacate our decision filed on November 15, 2018 in defendant's second appeal, and to reconsider the cause in light of Senate Bill No. 1437, and our determination in the defendant's first appeal that it was probable the jury convicted defendant of murder on the theory he aided and abetted Saundra Roberts in a target crime that, as a natural and probable consequence, resulted in her murder of the victim. (See *Gentile I, supra*, E064822, pp. 12-14.)

After reconsidering the matter in light of Senate Bill No. 1437, we again affirm.

The error that caused reversal of his first degree conviction did not require reversal of his later second degree conviction, under SB 1437.

In the first appeal, defendant relied on *Chiu, supra*, 59 Cal.4th 155, to argue that his first degree murder conviction should be reversed because the jury was instructed on an impermissible natural and probable consequences theory of liability. At trial, the jury had been instructed that it could convict defendant of first degree murder if it concluded defendant directly committed the murder, or if it found he aided and abetted the perpetrator (Roberts) in committing the murder. As to this second theory, the jury was further instructed that he could be convicted of first degree murder if he committed an aggravated assault on the victim (former § 245, subd. (a)(1)), while the coperpetrator com-

mitted an assault with a deadly weapon, and the victim died as a natural and probable consequence of the assault with a deadly weapon. (*Gentile I, supra*, E064822, p. 12.) We agreed this was error in reversing and remanding. We are now charged with determining whether the same error requires reversal of the second degree murder conviction. We conclude the second degree murder conviction is proper.

The Court first explained the application of *Chiu*.

> In *Chiu*, the Supreme Court held that a defendant cannot be found guilty of first degree murder under the natural and probable consequences theory of accomplice liability. (*Chiu, supra*, 59 Cal.4th p. 166.) However, the Supreme Court did not hold that an aider or abettor could never be convicted of murder; it simply limited liability for first degree premeditated murder to offenders whose convictions were based on direct aiding and abetting principles. (*Ibid*.) As for aiders and abettors convicted under the natural and probable consequences theory, the Court held that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder. (*Ibid*.)

Based on the reasoning of *Chiu*, we agreed that reversal was required in Gentile I, because the jury instructed on alternative theories of liability, one of which was improper: On one hand, according to the instructions and Roberts' testimony, the jury could conclude the defendant directly and personally killed the victim and that Roberts was an accomplice after the fact. (*Gentile I, supra*, E064822, p. 11.) On the other hand, the jury could conclude defendant committed an aggravated assault while aiding and abetting Roberts' assault with a deadly weapon, the natural and probable consequences of which was to cause the victim's death. (*Id*., at p. 12.) Reversal was required because we could not discern whether the conviction was based on a valid or invalid theory.

In the meantime, after the decision in *Gentile I*, and before *Gentile II* was decided, the Legislature passed Senate Bill No. 1437, amending the provisions of section 189 to add subdivision (e), in response to *Chiu*.

> The amendment to section 189 provides, "(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

Key to the Court's ruling here was its reliance on the Legislature's intent when passing SB 1437.

> In adopting this amendment, the Legislature indicated its purpose: "This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the per-

son was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree, or the person was a major participant in the underlying felony and acted with reckless indifference to human life." (Stats. 2018, ch. 1015, Sen. Bill No. 1437.) It only intended to prohibit murder convictions where the participant was not the actual killer or a direct aider or abettor of the murderer. (*Ibid*.)

The Court construed *Chiu* in light of SB 1437.

As indicated, *Chiu* made clear that second degree murder liability is proportional to the culpability of an aider and abettor under the natural and probable consequences doctrine. (*Chiu, supra*, 59 Cal.4th at p. 166.) Additionally, the plain language of section 189, subdivision (e), expressly provides for murder liability in situations in which the defendant is the actual killer, or where the defendant was a "major participant" within the meaning of section 190.2, subdivision (d). That subdivision authorizes imposition of the death penalty or imprisonment for life without possibility of parole for "every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons."

The Court expressly rejected the Gentile's argument that section 189 eliminates all murder liability for aiders and abettors.

To the contrary, the amendment expressly provides for both first and second degree murder convictions under appropriate circumstances. Defendant's construction would therefore conflict not only with the plain language of the statute, but also with the holding of *Chiu*, which also held that "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles." (*Chiu, supra*, 59 Cal.4th at pp. 166-167, citing *People McCoy* (2001) 25 Cal.4th 1111, 1117–1118.) Considering the statement in *Chiu*, holding that under the natural and probable consequences theory, punishment for second degree murder is commensurate with a defendant's culpability, neither the Supreme Court nor the Legislature intended to relieve an aider-abettor entirely of liability for murder.

Reviewing the facts of the murder, the Court found that Gentile's liability remained, post-*Chiu* and post-SB1437.

At a minimum, after reviewing the record, we conclude that defendant in this case was a direct or active aider and abettor. He actually delivered serious blows with his fists and feet to the victim at the urging of Roberts, and in one statement expressed fear that he may have killed the victim. His hands were swollen when he arrived in Imperial Beach, consistent with a beating by fists. Even if the jury believed defendant's testimony—that after his own beating of the victim he left the scene when Roberts began beating the victim with a deadly or dangerous weapon—the killing would have been the result of defend-

ant's aggravated assault committed while directly aiding or abetting Roberts' assault with a deadly weapon.

In other words, he directly aided and abetted the murder of the victim by beating and now stands properly convicted of second degree murder. We addressed the problematic instruction that allowed the jury to find him guilty of first degree murder under the natural and probable consequences theory in *Gentile I*. The People thereafter accepted a reduction of degree to second degree murder, obviating any prejudice from the erroneous instruction. The amended provisions of section 189, subdivision (e), did not prohibit this result, and the conviction for second degree murder is commensurate with defendant's culpability and conforms with the legislative intent underlying Senate Bill No. 1437 and the holding of *Chiu*.

The Court affirmed Gentile's second-degree murder conviction as an aider and abettor.

[W]e reach the merits and confirm our prior conclusion in this case (*Gentile II, E069088*, p. 3, fn. 2), that defendant was, at a minimum, an active aider-abettor who is not entitled to vacation of his murder conviction.

TEAGUE V. LANE RETROACTIVITY STANDARD GOVERNING FEDERAL HABEAS PETITIONS DOESN'T GOVERN CALIFORNIA HABEAS PETITIONS

In re Melvin Thomas II

--- CA5th ---; CA4(2); No. E069454
December 27, 2018

A jury found Thomas guilty of receiving a stolen vehicle (§ 496d, subd. (a)) and actively participating in a criminal street gang (§ 186.22, subd. (a)), but not guilty of vehicle theft. In bifurcated proceedings, the jury found true the allegations Thomas had suffered a prior prison term (former § 667.5, subd. (b)(5)), two prior serious convictions (§ 667, subd. (a)), and three strike priors (§§ 667, subds. (c), (e), 1170.12, subd. (c)(2)(A)). The trial court dismissed two of Thomas's strike priors on count 2 and sentenced him on count 2 to the aggravated term of six years as a second strike. However, the trial court refused to strike any of the priors on count 3 and sentenced Thomas to a concurrent term of 25 years to life plus an additional and consecutive five-year term for each of the two serious felony priors for a total sentence of 35 years to life.

However, Thomas' conviction hung on hearsay expert evidence which was permitted at the time of his direct appeal, but was later disallowed by the CA Supreme Court. Thomas sought relief via habeas corpus many years after his appeal was final.

