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.

[WRITER'S NOTE: IN THE *IN RE PALMER* SERIES OF CASES, THERE ARE NOW TWO INDEPENDENT CASES GRANTED REVIEW BY THE CALIFORNIA SUPREME COURT. TO MINIMIZE CONFUSION, WE HAVE REPEATED THE BASICS OF EACH CASE BELOW, ALONG WITH THE LATEST (3/09/20) CORRESPONDING UPDATES IN STATUS.]

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

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COURT CASES (in order)

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> 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 ordered the lower court opinion depublished.

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

<u>The opening brief, 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.</u>

3/09/20 UPDATE: SIX BRIEFS OF AMICUS CURIAE HAVE BEEN FILED AND ANSWERED. AS OF OCTOBER 10, 2019, THE CASE WAS FULLY BRIEFED. <u>NO DATE HAS BEEN SET YET FOR ORAL ARGUMENT.</u>

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

<u>In re William Palmer ("Palmer II")</u>

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

In addition to the case reported above, William Palmer had another writ going in the same division of 1st Appellate District, which challenged his continued denial of parole as constitutionally excessive punishment for his kidnap-for-robbery conviction. In another published decision, the 1st DCA recently

PUBLISHER'S NOTE

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

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

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

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

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.

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

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

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

> Our Supreme Court has recognized, however, that "even if sentenced to a life-maximum term, no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense. Such excessive confinement . . . violates the cruel or unusual punishment clause (art. I, § 17) of the California Constitution." (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1096 (*Dannenberg*).) "The proportionality of a sentence turns entirely on the culpability of the offender as measured by "circumstances existing *at the time of the offense*." (*Rodriguez, supra*, 14 Cal.3d at p. 652, italics added.) Where an inmate's sentence is disproportionate to his or her individual culpability for the offense, the Supreme Court has acknowledged, "section 3041, subdivision (b) cannot authorize such an inmate's retention, *even for reasons of public safety*, beyond the constitutional maximum period of confinement." (*Dannenberg*, at p. 1096, citing *Rodriguez*, at pp. 646-656, italics added & *Wingo, supra*, 14 Cal.3d at pp. 175-183; accord, *Butler, supra*, 4 Cal.5th at p. 744.) "[I]nmates may bring their claims directly to court through petitions for habeas corpus if they 'believe, because of the particular circumstances of their crimes, that their confinements have become constitutionally excessive as a result.' " (*Butler*, at p. 745, quoting *Dannenberg* at p. 1098.) In this sort of challenge, deference to the legislatively prescribed penalty is no longer a relevant factor, as the actual term of years served is a function of the Board's parole decisions, not the Legislature's determination of the appropriate penalty in this particular case.

[Writer's comment: This Dannenberg ruling did not result in Dannenberg's release – the Court majority held that if Dannenberg's

crime "exceeded the minimum elements of the offense," he could be confined indefinitely for that reason alone. This "meaningless" (per Justice Romero's Dannenberg dissent) parole denial standard was later deemed "unworkable" and overturned in In re Lawrence.]

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

3/9/20 UPDATE: REPLY BRIEF FILED 2/21/20. CASE FULLY BRIEFED. NO DATE HAS BEEN SET YET FOR ORAL ARGUMENT.

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

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

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

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

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

opinion of a Court of Appeal in the matter, and any published opinion of a Court of Appeal in a matter in which the Supreme Court has ordered review and deferred action pending the decision, is citable and has binding or precedential effect, except to the extent it is inconsistent with the decision of the Supreme Court or is disapproved by that court.

(3) Supreme Court order

At any time after granting review or after decision on review, the Supreme Court may order that all or part of an opinion covered by (1) or (2) is not citable or has a binding or precedential effect different from that specified in (1) or (2).

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

DENIAL OF RECALL OF LWOP SENTENCE FOR FOR 19-YEAR-OLD IS NOT AN EQUAL PROTECTION VIOLATION COMPARED TO JUVENILE LWOPS

In re Eugene Jones

---Cal.App.5th---; CA 1(4) No. A157877
November 22, 2019

Eugene Jones, sentenced to LWOP for a crime committed when he was 19, had petitioned the superior court for recall of sentence under PC §1170)(d)(2) because he was a youthful offender who was not fully developed at age 19. PC §1170)(d)(2) provides for applying for such relief if one was a juvenile (i.e., under 18) at the time of the offense.

Jones' argument was, in essence, to gain for LWOPs what non-LWOP lifers enjoy if they were under 25 at the time of their life crime: a chance for resentencing and an earlier initial parole hearing. Jones claimed that there was no difference between his group (LWOPs over 18) and the other consort (non-LWOP lifers under 25) as to such lack of maturation, and that it was a denial of equal protection without any rational basis for doing so to thusly treat him dissimilarly.

The superior court denied such "compassionate" relief, citing the express intent of the Legislature in excluding LWOP young adults from their juvenile counterparts. The Court of Appeal now agreed.

The Court's first observation was as to the application of equal protection of the law.

> "The Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution guarantee all persons the equal protection of the laws." (*People v. Edwards* (2019) 34 Cal.App.5th 183, 195 (*Edwards*).) "The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, ' "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." ' [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' " (*People v. Brown* (2012) 54 Cal.4th 314, 328, italics omitted.)

The Court then relied on the state statutory language distinctions.

> Because LWOP offenders who were between the ages of 18 and 25 when they committed their offenses are adult offenders they are not similarly situated

to juvenile offenders described in section 1170(d)(2).

Jones then argued that the Court should adopt similar maturation arguments to his case as are used in non-LWOP cases.

> Disputing this conclusion, Jones posits that the criteria for distinguishing juveniles from adults supports his equal protection claim. According to Jones, the "underlying rationale" of section 1170(d)(2) is that "young people are different developmentally and neurologically" from older offenders. He further alleges that young adults who are between 18 and 25 when they commit their LWOP offenses are similarly situated to juvenile LWOP offenders because they also have developing brains, lack maturity, and have increased potential for rehabilitation.

The Court didn't buy it.

> Jones cites no authority for the purpose he ascribes to section 1170(d)(2), and we think his formulation fails fully to capture it. The Legislature may well have been concerned that "young people are different developmentally and neurologically," but it was also concerned, more specifically, with LWOP sentences meted out on children—on those young people who were under the age of 18 when they committed their crimes. "[T]he most reliable indicator of legislative intent" is generally the language of a statute (Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1103), and here the express terms of section 1170(d)(2) indicate that the statute was aimed at providing relief only for those who had not yet reached the age of majority when they committed their crimes. By drawing the line at a defendant's eighteenth birthday, the Legislature has chosen to target the youngest, and presumably most deserving, of the group of youthful offenders whose brains were still developing and whose judgment had not yet matured. While young adults share many of the attributes of youth, they are by definition further along in the process of maturation, and the law need not be blind to the difference.
>
> Jones intimates that section 1170(d)(2) serves the same purpose as Penal Code section 3051, which establishes special parole eligibility guidelines for young adult offenders. He then opines that when section 3051 was amended to raise the age of youthful offender parole eligibility to 25, the Legislature implicitly found that the brain is not fully developed until at least that age. Jones overlooks, however, that section 3051 does not apply to individuals who received an LWOP sentence for a crime that was committed after they turned 18. (§ 3051, subd. (h).) Thus, to the extent it is relevant here, section 3051 is inconsistent with Jones's claim that criminal offenders who received LWOP sentences for crimes they committed before they turned 18 are similarly situated to young adult offenders serving LWOP sentences.

The Court then fell back on the strict interpretation of the statutory language to deny Jones relief.

> Even if we assume that adult LWOP offenders under the age of 25 are similar to juvenile LWOP offenders in the sense that their brains are not fully developed, section 1170(d)(2) does not violate equal protection because the "Legislature has a constitutionally sufficient reason to treat the groups differently." (*People v. Castel* (2017) 12 Cal.App.5th 1321, 1326.)

"Where a class of criminal defendants is similarly situated to another class of defendants who are sentenced differently, courts look to determine whether there is a rational basis for the difference. [Citation.] '[E]qual protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." ' [Citation.] . . . If a plausible basis exists for the disparity, '[e]qual protection analysis does not entitle the judiciary to second-guess the wisdom, fairness, or logic of the law.' " (*Edwards, supra*, 34 Cal.App.5th at pp. 195–196.)

To determine the age at which the diminished culpability of a youthful offender should no longer result in a categorically different sentence, a line must be drawn somewhere. (*Roper, supra*, 543 U.S. at pp. 574, *Graham, supra*, 560 U.S. at pp. 75–79.) "[W]hile '[d]rawing the line at 18 years of age is subject … to the objections always raised against categorical rules …[, it] is the point where society draws the line for many purposes between childhood and adulthood.' " (*People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482 quoting *Roper, supra*, 543 U.S. at p. 574.) The Legislature could reasonably decide that for those convicted of LWOP crimes, the line should be drawn at age 18, rather than at some later date when the brain is fully developed. Drawing a bright line at age 18 establishes an objective and easily implemented measure, which has been used by the United States Supreme Court for sentencing purposes. While a different line could have been drawn, it is not entirely arbitrary to limit section 1170 (d)(2) to individuals who committed their crimes before they were 18 years old.

In a concurring opinion, Justice Pollack noted that at some time, when Jones might be otherwise eligible for an early parole hearing, the question of the fairness of Penal Code §3051(h) should be reconsidered by the Legislature. That section excludes 18-25 year-olds (at the time of their crimes) from early parole on the sole grounds that their crimes were more severe. Noting that suitability for reentry into society eventually trumps punishment for the crime in Parole Board considerations, there appears to be a discontinuity in logic when excluding LWOPs.

However, in this writer's opinion, this Legislative change is less likely to occur because it has the effect of blurring the distinction between the most outrageous crimes (e.g., LWOP crimes) and lesser ones. This might encourage budding young criminals to not think twice about committing such crimes – because the price they pay for them will be the same.

LIFER GRANTED NORMAL PAROLE, BUT CONTINUING TO SERVE IN-PRISON CRIME DETERMINATE SENTENCE, NOT ENTITLED TO RETROACTIVE RELIEF AS A YOUTHFUL OFFENDER

In re Kevin Howerton

---Cal.App.5th---; CA5; No. F076546
January 30, 2020

In a novel case involving a lifer who was "normally" granted parole, but who remained in prison to serve his determinate 10 year term for two in-prison weapons possessions, the lifer's attempt to gain retroactive relief as a youthful offender (because he was 19 at the time of his

murder offense) was denied.

Kevin Howerton, doing 15-life for second degree murder, was granted parole – before the new laws providing relief for youthful offenders was passed. While continuing his incarceration to complete his 10 year in-prison crime added term, the law changed to permit youthful offenders early parole consideration and credit for excess time against their parole tail. Howerton petitioned the superior court for habeas relief – while he was still incarcerated on the determinate term – for youthful offender consideration. The court granted relief and ordered his immediate release plus credit against his parole.

> The facts relevant to this case are not in dispute. In 1991, Howerton was convicted of a second degree murder he committed in 1990, when he was 19 years old. He was sentenced to an indeterminate term of 15 years to life. Pursuant to section 3000.1, Howerton is subject to a lifetime period of parole with the exception that he must be discharged from parole after five years absent a finding of good cause to retain him on parole. (§ 3000.1, subd. (b).)
>
> In February 2000 and again in August 2002, while serving his second degree murder sentence, Howerton was convicted of possession of a weapon by an inmate. These convictions resulted in what was effectively an additional 10-year consecutive sentence.
>
> In July 2014, Howerton was granted parole on the second degree murder sentence. Consistent with the law at that time, Howerton then began serving, and continues to serve, his 10-year consecutive sentence for the weapons convictions.
>
> On January 1, 2016, amendments to section 3051 became effective that, if applicable, rendered Howerton eligible for a youth offender parole hearing on his second degree murder conviction. Subsequent case law, including but not limited to, *In re Trejo* (2017) 10 Cal.App.5th 972 (Trejo), held that youth offenders granted parole under section 3051 must be immediately released, even if they have later suffered adult convictions while incarcerated, provided any later convictions are not specifically identified as exempting those youth offenders from the statutory scheme. (See *In re Jenson* (2018) 24 Cal.App.5th 266 [summarizing and following *Trejo*]; *In re Williams* (2018) 24 Cal.App.5th 794, 799–805 [same].) Howerton, however, has not been released. Rather, he remains incarcerated pursuant to the weapons convictions.

On the state's appeal, Howerton's victory was reversed by the appellate court. The Court determined that the youthful offender law applied to someone yet *seeking* parole – not so someone who had already been granted parole. Howerton's attempt to get the new law retroactively applied to him did not meet this statutory requirement.

> Asserting that his situation is encompassed by the statutory scheme of section 3051, Howerton filed an application (petition) for a writ of habeas corpus with the Superior Court of the State of California for the County of Kern. In addition to release, Howerton argued any time served after he should have been released should count against his parole requirements. The People opposed, arguing Howerton was not a youth offender under the statute because he had been paroled

under the normal course of the law prior to section 3051's amendments, and thus was serving a determinate term sentence committed as an adult and not an indeterminate sentence as required under the statutory scheme. The People further disagreed that any excess time in custody could count against a lifetime parole requirement.

The Court first reviewed the current law and the applicable standard of review.

" 'As a general matter, we review the grant of a writ of habeas corpus by applying the substantial evidence test to pure questions of fact and de novo review to questions of law. [Citation.] "[W]hen the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, [the appellate] court's review is de novo." ' " (*In re Campbell* (2017) 11 Cal.App.5th 742, 753.)

"Our fundamental task in construing a statute is to ascertain and give effect to the intent of the Legislature. [Citation.] ' " 'We begin by examining the statute's words, giving them a plain and commonsense meaning.' " ' [Citation.] ' "[W]e consider the language of the entire scheme and related statutes, harmonizing the terms when possible." ' [Citation.] When the statutory language is clear and unambiguous, we presume the Legislature meant what it said." (*People v. Taggart* (2019) 31 Cal.App.5th 607, 612.)

