CALIFORNIA LIFER NEWSLETTER

State and Federal Court Cases

by John E. Dannenberg

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

STATUS OF *IN RE ROY BUTLER*

In re Roy Thinnes Butler

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

There is no material change in the case status as of 11/26/17. The case is fully briefed. On 12/14/17, the Court alerted all counsel that oral argument will be conducted on 1/4/18 at 9 a.m.

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

In re William M. Palmer

CA Supreme Court No. S244139
CA1(2); A147177
December 31, 2015

On November 15, 2017, the CA Supreme Court granted review and hold, pending the outcome of *Butler* above. The Court stayed Palmer's scheduled BPH hearing, and the Board accordingly canceled it on November 15, 2017.

> Event Description: Petition for review granted; briefing deferred

> Notes: The petition for review is granted. Further action in this matter is deferred pending consideration and disposition of a related issue in *In re Butler on Habeas Corpus*, S237014 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court. The motion to compel the Board of Parole Hearings to hold a parole hearing on October 26, 2017,

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is denied as moot. The July 26, 2017 order of the Court of Appeal in *In re Palmer*, A147177, requiring the Board of Parole Hearings to conduct a parole hearing for William M. Palmer, is hereby stayed pending further order of this court.

GOVERNOR'S REVERSALS UPHELD ON APPEAL

In re Christopher Dunaway

3rd DCA; C079664 and C082381

October 23, 2017

Christopher Dunaway had been twice found suitable for parole, but the Governor reversed the Board on both grants. In this appellate decision, the Court of Appeal, combining two separate habeas challenges by Dunaway, upheld the trial court's rejections of those challenges to the Governor's reversals.

> Dunaway's first writ petition claimed the Governor's 2014 parole decision was unsupported by the evidence, failed to consider youthful offender factors and demonstrated no nexus between alleged unsuitability and current dangerousness. His second writ petition asserted the Governor's 2016 parole decision lacked supporting evidence and was arbitrary in violation of due process, and the board's informal extension of the interval for parole consideration following a gubernatorial reversal violated his due process, ex post facto and equal protection rights.
>
> We conclude the Governor's 2014 and 2016 parole decisions are supported by some evidence and demonstrate a reasoned application of the correct legal principles. We further conclude Dunaway's constitutional rights were not infringed by the board's discretionary scheduling change.

Dunaway's youthful 2nd degree murder conviction stemmed from a dispute with a car repair shop, wherein he stabbed the victim 23 times. Although the Board found case, prison history, and age factors favorable to parole, the Governor found the details of the violence of the offense not resolved to his satisfaction.

In fact, Dunaway had shown deep reflection and advancing maturity gained from prison classes aimed at self-evaluation.

> Previously, Dunaway had claimed the victim pulled the wool over Dunaway's eyes or pulled a fast one by

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PUBLISHER'S NOTE

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

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

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

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

EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility

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WALKING BACKWARD THROUGH OUR MIND

At the end of every year we try to stop, take a breath and look back at the events of the preceding months. Although the last few years have been pretty full of changes in CDCR and prison issues, 2017 was quite a notable year for legislation affecting lifers.

YOPH was expanded to those under 26 at the time of their crime, LWOP for those who committed their life crime before the age of 18 was virtually abolished with the implementation of automatic hearings after 25 years of incarceration, elderly parole was codified and a tiered registration system for 290 convictions put in place. And while some of these new laws need additional modifications, at least the process has begun.

2017 also saw the Board of Parole Hearings expanded to 15 commissioners, a new process for considering confidential information implemented (the jury's still out on this one) and information on the parole process and individual inmates' release dates made available to the public. And more importantly, 2017 saw Governor Brown issue (as of publication date) 16 commutations of sentence, including 8 to LWOP inmates, making them eligible for parole after 25 years.

Helping us put all of this into perspective is a little excursion down memory lane, spurred by the discovery in our files of an old Lifer-Line newsletter, from September 2010. Vol. 1 Issue 6 of Lifer-Line reflected information gleaned from responses to our first-ever call for information from lifers. It must be noted, in 2010, under a former BPH administration, information on virtually any aspect of the parole process was not easily available to the public—in fact, under former BPH director Martin Hoshino (late of the state Judicial Council) virtually everything was done behind not only closed, but barricaded doors. And we started knocking.

Looking back at some of the goings-on at parole hearings sent to us from inmates who had been in the crosshairs at parole hearings (this long before LSA or other non-attorney observers were allowed to attend hearings), we quote the following few snippets from that aged publication:

"Nearly 60% of the reasons for denial in the survey responses listed the "heinous nature" or cruel circumstances of the crime as the reason for denial of parole, coupled 42% of the time with a reference to lack of insight. In finding lack of insight the commissioners rely heavily on the psychological evaluations made by the BPH's Forensic Assessment Division (FAD), a questionable and secretive group of psychologists working at the direction of and accountable only to the BPH. Indeed, in nearly 20% of the denials on which we received information the psych report itself was cited as a reason for denial."

"Comments made by the commissioners to prisoners ranged from the laughable to the bizarre to the truly outrageous. One inmate was chastised for his "repeated association with criminals while in prison"; another prisoner "possesses a dark side that will keep him from attaining" parole; family support from out of state "might as well be from the dark side of the moon" to the prisoner "just haven't [sic] done enough time."

"In October of 2009 [one inmate] appeared before the board with a package of rehabilitation that included 309 self-help chronos, 8 vocational trades, 19 vocational skills and 885 laudatory chronos over the course of his [over 40 years] incarceration. The decision? Denied three years, recommendations to continue to remain discipline free, continue in self-help programs and continue to gather supportive chronos."

"Other objectionable instances included prisoners being forced to show and explain their tattoos, with a deputy commissioner noting in one instance he "always had a problem with prisoners and their tattoos." And commissioners seem to be at odds as to how prisoners are to become suitable for parole, one telling a prisoner "you can't program your way out," while another told a different prisoner "you have to earn your release date."

Whew. Those were the days. We hasten to add, not only has the administration at the BPH changed, but only 2 commissioners from that era remain on the current board, and those two, thanks in part to training given to commissioners, better direction and leadership and, we can surmise, maturation and growth on their part as well, have changed considerably. It's doubtful those remarks and attitudes would be on display today.

So while we still have a long road ahead, it's helpful to turn around and look back, to see the bumps and potholes we've weathered, to acknowledge this road is a bit smoother and wider, and it pays to keep on truckin'.