On direct appeal, Thomas argued the gang expert's opinion that he was an active member of a criminal street gang violated the confrontation clause under *Crawford*, because it was based on testimonial hearsay. A panel of this court concluded it was bound to follow the California Supreme Court's holding in *Gardeley, supra*, 14 Cal.4th at pp. 618-619, that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions, even if those sources include testimonial hearsay. The panel also concluded *Crawford* does not undermine that established rule,

> "because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are *not elicited for the truth of their contents*; they are examined to assess the weight of the expert's opinion." (*Thomas, supra*, 130 Cal.App.4th at p. 1210, italics added.) The panel therefore affirmed Thomas's conviction.
>
> More than a decade later, the California Supreme Court revisited the issue in *Sanchez* and held the *Crawford* rule limits expert witnesses from relating case-specific testimonial hearsay in explaining the basis for their opinions. Thomas filed a petition for writ of habeas corpus and, after soliciting briefs and appointing counsel for Thomas, we issued an order to show cause why relief should not be granted.

It was uncontested that the CA Supreme Court ruling in *Sanchez* established new rules than were in place at the time of Thomas' conviction. He claimed on habeas that the earlier rules violated his Sixth Amendment right to confrontation, and that he was due retroactive relief.

> In *Sanchez*, the California Supreme Court changed how courts in California are permitted to treat expert testimony about the basis of their opinions. "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra*, 63 Cal.4th at p. 686.)
>
> By so holding, the Supreme Court parted ways with a well-established line of authority. It rejected the view it had previously endorsed in *Gardeley* that an expert could rely on and report to the jury out-of-court statements without violating the rule against hearsay, because such a statement would be introduced to support the expert's opinion, rather than establish the truth of the out-of-court statement itself. (*Gardeley, supra*, 14 Cal.4th at p. 618 ["an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion"]; see also *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9 ["experts—may give opinion testimony that is based upon hearsay, including conversations with gang members as well as with the defendant"].) Now, after *Sanchez*, an expert may introduce such testimony only "through an applicable hearsay exception . . . [or] the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Sanchez, supra*, 63 Cal.4th at p. 684.)

Thomas now asked the Court to decide that the confrontation clause rule announced in *Sanchez* applies *retroactively* and find he would have escaped conviction on the gang charge had the trial court applied the *Sanchez* rule to his case.

The question of retroactivity in habeas cases has different rules under the federal court guidelines from those under state court guidelines. Thomas tried to gain retroactivity relief by relying on the federal rule, but was denied.

The federal retroactivity rule ultimately was refined in *Teague v. Lane*.

> (*Teague, supra*, 489 U.S. at p. 310 (plur. opn. of O'Connor, J.); *id*. at p. 317 (conc. opn. of White, J.); *id*. at pp. 319-320 (conc. opn. of Stevens, J.).) Though this portion of Teague had the support of only a plurality of the justices, the full Court subsequently endorsed the test. "A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a '"watershed rul[e] of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'" (*Whorton v. Bockting* (2007) 549 U.S. 406, 416 (*Whorton*).

Successful application of *Teague v. Lane* is virtually nonexistent, because its window is so restrictive.

> The exception for watershed rules of criminal procedure is extraordinarily narrow. The Court has observed it is unlikely "any such rules '"ha[ve] yet to emerge,"'" and noted it had "rejected every claim that a new rule satisfied the requirements for watershed status." (*Whorton, supra*, 549 U.S. at pp. 417-418.) "In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent 'an "'impermissibly large risk'"' of an inaccurate conviction. [Citations.] Second, the rule must 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" (*Id*. at p. 418.) "[T]he only case that [the Supreme Court] ha[s] identified as qualifying under this exception" is *Gideon*, where "the Court held that counsel must be appointed for any indigent defendant charged with a felony. When a defendant who wishes to be represented by counsel is denied representation. *Gideon* held, the risk of an unreliable verdict is intolerably high." (*Whorton*, at p. 419.) In *Whorton*, the U.S. Supreme Court held the new rule in *Crawford*, which plays a role in this case, does not qualify as a watershed rule of criminal procedure. (*Whorton*, at pp. 419-420.)

The Court of Appeal found a distinction, however. It concluded that the Teague standard does not govern because Thomas is here on a *state* habeas petition, not a *federal* habeas petition.

> The distinction is critical. It means the *Teague* decision is not binding on us. The U.S. Supreme Court reached the same conclusion in *Danforth v. Minnesota* (2008) 552 U.S. 264 (*Danforth*). "Like *Linkletter*, *Teague* arose on federal habeas. Unlike in *Linkletter*, however, this procedural posture was not merely a background fact in *Teague*. A close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had *no bearing* on whether States could provide broader relief in their own postconviction proceedings than required by that opinion." (*Id*. at p. 277, italics added.) The court concluded *Teague* "clearly indicates that [its] general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute," so "it cannot be read as imposing a binding obligation on state courts." (*Danforth*, at p. 278.) The California Supreme Court agrees we are

"'free to give greater retroactive impact to a decision than the federal courts choose to give.'" (*In re Gomez* (2009) 45 Cal.4th 650, 655, fn. 3, quoting *Johnson, supra*, 3 Cal.3d at p. 415.)

The *Danforth* Court emphasized the *Teague* general rule against retroactivity in federal habeas proceedings bottoms out on comity. The *Teague* decision "justified the general rule of nonretroactivity in part by reference to comity and respect for the finality of state convictions. Federalism and comity considerations are unique to federal habeas review of state convictions. [Citation.] If anything, considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individual than is required by *Teague*. And while finality is, of course, implicated in the contest of state as well as federal habeas, finality of state convictions is a state interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts." (*Danforth, supra*, 552 U.S. at pp. 279-280.)

We agree with the *Danforth* Court's analysis and conclude we must look for guidance to the California Supreme Court in evaluating whether to apply *Sanchez* retroactively. The Supreme Court of Missouri reached the same conclusion about its own courts in *State v. Whitfield* (2003) 107 S.W.3d 253, 267. "It is up to each state to determine whether to apply the rule set out in *Teague*, to continue to apply the rule set out in *Linkletter-Stovall*, or to apply yet some other rule appropriate for determining retroactivity of a new constitutional rule to cases on collateral review. So long as the state's test is not narrower than that set forth in *Teague*, it will pass constitutional muster." (*Ibid*.)

The Court of Appeal decided it would follow the CA Supreme Court in *Johnson*.

> We conclude the three-factor balancing test articulated in Johnson still governs whether we should apply *Sanchez* retroactively when a petitioner seeks state habeas review. *Johnson* was itself a state habeas case, and the California Supreme Court weighed the three *Linkletter* factors to determine whether a new rule would apply to a state habeas petition attacking a final state judgment. (*Johnson, supra*, 3 Cal.3d at p. 410.) The Supreme Court has never disavowed *Johnson* and California courts continue to apply its retroactivity analysis in the context of state collateral review. (See, e.g., *In re Lucero* (2011) 200 Cal.App.4th 38, 45 [applying the *Johnson* factors and giving retroactive effect to the new rule that the crime of shooting at an occupied vehicle merges with the crime of homicide]; *In re Hansen* (2014) 227 Cal.App.4th 906, 918-919 [same]; compare *Lozano v. Diaz* (9th Cir. 2014) 586 Fed.Appx. 413 [refusing to apply the same new rule on federal habeas review].)

The Court found that *Sanchez* constituted a new rule.

> The rule articulated in *Sanchez* plainly constitutes a new rule under the standard articulated in these cases. In *Gardeley*, the California Supreme Court held an expert witness may inform the jury of the basis of her opinion even if that basis would in other circumstances be inadmissible as testimonial hearsay.