Section 3051 was enacted in 2013. (*People v. Franklin* (2016) 63 Cal.4th 261, 276.) The legislative intent behind section 3051 " 'is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity ....' " (*Trejo, supra*, 10 Cal.App.5th at p. 980.) The statute thus provides for youth offender parole hearings that guarantee youth offenders a meaningful opportunity for release on parole. (§ 3051, subd. (e).) Youth offenders who committed their "controlling offense" prior to reaching a specified age are entitled to a parole hearing after serving a designated period in custody. (§ 3051, subd. (b).) More specifically, and as relevant to the issues raised here, "[a] person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of less than 25 years to life shall be eligible for release on parole by the board during his or her 20th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (§ 3051, subd. (b)(2).) The "controlling offense" is defined as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (§ 3051, subd. (a)(2)(B).)

As originally enacted, section 3051 applied where the controlling offense was committed before the offender was 18 years old. (Trejo, supra, 10 Cal.App.5th at p. 981 & fn. 6.) By an amendment that became effective on January 1, 2016, the Legislature extended the availability of youth offender parole hearings to offenders who were under 23 years old when they committed their controlling offenses. (Stats. 2015, ch. 471, § 1 (Sen. Bill No. 261); see *Trejo, supra*, at p. 981 & fn. 6.)

> By a subsequent amendment that became effective January 1, 2018, the Legislature further extended the availability of youth offender parole hearings to offenders who were under 25 years old when they committed their controlling offenses. (§ 3051, subd. (b); Stats. 2017, ch. 675, § 1 (Assem. Bill No. 1308).) At each amendment, new time limits were set for conducting the relevant hearings for those who became eligible for parole based on the amendments. (See § 3051, subd. (i)(2)(A) ["The board shall complete all youth offender parole hearings for individuals who were sentenced to indeterminate life terms and who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the act that added this paragraph by July 1, 2017."].)

The Court then concluded that Howerton was not eligible for a youth offender parole hearing.

> A youth offender parole hearing is a procedural mechanism to ensure that youth offenders are provided with a meaningful opportunity for release on parole. As such, it is unsurprising that the statute has, within it, exemptions from the statutory scheme for those that have already been paroled or otherwise had a meaningful opportunity to obtain parole. Relevant to this case, one who would otherwise be eligible for release on parole through a youth offender parole hearing is not entitled to the protections of the statutory scheme if "previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (§ 3051, subd. (b)(2).) If one has obtained a reasonable opportunity at parole prior to the point the statute's mandated timeframes are triggered, neither the right to a youth offender parole hearing nor any of the subsequent effects mandated by the case law or statutory scheme are required by the statute. Indeed, such hearings and their subsequent effects are specifically excluded by the statutory language.

In this case, the trial court's determination that Howerton's second degree murder conviction qualified him as a youth offender under the statutory scheme was only half of the required analysis. The second requirement was to determine whether Howerton had been "previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions" such that he was entitled to a youth offender parole hearing. Here, the record is clear. Howerton received multiple prior parole eligibility hearings and had previously been released on parole with respect to his "controlling offense" of second degree murder. Although these hearings and the parole determination came after the 20-year period noted in section 3051, they all occurred before Howerton became eligible for a youth offender parole hearing in the first instance. Given that the amended statutes provide a cutoff date to perform a first youth offender parole hearing if one becomes required by the amendments, and make no suggestion the parole analysis itself should be retroactive to the point at which eligibility would have first arisen, the statutory language concerning prior release or prior eligibility hearings most naturally reads to restrict eligibility to those that have not yet received the benefits of parole or reasonable parole eligibility hearings at the time the

amended statute becomes effective.

In reaching its conclusion that Howerton should be released, the trial court determined that Howerton's prior parole hearings and determinations were the equivalent of a youth offender parole hearing and thus entitled him to the protections of subsequent case law developments such as those in *Trejo* that required full immediate release. We do not agree. Determining that hearings and parole determinations made prior to one's amended eligibility under section 3051 can be retroactively classified as hearings under section 3051 negates the specific language providing that prior release or parole eligibility hearings exclude a youth offender from the youth offender parole hearing requirement. While eligibility for release may be retroactive under the statutory scheme, we see nothing in the language, case law, or legislative history that suggests previously completed parole actions should be reclassified as youth offender parole hearings. To the contrary, the plain language of the statute states the opposite and is consistent with the legislative concern that youth offenders are not being provided reasonable opportunities for parole in a timely fashion.

Howerton was not entitled to a youth offender parole hearing when he was convicted. Nor was he potentially entitled to a youth offender parole hearing when he was paroled. Moreover, prior to any potential youth offender parole hearing eligibility, Howerton received multiple parole eligibility hearings, was ultimately deemed suitable for parole, and was actually paroled. By the plain language of the statute, Howerton was not entitled to a youth offender parole hearing at the time the statute became effective and thus was not entitled to the additional benefits afforded by the case law requiring immediate release upon parole under that statutory scheme.

It is undisputed that under the law at the time of Howerton's parole, a grant of parole on a life sentence did not relieve one from serving any subsequently obtained consecutive sentences. (§ 1170.1, subd. (c); see *In re Thompson* (1985) 172 Cal.App.3d 256, 259–262.) Nor has that law changed with respect to adult offenders. Thus, while an argument can be made that Howerton's release turns only on the timing of his parole grant and not upon any other distinguishing fact between him and other newly classified youth offenders, the statutory language shows this is the result of intentional line drawing on the part of the Legislature as reflected in the plain meaning of the language they chose for the statutory scheme.

Disposition

The trial court's order is reversed. The matter is remanded with instructions to vacate the order granting petition for writ of habeas corpus and enter a new order denying the petition.

GOVERNOR'S REVERSAL UPHELD – "SOME EVIDENCE" SUPPORTS DECISION

In re Michael Dubov

CA2(4); No. B297731
January 22, 2020

Michael Dubov, convicted of 1st degree murder, has been granted parole twice – and has twice had his grant reversed by the Governor. In the second case (by Governor Newsom), he challenged the reversal in superior court, and was denied relief. Accordingly, he brought a new petition to the

Court of Appeal.

As an observation by Life Support Alliance, many of Governor Newsom's reversals are against men whose victim was a female. Such was the case here, where Dubov killed his girlfriend and hid the body. Dubov admitted to earlier drug use as well as to a history of narcissistic personality disorder. Although the Board found Dubov had matured since (he was a youthful offender at the time), the Governor pointed to the drug and disorder histories as "some evidence" he relied upon in his reversal.

The question Dubov raised in his petition was whether this was really "some evidence" or just unchanging "baggage" from his past. In this report, we will concentrate on the reversal "logic" and its invulnerability, as found by the Court of Appeal in this unpublished opinion

Governor Newsom's reversal letter was summarized by the Court:

> Governor Gavin Newsom reversed the parole board's decision. The Governor acknowledged that Dubov was a youthful offender, and that he had "made some efforts to improve himself in prison." Nonetheless, "these factors are outweighed by negative factors that demonstrate he remains unsuitable for parole." The Governor called the crime "callous and cruel," noting that Dubov killed Bissett despite her allowing him to live in her apartment. The Governor stated, "I am troubled that Mr. Dubov still does not have a better understanding of how he came to inflict such violence on another human being."
>
> The Governor noted that Dubov said he felt he needed to win, and that he had power and control issues. At the parole hearing, Dubov explained that he felt entitled, that he had a "'fear of failure as a child, which stemmed to me creating ego, and entitlement, and grandiosity. And validation – external validation.'" The Governor stated, "These statements show me that Mr. Dubov has not gained adequate insight into his actions." Dubov had a stable childhood with no exposure to violence, and although he described [victim] Bissett as his "'last string of hope' in giving him the validation that he was seeking," he murdered her.
>
> The Governor also noted that Dubov had characterized his methamphetamine use as "an incendiary," and said, "I don't think drugs have a primary role." The Governor stated, "Until he demonstrates that he fully understands how his drug addiction contributed to his criminal actions, and shows that he is capable of refraining from similar behavior in the future, I do not believe he should be released from prison." The Governor concluded, "When considered as a whole, I find the evidence shows that [Dubov] remains an unreasonable danger to society if released from prison. Therefore, I reverse the decision to parole Mr. Dubov."

The superior court had denied Dubov's earlier habeas petition.

> Dubov apparently filed a petition for writ of habeas corpus in the Los Angeles Superior Court; neither the petition nor any supporting documents are included in the record on appeal. In a memorandum of decision, which is included in the record, the superior court denied the petition. The court found that there

was "some evidence to support the Governor's decision that Petitioner poses an unreasonable risk of danger to society, and if released, a threat to public safety due to the heinousness of the commitment offense and lack of insight." The superior court found there was evidence that the crime and Dubov's actions afterward in lying to Bissett's family and hiding her body "demonstrates an exceptionally callous disregard for human suffering." The court also found that in the 2009, 2015, and 2016 CRAs, Dubov "appeared to have attributed more significance to the role of drug addiction in the commitment offense than Petitioner currently does," and that "Petitioner's minimization of the role of drug addiction in the crime is some evidence supporting the Governor's finding of current dangerousness." The court noted that the Governor considered Dubov's youthfulness at the time of the crime and his attempts to improve himself in prison, yet concluded that these positive factors did not outweigh those showing unsuitability for parole. The court stated that there was a "rational nexus between the evidence in the record and the Governor's determination of Petitioner's current dangerousness."

The Court of Appeal accepted Dubov's new petition there, and, in its Opinion, summarized the applicable law.

Dubov contends that the Governor's decision is unsupported by the evidence because Dubov has demonstrated "more than sufficient insight and remorse," as well as "two-plus decades of rehabilitative effort." The Attorney General asserts that the Governor's decision was supported by the evidence.

"The essential question in deciding whether to grant parole is whether the inmate currently poses a threat to public safety. [¶] That question is posed first to the Board and then to the Governor, who draw their answers from the entire record, including the facts of the offense, the inmate's progress during incarceration, and the insight he or she has achieved into past behavior." (*In re Shaputis* (2011) 53 Cal.4th 192, 220-221 (*Shaputis II*).) "Judicial review is conducted under the highly deferential 'some evidence' standard. The executive decision of . . . the Governor is upheld unless it is arbitrary or procedurally flawed. The court reviews the entire record to determine whether a modicum of evidence supports the parole suitability decision. [¶] The reviewing court does not ask whether the inmate is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness. The court is not empowered to reweigh the evidence." (*Id*. at p. 221.)

Here, reviewing the entire record, we find that some evidence supports the Governor's findings. The Governor based his decision on two factors: the crime and Dubov's lack of insight.

The Court next summarized case law regarding the Governor's power.

"[A] life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2281, subd. (a).) This regulation "lists several circumstances relating to unsuitability for parole—such as the heinous, atrocious, or cruel nature of

the crime, or an unstable social background; and suitability for parole—such as an inmate's rehabilitative efforts, demonstration of remorse, and the mitigating circumstances of the crime. (Regs., § 2281, subd. (d).)" (*In re Lawrence* (2008) 44 Cal.4th 1181, 1202-1203.)

According to regulation 2281, subdivision (c)(1), a prisoner is unsuitable for parole when "[t]he prisoner committed the offense in an especially heinous, atrocious or cruel manner." Factors to be considered include whether the "offense was carried out in a dispassionate and calculated manner, such as an execution-style murder," the "victim was abused, defiled or mutilated during or after the offense," the "offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering," or the "motive for the crime is inexplicable or very trivial in relation to the offense." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(B)-(E).)

Where "certain circumstances of petitioner's offense, as well as his postoffense conduct, . . . involve particularly egregious acts beyond the minimum necessary to sustain a conviction for [first] degree murder," the Governor may "consider the nature of the offense in denying parole." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 683.) However, "the core statutory determination entrusted to the Board and the Governor is whether the inmate poses a current threat to public safety," thus there must also be "'some evidence' . . . that the inmate is unsuitable for parole because he or she currently is dangerous." (*In re Lawrence, supra,* 44 Cal.4th at p. 1191.)

In next discussing the offense factors that supported the Governor's reversal, the Court noted the following.

> Here, the Governor called the murder "callous and cruel." This conclusion is supported by the evidence. Dubov stated that in response to a perceived slight by Bissett being "in control" [reciting detailed facts of offense]; These facts demonstrate that the offense and Dubov's post-offense conduct involved particularly egregious acts, including carrying out the offense in a dispassionate and calculated manner; abusing, defiling or mutilating the victim during or after the offense; showing an exceptionally callous disregard for the suffering of both Bissett and her mother; and the motive for the crime was very trivial in relation to the offense. As the 2016 CRA stated, Dubov's actions "demonstrated a capacity for severe violence without any sense of feeling." The Governor's conclusion that the crime was callous and cruel is therefore supported by evidence.

The Governor had also cited "lack of insight" in his reversal letter.

> The Governor stated, "I am troubled that Mr. Dubov still does not have a better understanding of how he came to inflict such violence on another human being." He noted that Dubov said he committed the crime due to a need to win, a sense of entitlement, power and control issues, grandiosity, and a desire for external validation. The Governor stated, "These statements show me that Mr. Dubov has not gained adequate insight into his actions," especially in light of Dubov's stable and supportive background and lack of exposure to violence.

The Court pointed to statements in the hearing transcript that supported the Governor's

lack-of-insight finding.