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increasing the agreed-upon price for the car repair, but at a 2014 parole hearing Dunaway said those prior statements were untrue. Dunaway said he had previously been in denial when he said those things but prison classes helped him take responsibility. He admitted authorizing the repair after the victim told him how much it would cost; he had blamed the victim for Dunaway's sense that life in general had dealt him a bad hand. Dunaway also admitted he planned the crime in advance and facilitated it by parking his bicycle away from the repair shop. He explained he had been so hurt from internalizing his problems and fears that he had been a "real mess." Applying what he called "dysfunctional thinking," he wanted to lash out and hurt somebody.

Dunaway described his family situation at the time of the crime, including separation from his mother when his parents divorced and his sense of powerlessness when his father and sister were victimized by violent crime. He said he bottled up his anger and masked his fear and hurt. He was so convinced he had received an "unfair shake" that he eventually lashed out on the day of the crime in a way that far exceeded any provocation. Dunaway told the board: "I have no right to hurt another person. . . . So even when I find myself in conflict, even when I am angry, I've already replaced those values that were inherent in me when I committed my crime that under no circumstances can I allow myself to even get close to being aggressive." He said he had successfully avoided any violence in prison because of a conscious decision to never again let his anger lead to aggression. He identified anger as a warning sign that something needs to be addressed but he was emphatic that aggression is never an acceptable response to anger.

The Board recognized Dunaway's changes and found it justified the grant of parole.

While in prison Dunaway obtained two Associate degrees and several vocational certifications. He submitted a list of 40 self-help programs in which he had participated, including Alternatives to Violence and Victim Awareness. He did not receive any prison disciplinary notices. He had eight letters of family and community support, including offers for housing and jobs, along with many laudatory "chronos" praising his work in prison. A May 2014 psychological evaluation reviewed by the board praised his compliance and achievement and described him as a low risk for violence. He completed many vocational and training classes plus five book reports on subjects related to his rehabilitation. Based on the evidence, the board concluded Dunaway was eligible for parole and did not pose an unreasonable risk of danger or a threat to public safety if released.

The Governor focused on the gruesomeness of the stabbing as cause for his concern, notwithstanding Dunaway's youth, good prison record, and favorable psych eval.

The Governor recognized he must give great weight to the diminished culpability of juveniles, the hallmark features of youth, and any subsequent growth and increased maturity when determining a youthful offender's suitability for parole. But he also noted the circumstances of the crime can provide evidence of current dangerousness when the record establishes that something in the inmate's incarceration history, current demeanor or mental state indicates the circumstances of the crime remain probative of current dangerousness.

The Governor acknowledged Dunaway's clean disciplinary record and his efforts to

improve himself while incarcerated. He commended Dunaway for those positive steps but said they were outweighed by the negative factors that demonstrate he remains unsuitable for parole. The Governor recognized Dunaway was 17 years old when he committed the murder and that he experienced instability, insecurity and harassment at school because of his mixed ethnicity. But the Governor said Dunaway was an honor student who planned the especially gruesome and disturbing crime over a repair bill he could not pay, and his explanations for the murder were inadequate. According to the Governor, the circumstances that led to Dunaway's anger -- peer isolation, bullying, poverty, and lack of emotional support -- are common in the lives of many teens, and did not sufficiently explain why Dunaway planned to murder a stranger in connection with a repair bill or the extreme level of violence he exhibited. The Governor concluded Dunaway did not have a sufficient understanding of why he murdered the victim, and without such an understanding the Governor was not confident Dunaway could avoid similar violent behavior if returned to the community.

At Dunaway's next BPH hearing (18 months after the Governor's reversal), the Board again found him suitable.

A 2015 psychological evaluation was consistent with an evaluation in 2014, identifying as mitigating factors a notable level of insight into the crime at the 2014 hearing followed by continued exploration of the reasons for the crime and no new aggravating factors. In addition, Dunaway once more offered evidence of his educational achievements and success as a prison worker. The presiding commissioner said Dunaway had diminished capacity at the time of the crime because of his youth and the board did not find anything that would link Dunaway to current dangerousness. Concluding that stabbing a stranger 23

times is ultimately unexplainable, the presiding commissioner noted that Dunaway had shown growth, maturity and rehabilitation and there were no prison rules violations in his record to suggest any impulsivity or behavioral problems.

The Governor found that the concerns he had at the first reversal remained unresolved in this second parole grant decision by the Board.

The Governor reversed the board's decision in April 2016. Recognizing Dunaway's diminished culpability due to his youth at the time of the murder and acknowledging the instability, isolation, poverty and neighborhood conditions that Dunaway experienced, the Governor also noted Dunaway's growth and success in prison. But the Governor said Dunaway's understanding of why he planned such an extremely violent murder remained troubling. According to the Governor, Dunaway repeated many of the

same explanations: his anger stemmed from isolation, a dangerous neighborhood and family problems, and he targeted the victim because he wanted somebody else to hurt. The Governor said he did not overlook Dunaway's frustration with his circumstances, but his explanation for how he tried to solve those problems in such a callous, cold-blooded manner remained insufficient. Concluding that Dunaway's understanding of what caused him to unleash all of his anger and frustration in a vicious manner wholly disproportionate to his circumstances remained deficient, the Governor said he was still not confident Dunaway would not react violently if released from prison.

The Court then stated the current legal standard for the Governor's review of such a case as Dunaway's.

In reviewing a decision by the Governor that an inmate is not suitable for parole, a court must consider the entire record in the light most favorable to the Governor's decision, to see if the record discloses some evidence -- a modicum of evidence -- supporting the determination that the inmate would pose a danger to the public if released on parole. (*In re Shaputis* (2011) 53 Cal.4th 192, 214 (*Shaputis II*).) Although the "some evidence" standard is not toothless, it must not operate to impermissibly shift the ultimate discretionary decision of parole suitability from the executive branch to the judicial branch. (*Id*. at p. 215.) The Governor's decision is subject to judicial review, but that review is limited and narrower in scope than appellate review of a lower court's judgment. (*Ibid*.) The some-evidence standard is intended to guard against arbitrary parole decisions without encroaching on the broad authority granted to the Governor. (*Ibid*.) The standard is more deferential than substantial evidence review, and may be satisfied by a lesser evidentiary showing. (*Id*. at p. 210.) In fact, only when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Governor. (*Id*. at p. 211.)