> The rationale was such expert basis testimony is not presented for the truth of the matter, but only to support the expert's conclusion. In *Sanchez*, the Supreme Court rejected its prior holding. It rejected the premise that such evidence could be admitted to support the expert's opinion without implicating its truth because the basis evidence wouldn't support the expert's conclusion if it weren't true. As a result, the Supreme Court reversed itself and held case-specific testimonial hearsay must satisfy the normal limitations on the introduction of hearsay under the rules of evidence and, where the hearsay is testimonial, under the U.S. Supreme Court's decision in *Crawford*. (*Sanchez, supra*, 63 Cal.4th at pp. 683-684, 686.)

In its overview, the Court found that while *Sanchez* constituted a new rule, it was not one so strong as to permit retroactive effect under *Johnson*.

> That brings us to the questions of the degree to which law enforcement relied on the old rule and the burden on the administration of justice of applying the new rule retroactively to cases already final.
>
> Before *Sanchez*, prosecutors reasonably relied on *Gardeley* and its predecessors in deciding how to present their cases to juries. The settled rule gave them no reason to expend scarce resources and expend scarce trial time developing and presenting additional witnesses who could testify about the contents of police reports, STEP notifications, or field identification cards. The Supreme Court of California had said they could present that evidence through gang experts, so they did. (E.g., *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153; *People v. Williams* (2009) 170 Cal.App.4th 587, 622; *In re I.M*. (2005) 125 Cal.App.4th 1195, 1207.) As the *Ruedas* court noted, "*Gardeley* alone was cited in over 2,000 appellate decisions between the time it was decided in 1996 and the time *Sanchez* was decided in 2016." (*Ruedas*, *supra,* 23 Cal.App.5th at p. 801, fn. 9.)
>
> Approaching prosecutions in that way was a shortcut, but it wasn't always necessary. Had the *Sanchez* rule been in place at the time of these prosecutions, in many cases the prosecutors could have put on independent evidence to show what appeared in the reports, notifications, and cards. Having done so, they could have asked their gang experts to assume what that evidence indicated and respond to hypothetical questions to elicit their opinion as to gang membership and activity. The California Supreme Court explicitly endorsed this practice in *Sanchez*. (*Sanchez, supra*, 63 Cal.4th at p. 684 ["Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner"].) As a result, we conclude applying *Sanchez* retroactively to final cases would result in reopening thousands of cases in which the prosecution used a shortcut even though it could have obtained a conviction using other evidence.
>
> We also believe applying the new rule retroactively to final cases would be too disruptive and costly. The alternative evidence prosecutors could have used in cases tried years and even decades ago likely has gone stale. That means

many of the people who would receive relief would be offenders who could have been convicted using the *Sanchez* rule originally, but could not be convicted using the same rule today, though not because of innocence. We must also consider the raw cost to the court system of reopening these thousands of final cases for retrial and subsequent appeals. We conclude the benefits of applying the new rule retroactively do not justify the disruption to the administration of justice.

The bottom line is the purpose of the new rule in *Sanchez* is to improve the integrity of criminal trials involving gang experts, but its effect is neither so fundamental nor so far-reaching as to justify applying it to cases already final, especially in view of prosecutors' reasonable and routine reliance on the old rule. We concede our decision will leave some number of people in prison who wouldn't have been convicted of gang-related crimes had *Sanchez* been the law when they were tried. We have to bite that bullet. Our conclusion results from the fact that the retroactivity rule gives importance to finality as well as factuality. For that purpose, *Johnson* provides a good, workable, though imperfect approach to deciding whether to apply new rules to final cases in state habeas challenges. Here, the analysis counsels against retroactive application. It is for our Supreme Court to decide whether it is preferable to adopt a rule that gives more weight to factuality than finality.

For all these reasons, we conclude we should not give the *Sanchez* rule retroactive effect.

This case became final when the CA Supreme Court denied review.

CRICKETS ON COMMUTATION APPLICATION?

During the last few months of former Governor Brown's administration the race was literally on to get commutation applications to his desk before he walked out those big double doors for the last time. And while many received relief from Brown, many are still waiting for action, advice, any word on applications sent to the Governor's office but not yet reconciled.

Recently, now-Governor Newsom's website updated the process and provided the following information:

"If you submitted a commutation application to a prior governor and did not receive notice of a commutation grant, your application is deemed closed. If you submitted a commutation application in the last three years and would like Governor Newsom to re-open your prior application and consider it, you may submit a Reapplication for Clemency. To re-apply for a commutation: Submit a completed Reapplication for Clemency Form (1 page). Do not re-submit your original application or other documents unless requested to do so by the Governor's Office."

The website further details the commutation process thusly:

COMMUTATIONS

People who have been convicted of a crime and are currently serving their sentence in California may apply for a commutation (reduction of sentence).

In deciding whether to grant a commutation, the Governor's Office will carefully review each commutation application and consider:

• the impact of a commutation on the community, including whether the grant is consistent with public safety and in the interests of justice;

• the age and circumstances of the offense and the sentence imposed, and the age of the applicant at the time;

• the applicant's self-development and conduct since the offense, including whether the applicant has made use of available rehabilitative programs and has identified and addressed treatment needs;

• the applicant's need for a commutation; and

• the applicant's plans upon release from custody.

Applicants will be notified when the Governor takes action on a commutation application.

INVESTIGATION & REVIEW

The Board of Parole Hearings, a division of the California Department of Corrections and Rehabilitation, investigates commutation applications. The investigation will include a review of the applicant's criminal history records, court and police records, and records and information about the applicant's period of incarceration from the applicant's C-File and other sources.

We reprint this information, direct from Governor Newsom's website, because we receive so many questions from lifers and LWOPs about commutation applications, and because CDCR itself, and counselors in particular, seem to have so little information to provide to inmates. The one-page reapplication form referenced above is available on the Governor's website as well.

Please note, the single-page re-submission application is only for those who have previously submitted a commutation application that has not been acted on. The form also notes you should not send additional documentation at this time. If you are preparing to submit a commutation application for the first time, the application is 2-pages and allows the submitter to include supporting documentation.

Ask your counselor for it (surely CDCR has access to the web), ask your family to print it and mail to you, or, as a last resort only please, write LSA, send us a SASE and we'll forward to you.

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	SHARRIEFF	TAIRA	BPH HQ	Total CMR Hrg
Suitability Hrg Total	19	13	11	21	18	21	20	21	15	16	23	21	18	10	19	98	364
Grants	3	4	4	4	3	7	3	5	9	4	4	2	4	2	5	0	63
Denials	8	3	7	11	12	10	15	11	2	9	13	14	12	5	12	0	144
Stipulations	5	5	0	3	3	3	0	4	3	2	5	1	2	2	1	0	39
Waivers	1	1	0	1	0	0	0	0	0	0	0	0	0	0	0	18	21
Postponements	0	0	0	1	0	1	2	1	1	0	0	4	0	1	1	74	86
Continuances	2	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	3
Tie Vote	0	0	0	1	0	0	0	0	0	1	0	0	0	0	0	0	2
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	6	6