> Evidence supports the Governor's finding that Dubov did not display adequate insight into the factors that led to the murder. Dubov discussed relatively benign psychological issues, such as a desire to win, a sense of entitlement, and power and control issues, but he offered no insight into how those issues led him to murder Bissett rather than manifesting in less destructive ways. In addition, Dubov's explanations at the parole hearing included a need for external validation and when "I didn't get it, I destabilized," and "when I couldn't get [validation] from Mika, I couldn't self-soothe anymore." Dubov also talked about "causative factors of my youth," when he "started having my defects of character." Dubov's use of psychological jargon suggests an effort to construct a clinical assessment that appears insightful, rather than a manifestation of actual insight.
>
> In addition, Dubov mentioned his narcissistic personality disorder only in passing, as something to address "because of the last . . . psych eval." This also supports the Governor's conclusion that Dubov lacked insight into what caused him to commit the crime. … Dubov focused primarily on how the lies relating to the murder weighed on him, how relieved he felt after he was caught, and how he prolonged Bissett's mother's hope. These are peripheral issues surrounding the murder that focus primarily on Dubov, with little compassion or insight into what Bissett experienced in the abusive relationship or during the crime.

From this, the Governor concluded that Dubov was unchanged, which the Court found was a conclusion finding "some evidence" in the record.

> Evidence that an inmate's "character remains unchanged and that he is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming,' all provide some evidence in support of the Governor's conclusion that [an inmate] remains dangerous and is unsuitable for parole." (*In re Shaputis* (2008) 44 Cal.4th 1241,1260.) In addition, "an inmate's 'lack of insight' can provide a logical nexus between the gravity of a commitment offense and a finding of current dangerousness." (*In re Ryner* (2011) 196 Cal.App.4th 533, 547 (*Ryner*).) The record contains evidence to support the Governor's conclusion.

Dubov's argument that the Governor was unfairly "selective" in parsing the record was rejected by the Court of Appeal.

> Dubov asserts that "the Governor's conclusion regarding Dubov's insight is based on a parsed and selective reading of the record and rests on speculation and misinterpretation." He insists that "Dubov's testimony shows no material lack of insight or evidence of minimization, but the Governor simply refused to accept it." We disagree. Even if the record could be read to support a finding that Dubov had gained adequate insight, it is not the court's role to reweigh the evidence. "As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision." (*In re*

Rosenkrantz, supra, 29 Cal.4th at p. 677.) That standard has been met here.

Finally, the Court cited approvingly to the Governor's other observations that supported his decision.

> The Governor also pointed to Dubov's statements about his drug use, noting that Dubov said his use of methamphetamine was "an incendiary," but the murder "would have happened anyway." The Governor stated, "Until he demonstrates that he fully understands how his drug addiction contributed to his criminal actions, and shows that he is capable of refraining from similar behavior in the future, I do not believe that he should be released from prison."
>
> This statement is also supported by evidence. Dubov said he was actively using methamphetamine over the days leading to the murder, and that he had not slept as a result. He minimized the role of the drug in the crime, stating that the murder would have happened anyway. Although Dubov's willingness to take responsibility for the crime instead of simply blaming methamphetamine is laudable, his minimization of the role his addiction, drug use, and sleep deprivation played on his state of mind at the time of the crime supports the Governor's finding that Dubov has not shown adequate insight into this issue.
>
> "[T]he standard governing judicial review of parole decisions made . . . by the Governor is whether 'some evidence' supports the determination that a prisoner remains currently dangerous." (*In re Prather* (2010) 50 Cal.4th 238, 243.) "Due process of law requires that [the Governor's] decision be supported by some evidence in the record. Only a modicum of evidence is required." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 676-677.) Here, that standard has been met.

For a prisoner whose in-prison record is replete with educational accomplishments, zero write-ups, years of maturation from his youthful (age 20) crime, and being bright and articulate, this is a tough loss.

THREE-STRIKER ON NON-VIOLENT OFFENSE CANNOT BE DENIED PROP. 57 RELIEF BECAISE OF PRIOR §290 REGISTRATION CRIMES

In re Marcus Ellington

CA2(5); No. B296112
January 14, 2020

Marcus Ellington contended that CDCR improperly found him ineligible for early parole consideration under Prop. 57 because he is required to register as a sex offender under PC § 290 due to prior convictions for sex offenses. The Court agreed and granted his habeas petition.

Ellington is currently serving a 55 - life sentence for possession of a collapsible baton (PC § 22210) and criminal threats (PC § 422, subd. (a)), plus 360 days for two counts of sexual battery (PC § 243.4, subd. (e)(1).) Possession of a collapsible baton and criminal threats are nonviolent felony convictions. Sexual battery is a misdemeanor sex offense registrable under § 290.

Prior to sentencing on April 20, 2018, petitioner admitted he had five prior strike convictions under the Three Strikes law. The five prior strikes are registrable sex offenses under § 290.

Ellington disagreed with CDCR when they rebuffed his claim for an earlier parole consider-

ation under Prop. 57 due to his §290 registration requirement.

> Following his commitment to state prison in this case, petitioner learned CDCR considers him ineligible for an early parole hearing under Proposition 57 because he is subject to registration under section 290 for his prior felony sex offense convictions and his current misdemeanor sexual battery conviction. On March 8, 2019, petitioner filed a petition for writ of habeas corpus, seeking an order directing CDCR to grant him an early parole hearing. We appointed counsel, issued an order to show cause to CDCR, and now grant the petition.

The Court reviewed recent case law on this topic and concluded that it had been, in fact, decided that such registration did not foreclose Prop. 57 relief.

> Approved by California voters on November 8, 2016, Proposition 57 provides that "[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 of his or her primary offense." (Cal. Const, art. I, § 32, subd. (a)(1) (section 32(a)(1)).) The "full term" of the "primary offense" is "the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." (Cal. Const., art I, § 32, subd. (a)(1)(A) (section 32(a)(1)(A)).) Proposition 57 directs CDCR to adopt regulations "in furtherance of [section 32(a)]" and "certify that these regulations protect and enhance public safety." (Cal. Const., art I, § 32, subd. (b).)
>
> After this court partially invalidated CDCR's initial set of implementing regulations (see generally *In re Edwards* (2018) 26 Cal.App.5th 1181 (*Edwards*)), CDCR promulgated new regulations effective in 2019. These regulations exclude from early parole consideration any inmate who "is convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in Sections 290 through 290.024 of the Penal Code." (Cal. Code Regs., tit. 15, § 3491, subd. (b)(3).)
>
> In *In re Gadlin* (2019) 31 Cal.App.5th 784, review granted May 15, 2019, S254599 (*Gadlin*), we held these regulations invalid insofar as they bar early parole consideration for an inmate who is subject to registration under section 290 for a prior crime for which the inmate has already fully served his or her sentence. *Gadlin* disposes of CDCR's argument that petitioner is ineligible for early parole consideration due to his prior sex offense convictions.
>
> In *In re Mohammad* (2019) 42 Cal.App.5th 719 (*Mohammad*), we held "under sections 32(a)(1) and 32(a)(1)(A), an inmate who is serving an aggregate sentence for more than one conviction will be eligible for an early parole hearing if one of those convictions was for 'a' nonviolent felony offense." (*Id*. at p. 726.) That holding describes petitioner, who is currently serving an aggregate sentence for a nonviolent felony offense—actually two: possession of a collapsible baton and making criminal threats. Mohammad therefore disposes of CDCR's argument that petitioner is ineligible for early parole consideration by virtue of now serving a sentence that includes time for a misdemeanor sexual battery conviction. (*Id*. at pp. 726–727.)

IV. DISPOSITION

The petition for writ of habeas corpus is granted. CDCR is directed to evaluate petitioner for early parole consideration within 60 days of remittitur issuance.

YOUTHFUL OFFENDER WHO ALREADY HAD A PAROLE CONSIDERATION HEARING IS NOT LATER ENTITLED TO AN EARLY YOPH HEARING

In re Binh Vo

CA4(3); No. G056647
January 27, 2020

In 1996, petitioner Binh Vo committed a series of offenses for which he was sentenced to life in prison plus 14 years. Because he was only 20 years old at the time of his crimes, he contends he should have been provided a youth offender parole hearing (YOPH) by January 1, 2018. He also contends he is entitled to a "*Franklin* hearing" to create a record of mitigating factors of youthfulness that existed at the time of his offenses. (See *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).)

The record shows petitioner was afforded a standard parole hearing in 2015. In light of that hearing, he was not entitled to a YOPH by January 1, 2018. In addition, his request for a Franklin hearing in this habeas proceeding is foreclosed by the Supreme Court's recent opinion in *In re Cook* (2019) 7 Cal.5th 439 (*Cook*). Therefore, we deny his petition for a writ of habeas corpus. However, per the *Cook* decision, the denial is without prejudice to allow petitioner to pursue his *Franklin* claim in the trial court. ….

Petitioner's life term began in 2009, and on April 7, 2015, he appeared before the parole board for a hearing. Petitioner told the board he immigrated to the United States with his family when he was 16 years old. He said he was very immature, impressionable and selfish when he committed his crimes, but during his time in prison, he has grown into a responsible adult and is no longer a threat to public safety. However, the parole board disagreed and denied him parole consideration for five years. Petitioner is currently scheduled for a YOPH on February 28, 2020.

[Note: At Vo's 2020 hearing, he was denied parole for three years.]

Although his YOPH was just a month away, Vo argued that the BPH violated his statutory rights by not providing him with that hearing by January 1, 2018. His argument was based on PC § 3051, but, as the Court explained, he was exempted from the terms of that statute. Therefore, his claim was without merit.

The Court reviewed the history of PC § 3051 as well as its non-applicability here.

Section 3051 was enacted following a series of landmark juvenile sentencing decisions that were handed down shortly after petitioner began serving the life-term portion of his sentence in 2009. (See *Graham v. Florida* (2010) 560 U.S. 48 [it is cruel and unusual to sentence juvenile nonhomicide offenders to life without parole]; *Miller v. Alabama* (2012) 567 U.S. 460 [mandatory sentence of life without parole for juvenile homicide offenders is unconstitutional]; *People v. Caballero* (2012) 55 Cal.4th 262 [barring de facto sentences of life without parole for juvenile nonhomicide offenders].) These decisions established that, except in the rarest of circumstances – not presented here – juvenile offenders facing life-long prison terms must be given a meaningful opportunity to demonstrate their fitness to reenter society at some point in the future. (*Ibid.*)

As explained in *Franklin*, the Legislature

responded to this directive in 2013 by enacting "'a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity . . . .' [Citation]." (*Franklin, supra*, 63 Cal.4th at p. 277.) The lynchpin of that mechanism is section 3051, which authorizes a YOPH for defendants who were 25 years of age or younger at the time of their offense. (§ 3051, subd. (a).)

Section 3051 contemplates the YOPH will involve consideration of the juvenile offender's cognitive functioning, character, and social and family background at the time of his offenses. (*Franklin, supra*, 63 Cal.4th at p. 269.) To that end, the statute permits interested parties who knew the offender at that time to submit statements for review by the parole board. (§ 3051, subd. (f)(2).) The parole board must also consider any "psychological evaluations and risk assessment" that may be relevant to show "any subsequent growth and increased maturity of the individual." (*Id.* at subd. (f)(1).) And, it must "give great weight to the diminished culpability of juveniles as compared to adults" and "the hallmark features of youth[.]" (§ 4801, subd. (c).)

As originally enacted in 2013, section 3051 applied only to offenders who committed their crimes before reaching the age of 18. (Former § 3051; Stats. 2013, ch. 312.) However, effective 2016, the statute was amended to cover individuals, like appellant, who offended prior to the age of 23. (Stats. 2015, ch. 471, § 1.) The statute presently applies to anyone who was 25 years of age or younger at the time of their offenses. (§ 3051, subd. (a)(1).)

The timing of the YOPH depends on the length of the defendant's sentence. For offenders such as appellant, who were sentenced to an indeterminate term of less than 25 years to life, section 3051 states they shall be afforded a YOPH during the 20th year of their incarceration. (§ 3051, subd. (b)(2).) The statutory deadline for providing hearings to these individuals was January 1, 2018. (§ 3051.1 subd. (a).) However, section 3051 also contains an exception clause that exempts from its scope any person who was "previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (§ 3051, subd. (b)(2).)

Vo argued that he was excluded from this exception.

Petitioner reached the 20th year of his incarceration in 2016. While acknowledging he received a standard parole hearing in 2015, he contends that is immaterial for purposes of section 3051 because the statute was intended to create a special parole mechanism for juvenile offenders by which their growth, maturity and the distinctive attributes of their youth can be assessed. (Sen. Bill No. 260 (2013-2014 Reg. Sess.) § 1.) In other words, petitioner argues he is excluded from the exception clause in section 3051 because his 2015 parole hearing was not specifically tailored to his status as a juvenile offender.

The Court found this argument unavailing, given the statutory language.

The problem with this argument is that the exception clause in section 3051 is broadly worded to include any juvenile

offender who was "entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (§ 3051, subd. (b)(2).) Because petitioner did not come within the scope of section 3051 at the time of his initial parole hearing in 2015, that hearing was conducted pursuant to the statutory provisions governing standard parole hearings. (See §§ 3041 et seq.) And since those provisions are "other" than those set forth in section 3051, petitioner is expressly excluded from the general terms of the statute that would have otherwise entitled him to a YOPH during the 20th year of his incarceration, or no later than January 1, 2018.

When, as here, the statutory language at issue is clear and unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1184; *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1125-1126.) We are not at liberty to add to or alter the terms of the statute so as to override its plain textual meaning. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276; *People v. Miller* (2018) 23 Cal.App.5th 973, 982.) Because the exception set forth in subdivision (b)(2) of section 3051 plainly excludes petitioner from the scope of the statute, he was not entitled to a YOPH by January 1, 2018. Instead, he will have to wait until February 28, 2020 before he is provided such a hearing.

As an aside, Vo also asked for a *Franklin* hearing. This was referred to the superior court, per statute.