Resolution of conflicts in the evidence, and the weight to be given the evidence, are matters within the authority of the Governor. (*Shaputis II, supra*, 53 Cal.4th at p. 210.) Likewise, the precise manner in which the specified factors relevant to pa-

role suitability are considered and balanced lies within the discretion of the Governor. (*Ibid*.) It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. (*Ibid*.) Any relevant evidence that supports the Governor's determination is sufficient to satisfy the some-evidence standard. (*Id*. at p. 214.)

A parole suitability decision is an attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts. (*Shaputis II, supra*, 53 Cal.4th at p. 219.) Past criminal conduct and current attitudes toward that conduct may both be significant predictors of an inmate's future behavior. (*Ibid*.) While subjective analysis is an inherent aspect of the parole suitability determination, it plays a proper role only in the parole authority's determination. (*Ibid*.) The court's function is one of objective review, limited to ensuring that the Governor's analysis of the public safety risk is based on a modicum of evidence, not mere guesswork. (*Ibid*.) Accordingly, the reviewing court does not ask whether the inmate is currently dangerous. (*Id*. at p. 221.) That question is reserved for the executive branch. (*Ibid*.) Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness. (*Ibid*.)

The Court pointed out that searching for "some evidence" on appellate review does not compel a duty on the Board to have collected that evidence in one place to guide the reviewing court's analysis.

> But nothing in the requirement that a parole denial be accompanied by a statement of reasons demands that the parole authority comprehensively marshal the evidentiary support for its reasons. *(Shaputis II, supra*, 53 Cal.4th at p. 214, fn. 11.) Appellate review for some evidence supporting the parole authority's decision extends to the entire record, and is not limited to the evidence specified by the parole authority. (*Ibid*.)

The Court found that "some evidence" in the record supported the Governor's findings, in both reversals.

The record shows that at the time of the crime, Dunaway was an outstanding student with no history of discipline. There is no evidence that anyone expected him to plan the murder of a stranger and carry it out by stabbing the victim 23 times in the throat, chest and abdomen, exposing the victim's intestines and puncturing his heart and lungs. Jump to the present, and the record shows Dunaway is now an outstanding prison student with no history of prison discipline. Many people do not expect him to suddenly commit a violent crime if released. But nobody expected that to happen before. One witness expressed the opinion that Dunaway is not an obvious ticking bomb, but rather a hidden land mine. Another witness noted that Dunaway lied and was convicted of second degree murder, but later admitted he planned the murder, and yet in

all his book reports and rehabilitation he has never addressed how he could plan such a crime. Under the circumstances, it was not arbitrary or absurd for the Governor to place great weight on whether Dunaway understands why he committed the life offense and whether he has sufficient insight into how he will prevent such violence in the future.

The Governor repeatedly said Dunaway has not expressed a sufficient understanding for why he planned and carried out such a brutal murder. In fact, after all of Dunaway's testimony, the presiding commissioner noted it was still "extremely hard for any of us to understand why this murder even took place and the Governor had problems with it." The presiding commissioner concluded it is ultimately "unexplainable." But the Governor need not accept such a conclusion. Reasonable people might differ as to whether Dunaway has expressed sufficient understanding and explanation, but resolution of conflicts in the evidence, and the weight to be given the evidence, are matters within the authority of the Governor. (*Shaputis II, supra*, 53 Cal.4th at p. 210.) The Governor's decision focused on current dangerousness, as the law requires, and his decision is supported by some evidence in the record.

Separately, and in a ruling on a seemingly novel question, the Court analyzed Dunaway's complaint that he should have his next parole suitability hearing no more than 12 months after the Governor's reversal, rather than the 18 months he was subjected to, constituted unlawful 6 month extensions of his punishment. The Court of Appeal disagreed.

Dunaway acknowledges there is no legal constitutional or statutory provision specifying when the board should hold another parole hearing after the Governor reverses a grant of parole. In 2008, the board had scheduled new hearings immediately after notice of the Governor's reversal and had set hearings about 12 months after the hearing at which parole had been granted. But in 2013, the board changed this process and began setting parole hearings approximately 18 months after the board's initial grant of parole. The board said it would not displace other inmates due for a hearing, and explained that the prior shorter time period gave inmates little time to address the Governor's concerns.

Dunaway contends there is a great likelihood the board will find him suitable for parole again and thus the scheduling change will add an extra six months to his period of incarceration. He says "there is almost no chance" he will be denied parole again. Accordingly, he contends the board's schedule is an ex post facto punishment. We disagree.

The United States and California constitutions prohibit the passage of ex post facto laws. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) But a parole guideline is not a law because, unlike a law, it may be discarded where circumstances require. (*Inglese v. U.S. Parole Com*. (7th Cir. 1985) 768 F.2d 932, 936 [citing cases]; accord *Smith v. U.S. Parole Com*. (9th Cir. 1988) 875 F.2d 1361, 1367.) Dunaway concedes the board's 2008 and 2013 letters describing scheduling are not based on unconstitutional law.

Dunaway points out that a change in parole law may run afoul of ex post facto principles if it creates a significant risk of

prolonging incarceration. He says the Attorney General failed to prove a need for extending the time for a parole applicant to secure parole after gubernatorial reversal. However, Dunaway's sentence has not changed. He is still serving the same indeterminate life sentence. His claim of prolonged incarceration is based on speculation that he will be approved for parole by the board and the Governor in the future. He claims a right to annual parole hearings but cites no statutory or constitutional authority for such a right. The board's prior practice did not create such a right, and the case cited by Dunaway, *Peugh v. United States* (2013) __ U.S. __ [186 L.Ed.2d. 84], does not support his contention. That case presented an ex post facto violation because a more severe set of sentencing guidelines was adopted between the time of trial and the time of sentencing, resulting in a more severe sentence which extended punishment well beyond what it would have been on the day of conviction. (*Id*. at pp. __-__ [186 L.Ed.2d at pp. 93-94].) No such circumstances are present in this case.

California and federal ex post facto provisions are analyzed the same way. (*In re Vicks* (2013) 56 Cal.4th 274, 287.) Ex post facto claims were addressed after voters passed a proposition known as Marsy's Law in 2008 because the law deferred parole hearings for some murderers so that victims would no longer have to attend annual hearings when a grant of parole was unlikely. (*Id*. at pp. 283-284.) The California Supreme Court found no ex post facto violation because the board retained unfettered discretion to advance a parole hearing and such discretion sufficiently alleviated the risk of prolonged incarceration. (*Id*. at p. 306.) Dunaway has not identified any source of restriction on the board's scheduling discretion for inmates whose parole was approved by the board but denied by the Governor, and his claim lacks merit.