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

Subtotal (Deny+Stip)	13	8	7	14	15	13	15	15	5	11	18	15	14	7	13	0	183
1 year	0	2	0	0	0	0	0	0	0	0	0	0	0	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	6	4	5	9	9	11	6	7	4	10	14	9	10	5	8	0	117
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	4	2	2	4	3	2	5	5	1	1	4	6	4	2	4	0	49
7 years	1	0	0	1	2	0	3	3	0	0	0	0	0	0	1	0	11
10 years	2	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	4
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	1	0	0	0	0	0	0	0	0	0	0	0	18	21
1 year	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	12	13
2 years	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	2	3
3 years	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	3
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	0	0	0	1	0	1	2	1	1	0	0	4	0	1	1	74	86
Within State Control	0	0	0	1	0	0	1	1	0	0	0	4	0	0	0	70	77
Exigent Circumstance	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	1	3
Prisoner Postpone	0	0	0	0	0	1	0	0	1	0	0	0	0	1	0	3	6

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	SHARRIEFF	TAIRA	BPH HQ	Total CMR Hrg
Suitability Hrg Total	**25**	**26**	**27**	**28**	**31**	**31**	**30**	**22**	**21**	**15**	**36**	**23**	**20**	**25**	**15**	**167**	**542**
Grants	7	5	10	10	8	8	3	6	7	6	5	11	4	9	3	0	102
Denials	14	16	13	12	17	16	18	10	11	9	17	9	11	12	8	0	193
Stipulations	2	4	4	3	5	5	9	6	3	0	7	3	5	3	2	0	61
Waivers	1	0	0	1	0	0	0	0	0	0	2	0	0	0	0	35	39
Postponements	1	0	0	1	0	2	0	0	0	0	2	0	0	1	2	119	128
Continuances	0	1	0	0	1	0	0	0	0	0	2	0	0	0	0	0	4
Tie Vote	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	2
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	13	13

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

Subtotal (Deny+Stip)	**16**	**20**	**17**	**15**	**22**	**21**	**27**	**16**	**14**	**9**	**24**	**12**	**16**	**15**	**10**	**0**	**254**
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	11	14	14	12	18	15	14	12	8	7	13	10	12	10	8	0	178
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	3	6	2	1	4	5	5	3	4	2	8	2	4	4	1	0	54
7 years	1	0	1	1	0	1	4	0	1	0	3	0	0	1	1	0	14
10 years	1	0	0	1	0	0	4	1	1	0	0	0	0	0	0	0	8
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**	**0**	**0**	**1**	**0**	**0**	**0**	**0**	**0**	**0**	**2**	**0**	**0**	**0**	**0**	**35**	**39**
1 year	1	0	0	1	0	0	0	0	0	0	2	0	0	0	0	25	29
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	7	7
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	**1**	**0**	**0**	**1**	**0**	**2**	**0**	**0**	**0**	**0**	**2**	**0**	**0**	**1**	**2**	**119**	**128**
Within State Control	1	0	0	1	0	0	0	0	0	0	0	0	0	0	0	106	108
Exigent Circumstance	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	9	11
Prisoner Postpone	0	0	0	0	0	0	0	0	0	0	2	0	0	1	2	4	9

BPH SIGNIFICANT EVENTS IN 2018

It was a busy year for the BPH, all reported in the Report of Significant Events, 2018, released recently. This is the fifth year the board has released this report and each year more information in included, making the workings and the results of the Board's activities more transparent.

As an example, in 2018 the board scheduled 5,226 parole hearings, but only about 56% of that number actually went to completion, with a decision announced. The remaining scheduled hearings were not held, due to postponements, stipulations, waivers, cancellations, continuances. Of course, the big question is—what was the all-important, all-revealing, all-telling grant rate?

Short answer: 39%. Of the hearings actually held in 2018, 39% of the time, for 1,136 prisoners, the commissioners said granted. In deeper detail, 25% of those grants (285) were given at an inmate's initial hearing, 69 (6%) were for women, 698 (61%) were for YOPH inmates and 234 (21%) for elderly parole inmates. We should note, there were a few inmates, actual numbers not available, who were considered under both the guidelines of YOPH and elderly parole.

If you were a YOPH inmate in 2018, you had a 40% chance of being granted parole and if you went in under consideration of elderly parole factors, your chances were 38%, overall. Interestingly, but perhaps not surprisingly, there was a difference in the success rate for Indeterminately Sentence Length inmates (ISL: lifers) and those with a Determinate Sentence Length (DSL; long term but definite number of years) Youth offenders with life sentences had a significantly better success rate at hearings in relation to DSL inmates—43% to 17%. For those under elderly parole guidelines, the difference in the success rate for ISL inmates was substantial (lifers) when compared to determinate inmates. Lifers were successful at parole hearings 39% of the time, while those with long-term determinate terms, heard under elderly parole proceedings, were granted a mere 5% of the time. The difference may be in the nature of crimes under consideration, but no firm empirical evidence is available.

And for those inmates denied parole and contemplating ways to advance their next hearing date—take heart. If you received a 3-year denial and your hearing is advanced under the automatic Administrative Review process, as happened 82% of the time for those reviewed, your chances of achieve a grant at that advanced hearing were 58%.

And for those who received a longer than 3-year denial and filed a PTA in 2018, the news was nearly as good. Some 72% of PTA requests were granted and 40% of those advanced hearings were successful in achieving a grant at the advanced hearing.

That's the good news for lifers. Now for the not-so-great news. Reconsideration hearings, those held for former prisoners released under the lifer parole process who were so unsuccessful on parole as to find themselves back in prison with their life sentence reinstated, were up. In 2018 parole panels considered a second, second chance for these individuals 108 times, a pretty healthy jump from the 83 such hearings the previous year. Almost half that number (48) were initial reconsideration hearings and while we don't know the number of times grants (re-grants?) were made, we can get an idea for looking at the numbers from previous years.

If a lifer is denied at a parole reconsideration hearing, s/he will receive a parole hearing every year; on that basis, knowing there were 83 reconsideration hearings in 2017 and 60 of the reconsideration hearings in 2018 were subsequent, we can deduce that in 2017 only 23 inmates were successful in re-achieving parole, roughly 27%. With the rate of such hearings going up, there is little reason to conclude that a significantly larger number of re-offending lifers fouAlso troubling

was the report of an uptick in re-offenses by lifers paroled over the last 3 reporting periods. The 2016 CDCR Outcomes Report nd favor, again with the board.

looked at 349 lifers released via parole in the 2011 -12 fiscal year. In that report the department noted 11 individuals, about 3.2%, had been convicted of a crime during the 3-year follow up period after their release reported on in the 2016 report. Of some relief is that only one of those re-incarcerated individuals was convicted of a felony against a person.

The 2018 Outcomes Report found that of the 510 ISL inmates released via prole in fiscal year 2013-14, about the same percentage (3.1%) of those parolees had been convicted of an additional offense during the reporting period, but 3, an increase, had committed a felony against a person. Be careful out there.

Interestingly, those prisoners who came under board consideration under the Determinately Sentenced Non-Violent parole review process didn't fare as well, release wise, than did those who had an in-person parole hearing. The non-violent review process is entirely a paper review process, with inmates who may qualify screened by CDCR classification initially before being referred to the BPH for an additional jurisdictional review before being considered on merits and for actual release. About 13% of the over 5,000 inmates initially referred to the BPH were screened out by the board, which then considered a little over 4,500 on the merits of their case. Release was approved, however, for only 23% of those. Those denied release via this process will receive another review in one year.

The 2018 report also noted the training sessions conducted by the BPH, both for commissioners and the clinicians of the Forensic Assessment Division. Commissioners and Deputy Commissioners received some 42 training sessions during the year, often as part of the BPH monthly Executive Board meetings. These sessions, ranging from 30 minutes to 2 hours, covered a variety of issues from transitional housing, mental health services, transgender issues, VNOK procedures, CRA matters…and even what Life Support Alliance is about and up to.