Petitioner also contends he is entitled to a "*Franklin* hearing" to make a record of

youth-related factors that existed at the time of his offenses that might be relevant at his YOPH. However, because petitioner's case is already final for purposes of direct appeal, he must pursue that claim in the trial court in the first instance by filing an evidence preservation motion under section 1203.01. (*Cook, supra*, 7 Cal.5th at pp. 446-447.) Accordingly, we deny petitioner's petition for a writ of habeas corpus without prejudice to his filing such a motion. (*Id*. at p. 460.)

DISPOSITION

The petition for a writ of habeas corpus is denied without prejudice to allow petitioner to file a motion for a *Franklin* proceeding in the trial court pursuant to section 1203.01.

LIFER PAROLE REVOCATION ORDER UPHELD

In re Clement Brown

CA2(1); No. B296499
January 15, 2020

It is a sad duty to report on one of the infrequent events in current "liferdom" – the revocation of a lifer's parole. We report this case to alert our readers to the type of events that resulted in such a conclusion.

Clement Brown appealed from an order revoking his parole and returning him to custody. The Court of Appeal affirmed.

Brown was convicted of first degree murder on November 22, 1985 and sentenced to 26 years in state prison. He was released on parole on May 30, 2013.

On January 17, 2019, the Department of Corrections and Rehabilitation (CDCR) filed a petition for revocation of parole. The grounds for the petition were that Brown violated the terms of his parole by: (1) engaging in criminal conduct, namely, incest; (2) having contact with his codefendant, Tutuila Tuvalu; (3) traveling more than 50 miles from his county of residence, and traveling out of California, without the prior approval of his parole officer; and (4) consuming or possessing alcoholic beverages.

At the parole revocation hearing on February 27, 2019, 20-year-old Jessica D. testified that Brown is her maternal uncle. The two had been involved in a sexual relationship since 2016.

According to Brown's parole agent, Don Gonzales, Brown admitted that he had contact with Tuvalu at family gatherings. Brown also admitted that he had traveled outside the 50-mile radius. A photograph showed Brown in Las Vegas with a beer in his hand, although Brown denied consuming alcohol while on parole.

Other photographs showed Brown holding a beer. Jessica D.'s sister testified that she had observed Brown drink alcoholic beverages. She also observed Brown and Tuvalu together at family gatherings.

The matter was referred to superior court for a hearing. Brown asked for remedial sanctions, leaving him on parole. The court denied this.

Brown's counsel requested that the court dismiss the petition and allow Brown to continue on parole with a remedial sanction. Counsel noted that Brown had housing and a job, which were "stabilizing factors."

The court found that Brown violated the conditions of his parole by being together with Tuvalu at family gatherings,

traveling more than 50 miles from his county of residence without prior approval, and possessing and consuming alcoholic beverages. The court further found that Brown committed incest by having a sexual relationship with his niece.

The court found continuation of parole with remedial sanctions was inappropriate, based on the fact there was not just one parole violation but "a cumulation of a number of things." It ordered Brown returned to custody. Brown timely appealed.

The Appellate Court appointed counsel for Brown, who examined the record and found no arguable issues for appeal. The Court of Appeal did likewise, and issued a Wende decision.

We have examined the entire record. We are satisfied that no arguable legal issues exist and that Brown's counsel has fully complied with her responsibilities. By virtue of counsel's compliance with the Wende procedure and our review of the record, we are satisfied that Brown received adequate and effective appellate review of the order entered against him in this case. (*People v. Wende, supra*, 25 Cal.3d at p. 441; accord, *People v. Kelly* (2006) 40 Cal.4th 106, 109-110.)

Because of this return to custody just short of his minimum 7 year parole tail, Brown will have to start a new 7 year tail at such time as he is reparoled. He is receiving annual parole reconsideration hearings.

SB1437 RELIEF NOT AVAILABLE FOR MANSLAUGHTER CONVICTIONS – ONLY MURDER CONVICTIONS

P. v. Daniel Cervantes

---Cal.App.5th ---; CA2(6); No. B298077
January 30, 2020

Simply stated, this case refers to the retroactive relief availability recently announced for felony murder and murder convictions obtained under a "natural and probable consequences" theory of prosecution. The holding here is that this relief does not apply to those convicted of the lesser offense of manslaughter.

Penal Code section 1170.95, subdivision (a) provides, in relevant part, "A person convicted of *felony murder* or *murder* under a natural and probable consequences theory *may file a petition* with the court that sentenced the petitioner to have petitioner's *murder conviction* vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] . . . The petitioner was convicted of first degree or second degree *murder* . . . ." (Italics added.)

Daniel Cervantes was convicted of voluntary manslaughter. (§ 192, subd. (a).) He appeals an order denying his petition for resentencing under section 1170.95. We conclude that section 1170.95 applies only to murder convictions; his exclusion from section 1170.95 does not violate his right to equal protection. We affirm.

In 2012, Cervantes had been charged with murder. He entered a no contest plea to voluntary manslaughter. He was sentenced to 13 years.

In 2019, following the passage of SB 1437 (2017-2018 Reg. Sess.), Cervantes filed a PC §1170.95 petition for resentencing. The trial court denied the petition, ruling that he was not eligible for relief under § 1170.95.

The Court first dealt with his claim that manslaughter fell under the aegis of SB1437.

Cervantes contends that section 1170.95 is not limited to murder convictions; that it authorizes resentencing for his voluntary manslaughter conviction.

In interpreting a statute, we first look at the words the Legislature used. " ' "[I]f the statutory language is not ambiguous, then . . . the plain meaning of the language governs." ' " (*People v. Colbert* (2019) 6 Cal.5th 596, 603.)

Here the language of the statute unequivocally applies to murder convictions. There is no reference to the crime of voluntary manslaughter. To be eligible to file a petition under section 1170.95, a defendant must have a first or second degree murder conviction. The plain language of the statute is explicit; its scope is limited to murder convictions. (*People v. Colbert, supra*, 6 Cal.5th at p. 603.)

Of course, " 'language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' " (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) But that is not the case here. The plain reading of the statute is consistent with the legislative goal of Senate Bill No. 1437. That bill was enacted to correct the unfairness of the felony murder rule so that murder convictions could be vacated by filing section 1170.95 petitions. (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147; *People v. Martinez* (2019) 31 Cal.App.5th 719, 722-723; Sen. Bill No. 1437, § 1(f), Stats. 2018, ch. 1015, § 4, pp. 6679-6681.) The felony murder rule, however, is not applicable to the crime of voluntary manslaughter.

Cervantes argued both equal protection and substantive due process claims.

Cervantes contends the failure to include voluntary manslaughter convictions in section 1170.95 violates his constitutional rights to equal protection and substantive due process. We disagree.

The first step in an equal protection analysis is to determine whether the defendant is similarly situated with those who are entitled to the statutory benefit. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565.) Cervantes was convicted of voluntary manslaughter, a different crime from murder, which carries a different punishment. Normally "offenders who commit different crimes are not similarly situated" for equal protection purposes. (*People v. Morales* (2019) 33 Cal.App.5th 800, 808.) "[O]nly those persons who are similarly situated are protected from invidiously disparate treatment." (*Barrera*, at p. 1565.)

Cervantes contends Senate Bill No. 1437's underlying goal was to eliminate harsh sentences and to reform the law to make punishment related to actual culpability. He claims it is an irrational discrimination to provide section 1170.95 relief for murderers, but to deny it to those who commit the less serious offense of manslaughter.

The Court found that the Legislature is free to make distinctions in drawing the line as to which relief applies to which sentences.

When the Legislature reforms one area of the law, it is not required to reform other areas of the law. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 488.) It may elect to make reforms " ' "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." ' " (*Ibid*.) Here the leg-

islative focus was centered on the unfairness of the felony murder rule. The Legislature could rationally decide to change the law in this area and not be currently concerned with crimes not involved with that rule. (*Ibid*.) It also could reasonably decide that the punishment for voluntary manslaughter was appropriate, but the punishment for murder based on the felony murder rule could be excessive and reform was needed only there. (*Williams v. Illinois* (1970) 399 U.S. 235, 241 ["A State has wide latitude in fixing the punishment for state crimes"].) Legislators in making this choice could also consider a variety of other factors including the number of prisoners subject to the change and its impact on the "administration of justice." (*Mills v. Municipal Court* (1973) 10 Cal.3d 288, 310.)

The decision not to include manslaughter in section 1170.95 falls within the Legislature's "line-drawing" authority as a rational choice that is not constitutionally prohibited. (*People v. Chatman* (2018) 4 Cal.5th 277, 283.) "[T]he Legislature is afforded considerable latitude in defining and setting the consequences of criminal offenses." (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 887.) A classification is not arbitrary or irrational simply because it is "underinclusive." (*Ibid*.) "A criminal defendant has no vested interest ' "in a specific term of imprisonment or in the designation [of] a particular crime [he or she] receives." ' " (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) "Courts routinely decline to intrude upon the 'broad discretion' such policy judgments entail." (*Ibid*.)

The Court also found the substantive due process argument unavailing.

We also reject Cervantes's claim that he was denied substantive due process. "[S]ubstantive due process requires a rational relationship between the objectives of a legislative enactment and the methods chosen to achieve those objectives." (*California Rifle & Pistol Assn. v. City of West Hollywood* (1988) 66 Cal.App.4th 1302, 1330.) Here there was such a relationship. The legislative goal was to eliminate the sentencing disparity caused by the felony murder rule. That goal was properly achieved by the section 1170.95 petition procedure to vacate those murder convictions.

DISPOSITION

The order denying the section 1170.95 petition is affirmed.

SB1437 RELIEF NOT AVAILABLE FOR MANSLAUGHTER CONVICTIONS – ONLY MURDER CONVICTIONS

P. v. Fallon Flores

---Cal.App.5th ---; CA4(1); No. D075826
February 3, 2020

In another district of the Court of Appeal, the same issue as was heard in *Cervantes* (above) was similarly resolved. CLN cites this case as further evidence of the unity of the Courts of Appeal on this issue. Petitions for review in the CA Supreme Court have not – as yet – been filed.

In 2018, the Legislature passed and the Governor signed into law Senate Bill No. 1437, which restricted the circumstances under which a person can be liable for felony murder and abrogated the natural and probable consequences doctrine as applied to murder. (Stats. 2018, ch. 1015.) It also established a procedure permitting qualified persons with murder convictions to petition to vacate their convictions and obtain resentencing if they were previously convicted of felony

murder or murder under the natural and probable consequences doctrine. (*Id*., § 4.) This appeal requires us to determine whether an otherwise-qualified person convicted of voluntary manslaughter, as opposed to murder, can invoke the resentencing provision of Senate Bill No. 1437.

Defendant Fallon Lupe Flores was charged with murder, but pleaded guilty to the lesser included offense of voluntary manslaughter. Years later, she filed a petition to have her conviction vacated and to be resentenced under the resentencing provision of Senate Bill No. 1437. The trial court denied Flores's petition on grounds that the resentencing provision is available only to qualifying persons who were convicted of murder—not persons who were convicted of voluntary manslaughter. We agree with the trial court. Therefore, we affirm the order denying Flores's petition.

SB1437 RELIEF NOT AVAILABLE FOR AIDER-AND -ABETTOR CONVICTIONS – ONLY MURDER CONVICTIONS

P. v. Vincent Lewis

---Cal.App.5th ---; CA1(1); No. B295998
January 6, 2020

And in yet another interpretation of the applicability of SB1437, the Court of Appeal held that such relief was also unavailable to aiders and abettors to murder.

A jury convicted defendant Vincent E. Lewis of first degree premeditated murder in 2012, and we affirmed the conviction in 2014. (*People v. Lewis* (July 14, 2014, B241236) [nonpub. opn.] (Lewis).) In January 2019, defendant filed a petition for resentencing under Penal Code section 1170.95 and requested the appointment of counsel. The trial court, relying on our prior decision in *Lewis*, found that defendant was ineligible for relief and denied the petition without appointing counsel or holding a hearing. Defendant appealed. For the reasons set forth below, we affirm the order.

The Court of Appeal laid out the record below and the clear fact that Lewis was guilty of aiding and abetting.

Defendant and two codefendants were tried for the murder of a fellow gang member. One of the codefendants allegedly fired the shots that killed the victim. The People prosecuted the case against defendant on three alternative first degree murder theories: direct aiding and abetting; aiding and abetting under the natural and probable consequences doctrine; and conspiracy. The prosecutor argued to the jurors that the evidence could support a verdict under each murder theory and that they did not have to agree on the same theory to return a guilty verdict.

The court instructed the jury on each of the prosecution's theories. The jury convicted defendant of first degree premeditated murder in a general verdict and made no findings that indicate which murder theory it relied upon. The court sentenced defendant to 25 years to life.

In his direct appeal, defendant asserted that the court erred by instructing the jury that it could find him guilty of premeditated first degree murder based on the natural and probable consequences doctrine. The argument had merit.

While his appeal was pending, our Supreme Court decided *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), which held that "an aider and abettor may not be

convicted of first degree premeditated murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." (*Id*. at pp. 158–159.) The error, the court stated, requires reversal unless the reviewing court concludes "beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Chiu, supra*, 59 Cal.4th at p. 167; see also *In re Martinez* (2017) 3 Cal.5th 1216, 1218.)

Although we agreed with defendant that it was error to give the natural and probable consequences instruction, we held that the error was harmless "beyond a reasonable doubt" based on "strong evidence" that defendant "directly aided and abetted [the perpetrator] in the premeditated murder of [the victim]." (*Lewis, supra*, B241236 at p. 19.) We rejected defendant's other arguments and affirmed the judgment. (*Id*. at p. 20.)

In 2018, the Legislature enacted Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill No. 1437), which, among other changes, amended section 188 to eliminate liability for murder under the natural and probable consequences doctrine. (*Lopez, supra*, 38 Cal.App.5th at pp. 1092–1093.) The legislation also added section 1170.95, which establishes a procedure for vacating murder convictions that were based upon the natural and probable consequences doctrine and resentencing those who were so convicted. (Stats. 2018, ch. 1015, § 4, pp. 6675-6677.)