Dunaway's optimism for a "great likelihood" of another grant on his next post-reversal BPH hearing faded, when, on May 31, 2017, the Board denied him parole for three years. Hopefully, they gave him valuable guidance on gaining a third grant that will survive the Governor's past concerns.

HABEAS PETITION TO REVERSE LWOP SENTENCE FOR EVIDENTIARY INSUFFICIENCY IS DENIED

In re Larry Richardson

CA2(2); B280705
October 30, 2017

Petitioner Larry Richardson, Jr. had filed a petition for a writ of habeas corpus seeking to vacate his sentence of life without the possibility of parole (LWOP) because, in his view, the evidence presented to the jury was insufficient to meet the evidentiary minimum required by Penal Code section 190.2, subdivision (d), as construed by *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*).

The Court of Appeal had summarily denied his petition, but the CA Supreme Court granted review and directed the appellate court to vacate its denial and issue an order to show cause why Richardson was not entitled to relief. Having now considered the parties' subsequent filings, and concluding that Richardson's petition is without merit, the Court of Appeal denied it.

The case involves a murder committed during the commission of a robbery of a jewelry store by Richardson and others. The question is whether Richardson's participation in the murder factually qualified him for an LWOP sentence under PC § 190.2(d). The Court summarized the facts.

On June 9, 1999, three men walked into Classic Wholesale Jewelers, a store in the jewelry district of downtown Los Angeles; one of them put a gun to the back of the store owner's head and said, "Don't move, motherfucker" while another vaulted the counter to reach the store's safe; the robber who was armed then pulled the trigger, killing the owner; all of the men then fled without taking any jewelry.

Moments before the robbery began, five or six men had pulled up in two cars just across the street from Classic Wholesale Jewelers. Defendant was one of those men. The evidence is conflicting as to whether defendant was one of the three men who entered the jewelry store: One bystander, who had seen defendant previously, repeatedly testified at trial that defendant had gone inside, but had previously testified at the preliminary hearing that defendant had remained outside near one of the cars. The store owner's wife, who was inside the store, did not identify defendant as one of three robbers, but acknowledged that she was behind the counter and could not see what was happening for part of the time. Minutes after the robbery ended, defendant was pulled over driving one of the two cars; the man identified as the shooter was a passenger.

This was not the first time defendant and the others had participated in armed robberies. Just seven weeks earlier, on April 20, 1999, defendant and two others walked into the Guadalajara Jewelry shop, and one of the robbers pointed a gun at two people inside while the other two robbers stuffed their shirts with jewelry. That same day, two bystanders saw defendant and two others enter a different jewelry store; a few minutes later, the bystanders saw defendant run by with a gun in his hand and jewelry stuffed under his shirt. Nine days later, on April 29, 1999, defendant and four others congregated near Sa-

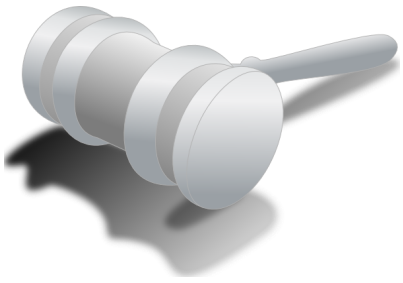
rah Jewelers in the same area. Three of those men (but not defendant) went inside, and one of them (different from the shooter at Classic Wholesale Jewelers in June 1999) held a gun to the owner's head while the other two took jewelry.

The jury was instructed that it could impose a sentence of life without the possibility of parole under section 190.2 only if it found that defendant acted as a "major participant" in the attempted robbery and burglary, and only if he acted "with reckless indifference to human life." The jury so found, and the Court of Appeal affirmed his conviction and sentence after rejecting a challenge to the sufficiency of the evidence underlying the jury's section 190.2 finding.

On Petition for Review of this later habeas petition, the CA Supreme Court granted review and directed the Court of Appeal to issue an order to show cause and hear the matter. Instead of its earlier summary denial, the Court of Appeal now gave a reasoned denial.

The Court of Appeal first dealt with the State's argument that the habeas petition was procedurally barred. The Court disagreed.

> The People argue that we may not reach the merits of defendant's sufficiency-of-the-evidence challenge because (1) it was raised and rejected on appeal, and is thus barred by *In re Waltreus* (1965) 62 Cal.2d 218, 225 (*Waltreus*), and (2) such challenges are specifically not permitted on habeas under *In re Lindley* (1947) 29 Cal.2d 709, 723 (*Lindley*).



> Both of these arguments were recently considered, and rejected, in *In re Miller* (2017) 14 Cal.App.5th 960, 977-980. We agree with *Miller*. The so-called *Waltreus* bar does not apply—and does not preclude consideration of an issue on habeas notwithstanding its prior consideration during a direct appeal—in a case such as this one, where a court has subsequently "confirmed a substantive definition of [a] crime [or enhancement] duly promulgated by the Legislature" that alters the analysis of the previously addressed issue. (*People v. Mutch* (1971) 4 Cal.3d 389, 395-399.) That is the situation here. And the so-called *Lindley* bar is designed to preclude relitigation on habeas of "routine claims that the evidence presented at trial was insufficient." (*In re Reno* (2012) 55 Cal.4th 428, 505.) Evaluating the sufficiency of the evidence under a newly refined statutory standard is not a "routine" sufficiency claim, and thus falls outside of *Lindley's* reach.

The Court then extensively reviewed the law on a determination on the merits of a claim of insufficiency of the evidence to support an LWOP sentence.

> A person who is convicted of first degree murder on the theory that he aided and abetted a robbery that resulted in a death (rather than being the actual killer) may only be sentenced to life without the possibility of parole if he (1) acted with the intent to kill (§ 190.2, subd. (c)); or (2) (a) was "a major participant" in the underlying robbery, and (b) acted "with reckless indifference to human life" (§ 190.2, subd. (d)). The elements of section 190.2, subdivision (d) are drawn from—and designed to incorporate—the holdings of two United States Supreme Court cases—*Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*) and *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*). (*Banks, supra*, 61 Cal.4th at p. 794.) *Tison* and *Enmund* demarcate the end points of a "continuum" that describe the degree of an aider and abettor's "personal role in the crimes leading to the victim's death." (*Banks*, at pp. 801-802; *In re Loza* (2017) 10 Cal.App.5th 38, 41.) Only if the aider and abettor "'substantial[ly] participat

[es] in a violent felony under circumstances likely to result in the loss of innocent human life'"—that is, only if he is a major participant who acts with reckless indifference to human life—may a court impose a sentence of life without the possibility of parole. (*Banks*, at p. 801, quoting *Tison*, at p. 154.)