The psychologists of the FAD also received training in 2018, though, it appears, less extensive, both in time and variety. Dr. Kusaj reported the FAD clinicians receive 'training during routine staff meetings throughout the year,' and reviewed 'a variety of published research' via a research data base. The clinicians also received additional training, some of it actually from outside (out of FAD that is) experts. Of the eleven training sessions listed, 5 were conducted by individuals not FAD affiliated, though none were from outside CDCR. The remaining majority of the FAD training was presented by members of the FAD itself. We reserve comment.

SEEKING VERY SPECIFIC LETTERS

It didn't take long for in-coming Governor Gavin Newsom to ruffle lots of feathers in the prison advocacy community, on both sides. After 8 years of Jerry Brown, most in the field had a decent read on the former Governor's triggers, who and why he was prone to reverse on parole grants and/or send to en banc consideration.

Not that we got that understanding immediately, but Brown didn't veer far from the guideposts he set from himself early in his second two-term stint. Newsom appeared to start off with a bang, though not quite as big a bang as some rumors would contend. At LSA we've been peppered by letters, calls, emails, questions all about the current Governor's 'massive' number of reversals. Those numbers range anywhere from 50 to 240 to over 500 reversals and 'everyone' else to en banc during the first 2 months of his term.

And while those numbers are inflated (it appears to be more in the area of 50 or so reversals and 30 +/-

en banc referrals during that time), it is true Newsom appeared to be pretty free with the veto pen in his first weeks in office. Of course, we, and lots of others, want to know exactly how many and why.

The obvious thing, to us, seemed to be to ask the Governor. And so, we did—posing the question both in email, through his website (the preferred method) and by phone to staff in his office. How many parole grants did Governor Newsom reverse in his first weeks in office and how many grants did he refer to en banc proceedings at the BPH? Pretty straight forward and simple; at least we thought so.

And while the result wasn't exactly a stonewall, it certainly wasn't transparent. But—we are nothing if not persistent, so when the Newsom's staff stuffily suggested (by emailed letter) we might have to file a FOIA (Freedom of Information Act) request for 'specific documents,' (even though we hadn't asked for documents, only numbers), well, OK, it that's the way you want it, we'll be happy to accommodate you.

So, while the process of crafting the letter citing 'specific documents' we'd like to see is being created, we thought we'd reach out to a much more forthcoming and helpful population—lifers who received those grant reversals and en banc referrals. It appears those letters from the Governor's office to the inmates affected might not be wholly in the realm of public record, at least not until the end of the year when by law the Governor's office is required to report on reversals to the state legislature.

But we don't want to wait until then. We're persistent, yes, but not terribly patient. Which leads us to this: for those lifers who were reversed by Newsom and/or had their parole grant referred to the BPH for en banc, we're asking you to contribute to our data and information bank by sending us a copy of those letters notifying you of the reversal or en banc referral. If you send us the original, we'll copy it and send it back, just specify if you need it returned.

What to we hope to learn from this? As with our past examination of reversal letters from Brown, we hope to mine each letter for the specific reasons the Governor noted in making his decision, as well as get something of a 'read' on just how many dates were impacted in Newsom's first weeks. Your name won't be used, but your information could provide real 'insight' into this new era now underway.

And we would be remiss here, if we didn't give credit where due. Even though we're a bit flummoxed by Newsom's apparent nervousness about releasing lifers, we are heartened by his moratorium on executions. On March 12 Newsom signed an executive order halting executions during his time in office.

While Newsom's action does not do away with the death penalty (only an amendment to the state Constitution can do that), it does mean that while this debate rages on no more men or women will be subjected to state-sanctioned murder during Newsom's term. So far, Governor, you're 1 and 1: kudos on the death penalty action, but ya gotta loosen up on parole grants and provide us, the public, with some solid information.

In the meantime, if you've had a grant reversed or sent to en banc since January 7, please send us that notification letter: PO Box 277, Rancho Cordova, Ca. 95741. Thank you for our support.

UPDATE: It appears, at least in reference to en banc referrals, the Governor may have let up on the gas pedal. While the first three months of his tenure in office saw more than 30 en banc referrals, the following 3 months, (April, May and June), have seen a total of only 11 referrals. Progress, perhaps? Stay tuned.

In mid-June LSA met with representatives of Governor Newsom's legal staff to discuss several areas of interest and impact to lifers, including the numerous reversals and referrals to en banc in the early months of his administration. The Governor's staff, recruited from many venues and areas of the nation, are settling into both their respective offices

and the peculiarities of California law, including laws pertaining to parole and corrections. The discussions were extensive and cordial. All indications are that the initial spate of adverse actions was something of an anomaly and Newsom's intent is to be progressive in all areas, including corrections and prisons.

Two major take-aways from the 90+minute meeting:

1. If you have applied for commutation of sentence in the last 2 years and have not been notified of the outcome of that petition, you MUST submit the 1-page re-application form to keep that request open
2. Expect to see the level and number of reversals and referrals slow down as everyone catches their collective breath and finds their pace
3. This administration is interested in communication and information and plans were laid for future meeting between the Governor's staff and LSA.

BPH NEW LEGAL COUNSEL, COMMISSIONERS TO BE NAMED

Along with the appointment of 2 new parole commissioners early this summer, and the need to reappoint currently serving or appoint new commissioners to 5 spots, it appears the BPH will now also see a new Chief Legal Counsel named. In late May Gov. Newsom's office announced Jennifer Neill, who has been Chief Legal Counsel at the BPH since 2016 will be joining the office of Legal Affairs at CDCR. As of press time, no replacement for Neill had been announced, though an Acting Chief Council has been named.

And, as of the time we go to print, no new commissioners nor reappointments of sitting commissioners have been announced. Up for possible reappointment are Commissioners Anderson, LaBahn, Grounds, Cassady and Ruff. These commissioners must be reappointed, or their seats filled by other candidates, by July 2019. Whether Gov. Newsom chooses to name his picks for these 5 seats at the same time and either in conjunction with or in addition to, individuals to fill the two new seats created under this year's budget, is anyone's guess.

PROP. 57 CREDITS UPDATE

CDCR has announced that as of May 1, Prop. 57 credits will be expanded in the following manner:

Educational Merit credits will increase from 90 to 180 days for high school diploma or equivalency approved by CDCR. This could apply retroactively to those who submitted requests for such credits on or after August 1, 2017

Rehabilitative Achievement Credits (RAC) will increase from 7 days to 10 days for credit for completion of 52 hours of programming in a 12-month period, up to a total of 40 days credit for 208 hours of programming in a single year. These will be awarded retroactively to Aug. 1, 2017, to allow those who had excess programming hours in the past to receive credit for that work.

Good conduct, Milestone Completion and Extraordinary Conduct credits remain unchanged. On April 2, 2019 the department began restoring credit to those who were disciplinary free for the requisite length of time following a rules violation—those credits will be restored automatically. The memo outlining these changes also notes Correctional Counselors should have more information. We hope.

HIGHLIGHTS OF STAKEHOLDER'S MEETING

In an effort to improve communication and transparency, the BPH reportedly plans to hold Stakeholder's Meeting on a quarterly basis, rather than bi-annually as has been the case. In early May the board held the second such meeting of the year, information highlights of which are below.

Much of the discussion, including questions and answers from those attending in person and via conference call, dealt with the new Structured Decision-Making Format, details of which are discussed elsewhere in this issue. Similarly, two court cases, Palmer and McGee, are detailed elsewhere in CLN.