On January 7, 2019, defendant filed a petition in the superior court for resentencing under section 1170.95. In accordance with the statute, defendant identified the superior court's case number and the year of his conviction and stated that he had been "convicted of [first or second] degree murder pursuant to . . . the natural and probable consequences doctrine." Defendant further stated that, because of the changes made by Senate Bill No. 1437, he "could not now be convicted" because he "was not the actual killer" and "did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree." Defendant also requested the court to appoint counsel for him.

On February 4, 2019, the trial court denied the petition without appointing counsel for defendant or holding a hearing. The court concluded that defendant was not eligible for resentencing because, based on our opinion in Lewis, he "would still be found guilty with a valid theory of first degree murder."

Defendant contends that the court erred by "going behind [the] allegations" in his petition and relying on our prior opinion to determine that he failed to make a prima facie showing of eligibility under Senate Bill No. 1437. For the reasons given below, we disagree.

The Court recognized that in relying on the underlying record of appeal, it was breaking new ground as to SB1437 challenges. But it found such lower court records were useable here.

Although no published decision has addressed the question whether the trial court can consider the record of convic-

tion in evaluating the petitioner's initial prima facie showing under section 1170.95, subdivision (c), in analogous situations trial courts are permitted to consider their own files and the record of conviction in evaluating a petitioner's prima facie showing of eligibility for relief. Under section 1170.18, enacted by Proposition 47, for example, a person convicted of certain felonies that the Legislature subsequently redefined as misdemeanors may petition the court to recall his or her sentence and have the felony conviction reclassified as a misdemeanor. (See § 1170.18; People v. Page (2017) 3 Cal.5th 1175, 1179.) The court undertakes an " 'initial screening' " of the petition to determine whether it states " 'a prima facie basis for relief.' " (*People v. Washington* (2018) 23 Cal.App.5th 948, 953.) In evaluating the petition at that stage, the court is permitted to examine the petition "as well as the record of conviction." (Id. at p. 955.)

Similarly, under the Three Strikes Reform Act of 2012, known as Proposition 36, an inmate serving a third strike sentence may petition to be resentenced if, among other criteria, his or her sentence is for a crime that is not a serious or violent felony. (§ 1170.126, subd. (e).) The petitioner's initial burden is to establish "a prima facie case for eligibility for recall of the third strike sentence." (*People v. Thomas* (2019) 39 Cal.App.5th 930, 935.) The trial court can determine whether the petitioner met that burden based in part on the record of the petitioner's conviction. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1341.) And in habeas corpus proceedings, the court may summarily deny a petition based upon facts in its file that refute the allegations in the petition. (*In re Serrano* (1995) 10 Cal.4th 447, 456.)

The Court made the common sense ruling that it could – and did – rely on its earlier appellate finding on this very point. And that ended Lewis's challenge.

> In our prior opinion, we agreed with defendant that the trial court erred in instructing the jury on the natural and probable consequences doctrine. (*Lewis, supra*, B241236 at p. 19.) We explained that we were required to reverse the judgment " 'unless there is a basis in the record to find that the verdict was based on a valid ground.' " (*Ibid*., quoting *Chiu, supra*, 59 Cal.4th at p. 167.) The only " 'valid ground' " available to the jury was the prosecution's alternative theory that defendant acted as a direct aider and abettor. We concluded that the evidence that defendant "directly aided and abetted [the perpetrator] in the premeditated murder . . . is so strong" that the instructional error was harmless "beyond a reasonable doubt." (*Lewis, supra*, B241236 at p. 19) Stated differently, we held that the record established that the jury found defendant guilty beyond a reasonable doubt on the theory that he directly aided and abetted the perpetrator of the murder. The issue whether defendant acted as a direct aider and abetter has thus been litigated and finally decided against defendant. (See generally 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Defenses, § 208, pp. 683–684 [collateral estoppel applies in criminal cases].) This finding directly

refutes defendant's conclusory and unsupported statement in his petition that he did not directly aid and abet the killer, and therefore justifies the summary denial of his petition based on the authorities and policy discussed above. (Cf. *People v. Karis* (1988) 46 Cal.3d 612, 656 [conclusory allegations in habeas petition "made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing"].)

Accordingly, the Court upheld the superior court below, which found that Lewis was not entitled to SB1437 relief here.

PAROLEES SUBJECT TO CELL PHONE SEARCHES

P. v. Alejandro Delrio

---Cal.App.5th ---; CA1(3); No. A154848
February 28, 2020

This case, while technically not a "lifer" case, is nonetheless instructive to paroled lifers. The question is whether a parolee's cell phone is subject to search by an investigating officer, without a search warrant. The answer is, "yes."

This case arises out of a warrantless search of the contents of a cell phone belonging to defendant Alejandro Manuel Delrio. At the time of the search, defendant was a convicted felon in the legal custody of the California Department of Corrections and Rehabilitation (CDCR) as he served out the remainder of his term on parole. As a parolee, defendant was subject to a statutorily mandated parole term that required him to submit to warrantless and suspicionless searches of his person, his residence, and any property under his control by a parole officer or other peace officer at any time. At the time of the cell phone search, police officers knew defendant was on parole and had specific, articulable reasons to suspect he was involved in a residential burglary.

Defendant pleaded guilty to first degree burglary after the trial court denied his motion to suppress evidence obtained from the search of his cell phone. On appeal, defendant claims the search violated his Fourth Amendment rights because his written parole conditions

gave him a reasonable expectation of privacy in the contents of his cell phone. We conclude that any expectation of privacy defendant may have had did not outweigh the government's interest in conducting the search because the officers had specific reasons to suspect he was involved in a residential burglary. The judgment is affirmed.

The facts of the case show that Delrio complied with an officer's request to unlock his cell phone, and then used the contents therein to base the arrest and charges on.

In September 2014, a residential burglary was committed in Redwood City. A surveillance video from a neighbor's house showed two individuals walking from a black truck to the burglarized house and then walking away, each carrying a sack. After the residents of the home reported the burglary, Sheriff's Deputy Robert Willett contacted defendant and told him that a vehicle registered to him had been involved in a burglary. Defendant denied any involvement, told the deputy that he had loaned the truck to a coworker, and further claimed that if the truck was involved with a burglary, it must have been used without his permission. Defendant then completed paperwork to report the vehicle stolen.

Deputy Willett then viewed the surveillance video and concluded that one of the two individuals shown in the video had "a very close resemblance to the defendant." Thus, Willett recommended that defendant be re-contacted as a suspect.

Sergeant Hector Acosta conducted a records check on defendant and determined that he was on active parole. At around 10:30 a.m. on September 26, 2014, Acosta and several officers went to defendant's house to conduct a parole search. While the officers searched the house, Acosta interviewed defendant and his girlfriend. Acosta showed defendant a still photo from the surveillance footage and said one of the suspects looked like him, but defendant denied involvement in the burglary. During the search of the house, officers located a cell phone that belonged to defendant. Acosta later testified at the suppression hearing that he believed defendant's parole obligations required him to surrender his password, and Acosta may have told defendant, " 'you're on parole. I need the passcode [,]' " or "give me your passcode." Defendant complied, and Acosta gave the cell phone to a detective who used a Cellebrite device to download the contents of the phone before returning it to defendant.

A few minutes after the officers left his house, defendant called Sergeant Acosta and asked him to return to the house. Upon the officers' return, defendant showed Acosta a photograph from his cell phone in which defendant was holding five $100 bills. Defendant said the money was the proceeds from selling the stolen jewelry from the burglary. Defendant also told Acosta about his involvement in the burglary and said he should not have reported his vehicle stolen.

Defendant was charged by information with first degree burglary (Pen. Code, § 460, subd. (a); count one); grand theft (id., § 487, subd. (a); count two); perjury (*id*., § 118, subd. (a); count three); and making a false report of a criminal offense (id., § 148.5, subd. (a); count

four). As to count one, the information alleged a number of sentencing enhancements.

Defendant moved to suppress the evidence obtained from the cell phone search and all statements made by him as fruit of that search. The trial court denied the motion. Defendant then pleaded guilty to count one and admitted enhancements for being on parole after imprisonment for a prior serious or violent felony (Pen. Code, § 1203.085, subd. (b)); commission of a prior serious felony while on parole (id., § 1203.085, subd. (b)); having a prior strike (id., §§ 667, subds. (a)1), 1170.12, subd. (c)(1)); and having a prior serious felony conviction (id., § 667, subd. (a)(1)). The trial court sentenced defendant to seven years in state prison. Defendant appealed from the judgment based on the trial court's allegedly erroneous denial of his motion suppress (id., § 1538.5, subd. (m)).

The Court of Appeal relied heavily on the US Supreme Ct. case in *Samson*.

A warrantless search is per se unreasonable under the Fourth Amendment absent a recognized exception. (U.S. Const., 4th Amend.; *Katz v. United States* (1967) 389 U.S. 347, 357.) Both the United States Supreme Court and the California Supreme Court recognize that a parole search conducted pursuant to California Penal Code section 3067, subdivision (b)(3), constitutes one of those exceptions. (*Samson v. California* (2006) 547 U.S. 843 (*Samson*); *Schmitz, supra*, 55 Cal.4th at p. 916.) Under that statute, "every inmate eligible for release on parole 'is subject to search or seizure by a . . . parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause.' " (*Schmitz*, at p. 916.) Upon release from incarceration, parolees are notified: "You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections [and Rehabilitation] or any law enforcement officer." (Cal. Code Regs., tit. 15, § 2511, subd. (b)4.) Because such searches are mandated as a term of every parolee's release, "an officer's knowledge of a parolee's status is equivalent to knowledge of the applicable search condition." (*Schmitz*, at p. 922, fn. 13, citing *People v. Middleton* (2005) 131 Cal.App.4th 732, 739–740.) As the California Supreme Court has emphasized, "[w]arrantless, suspicionless searches are a vital part of effective parole supervision" in California. (*Schmitz*, at p. 924; accord, *Samson, supra*, at p. 854.)

In examining whether a warrantless search of a parolee's cell phone is constitutionally valid, we find it helpful to review the analysis of the United States Supreme Court in *Samson, supra*, 547 U.S. 843, which preceded the California Supreme Court's decision in *Schmitz, supra*, 55 Cal.4th 909. In *Samson*, the issue was whether the warrantless and suspicionless search of a parolee's person was reasonable within the meaning of the Fourth Amendment. In analyzing that issue, *Samson* looked to the totality of circumstances and weighed the privacy expectations of parolees against the interests of the government in conducting such searches. (*Samson*, at pp. 848–857.)

Samson deemed it significant that California parolees, like parolees elsewhere,

"have severely diminished expectations of privacy by virtue of their status alone" (*Samson, supra*, 547 U.S. at p. 852)—even below that of individuals on probation—because "parole is more akin to imprisonment than probation is to imprisonment" (*id*. at p. 850). That is, "an inmate-turned-parolee remains in the legal custody of the California Department of Corrections through the remainder of his term . . . and must comply with all of the terms and conditions of parole" (id. at p. 851), including the term permitting warrantless and suspicionless searches at any time (Pen. Code, § 3067, subds. (a), (b)(3)). *Samson* noted the additional circumstance that when the petitioner there signed the order submitting to the parole search term, he "thus was 'unambiguously' aware of it." (*Samson*, at p. 852.) "Examining the totality of circumstances pertaining to petitioner's status as a parolee, 'an established variation on imprisonment,' [citation], including the plain terms of the parole search condition," *Samson* concluded the "petitioner did not have an expectation of privacy that society would recognize as legitimate." (*Id*. at p. 852, fn. omitted.)

The Court found the governmental interests in such searches "overwhelming."

Samson then turned to the governmental interests at stake. *Samson* began by noting the Supreme Court's repeated acknowledgement that the government's interest in supervising parolees is " ' "overwhelming" ' " because parolees " 'are more likely to commit future criminal offenses.' " (*Samson, supra*, 547 U.S. at p. 853.) Samson similarly relied on the high court's repeated acknowledgment that the governmental interests "in reducing recidivism, and thereby promoting reintegration and positive citizenship among probationers and parolees, warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." (*Samson*, at p. 853.) *Samson* then considered empirical evidence regarding California recidivism rates among parolees and the "grave safety concerns that attend recidivism." (*Id*. at pp. 853–854.) Recognizing that "the Fourth Amendment does not render the States powerless to address [such public safety] concerns effectively," *Samson* determined that "California's ability to conduct suspicionless searches of parolees serves its interest in reducing recidivism, in a manner that aids, rather than hinders, the reintegration of parolees into productive society." (*Id*. at p. 854.)

Because the totality of the circumstances supported the reasonableness of the warrantless and suspicionless parole search, *Samson* concluded there was no Fourth Amendment violation. (*Samson, supra*, 547 U.S. at p. 857.) In *Schmitz, supra*, 55 Cal.4th 909, the California Supreme Court likewise applied a totality of the-circumstances approach in concluding that three warrantless parole-based searches of items within a car belonging to and being driven by the defendant, in which the only parolee in the car was the front seat passenger, were reasonable under the Fourth Amendment because the searched items were within those areas of the vehicle where the officer reasonably expected that the parolee could have stowed or discarded personal belongings. (*Schmitz*, at pp. 921–922, 926.)

Finally, the Court found that the cellphone search was not "arbitrary, capricious, or harassing," so as to besmirch its legitimacy.

As discussed, California has an "overwhelming" interest in supervising parolees in order to detect possible pa-

role violations, reduce recidivism, and promote reintegration of parolees into society. (Samson, supra, 547 U.S. at p. 853.) The government also "has a duty not only to assess the efficacy of its rehabilitative efforts but to protect the public, and the importance of the latter interest justifies the imposition of a warrantless search condition." (*Reyes, supra*, 19 Cal.4th at p. 752.) Furthermore, the strength of the governmental interest in conducting a probation or parole search " 'varies depending on the degree to which the government has a specific reason to suspect that a particular probationer [or parolee] is reoffending or otherwise jeopardizing his [or her] reintegration into the community.' " (*Lara, supra*, 815 F.3d at p. 612.)