Our Supreme Court in *Banks* and *Clark* explained how courts and juries are to assess whether an aider and abettor is a "major participant" and when that person has acted "with reckless indifference to human life."

A "major participant" in a robbery is someone whose "personal involvement" is "substantial"; such a participant "need not be the ringleader," but his involvement must be "greater than the actions of an ordinary aider and abettor." (*Banks, supra*, 61 Cal.4th at pp. 801-802; *People v. Williams* (2015) 61 Cal.4th 1244, 1281.) Courts are to examine the totality of the circumstances when evaluating the extent of participation, including several factors our Supreme Court identified in *Banks* as relevant but not dispositive on the issue: (1) the defendant/aider and abettor's role in planning the robbery; (2) his role in supplying or using lethal weapons; (3) his awareness of the "particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants"; (4) his presence at the scene of the killing and thus whether he was "in a position to facilitate or prevent the actual murder"; and (5) his actions after the use of lethal force. (*Banks*, 61 Cal.4th at p. 803; *Clark, supra*, 63 Cal.4th at p. 611 [noting relevance of these factors to the "major participant" element].)

A defendant acts with a "'reckless indifference to human life'" when he "'"knowingly engag[es] in criminal activities known to carry a grave risk of death."'" (*Banks, supra*, 61 Cal.4th at pp. 800-801, quoting *People v. Estrada* (1995) 11 Cal.4th 568, 577, quoting *Tison, supra*, 481 U.S. at pp. 157-158.) The defendant must "'subjectively appreciate[]'" that his acts "'were likely to result in the taking of innocent life'" (*Banks*, at pp. 801-802, quoting *Tison*, at p. 152), although jurors may infer that subjective awareness from the nature of the criminal activity itself (e.g., *People v. Mora* (1995) 39 Cal.App.4th 607, 616-617). Whether a defendant/aider and abettor has such a subjective awareness is to be evaluated in the totality of the circumstances, including several factors our Supreme Court in *Clark* identified as relevant but not dispositive on the issue: (1) the defendant/aider and abettor's awareness that a gun will be used and/or his personal use of a gun during the robbery; (2) the defendant's "[p]roximity to the murder and the events leading up to it"; (3) the length of time the victims were restrained by the defendant and his cohorts; (4) whether the defendant had "advance notice" that his cohorts might use lethal force; and (5) whether the defendant "engaged in efforts to minimize the risk of violence." (*Clark, supra*, 63 Cal.4th at pp. 618-622.)

Defendant argues there was insufficient evidence to support the jury's findings that he was a major participant in the June 9, 1999 robbery or that he acted with reckless indifference to human life. In examining the sufficiency of the evidence, we must ask whether the record contains "substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable

> doubt." (*People v. Hubbard* (2016) 63 Cal.4th 378, 392.) In undertaking this inquiry, we must view the record "in the light most favorable" to the verdict. (*Ibid*.) We may not reweigh the evidence (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890); as long as the jury's resolution of any conflict in the evidence is "reasonable," we cannot reverse just because the jury could have reasonably resolved the conflict the other way (*Hubbard*, at p. 392).

The Court found evidence in the record that supported the jury's finding that Richardson was a "major participant," and not just the getaway driver he now claimed.

> The jury's finding that defendant was a "major participant" in the June 1999 robbery is supported by substantial evidence. Although the evidence does not show that defendant was the sole "mastermind" who single-handedly planned the June 1999 robbery, it does show that he was an integral part of a team of robbers who closely adhered to a specific plan: Three men would enter a jewelry store, one man would hold the store owner and other witnesses at gunpoint, the other two men would grab as much jewelry as they could. This was the plan followed during the two robberies on April 20, the robbery on April 29, and the charged robbery on June 9. What is more, the men rotated their roles: Defendant was the gunman for one and ostensibly both of the robberies on April 20; the jury could reasonably have concluded he was one of the two who grabbed jewelry during the June 9

robbery; and he stayed outside during the April 29 robbery. Given this level of coordination, the jury could reasonably infer that defendant—as a major player in this rotating team of robbers—was also one of the robbery team's planners. And although there was no evidence indicating that defendant supplied the guns used in the robberies, he certainly carried and used a gun during one (and possibly two) of the robberies. Further, defendant's extensive involvement in the robberies evinces an awareness of the "particular dangers posed by the nature of the crime [and] weapons used" because he was present during several of the prior robberies. Although the evidence on this point is conflicting, there was evidence—namely, the bystander's testimony at trial—that reasonably supports a finding that defendant was inside Classic Wholesale Jewelers. Accepting this testimony, as we must under a substantial evidence review standard, defendant was present at the scene of the shooting and did nothing to prevent it and, instead, fled with the others.

Likewise, the Court found there was sufficient evidence in the record to support the jury's requisite finding of "reckless indifference to human life."

The jury's finding that defendant acted with reckless indifference to human life is also supported by substantial evidence. Here, there was ample evidence from which a jury could reasonably infer that he was subjectively aware that his acts were likely to result in the taking of an innocent life. (*Banks, supra*, 61 Cal.4th at pp. 801-802.) Although a defendant's awareness that his cohorts are "armed" or that a gun will be used is not enough, "without more," to establish an awareness of a grave risk of death (*id*. at p. 809, fn. 8), "[a] defendant's use of a firearm, even if [he] does not kill the victim . . . , [is] significant to the analysis of reckless indifference to human life" (*Clark, supra*, 63 Cal.4th at p. 618). Here, defendant held a gun to the victim's head in one, and potentially both, of the jewelry store robberies on April 20. He was part of the team that regularly held guns to their victims' heads. Moreover, as explained above, the jury could reasonably find that defendant was inside Classic Wholesale Jewelers on June 9, so he had close proximity to the charged murder as well as the events leading up to it. Although the robbery lasted only a matter of minutes, and defendant had no advance notice that anyone would pull the trigger, defendant—unlike the mastermind in *Clark* who told his cohorts only to use unloaded weapons—did not take steps to minimize the likelihood that someone might fire the weapon or to otherwise minimize the risk of violence.

Finally, Richardson's argument that there was no plan to kill anyone insulated him from an LWOP liability. The Court disagreed.