After several years of trying, BPH officials have succeeded in obtaining an increase in the stipend for state appointed attorneys. The raise is considerable: up to about $750 per completed hearing from the current $400. With that increase will come an increase in training and expectations, via an evaluation system.

The board also announced it will not provide sign language interpreters for attorney visits for inmates with hearing disabilities. The attorney must notify BPH that such an accommodation is needed 10 days prior to the date of the attorney visit.

NOW MORE THAN EVER

We've frequently run survey forms in the newsletters; decision surveys, CRA surveys, and, most often, attorney performance surveys. And while our mantra has always been and remains 'no attorney can get you a date if you aren't ready and no attorney can lose you a date if you are ready,' attorney performance helps and is important. Thus, the surveys.

We don't discriminate, we ask for prisoner ratings on both private attorneys and those appointed by the state, and we've found great examples, as well as poor ones, in both categories. If you've been to a hearing within the last couple of years and haven't responded to our attorney survey in that time, we'd like you to rethink that decision.

BPH has announced it will be modifying the manner in which attorneys for the state appointed list are selected, and performance will now be a real consideration of that selection. And where can they get reports of that performance? Well, to our mind, with the end users, and that would be you, the prisoner.

And yes, you can write BPH with your thoughts and concerns, and in fact we urge you to do so. But we'd also ask that you respond to the following survey, as we've got several years of survey results we'd like to update and improve, all with an idea to providing this compendium of data to the BPH.

Be real and be realistic. Consider what we're looking for here—was your attorney a help to you, or just a body sitting at the same side of the table? Did s/he give you support and advice on the day of the hearing or seem more interested in breaking for lunch. Did they know your name? Return your documents? Go above and beyond, or just barely make the cut? Inquiring minds (ours) want to know. And now is the time.

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

NO, NOT 'THE CANADIAN METHOD' OF PAROLE

As discussed previously, the BPH is now conducting parole hearings under a new format, known as Structured Decision-Making Framework (SDMF). And while this new pattern of consideration originated in Canada, BPH has not, as rumor would have it, gone to using the same considerations in making parole decision as those used by Canadian parole authorities.

As explained by BPH officials, both in sessions at the monthly business meetings and in the recent Stakeholder's SDMF meeting, is intended to provide a 'roadmap' to making consistent, well-reasoned decisions that comport with the law. While SDMF is based on the Canadian model, BPH officials and the originator of the format spent several months considering how to adapt the original structure to meet California's unique laws and requirements.

The benefits of using SDMF, according to BPH officials, is not only less subjectivity in parole considerations, but factors of relevance to a particular case will be given the appropriate weight for that case; while many factors may be present in several cases, those factors can be of more importance in certain circumstances than others. And, because the panel members are giving their greater consideration, and therefore time, to those more weighty factors, the hearings should be of shorter duration.

In the board's Fact Sheet, touting the implementation of SDMF, the board states, for perhaps the first time in writing, what has been the mantra of lifers and advocates for decades: *"Parole release for long-term offenders in California is presumptive by statute, unless the Board determines the inmate continues to pose a current unreasonable risk to public safety."* Translation: unless there is evidence that the individual being considered for parole dangerous, the law expects the inmate to be granted parole.

Also, from the Board's fact sheet, explaining the purpose and practice of SDMF, *"The SDMF distinguishes between risk relevant factors and legal factors the Board must consider, such as youth offender and elderly parole factors. Such approach is consistent with due process and will be helpful in situations where the applicant's release decision is reviewed."* Again, translation; the board hopes the using the SDMF will make their decisions even more judicially sustainable (impervious to courts finding reasons to overturn parole decisions).

The worksheet for SDMF identifies a baker's dozen 'domains,' or areas for consideration by the parole panel, most of which will be evaluated in relation both to the relevancy to the inmate and the degree to which the domain presents an aggravating, mitigating or neutral impact on the case. And while the both the worksheet, the fact sheet and in discussions BPH officials are quick to note SDMF is not an arithmetic score sheet and the commissioners' discretion is fully intact, there has yet been no clarification as to whether the order in which the domains are presented is relevant to their weight in the decision. This may be important, as the first domain listed is the risk rating given via the Comprehensive Risk Assessment.

While the SDMF has only officially been in use for less than a month, several commissioners began following the format several weeks earlier, so that reports are beginning to filter in from both inmates and inmate attorneys. Several attorneys have expressed the shared (and expressed) concern of LSA, that SDMF may rely too heavily on the CRA, particularly in identifying the causative factors of the crime, usually a topic for considerable soul-searching by the inmate and lengthy discussion with the parole panel. Officials have been quick to assure all concerned that such is not the case, but as the process rolls out, we'll be attuned for that possibility.

Additionally, at a recent Executive Board meeting, a DA representative expressed the opinion that implementation of SDMF should be subject to regulations and the regulatory approval process. And as

much as it pains us to admit it, this may be a rare area wherein LSA and the DAs agree. While creation of the SDMF has not been rushed, the implementation and training of both commissioners and inmate attorneys (to say nothing of informing the inmates themselves) has been done at a pretty rapid pace, and in the case of inmate attorneys, appears to be simply on-the-job training at the end.

After considerable research on SDMF concept we are not opposed, and in fact, remain cautiously optimistic. But we would prefer to see some more training, publicly accessible training, on the use of the format, how relevant factors are identified and how the CRA, which itself does not rely on any sort of structured decision making, play into commissioners' considerations. And some training for inmate attorneys, as well as informational memos, meetings, recordings, what have you, for inmates would also be welcomed.

On the whole, we're relying in part on the input from inmates and attorneys who have had hearings using the new process to provide us with their 'insight.' And, we've stepped up our attendance at parole hearings as well, as nothing can replace in-person observation and knowledge. As things progress and our opinions solidify, we'll let you know.

1170 (d): HOW IT DOES AND DOESN'T WORK

Although possible recall of sentence under changed provisions of PC 1170 (d) became law on January 1, and while no prisoner cohort or crime was specifically excluded from consideration under this new policy, it's still a slow and uncertain process for those hoping to see relief via this path. That's because it isn't up to the inmate to initiate consideration for 1170 (d) consideration, but a referral to the sentencing court for recall of sentence must come from the individual county District Attorneys or CDCR/BPH.

As DA offices in various counties decide on process and practices for their county and begin reviewing cases from the county that may qualify, they are referring those cases to the appropriate sentencing courts for consideration. However, participation in this process is completely discretionary for DAs; they are not required to review or refer any cases for recall of sentence consideration.

Those agencies and individuals who are involved in the process suggest that prisoners and/or their advocates do not write the DA requesting review and outlining the reasons that individual prisoner should be considered. Since each county is free to participate or not in the review there is no real way, at this time, to know how many and which counties are engaged in the process.

Currently, there is no direct path for prisoners to individually petition the courts for this review. The only way this review can be initiated, for inmates in state prison, is from the DA office that originally prosecuted the case or CDCR/BPH referral. Any agency or legal office purporting to file a petition on an inmate's behalf should be viewed with suspicion.

CDCR is reviewing cases for possible referral for 1170(d) consideration, in basically 3 instances: when an inmate meets 'exceptional conduct' standard; when the sentence an individual is currently serving is invalid due to new information, change in law or judicial decision or when enhancements in the current sentence are now within a court's jurisdiction to strike.

Latest word from the department is:

"The Department of Corrections and Rehabilitation

recognizes the Agency Secretary may recommend to a sentencing court that the sentence and commitment previously imposed on an inmate be recalled and that the court resentence the inmate.