In the instant case, the officers knew defendant was a parolee and they had specific, articulable reasons to suspect he was involved in a residential burglary and was therefore reoffending. The video surveillance evidence showed that the burglary involved defendant's truck and two individuals, one of whom bore a "very close resemblance" to defendant. Under these circumstances, the government had a particularly acute interest in determining whether defendant had violated the conditions of his parole and was a danger to the public. (Cf. *Lara, supra*, 815 F.3d at p. 612 [government's interest in searching probationer who merely missed probation meeting was "worlds away" from searching probationer suspected of violent crime].)

And it was reasonable for the investigating officers to believe there might be evidence of the burglary on defendant's cell phone, such as text messages or calls with his accomplice, or photographs or location information regarding the targeted residence. Thus, despite any perceived expectation of privacy that defendant may have had in his cell phone due to the lack of clarity in the written search conditions, consideration of the totality of the circumstances presented leads us to conclude that the balance ultimately tilts in favor of the government's substantial interests in supervising defendant and protecting the public.

Finally, we observe the cell phone search was not arbitrary, capricious, or harassing. (*Reyes, supra*, 19 Cal.4th at p. 752.) A search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformative, or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee. (*In re Anthony S*. (1992) 4 Cal.App.4th 1000, 1004.) Because the officers here had specific reasons to suspect that defendant was involved in a residential burglary, the search was related to legitimate parole monitoring and law enforcement purposes, and there was no evidence suggesting the officers had personal animosity towards defendant. The search took place at a reasonable hour and was not unreasonably prolonged. (*Reyes*, at pp. 753–754.)

Accordingly, the judgment below was affirmed.

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	GUTIERREZ	LONG	MINOR	ROBERTS	RUFF	SAN JUAN	SCHNEIDER	SHARRIEFF	TARA	THORNTON	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**20**	**27**	**28**	**10**	**22**	**28**	**30**	**21**	**21**	**20**	**27**	**24**	**24**	**24**	**22**	**20**	**21**	**162**	**551**	**11**	**540**
Grants	7	4	11	2	4	9	10	4	10	8	10	5	9	7	5	4	4	0	113	4	109
Denials	10	15	15	5	10	11	16	11	8	10	11	13	12	13	14	13	11	0	198	7	191
Stipulations	3	8	0	3	5	5	2	6	3	2	3	1	3	3	3	1	4	0	55	0	55
Waivers	0	0	0	0	0	0	1	0	0	0	2	0	0	0	0	0	0	37	40	0	40
Postponements	0	0	2	0	1	3	1	0	0	0	1	3	0	1	0	2	1	103	118	0	118
Continuances	0	0	0	0	2	0	0	0	0	0	0	1	0	0	0	0	1	0	4	0	4
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	22	22	0	22

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

Subtotal (Deny+Stip)	**13**	**23**	**15**	**8**	**15**	**16**	**18**	**17**	**11**	**12**	**14**	**14**	**15**	**16**	**17**	**14**	**15**	**0**	**253**	**7**	**246**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	3	19	11	5	10	10	9	9	8	9	10	12	6	7	11	10	10	0	159	2	157
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	5	3	4	1	5	3	6	8	2	3	4	1	7	7	6	4	3	0	72	4	68
7 years	4	1	0	2	0	2	2	0	1	0	0	1	1	2	0	0	1	0	17	1	16
10 years	1	0	0	0	0	1	1	0	0	0	0	0	1	0	0	0	0	0	4	0	4
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**2**	**0**	**0**	**0**	**0**	**0**	**0**	**37**	**40**	**0**	**40**
1 year	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	20	21	0	21
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	13	13	0	13
3 years	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	3	5	0	5
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	**0**	**0**	**2**	**0**	**1**	**3**	**1**	**0**	**0**	**0**	**1**	**3**	**0**	**1**	**0**	**2**	**1**	**103**	**118**	**0**	**118**
Within State Control	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	98	99	0	99
Exigent Circumstance	0	0	2	0	1	2	0	0	0	0	0	3	0	1	0	0	0	5	14	0	14
Prisoner Postpone	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0	2	1	0	5	0	5

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASBADY	CASTRO	CHAPPELL	DOBRIS	GROUNDS	GUTIERREZ	LONG	MINOR	ROBERTS	RUFF	SAN JUAN	SCHNEIDER	SHABAZZ	TARA	THORNTON	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**33**	**38**	**32**	**32**	**14**	**28**	**11**	**21**	**22**	**38**	**30**	**30**	**32**	**35**	**17**	**16**	**23**	**211**	**663**	**1**	**662**
Grants	11	10	8	8	5	5	5	3	8	9	10	8	14	8	3	2	7	0	118	1	117
Denials	17	13	21	16	8	15	5	12	8	22	13	17	7	21	10	13	14	0	230	0	230
Stipulations	3	12	1	9	1	7	1	6	8	6	5	6	10	6	4	0	2	0	87	0	87
Waivers	1	2	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	58	63	0	63
Postponements	1	1	4	0	0	0	0	0	0	1	0	0	1	0	0	1	0	141	150	0	150
Continuances	0	0	0	1	0	0	0	0	0	0	1	1	0	0	0	0	0	0	3	0	3
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	12	12	0	12

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

Subtotal (Deny+Stip)	**20**	**25**	**22**	**25**	**9**	**22**	**6**	**18**	**14**	**28**	**18**	**23**	**17**	**27**	**14**	**13**	**16**	**0**	**317**	**0**	**317**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	8	17	16	10	7	15	3	13	6	18	11	8	5	12	12	8	11	0	180	0	180
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	8	8	6	13	1	6	1	5	6	8	6	13	12	13	2	4	2	0	114	0	114
7 years	4	0	0	1	1	1	2	0	2	2	1	2	0	2	0	1	1	0	20	0	20
10 years	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	2	0	3	0	3
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**2**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**0**	**0**	**0**	**58**	**63**	**0**	**63**
1 year	1	2	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0	37	42	0	42
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	15	15	0	15
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	4	0	4
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	**1**	**1**	**4**	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**1**	**0**	**0**	**1**	**0**	**141**	**150**	**0**	**150**
Within State Control	1	1	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	140	144	0	144
Exigent Circumstance	0	0	1	0	0	0	0	0	0	1	0	0	1	0	0	1	0	0	4	0	4
Prisoner Postpone	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	2	0	2

BOARD BUSINESS

At the January BPH Executive Board meeting BPH Executive Officer Jennifer Shaffer noted a change in the board's meeting schedule, beginning immediately. For the past many years, the Executive Meeting has spanned two days, beginning in the afternoon of the third Monday of the month (barring that day being a holiday) and continuing into a morning session on Tuesday. While en banc hearings of all stripe, from clemency to referrals for possible rescission, were considered on Tuesday, Mondays typically saw reports and training sessions for Commissioner and Deputy Commissioners, many of whom were usually in attendance.

Going forward, however, Shaffer announced that the Monday (or first) session of the meeting would feature reports and training alternating monthly with the Board's consideration of en banc hearings dealing with clemency issues (commutation and pardon). Although Monday sessions will still feature monthly reports from Shaffer and BPH Chief Legal Counsel, other reports and outside training presentations will be relegated to Mondays of even-numbered months.

Shaffer indicated this action was in preparation for what the board believes will be a significant up-tick in pardon and commutation applications sent from the Governor's office to the board for consideration. Until now, Governor Newsom has sent few such requests, including commutation applications, as the consideration and investigation process began anew with Newsom's assumption of the Governor's office in January.

Shaffer, noting the Board's annual report on Significant Events would be released in February, did offer a few glimpses into the statistics and information in that report. The board scheduled over 6,000 parole hearings in 2019, 43% of which were initial hearings. A total of 1,183 grants were given, about a 34% grant rate for hearings which actually went to decision and were not continued, stipulated or postponed. And the FAD performed over 3,000 CRA interviews.

Looking forward, Shaffer anticipates scheduling nearly 8,000 hearings in fiscal year 20/21, about 68% of which will be initial considerations. The board also anticipates an increase in the number of hearings held for third strikers and for non-violent second strikers. The 2019 Significant Events report will contain substantially more statistical information and that will be reported in the following issue of CLN.

Dr. Cliff Kusaj, head of the Forensic Assessment Division, announced the hiring of 6 new clinicians, preparing for an increase in the number of CRAs required in the coming year. Continuing an encouraging trend, all the new hires announced by Kusaj had actual experience working in prisons and with lifers. In prior years many FAD new hires lacked that lived experience, often having worked with inmates only in Atascadero or Patton state hospitals. It is encouraging to see the trend of hiring experienced clinicians continue.

In February, Shaffer distributed the Significant Events report, noting the board was receiving increasing referrals for non-violent parole release consideration, about 600 per month. She also noted an additional 1,500, give or take, will be re-reviewed following the court decisions requiring CDCR to include additional inmate cohorts in this process.

Shaffer also noted the board will undertake updating regulations dealing with several board processes to reflect changes in law and court decisions, including discharge from parole review. (You can be assured LSA will be taking a close look at that one). Shaffer intends to work with DAPO to offer a more formalized and standardized process for discharge review.

Reporting on the new inmate attorney selection and training, Shaffer noted the selection process should be complete within the next two months, with training sessions scheduled shortly after completion of selection. As part of the new process, the board intends to create a video on the hearing process that can be viewed by both victims considering attending hearings, as well as inmates.

In other reports, Chief Counsel Jessica Blonien reported new regulations for YOPH hearings were fully operational on Jan. 1, 2020 and new regs for non-violent determinate sentenced inmates parole review were submitted on Feb. 11, 2020, with the next phase of review of those regs slated for mid-March.

Deputy Chief of Operations Sandra Maciel informed the board attorneys are still being sought for hearings at HDSP, CVSP, ISP, Calipatria, Centinela, and PBSP, as well as prisons in the Sacramento area. Once all attorney panel openings have been filled, Maciel reported the lists for each prison will be available on the BPH's webpage.

EN BANC RESULTS

In January the board was faced with three inmates seeking release under 1170 (e), compassionate release, due to terminal medical conditions. Of those three, only one found that relief. Recall of sentence was recommended for **Edwin Chambers**, but similar relief was denied for **William Hatley** and **Alvin Hunt**. While there were no speakers on the Chambers consideration, the DA opposed action both on Hatley and Hunt, alleging both malingering in the case of Hatley and return to custody after medical parole for Hunt.

In February **Gary Botha** won a recommendation for recall of sentence under compassionate release, but not easily. The recommendation for recall under 1170 (e) came only after a motion to deny that recommendation failed to find a majority of the commissioners in favor.

In January the denial of parole for **Michael Murphy** was vacated and a new hearing ordered after referral of Murphy by the board's chief counsel to correct an error of law. Referrals by BPH counsel in February, **Michael Alvidrez** and **Marco Vargas**, both saw their grants of parole vacated due to alleged institutional misconduct after their successful parole hearing**.** **Derek Wilson's** grant of parole was also sent to rescission hearing, following reports of repeated misconduct in October.

Governor Newsom also contributed to the en banc calendar, referring 7 in January and an additional 5 in February. The good news was, of the total of 12 referred for en banc consideration, only 2 of those grants were recommended for rescission hearing. In January the grant for **James Foley** was sent to rescission, while grants for **Carl Hancock, Danual Hodges, Austin Schwartzler, John Taylor, Gerald** Williams and **Joaquin Valenzuela** were affirmed.

Several of these inmates' release was opposed by victims and/or victims' family members, some of whom offered comments that were inflammatory as well as accusatory toward the board. To their credit, all parole commissioners, directly and personally targeted by those comments, remained even countenanced and polite, thanking the speakers for participating in the process.

The February meeting saw the grant for **Frederick Jackson** sent to rescission consideration, while grants for **Gary Moorhead, David Thorne, Maria Vargas** and **Anthony Vialpando** were affirmed. As with the previous month, several victims and/or family members appeared to oppose various grants under consideration, their comments once again reflecting the unfortunate situa-

tion many victims find themselves in, not knowing anything about the inmates' current situation or how the process works, as evidenced by one victim representative asking the board to impose a longer sentence on the prisoner in question. This apparent lack of assistance for victims and their families in navigating the parole system is unfortunate, both from a legal and human perspective.

And in various other considerations, in January a tie vote at a parole hearing was decided in favor of parole for **Ray Alvardo**; a new hearing was ordered for **Mark Faught**, apparently as the result of lack of proper transcript due to recording problems and **John Nolan** was recommend for gubernatorial pardon.

NEW INFORMATION QUEST: VNOK

We learn a lot from our constituents—that would be you folks, the residents of CDCR's structured living facilities. Once again, we're reaching out for information, this time on the topic of VNOK (Victims Next of Kin) at parole hearings.

Under Marsy's Law, the next of kin of crime victims, who are registered with CDCR and apply to attend parole hearings can do so. And in about 30% of hearings they do attend. But Marsy's Law goes further, allowing 2 victims representatives to come along, as well as speak either in place of or in addition to the victim or victim relative. And one more—any victim or next of kin can also bring along a (according to the guidelines) non-speaking individual there for emotional support of the victim or relative

So, that for every victim or family member who attends a hearing, up to 4 people can actually be present, and up to 3 of those speak. Under the terms of Marsy's Law, VNOK speak last, just before the panel adjourns for deliberation, and cannot be questioned, rebutted or cut short. And while their comments are supposed to be about the impact, both immediate and lasting, of the crime on themselves and their families, in reality they can, and do, speak on just about any topic, related or not.

No one disputes victims and/or their relatives have every right, both legal and moral, to speak on the impact of crimes against themselves or family. And no one disputes coming to hearings is a difficult, searing and emotional experience for all concerned, nor that victims can't simply 'get over' those effects. That doesn't happen, regardless of the time involved.