Defendant asserts that there was no plan to shoot the owner of Classic Wholesale Jewelers, and that the victim's death by shooting that day was spontaneous and unplanned—as evidenced by the fact that the robbers fled without taking any jewelry. Further, defendant notes, there was no evidence that any of defendant's cohorts had ever fired the guns they had previously held to their victims' heads. To be sure, defendant is correct that there was no plan to kill the

> jewelry store owner and hence insufficient evidence of an intent to kill, but such an intent is irrelevant to the inquiry under section 190.2, subdivision (d). And while the absence of prior shootings precludes a finding that the shooting on June 9 was a certainty, a jury need only find that defendant subjectively appreciated that his acts "were *likely* to result in the taking of innocent life." (*Banks, supra*, 61 Cal.4th at pp. 801-802, italics added.) Given defendant's involvement with prior robberies where he witnessed others holding a gun to the jewelry store victims' heads and sometimes held the gun himself, given the evidence supporting a reasonable jury's finding that he was inside Classic Wholesale Jewelers on June 9, when the gun was loaded, and given the reasonable inference that the robbery team was using a loaded gun for all of its robberies, the jury had substantial evidence upon which to conclude that he was subjectively aware that his acts were "likely to result in the taking of [an] innocent life."

Accordingly, the Court found that there was sufficient evidence in the record to support the jury's finding that Richardson was subject to PC § 190.2(d)'s LWOP eligibility.

PROP. 47 RELIEF AVAILABLE FOR PROP. 36 LIFER ON STAYED NON-LIFE OFFENSE

P. v. Hernandez

___Cal.App. 5th ___; CA(6); H043551
March 28, 2017

In 1997, Peter Hernandez was convicted of second degree robbery and petty theft with a specified prior conviction and two prior strike allegations were found true. For the robbery, defendant was sentenced to an indeterminate term of 25 years to life under the Three Strikes law. His petty theft term was stayed. In 2015, defendant petitioned to have his petty theft with a prior conviction reduced to a misdemeanor under Proposition 47. The trial court denied relief on the ground that his conviction for robbery was a disqualifying factor because he received an indeterminate life sentence.

The Court of Appeal reversed. PC § 1170.18(i) precludes resentencing under Prop. 47 for defendants who have previously been convicted of certain disqualifying offenses specified in PC § 667, subdivision (e)(2)(c)(iv), including "any serious and/or violent felony offense punishable in California by life imprisonment or death." Applying principles of statutory interpretation, the court concluded that the offense itself must be punishable by an indeterminate term in order to qualify as "an offense punishable in California by life imprisonment or death." The offense of robbery has an associated statutory punishment of two, three, or five years. Although defendant's robbery conviction was punished by an indeterminate life term under the Three Strikes law, robbery itself is not a "serious and/or violent felony offense punishable in California by life imprisonment or death" under section 667, subdivision (e)(2)(c)(iv)(VIII). Accordingly, the trial court erred in denying defendant's petition on this ground.

Part of the State's convoluted argument was that the timing of the relief petition, not the timing of the underlying offense, barred relief. The trial court bought this argument, but the Court of Appeal did not.

> On September 25, 2015, defendant filed a petition for resentencing pursuant to section 1170.18, subdivision (a), seeking to have his conviction of petty theft with a prior reduced to a misdemeanor. Defendant asserted that his robbery conviction

was not a "prior conviction" within the meaning of section 1170.18, subdivision (i) because he suffered that conviction at the same time as his conviction of petty theft with a prior. Defendant further argued that his robbery conviction was not a conviction of an "offense punishable in California by life imprisonment or death" within the meaning of section 667, subdivision (e)(2)(C)(iv)(VIII) because the punishment for robbery is generally a determinate term; a robbery conviction is only punishable by a life term if the person is a recidivist subject to the Three Strikes sentencing scheme.

The District Attorney filed opposition to defendant's resentencing petition, arguing that defendant's robbery conviction precluded him from obtaining Proposition 47 relief for his conviction of petty theft with a prior. The District Attorney argued that the robbery conviction was a "prior conviction" within the meaning of section 1170.18, subdivision (i) because it occurred "prior to the request for relief." The District Attorney also argued that the robbery conviction was "punishable by life imprisonment" because defendant received a life sentence for that offense.

The trial court denied defendant's petition for resentencing in a written order filed on April 28, 2016. The trial court determined, based on the plain language of section 1170.18, subdivision (i), that defendant had a "prior" robbery conviction because the conviction occurred prior to the filing of his resentencing petition. The trial court also found that "as a result of the Three Strikes law," defendant's robbery conviction was a conviction for an offense "punishable by life imprisonment."

The Court of Appeal discussed its legal reasoning for finding that Hernandez qualified for resentencing consideration under Prop. 47. It also noted that even though the existing sentence for the petty theft was *stayed*, this would not be moot since having one less felony on one's record can be a factor in future legal considerations, not the least of which is eventual parole consideration. Accordingly, the full (published, and thus citable) discussion of the case law interpreting Props. 36 and 47, as they apply here, is repeated below.

> Defendant argues, as he did in the trial court, that his conviction of petty theft with a prior was eligible for resentencing under section 1170.18 because his robbery conviction did not qualify as a prior conviction for an "offense punishable in California by life imprisonment or death" (§ 667, subd. (e)(2)(C)(iv)(VIII)).
>
> Section 667, subdivision (e)(2)(C)(iv) was added by Proposition 36, the Three Strikes Reform Act of 2012. Under the Three Strikes law as it existed prior to Proposition 36 (former §§ 667, subds. (b)-(i); 1170.12), "a defendant who had previously been convicted of two or more serious or violent felonies was subject to an indeterminate sentence of 25 years to life upon his or her conviction of any new felony. [Proposition 36] prospectively changed the Three Strikes law by reserving indeterminate life sentences for cases where the new offense is also a serious or violent felony, unless the prosecution pleads and proves an enumerated disqualifying factor. In all other cases, a recidivist defendant will be sentenced as a second strike offender, rather than a third strike offender. [Citations.]" (*People v. Chubbuck* (2014) 231 Cal.App.4th 737, 740-741 (*Chubbuck*).) One enumerated disqualifying factor is that "[t]he defendant suffered a prior serious and/or violent felony conviction" for one of the "felonies" listed in section 667, subdivision (e)(2)(C)(iv), which include "[a]ny serious and/or violent felony offense

punishable in California by life imprisonment or death" (*id*., subd. (e)(2)(C)(iv)(VIII)).