Currently, the department receives referrals from the institution directly via the Classification and Parole Representative. We are not accepting self-referrals or referrals from inmate family, friends or attorneys at this time, but encourage the inmate to remain disciplinary-free, and continue their rehabilitative journey should their case be referred to us in the future."

RESTITUTION

Restitution, assessed by the courts as part of a sentence, can fall into two categories and any given inmate may be assessed payments in either or both categories. Funds collected under the two categories actually go to different destinations and while inmates are often told only the total of the restitution assessed, it may serve them well to investigate the particulars of their restitution total.

Many lifers, indeed, many prisoners, are faced continually with the problem of restitution fines imposed on them by the courts that they must continually or eventually pay. And often those amounts are staggering, with many inmates saying they'll never be able to pay those assessments, so why try? Because, not that the chances of parole are better than ever, that restitution may be a real financial burden with the prisoner is released. The two categories are Direct Order to the victim (or family) and fines to the court. While those two sums are often combined to provide a total restitution amount, they are in fact separate and apart. While both are collected and distributed the Office of Victims and Survivors Rights and Services and both amounts are imposed by the court, payments to the victims or victim's family are assessed for expenses directly incurred by those individuals as the result of the crime.

Those often include medical, even funeral expenses, lost wages, on-going treatment and similar categories, for direct harm to the victim or family. Those amounts, once set by the court, cannot be reduced or eliminated, no matter how long an inmate has served, how well he programs or how much of the total amount he has repaid.

The portion of restitution, fines and court costs associated with the legal process can, however, be reduced, though now eliminated. Prisoners with these sorts of assessments can petition the sentencing court for a reduction in these fees, if they can show compelling circumstances why such fines should be reduced. A rule of thumb on the amount assessed is often $300 times the number of years of sentence.

If court-ordered fines and fees, absent any money directed to compensating victims, is in excess of this general standard it may be possible to get the amount reduced. But again, it cannot, by law, be eliminated.

There are a couple of ways to make small inroads into the amount owed while a prisoner is still incarcerated. Most prisoners and families know that any money in an inmate's trust account, whether earned as a result of inmate employment or family

contributions, is subject to attachment by CDCR, if that prisoner owes restitution of any kind. The current rate is 55%, automatically deducted from an inmate's trust account for restitution purposes. In other words, like most banks, CDCR is charging you for the privilege of taking your money.

The charge, a 10% administrative fee, can be avoided, however, if the prisoner voluntarily sets aside part of his/her funds for application to the restitution amount. And family members, if they'd like to help in this process, can notify the trust administrator at the prison that they will be sending "X" dollars every month specifically for restitution.

And don't for a moment that that once you're paroled and CDCR no longer has access to that trust account, that you're off the hook. OVS now works with the state Franchise Tax Board (FTB—you know, the state version of the IRS) to find out where you'll be, how much you're making and extract the state's share for any remaining restitution balance owed.

FTB will notify you, once paroled, letting you know how much you still owe and make arrangements for a payment plan. And if the plan goes in arrears (you don't pay as agreed) the FTB can will attach any wages or money you may have.

And here's where some of the confusion lies: once you're released OVS, via the Victims' Compensation Board, is still looking out for the sums owned directly to victims, but restitution for court costs now is the bailiwick of the FTB. And often these agencies don't act in tandem—imagine.

So once released you may be notified of a restitution amount and be making payments, only to receive a notice up to two years later that still more owed, because now both courts fees and direct victims' payments have been tallied. It isn't that the total restitution amount has gone up, but that all parties are now talking to each other and comparing notes.

Bottom line: if the court fees segment of restitution can be reduced, it may save some money and headaches. But restitution won't go away, even once you're home.

And if restitution is still on your books, it's wise to know how much and to whom, so that if asked at your parole hearing (not an unknown circumstance) you can speak to that obligation. Not how you're going to try to get out of it, but to acknowledge your debt and your intention to discharge that responsibility.

If you want more information on your restitution situation contact OVS at: P.O. Box 942883, Sacramento, CA 94283. Be sure to include your name and CDCR number.

THE PRISON REFORM JOURNEY

It's been a long, convoluted and sometimes confusing journey, not without potholes and bumps along the way, but California has made significant progress in prison population reduction, from the bad old days when inmates were stacked 3-high and packed into prison gyms, health care was below third-world standards suicides were rampant and 'riots/incidents' resulting in interminable lockdowns were the rule of the day. California's prison population, fed by decades of 'tough on crime' sentences stoked by zealous, perhaps overly-so, District Attorneys ballooned to the largest in the state's history, over 165,000 men and women.

The soaring numbers of inmates, the suicides, the inmate deaths due to inadequate health care, draconian mental health care, all began to draw the attention not only of prison activists and litigators, but also the federal government. State officials faced the hard reality that they had to do something. The first to act was former Governor Arnold Schwarzenegger in 2003, who ordered the transfer of some 8,000 inmates to out of state prisons in an emergency measure, more like a band aid on a hemorrhage, while changing the name of the prison oversight department to something more palatable, adding "Rehabilitation" to the title of the California Department of Corrections. Optics notwithstanding, Schwarzenegger's efforts also included building yet

another state prison (the 33rd) and watching costs per inmate housing soar to more than $50,000 yearly.

But that wasn't enough to stave off the federal government, which in 2006, in the name of protecting the Constitutional rights of even inmates to have adequate health care, plunked a special receiver in charge of prison health care. In 2008, with the receiver still in place and problems still rampant, the Schwarzenegger administration committed nearly $8 billion to create more than 53,000 state and county custody beds. About the same time, the 3 federal judge panel, overseeing the receiver's efforts to improve health care and general prison conditions, and much to the agitation of the state, ordered the release of some 44,000 prisoners in a massive effort to ease overcrowding.

And although that order was never carried out, becoming bogged down in litigation, in 2009 it appeared the US Supreme Court was on the verge of not only allowing the releases but possibly taking the state to task financially, Schwarzenegger, in his waning days in office, finally came up with a plan that satisfied the 3 judge panel. And the, in 2011, enter a new Governor, in the form of Edmund G. Brown, Jr.

Back in 2009 when his predecessor's plan to reform prison conditions was under discussion and Brown was California's Attorney General, he opined that the federal judges wouldn't find California prisons so egregious, because of the changes (relatively few) years of reform had provided. So it must have been a rude awakening when a few months into his governorship Brown was faced with a US Supreme Court decision ordering the release of 30,000 +/- inmates to reach what the court decided was a manageable inmate population of 110,000, which equated to 137.5% of the system's design capacity at that time.

But before Brown, the courts or the resident experts could implement a plan to reduce the population the voters acted. In 2012 Prop. 36 was passed with an astounding 70% of the vote. That change modified the state's long vilified and prisoner replicating Third Strikes law so that only crimes deemed violent or serous would merit a life sentence. Two year later, 2014, Prop. 47 passed with a less dramatic but clear majority of nearly 60% of the voters. Prop. 47 changed many offenses from felonies to misdemeanors, releasing a significant number of inmates.

But the real change began with the Brown administration, working to abide by the court order and yet keep public confidence, often in the face of dire and since proven false predictions by many in law enforcement that the release of large numbers of inmates would result in the old 'blood running in the streets' fear. Knowing that getting the legislature to buy in to the change was crucial, Brown and colleagues pushed AB 109, more familiarly known as 'realignment', changing the face of the prison and jail population by reclassifying hundreds of crimes from punishable by state prison time to shifting incarceration and/or post-incarceration supervision to local entities, along with billions in tax monies to help pay for the change.