The question has always been, how much impact do the VNOK statements have on the outcome of the hearing and are the intent and the tenants of Marsy's Law being followed? What is said, what actions are taken and what do statistics from these hearings tell us?

Which is where the inmate population comes in. If you've had a hearing within the last 3 years that has been attended by VNOK, whether one or 20 (and yes, that happens), we'd like to know. You don't need to send your transcript, those are public record and available to us. But we'd like your impressions of the events, the tenor of the hearing and your reaction to the VNOK statements. We're not looking for names and not on a crusade to ban VNOK from hearings, even if such were possible, and it isn't.

We're looking for a body of data on VNOK participation, hearing impact and comportment. No form involved, just send us your name, number and date of hearing and your thoughts on the events. We'll compile our own data and see what we can learn.

Why? Because the better we understand the relationship between VNOK at hearings, grants and inmate articulation, the more help we can be to you, the potential parolee, in getting ready for your hearing. We're waiting to hear from you.

GOING TO EN BANC?

If you find yourself in the position of having your grant reviewed in an en banc hearing by the BPH, be aware you can muster your supporting forces for an actual face-to-face with the commissioners. Yes, they'll have to travel to Sacramento and yes, they'll only have 5 minutes per speaker to make your case, but it really is the only time your friends and family can do so in person.

Finding out in time to marshal those forces, however, is often a problem. The communication system notifying potential parolees of their en banc hearing is at best insufficient and at worst non-existent. We've covered that issue before and continue to work with BPH and the Governor's office to improve, even install, a system to allow timely notice. But in the meantime, the only sure-fire way we know to answer that burning question depends on friends and family.

By law, the BPH must publish an agenda of their up-coming meeting at least10 days prior to the meeting date. It's found on-line, on the BPH webpage, and giving credit where due, the board doesn't fail to meet that deadline. The Executive Board meetings, those proceedings where the en bancs are considered, are held the third Monday and Tuesday of each month (unless the Monday is a holiday, in which case, it's Tuesday and Wednesday), so alert your possible speakers to check.

And if they decide to appear in person, please have them contact LSA, but phone or email, for assistance in what to say. It pains us deeply to watch (and in 10 years we've missed 1 meeting) friends and family, many of whom have traveled considerable distances, not make the best use of that precious 5 minutes by pouring out an emotional, but fact-less appeal.

And while the board is sympathetic to the heartfelt pleas of those family members, as in the case of victims' next of kin who speak at en bancs, it's not the emotion, but the facts on which the commissioners are supposed to rely. To have a family plead with the board to 'let Johnny come home, he'll never do anything wrong again,' while heart-wrenching, provides the board with no factual reassurances that Johnny will, indeed, toe the line.

Better to speak to the maturation and change family has seen in their prisoner, recount the actual support they can offer that potential parolee and why that person is no longer a danger to society. And we always suggest writing out what comments your supporters want to make, and practice reading that statement for time constraints, so that they won't become inarticulate in the stress of the moment. Nor do they need to verbally prostate themselves before the board, thanking them for the opportunity, the kindness of allowing them to speak.

It is their right to speak at en bancs, and while the board members are unfailingly polite and attentive, they are not granting any special favors, but simply exercising their responsibilities in hearing the comments. Contact us—we can help.

EARLY REPORT: COMMISSIONER GRANT RATES

Always a subject of interest, and yet not really true reflection of potential results, the compilation and release of the Commissioner Summary for the 2019 calendar year does provide some interesting information on the actions of parole commissioners. The source of this report, the chart reporting the raw numbers, is published elsewhere in this edition of CLN, but we've done some of the work for you, parsing out the answer to that eternal question---who gives the most grants?

We'll get to that, but first a few disclaimers. Grant rates are affected by many things, not the least of which is the readiness of the individual inmate. Some commissioners may appear to have significantly higher grant numbers than others, but that result is also affected by the character of the institutions where the commissioner(s) preside over hearings.

Thus, commissioners who, by virtue of geography or just luck of the draw, hold hearings more often at Level II prisons, their grant rate numbers will be demonstrably higher than those commissioners who more regularly are presiding at hearings at Level IV and even Level III prisons. And as anyone who has studies statistics knows, a variety of factors, in this case, such things as how many stipulations/cancellations occur within a commissioners' assigned case load occur, can impact and skew the overall numbers.

And while these figures are officially from BPH, adjustments, even at this stage are possible. However, even given those caveats, there are some interesting trends to be noted. More detailed information will be available later this month when the 2019 Significant Events Report is released.

The number one question is always what's the grant rate? Having previously explained how we calculate the grant rate (number in grants in relation to hearings held to completion, not hearings scheduled) we can report the 2019 grant rate was 34%, the result of some 3,441 hearings held and 1186 grants issued.

The raw number of grants represents the highest number of grant rates in anyone's memory and while the percentage is down slightly from the 2018 rate of 39% that change is probably reflective of the increased number of initial hearings held, which usually result in a lower grant percentage.

Overall, grant rates for individual commissioners ranged from a low of 27% to a high of 65%. And yes, while we could list each commissioner and their accompanying individual grant rate, we do not for several reasons, not the least of which is not having the desire to make those at either end of the spectrum targets of various groups. Suffice to say there were 12 different percentages among the 17 commissioners, 4 percentage numbers being met by more than one commissioner.

For example, 2 commissioners came in at 37%, 3 at 36%, 2 others at 33% each and an additional 3 commissioners racking up a 30% rate. Only 1 commissioner was at the low end at 27% and only one at the higher end, 65%.

Of the more than 2,250 denials of parole meted out only two (2), that's right, only 2 denials for 15 years. And 10-year denials numbered only 44—still statistically insignificant over the course of the number of hearings held. Given these numbers, fear of an unwarranted long denial should not deter anyone from going forth with their hearing via postponement or stipulation. In fact, far more lifers stipulated to unsuitability in 2019 (644) than were given lengthy denials.

In 2018 there were a total of 5 tie votes, requiring final determination at en banc proceedings, while 2019 saw nearly double that number, 9 tie votes. Commissioners Castro and Chappell each racked up 2 tie votes, with Grounds (former commissioner) LaBahn, Roberts, Minor and Ruff each accounting for a single tie decision.

And while we don't attach names to specific grant percentages, we will reveal that Commissioners Dobbs, Long and San Juan were in the upper echelon of grant rates, while Commissioners Chappell Grounds and Tiara were in the lower level. And by the way, these names are listed alphabetically, not by numerical standing. Insofar as who presided over the most hearings, that honor goes to Commissioner Tiara, at 263, but close on the heels was Commissioner Dobbs, at 260. And close behind her were Commissioners Roberts and Ruff, with 253 and 246. In fact, 13 of the commissioners racked up over 200 hearings last year. Of course, the 3 new commissioners appointed late in the year (Gutierrez, San Juan and Thornton) posted lower over numbers, as did former Commissioner LaBahn, who resigned in late Fall.

FIRST STATS LOOKING BACK AT 2019

As we await the release of BPH's yearly Significant Events report for 2019 we can offer up a short preview of some information contained therein, figures that give us a glimpse of what last year brought to parole. There will be much more information to be teased out of the report, typically made public in late February, but some of the most interesting and important facts are out.

The big question on everyone's mind—how many parole grants were made last year? Answer? A record 1,184 up from the 1,136 in 2018 and another all-time high. The board noted an increase in the number of parole hearings scheduled and held, though that number is not the same, typically a substantial number of hearings are not held due to stipulations, postponements and cancellations. In 2019 some 6,061 hearings were scheduled.

Of those held, the 1,184 grants represented 34% (though the grant number equated to only 19% grant rate for hearings scheduled). That number is down somewhat from 2018, when 39% of hearings held to completion resulted in grants. As to why the grant rate decreased slightly, BPH officials say look no farther than a couple of more statistics; 43% of hearings were initial hearings, the first time the individual prisoner came before the board.

And as those who have been to hearings can attest, it's harder to win a grant at an initial hearing than subsequent hearings. Why? Not because the factors of suitability change, but historically grant rates for initial hearings have been lower, as often the potential parolee isn't as completely prepared as they become at later hearings.

The other factor probably contributing to the somewhat lower grant rate was the increased number of determinate sentence length (DSL) inmates coming to hearing under various changes in law, from Prop. 57 through YOPH to elderly parole hearings. Typically, DSL inmates, who may have started their rehabilitative efforts relatively recently, often after finding they would be facing a parole hearing, have an overall lower grant rate than other cohorts.

Peering into the future, the board prognosticators are anticipating over 7,600 scheduled hearings, of which they estimate 68% will be initial hearings. The increase in initial hearings is attributed to the effects of Prop. 57, YOPH and non-violent 3rd strikers now included in parole hearings. Regarding the last category, so far, some 2,335 inmates serving sentences for non-violent convictions have been referred to the BPH for the non-violent parole process.

And on a related front, the board reports that the FAD performed a reported 3,249 CRAs in 2019, about 500 more than the previous year. The breakdown of risk ratings will have to wait for the release of the Significant Events report. More information as it becomes available; watch this space.

ANOTHER NEW HOUSING/PROGRAM PROPOSAL

Just when the dust may be starting to settle form CDCR's implementation of the non-designated programming yards (and please note, we said 'may'—we know there are still issues in some locations), the department is preparing to roll out yet another housing shift. And while we can speculate on the reasons for why this one is on the horizon, so far, we've received little information.

Called the CITPP (yeah, more alphabet soup) the Condemned Inmate Transfer Pilot Program has the potential to bring death row inmates, long confined to San Quentin only, into a select number of Level III and IV prisons. In a memo dated January 29 of this year, the department proposes to allow condemned inmates to voluntarily transfer to one of eight prisons for men, while female condemned inmates would remain at CCWF, though they would be eligible to transfer to alternative housing assignments within the prison and participate in work and rehabilitative programs.

The following institutions would be eligible to house male condemned prisoners under the new program:

- California Correctional Institution
- California Medical Facility
- California State Prison, Corcoran
- Centinela State Prison
- Central California Women's Facility
- Kern Valley State Prison
- Richard J. Donovan Correctional Facility
- Salinas Valley State Prison

While under the pilot program participation would be voluntary, but once an inmate applies to participate and is approved to do so, then participation become mandatory. Men's Advisory Council, the Women's Advisory Council, and the Inmate Family Council at each designated CITPP institution, as well as the CDCR Office of the Ombudsman, have been advised of the new pilot program.

The memo notes that initial evaluation for inclusion in the program as well as considerations for placement will be based on safety and enemy concerns, as well as county of commitment. In addition to classification staff, mental health clinicians will be party to the selection process. Any need for specialized medical services will also be considered.

Although there are several criteria to be met before an inmate is accepted into the CITPP status, two factors, currently serving a SHU term, or equivalent or an inmate with a pending guilty of Division A through B offenses within the last five calendar years from the date of his annual review, will be excluded. Those referred for inclusion in CITPP will be given a mandatory minimum score of 36 points and will be permanently assigned Close Custody designation, though MAX custody will not be assigned unless the case factors indicate.

Those inmates will be granted priority legal user status, attorney visitations, legal phone calls and consultations in line with statue and the receiving institution must provide sufficient storage space and access to the inmates' legal files and records. Additionally, the sending and receiving wardens must agree to the transfer.

While the memo states the transferring inmates will be" interspersed with other inmates in CDCR's population," it also notes placement could be in general population, SNY or non-designated programming

yards, as the committee(s) feel appropriate. Participating condemned inmates will be issued job assignments, as available, based on their 'case factors,' and may be included in rehabilitative programs as available.

Public reaction to a potential program that hasn't even been fully approved as yet has already started with some DAs and victims groups decrying the 'slap in the face' to victims that allowing condemned inmates to live and work alongside other inmates, in their opinion, constitutes. And yet, ironically, those very factions may have brought this on themselves.

In pushing the successful effort in 2016 to speed up implementation of the death penalty, proponents of Prop. 66 made the argument that those sentenced to death needn't be housed exclusively in San Quentin, where costs are higher due to the age of the facility. Those backing Prop. 66 pushed the argument that those inmates awaiting implementation of their death sentence could be housed in other institutions as a way to "to defuse one of the contrary arguments" (against the death penalty), according to one Prop. 66 supporter.

During that hard-fought campaign the non-partisan Legislative Analyst's Office in Sacramento noted the costs to house high custody level inmates in the state's oldest prison were elevated in part because they were housed one to a cell also handcuffed and escorted by one or two correctional officers whenever they are outside their cells. Those practices will change, with the start of CITPP.

In another 'cost savings' move, 70% (plus service fee of 10%) of all monies earned by inmates in the CTIPP would go toward restitution, a jump from the 50% (plus 10% service fee) imposed on non-condemned inmates owing restitution. And while one victim advocated disputed that any victim would accept money from this process, it appears those funds could simply be applied toward the state's victims' compensation fund.

As noted, this program was only recently broached and is not yet in place. We've asked for additional details and as those filter out, we'll report.

NON-VIOLENT PAROLE HEARINGS---THE STANDARD IS THE SAME

Anyone who has dealt with CDCR for any length of time knows the watchword on any given day is often confusion—on regs, implementation of programs and policies and what to do next. To be fair, CDCR and all its divisions don't create all of this confusion, as they are often at the mercy of the legislature and courts; the legislature passes laws that are not well thought out regarding unintended consequences, vague as to implementation and intent and controversial, begging for court challenges. And the courts often take their own considerable time in handing down decisions on the viability of new laws, meaning regs to implement those laws can't really be written with any confidence until the decision is rendered.

The result, at any given time, is often confusion, chaos, rumor and guesswork. And even after the situation is reconciled it often takes considerably longer for the actual results, facts and how-tos to trickle down to the prisons and even longer to be disseminated among the prisoner population.