Proposition 36 "also created a ' "post-conviction release proceeding" ' whereby a Three Strikes prisoner who is serving an 'indeterminate life sentence' for a crime that was not a serious or violent felony—and who is not otherwise disqualified—may have his or her sentence recalled and be resentenced as a second strike offender . . . ." (*Chubbuck, supra*, 231 Cal.App.4th at p. 741.) Again, one disqualifying factor is that the defendant has a prior conviction for an offense listed in section 667, subdivision (e)(2)(C)(iv). (§ 1170.126, subd. (e)(2).)

The issue here is whether an offense itself must be punishable by an indeterminate life term in order to qualify as an "offense punishable in California by life imprisonment or death" under section 667, subdivision (e)(2)(C)(iv)(VIII), or whether an offense is "punishable in California by life imprisonment or death" if it is punishable by an indeterminate life term in the particular case, i.e., due to application of the Three Strikes law.

Defendant contends the phrase "[a]ny serious and/or violent felony offense punishable in California by life imprisonment or death" (§ 667, subd. (e)(2)(C)(iv)(VIII)) refers only to offenses that are listed as serious felonies under section 1192.7, subdivision (c) and/or violent felonies under section 667.5, subdivision (c) and for which the usual prescribed punishment is a life sentence, such as kidnapping in violation of section 209.

The Attorney General contends the phrase "[a]ny serious and/or violent felony offense punishable in California by life imprisonment or death" (§ 667, subd. (e)(2)(C)(iv)(VIII)) also includes offenses that are statutorily enumerated as serious and/or violent felonies, such as robbery, for which the usual prescribed punishment is a determinate term but which are punishable by a life sentence under the Three Strikes law when the defendant has qualifying prior convictions.

In determining the meaning of the phrase "[a]ny serious and/or violent felony offense punishable in California by life imprisonment or death" (§ 667, subd. (e)(2)(C)(iv)(VIII)), an issue of statutory interpretation, we apply de novo review. (See *People v. Simmons* (2012) 210 Cal.App.4th 778, 790.) "When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure. [Citation.]" (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

We begin with the ordinary meaning of the phrase "offense punishable in California by life imprisonment" as used in section 667, subdivision (e)(2)(C)(iv)(VIII). The word "offense" generally refers to a criminal act. Section 15 specifies: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding

it, and to which is annexed, upon conviction," punishment by death, imprisonment, a fine, removal from office, or disqualification from office. By using the term "offense punishable . . . by life imprisonment," section 667, subdivision (e)(2)(C)(iv)(VIII) focuses on the offense and its associated statutory punishment, not the type of offender or the effect of other prior convictions on the offender's sentence. Since the "offense" of robbery has an associated statutory punishment of "imprisonment in the state prison for two, three, or five years" (§ 213, subd. (a)(2)), it is not an "offense punishable in California by life imprisonment or death" (§ 667, subd. (e)(2)(C)(iv)(VIII)).

We next consider the context of section 667, subdivision (e)(2)(C)(iv)(VIII). As noted above, section 667, subdivision (e)(2)(C)(iv) was enacted as part of Proposition 36, to provide a list of "super strikes"—prior convictions that make a defendant ineligible for the Three Strikes law reforms enacted by Proposition 36. Under section 667, subdivision (e)(2)(C)(iv), a defendant is ineligible for those sentencing reforms if he or she "suffered a prior serious and/or violent felony conviction . . . for any of the following felonies." We find it significant that the statute uses the term "felonies" to describe the disqualifying prior convictions. The use of the term "felonies" strongly indicates that the determination of whether an offense qualifies as a "super strike" depends on the nature of the offense itself, not the nature of the defendant or the effect of other prior convictions on the defendant's sentence.

We also find it significant that section 667, subdivision (e)(2)(C)(iv)(VIII) is the final subclause in a list of specific crimes and categories of crimes. None of the other seven sub-clauses of section 667, subdivision (e)(2)(C)(iv) focuses on characteristics of the offender or the effect of other prior convictions on the offender's sentence. "The rule of statutory construction, *noscitur a sociis*, a word takes meaning from the company it keeps, is useful here. 'A word of uncertain meaning may be known from its associates and its meaning "enlarged or restrained by reference to the object of the whole clause in which it is used." [Citation.]' [Citation.]" (*People v. Drennan* (2000) 84 Cal.App.4th 1349, 1355.) " ' "In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list." [Citation.]' [Citation.]" (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 40.) If we were to adopt the Attorney General's interpretation of the term "offense punishable in California by life imprisonment" as including offenses that are punishable by life imprisonment due to factors such as the presence of prior convictions, sub-clause (VIII) would be markedly dissimilar to the other seven items listed in section 667, subdivision (e)(2)(C)(iv), which are: sexually violent offenses, specified sex crimes against minors, homicide offenses, solicitation to commit murder, assault with a machine gun on a police officer or firefighter, and possession of a weapon of mass destruction.

Our construction of section 667, subdivision (e)(2)(C)(iv)(VIII) is also consistent with the stated purpose of Proposition 36. In section 1, the "Findings and Declarations" section, the initiative stated, "This act will . . . [r]equire that murderers, rapists, and child molesters serve their full sentences—they will receive life sentences, even if they

are convicted of a new minor third strike crime." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1, p. 105.) The electorate specified that certain crimes would make an offender ineligible for Proposition 36's sentencing changes. Those specified crimes did not include robbery or any similar offenses. (See gen., *People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1310 ["Section 667, subdivision (e)(2)(C)(iv) enumerates a narrow list of super-strike offenses such as murder, rape and child molestation."].) And nothing in the text of Proposition 36 suggests that the electorate intended to disqualify an offender from the sentencing changes due to the offender's conviction of a serious or violent offense that resulted in an indeterminate life sentence under the Three Strikes law.