Today, the state prisons are still crowded, but CDCR has managed to keep the overall population under the 137.5% cap, in part by creating more 'design capacity' through building more housing and beds at existing prisons, a process known as 'in-fill' construction. In mid-June the total prisoner population housed in California prisons was pushing 118,000 individuals, but remains at 131% of design capacity, capacity that has increased to room for nearly 90,000.

All this does not mean the prisons are out of the woods, population, health and mental care or rehabilitation-wise. But the situations in state prisons are no longer quite so dire, the 3 judges, while still supervising CDCR, seem satisfied, if not yet ready to hand the reigns of corrections totally back to state hands. But in many ways, the problems that plagued the state prisons and led to litigation, changes and massive amounts of spending, have now been transferred to the county lockups.

Perhaps the solution is, after all, simply not to lock up quite so many of our fellow Californians.

PRISON POPULATIONS IN CALIFORNIA, US DECLINE

The movement to reduce prison populations appears to be making headway, both in California and nationwide. Recent reports released by US Department of Justice revealed that at the end of 2017, the most recent year for which complete figures are available, the prison population in the United States had gone down 7.3%. US DOJ attributes the national decrease to the efforts of several states which have reduced their individual prison levels by as much as 30%; but more than half the nation's states are till seeing prisoner levels rise or only slightly decrease. California is one of the latter group, with figures from CDCR projecting a net 4.8% reduction in inmate numbers for a 5-year period ending in 2023.

The United States remains the world's primary incarcerator, locking up individuals 5 to 10 times the rate of other industrialized nations. And although California doesn't have the highest rate of incarceration per capita, it does house the most prisoners in state prisons in the US. In 2017 that number was a little over 131,000, down from a high in 2009 of nearly 168,000. Projections for the end of 2019 are for just over 127,000 inmates in state prisons.

California joins 5 other states in having reduced the state prison population by 30% or more over the span of 20 years. However, the number of state inmates nationwide who are serving life terms is at an all-time high, 206,000, roughly 35,000 of those in California.

Due to what the department calls "Post-Projections Policy Changes," (law changes such as Prop. 57, sentence recall and 1170(d)) the population is expected to continue to decrease, although CDCR notes those figures will be adjusted as the impact of the post projections policy changes continue to be applied.

In California, as of early June 2019, the most overcrowded prisons were:

CCP-SOL population 4,476; 171.5% of capacity

CTF, population 5,587; 168.7% of design capacity

Wasco, population 5,002; 167.9% of design capacity

In female institutions, CCWF, with a population of 2,842 was the most crowded, at 141.8% of capacity.

EN BANC ACTIONS

En banc actions at the April and May BPH Executive Board meetings thankfully both showed a continued showdown from the rush of gubernatorial referrals that marked the first months of Gov. Newsom's term. April saw only two such referrals and May referrals numbered 4, quite a decrease from the more than a dozen in one month shortly after Newsom took office.

In other en banc referrals both months saw two referrals each for possible compassionate release. The April results were mixed, with **Larry Cramer** being recommended for recall of sentence, despite opposition from the LA County DA's office, but **John Gunn** being denied such relief on the basis that his continued mobility and housing plans could pose a public safety risk. May compassionate release candidates fared better, with both **Robert Goldthread** and **Tony Torres** being recommended for recall of sentence, despite emotional opposition from the relatives of Torres' victim. Those victim family members appeared to be laboring under the impression that Torres, who has been certified by CDCR physicians to be within 6 months of death, would be paroled to the community for release, rather than to a specific living environ-

ment to await his death.

In April BPH counsel referred the denial of parole for **Larry Histon** for consideration by the panel to be sure the decision comported with the Lawrence decision. Although opposed by the LA County DA, Histon's denial was vacated by the entire board due to errors in information in the record and a new hearing ordered. In May BPH legal referred **Isaac Bellinger** and **Levert Cox** for review, Bellinger to be sure the denial complies with Lawrence and Cox to review new information on received after his denial.

Bellinger's denial decision was vacated, and a new hearing ordered, while Cox, who was denied 7 years, will receive a new hearing following new information that apparently debunked some of the information used by the parole panel in the denial. A relatively rare case of two denials being set aside in favor of new hearings and consideration. Attorneys for both men, Phyllis Marshall in the case of Bellinger and Steve DePhillippis for Cox, appeared for their clients.

Also in May **Peter Lopez** was referred for to en banc once again, this time to consider allegations of misconduct since February 2019 when he was first considered by an en banc panel. Lopez was one of more than a dozen parole grants referred for en banc by Newsom in this first flood of referrals after he took office. At that time the board affirmed Lopez' grant, this time, however, based on alleged misconduct after that en banc hearing Lopez was referred for a rescission hearing.

Governor referrals in April sent **Leonard Smith** and **Brian Webb** to en banc, joined by **Jorge Arias, Jose Garcia, Angel Medina** and **Jeffrey Shannon** in May. In all cases save one (Jose Garcia, no speakers) the DAs from the respective counties opposed the parole grants, often being the only speakers. While both Smith and Webb were referred by the entire board for possible rescission of their grants the commissioners appeared to feel themselves on firmer footing with the batch of gubernatorial referrals from May, affirming the grants of Arias, Garcia and Medina, sending only Shannon for rescission consideration.

Recent months have also seen a bit of an uptick in tie votes at parole hearings, as evidenced by two tie decisions coming to the entire parole board in both April and May for final adjudication. In **April Steven Martinez** was granted parole following an original tie vote, but the results for **Jose Vargas** in April and **Amos Johnson** and **Lonnie Morris** in May were not as favorable, all three being denied parole.

BOARD BUSINESS

April and May business meetings of the Board of Parole hearings continued what has become a pattern of rather short meetings primarily dealing with routine issues and perhaps one or two training sessions. The two month's meetings shared a commonality of brevity. The April meeting, featuring an extensive presentation on Transgender 101, lasted just over 2 hours, while the May meeting, with reports from BPH Executive Director Jennifer Shaffer on Significant Events of 2018 (see report elsewhere in this issue) and a recap by the Anti-Recidivism Coalition of their in-prison programs, was even shorter, barely over 90 minutes long.

At the April meeting Shaffer also identified several legislative bills the BPH is watching, to gage the impact the passage of those pieces of legislation would have on board logistics and briefly discussed the board's newly implemented Structured Decision-Making Format (SDMF). It was also reported that, with CDCR ceasing to provide sing language interpreters for inmates with hearing challenges during their attorney interviews, BPH will not provide that service. Attorneys must now request that service from BPH at least 10 days prior to the scheduled interview.

During the May business session, Shaffer, in addition to the aforementioned report on Significant

Events, summarized the 2-day training session commissioners and deputy commissioners received on implementing SDMF, reporting that following the training participants reported they felt the hearings were more focused and efficient (read shorter in length) and that the ultimate decisions were not impacted. While it appears no additional training sessions are currently planned, Shaffer indicated the board was open to feedback from stakeholders as the process rolls out.

Brain Twisters

NO ONE LAW	No one is above the law
GROUND REGULATION	Underground regulation
ARREST YOU'RE	You're under arrest
BIG BIG IGNORE IGNORE	Too big to ignore
COMMUNITY P P P I I I L L L A A A R R R S S S	Pillars of the community
9S2A5F4E1T8Y6	Safety in numbers
FLAUBADENCE	Bad influence (bad in-fluence)
TIME TIME	Time after time

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

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For more information please contact us at

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

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

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

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

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