All of which was the case several times over with the passage of Prop. 57, which initially excluded several prisoner cohorts, predicating the filing of challenging lawsuits, many of which are now resolved and the resultant regs being promulgated and put into effect. But—that word still hasn't reached many inmates. We know this because our

office continues to field questions on various aspects of Prop. 57, who it does and doesn't impact and how that impact is felt. And while most of this information is available on the internet, the CDCR website, specifically, we do understand, most lifers don't have access to the internet. At least officially.

In aid of understanding, herewith is a summary of the process of Non-violent Offender Parole Hearings for Indeterminately Sentenced Inmates (prisoners, usually third strikers, serving a life sentenced for a non-violent crime). For those who like to quibble about details, please note, this information is taken directly from the BPH website, which is pretty much as direct from the horse's mouth as you can get. Remember, we don't make the rules, we just report them, with hopefully clarifying comments bracketed [ ] and [*italicized]*.

"A nonviolent offender parole hearing is a parole suitability hearing for an inmate sentenced to an indeterminate term (life with the possibility of parole) under an alternative sentencing scheme (such as California's Three Strikes Law) for a nonviolent offense.*[In this case, the instant offense, or the crime for which the prisoner is serving his/her current term].* Under this parole hearing process, the California Department of Corrections and Rehabilitation refers certain nonviolent offenders to the Board *[this initial determination of eligibility is made not by the BPH, but by CDCR classification unit]* for a parole hearing and possible release, once the inmate has served the full term of his or her primary offense. All of the general information about parole suitability hearings is applicable to nonviolent offender parole hearings *[this means the standard for suitability is the same; are you a current risk of danger to society]*. "

The nonviolent offender parole hearing process was enacted by emergency regulations filed by the California Department of Corrections and Rehabilitation that took effect on January 1, 2019. Implementation of nonviolent offender parole review hearings was mandated by the passage of Proposition 57, The Public Safety and Rehabilitation Act of 2016, approved by the voters in November 2016. See also In re Edwards (Sept. 7, 2018, B288086) __Cal.App.4th__ [237 Cal.Rptr.3d 673]. Referrals of nonviolent offenders to the Board for parole hearings began in January 2019."

WHO IS ELIGIBLE?

"Only nonviolent offenders sentenced to an indeterminate term (life with the possibility of parole) are eligible for a nonviolent parole hearing. The inmate must have completed the full term of his or her primary offense, which is the single crime for which a court imposed the longest term of imprisonment. For purposes of determining an inmate's primary offense, the term of imprisonment for inmates sentenced to a life term under an alternative sentencing scheme for a nonviolent crime shall the be the maximum term applicable by statute to the underlying nonviolent offense. Additionally, the inmate cannot have a conviction for a violent felony (as defined in Penal Code section 667.5, subdivision (c)) associated with his or her current incarceration. Inmates who are required to register as a sexual offender under Penal Code section 290 are also not eligible for a nonviolent offender parole hearing."

"Inmates sentenced to an indeterminate term for nonviolent offenses will be reviewed for eligibility for a nonviolent offender parole hearing by the California Department of Corrections and Rehabilitation [*classification unit, not the BPH, as noted above]*. Once an inmate is determined to be eligible for the process, the department will determine when the inmate will have served the full term of his or her primary offense. This date is called the inmate's nonviolent parole eligible date (NPED). Inmates who are reviewed will be provided written notice from the California Department of Corrections and Rehabilitation of their eligibility and their nonviolent parole eligible date. Eligibility determinations are subject to appeal by an inmate through the department's inmate appeals process."

TIMELINES FOR REFERRAL AND HEARINGS

"At least 180 days before an inmate's nonviolent parole eligible date, he or she will be referred to the Board for a parole suitability hearing and possible release. If the inmate has not already had a parole suitability hearing and is not scheduled to have one within 12 months pursuant to any other provision of law *[if you're already on calendar for a YOPH or elderly hearing, that will by your hearing date].*

Eligible inmates referred to the Board will be scheduled for a parole hearing as follows:

Indeterminately sentenced nonviolent offenders who are eligible for an initial parole hearing on or before December 31, 2020 and who, on January 1, 2019, had been incarcerated for 20 years or more and who are within five years of their Minimum Parole Eligible Date (MEPD) will be scheduled for a hearing no later than December 31, 2020.

All other indeterminately sentenced nonviolent offenders who are eligible for an initial parole hearing on or before December 31, 2021 shall be scheduled for a parole hearing no later than December 31, 2021.

Inmates will be provided written notice of the outcome of the referral decision by the California Department of Corrections and Rehabilitation. Referral decisions are subject to appeal by the inmate through the department's inmate appeal process. Inmates who are referred to the Board will be provided

a written explanation of the Board's parole suitability hearing process.

Inmates will receive written notice about six months in advance of their parole suitability hearing date. Notices of the hearing will be sent to victims and their family members who are registered with the Office of Victim & Survivor Rights & Services. The Board will also send a notice to the district attorney's office that prosecuted the inmate *[both VNOK and DA notifications are standard for any parole hearing]*. "

Those qualifying for a NV hearing should also be aware the same review timelines apply, 120 for the BPH legal division to review the decision to be sure it comports will legal standards and then 30 days for the Governor's review. If the Governor has questions about a grant of parole he can refer that decision for review by the entire 17-member parole board, a process known as en banc hearing.

TIPS FROM A HEARING—THE BASICS

Don't let the little things trip you up. Every parole hearing is a stressful event and you're bound to be nervous. But there are some basic strategies you can use to help calm those nerves and assist you in making your best presentation possible to the parole panel. Here's a baker's dozen of small things you can do to help yourself.

1. Read the transcript of your last hearing; note what the commissioners told you to work on and be sure you can show progress in those areas. And read your CRA—know what's in it and be prepared to discuss the clinician's conclusions.
2. Be sure to speak when answering questions; the transcriber can't hear a nod of the head.
3. Don't interrupt the panel members; they'll let you know when they've finished their questions and want your response.
4. Don't use 'bad decisions' as the reason for your crime; bad decisions lead to wearing brown socks with a black suit, not committing a crime
5. If AA is a part of your recovery, know the 12 steps. If you can't memorize all of them, know which one is the most important to you and why.
6. Ask your attorney what questions he's likely to ask you—you don't want any surprises there.
7. Don't say you'll deal with anger and stress by never getting mad or letting yourself get stressed. Reality check—it will happen, but it's how you deal with it that matters.
8. If you have victims at hour hearing, keep your eye focused on the panel during their statements. The commissioners understand this and the better ones will tell you to do so.
9. Wait for the commissioner to paraphrase or repeat clarifying questions from the DA and then answer the commissioner. The DAs are not to question you directly and the commissioners sometimes decide some questions are irrelevant and don't require you to answer.
10. If you start to feel stressed and overcome, don't be afraid to ask for a short break. Chances are the panel members could use one, too.
11. Don't try to impress anyone with your vocabulary. Even if you know what that 11-letter word means and when it use it (and chances are pretty good you only think you know) this is the place to keep it humble and simple
12. If you are denied, don't become angry. Look at it as a temporary setback and read your transcript for what areas you need to work on and improve. Showing your anger at a disappointment is proof to the panel that you might be dangerous.
13. Be honest. Don't take the blame for something you did not do and don't try to make yourself look good. Honest works, and it's much easier to deal with in the long run.

WHAT'S IN YOUR PACKET?

Since CDCR went electronic with C-files a few years ago we've heard, and seen, all sorts of problems resulting from the scanning of all that paper in old C-files into the electronic version. This can sometimes manifest in missing chronos and certificates. That's the purpose of the Olson review, to check and be sure everything you expect to be in the file is indeed there.

Counselors who are 'too busy' or impatient to allow lifers a real and meaningful chance to do an Olson review, staff who simply refuse to scan inmate-submitted documents into the file and the BPH's 20-page limit for submissions on the day of the hearing leave many inmates anxious in the extreme. We'll try to provide some actual practical advice and solutions. Frist alert your attorney to the issue, so that he/she can put it on record the fact that you were not able to do an adequate Olson review.

Second, the 20-page rule isn't in Title 15 or the DOM but is rather an Administrative Directive from the BPH itself. And, it is at the discretion of the commissioners; if they see the value in allowing more than 20 pages to be submitted on the day of the hearing, they can.

Third, support letters are NOT counted in that 20 -page limit—any number can be submitted at any time, up to and including on the hearing day. And don't worry if you're submitting hand-written documents—those are acceptable, but obviously (or maybe not so obviously to some), they should be cleanly written and easy to read. Don't make the panel guess what the words are.

Chronos and certificates are probably in the file, but you might bring your copies, and if your file is missing one you feel is important, offer it up at that point. And it can sometimes help to provide the panel a list of those certificates, chronos and the like, listed chronologically. That way, they won't have to search completely through the file. And keep a copy for yourself as well, make it your cheat sheet, adding a note on an important concept you learned from each class or group.

Acceptance letters to transitional housing and job offers are also not counted in the 20 pages. And a good relapse prevention plan is a must. A word on book reports: book reports can be very effective, but not your high-school version; book reports should show how the information in that volume impacted your insight, empathy or thinking. Bring the reports, but be prepared for a not-unusual question from the panel: "What did you learn from this book?" Those are some of the 20 pages you should strategically select.

Pictures, of family, residences, cars, etc. are nice, but not critical to your parole plans. Think about what the board looks for: ways to support yourself on release, where you will live and who will be your primary safety net. Remember, the panel has a pretty good idea on what you've been doing while inside, they're looking to you to show them what you'll be doing on the outside.

WHAT YOU SHOULD EXPECT FROM AN APPOINTED ATTORNEY

State appointed attorneys have largely been given a bad rap, certainly there are highly competent, dedicated and passionate individuals in that cohort. In fact, many of the best now exclusively privately retained attorneys began their parole hearing career as appointed counsel. However, no attorney, no matter how competent or incompetent, how highly or modestly paid, can win a parole hearing for an unprepared inmate, nor loose a grant for a prisoner who is ready to parole.

Can they help? Of course. And understanding what sort of help they can offer and how much is crucially important. The primary duty of any attorney is to be sure his/her clients' rights are recognized and met, but the training provided now to commissioners, coupled with an in-house BPH review process and a legal team more committed to following, rather than circumventing the law (a practice driven from the Executive officer down), there are less glaring examples of parole panels blatantly going their own way.

Beginning at the first of this year BPH put into effect new guidelines and expectations for appointed attorneys, as well as increased financial compensation (their pay). It is expected, by both the BPH administration and advocates (like us) that these new guidelines and expectations, as well as new a new training protocol soon to be rolled out, will result in better representation for those lifers receiving the services of state appointed attorneys.

If you find yourself deciding on using the services of the state-appointed attorney provided by the BPH, there are some limitations you should be aware of, before deciding your attorney was a 'dump truck,' and some actions you have a right to expect as their client. Because you are their client; the state may be paying the bill, but you are the client.

Keep in mind, state-appointed parole attorneys can be very experienced in parole hearings and can often provide you with better representation in that venue than an attorney unfamiliar with parole proceedings. As you wouldn't use a podiatrist if you needed an optometrist, don't expect a criminal defense attorney to understand the nuances of parole hearings. And we won't even mention the cases who've woefully lamented to us about their error in using mom's real estate attorney, their former divorce attorney or cousin John who just hung out his shingle at their hearings because they offered 'a good deal.'

If you plan, through preference or finances, to utilize a state-appointed attorney there are

some basic tasks both you and the BPH expect from them. Among those:

- Meet with you at least twice, once shortly after appointment and once 45 days before the hearing, in a confidential setting
- Have received and read your CRA
- Have reviewed your C-file and hearing packet prior to your meeting—all attorneys have access to BPH/CDCR computerized files through a complicated security system that allows them to look at your C-file and other pertinent information
- Make sure that any potential communications problems (i.e. language, cognitive issues or hearing) have been identified and remedies applied for both the meeting and hearing
- Bring CDCR Form 1003 (to stipulate or waive the hearing or change attorneys) with them and see that it is filed, if necessary
- Identify issues or documentation of possible concern at the hearing
- Inform you of your rights and what to expect at the hearing
- They should also respond to your (and your family's) reasonable number of letters or calls in a timely manner. However, remember, their time is limited and it's you, not your family, that are their clients.
- Oh, and did we mention actually showing up at the hearing (yeah, that's been an issue) and actively advocating for your rights.

Never let any attorney pressure you into a stipulation if that isn't what you want to do. There's a difference between advice and pressure; one is allowed and expected, the other is unethical. While you should listen to your attorney's advice, the ultimate decision is yours. If it seems as though 'the fix is in' regarding stipulations, well, oftentimes the commissioners and the attorney will

consult prior to the hearing, especially if there are glaring issues.

Again, the final decision is up to you, the client. If your attorney suggests a stipulation, ask them to explain the reasons for the recommendation, if they've spoken about the possibility with the commissioners and the length of stipulation recommended. If you do decide to accept the stipulation, there are a couple of important things to remember: you won't automatically be reviewed for an advancement via the Administrative Review process (which is done for most lifers given a 3 year denial decision after completion of a hearing) but you CAN file a PTA to advance your next hearing, should you feel you've made better than anticipated progress.

As mentioned before, it's you, not your attorney who is being assessed by the parole panel, and while an attorney can help you a lot or hinder you some, the ultimate decision of suitability does not rest on the attorney's performance. And after your hearing, regardless of the outcome, we'd like your evaluation of the performance and preparedness of your attorney. In just about every other issue of CLN you'll find an Attorney Survey form; take a few minutes to fill it out and send to us, or if you can't find the form, just write us your observations.

One more thing—if you do comment on the performance of your attorney, please be sure to include his/her name in your report. We can't do much about poorly performing or unresponsive attorneys if we don't know who they are.

ASH
Artists Serving Humanity

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

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

For more information please contact us at

ARTISTS SERVING HUMANITY
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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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