Our construction of the phrase "offense punishable in California by life imprisonment or death" (§ 667, subd. (e)(2)(C)(iv)(VIII)) is consistent with the construction of a similar statutory phrase by the court in People v. Turner (2005) 134 Cal.App.4th 1591 (*Turner*). In *Turner*, the court considered former section 799 (now § 799, subd. (a)), which sets forth the statute of limitations for "an offense punishable by death or imprisonment in the state prison for life." The question in *Turner* was whether a robbery charge was subject to the three-year statute of limitations applicable to most felonies set forth in section 801 or whether that particular robbery could be prosecuted "at any time" under former section 799 because the defendant had prior strike convictions that made the robbery "an offense punishable by death or imprisonment in the state prison for life." The *Turner* court concluded that "for the purpose of determining the applicable statute of limitations, the maximum punishment is the punishment prescribed for the offense itself," not the "punishment that applies to a particular offender, and which is based upon facts other than the commission of the offense for which he or she is being prosecuted." (*Id*. at pp. 1596-1597.) The court noted that section 15 defines an "offense" as " 'an act committed or omitted in violation of a law forbidding or commanding it' " (*Turner, supra*, at p. 1597) and that therefore, the word "offense" in former section 799 "must refer to the current felony for which the defendant is to be, or is being, prosecuted, not the facts of prior convictions" (*Turner, supra*, at p. 1597). The court held that an indeterminate life term imposed under the Three Strikes law is "an alternative sentence imposed upon those who commit a current felony offense, and who are recidivist offenders." (*Turner, supra*, at p. 1597.)

The California Supreme Court has also similarly construed section 667.5, subdivision (c)(7), which specifies that "violent felonies" include "[a]ny felony punishable by death or imprisonment in the state prison for life." In *People v. Thomas* (1999) 21 Cal.4th 1122 (*Thomas*), the issue was whether the defendant could accrue conduct credits while in custody under section 4019 or whether he was subject to the 15 percent conduct credit limitation of section 2933.1, which applies to a person who is convicted of a violent felony listed in section 667.5, subdivision (c). The defendant had not been convicted of any violent felony specifically enumerated in section 667.5, subdivision (c), but he had received indeterminate life sentences under the Three Strikes law, and thus his offenses were argua-

bly felonies "punishable by death or imprisonment in the state prison for life" under section 667.5, subdivision (c)(7). The *Thomas* court concluded that "sections 2933.1 and 667.5(c)(7) only apply when a defendant is convicted of an offense that itself carries a punishment of life imprisonment, not when he receives a life sentence merely due to his status as a recidivist." (*Thomas, supra*, at p. 1127.) The court reasoned that if an offense subject to a Three Strikes sentence qualified as a "felony punishable by" life imprisonment under section 667.5, subdivision (c)(7) or section 1192.7, subdivision (c)(7), "[a] third strike would by definition, therefore, always qualify as a serious or violent offense." (*Thomas, supra*, at p. 1128.)

The rationale of *Turner* and *Thomas* lends further support to our conclusion that the phrase "offense punishable in California by life imprisonment or death" (§ 667, subd. (e)(2)(C)(iv)(VIII)) means an offense that itself has an associated statutory punishment of life imprisonment or death, not an offense such as robbery, which has an associated statutory punishment of two, three, or five years. An offense such as robbery is not converted to an "offense punishable in California by life imprisonment or death" (§ 667, subd. (e)(2)(C)(iv)(VIII)) by virtue of the fact that the particular offender has two prior serious or violent felony convictions.

The Attorney General contends that a particular conviction falls within section 667, subdivision (e)(2)(C)(iv)(VIII) if the defendant received a life sentence as the result of a "penalty provision." The Attorney General relies on *People v. Williams* (2014) 227 Cal.App.4th 733 (*Williams*) for the proposition that "to determine whether the punishment imposed for a felony conviction constitutes a life sentence," a reviewing court "look[s] at the applicable sentencing scheme." (*Id*. at p. 744.) The *Williams* case involved the interpretation of section 186.22, subdivision (b)(5), which provides that "any person who [acts for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members] in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." In *Williams*, the defendant had been sentenced to terms of 25 years to life for three offenses—robbery, assault, and kidnapping—as a result of the application of the Three Strikes law. None of the defendant's convictions "standing alone" provided for a life sentence. (*Williams, supra*, at p. 741.) However, his offenses were "punishable by imprisonment in the state prison for life" within the meaning of section 186.22, subdivision (b)(5) as "the result of a penalty provision," i.e., the Three Strikes law, and thus he was subject to a 15-year minimum parole period rather than a 10-year determinate term enhancement under section 186.22, subdivision (b)(1)(C). (*Williams, supra*, at p. 745.)

The *Williams* case relied on the distinction between a penalty provision and an enhancement recognized in two California Supreme cases: *People v. Montes* (2003) 31 Cal.4th 350 (*Montes*) and *People v. Jones* (2009) 47 Cal.4th 566 (*Jones*), both of which also involved issues arising under the gang enhancement statute. *Montes* held that section 186.22, subdivision (b)(5) applies to "a felony that, by its own terms, provides for a life sentence," not to a felony that had an associated enhancement of 25 years to life pursuant to section 12022.53, subdivision (d). (*Montes, supra*, at p. 352.) *Jones* held that a defendant who is subject to a

life term for a gang-related crime pursuant to section 186.22, subdivision (b)(4), which is a "penalty provision," has committed a "felony punishable by death or imprisonment in the state prison for life" within the meaning of section 12022.53, subdivision (a)(17). (*Jones, supra*, at pp. 575-576, 578-579.)

Williams, *Montes*, and *Jones* all involved the criminal street gang statute, which provides for different punishment depending on the defendant's conduct and other circumstances. None of those cases considered the meaning of the phrase "offense punishable in California by life imprisonment or death" as used in section 667, subdivision (e)(2)(C)(iv)(VIII). "It is axiomatic that cases are not authority for propositions not considered. [Citations.]" (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) Our analysis of section 667, subdivision (e)(2)(C)(iv)(VIII) is unaffected by the distinction between a penalty provision and an enhancement.

The Attorney General also contends that the issue in this case is moot, pointing out that if defendant's petition is granted, it will not provide him with any "material benefit" because his sentence for petty theft with a prior was stayed pursuant to section 654. In other words, defendant will still be serving an indeterminate term of 25 years to life for the robbery and a 10-year determinate term for the two serious felony conviction allegations.

The Attorney General cites *People v. Valencia* (2014) 226 Cal.App.4th 326 (*Valencia*) for the proposition that an issue is moot if "no prejudicial collateral consequences would be ameliorated" by ruling in the defendant's favor. (*Id*. at p. 329.) In *Valencia*, the Court of Appeal determined that the defendant should have been awarded three more days of custody credit. (*Ibid*.) However, the defendant had already been released from jail. As there was no scenario under which it would have benefitted him to be awarded the additional credits, the issue was moot. (*Ibid*.) In this case, by contrast, if defendant is ultimately successful with his section 1170.18 petition, he will have one of his felony convictions reduced to a misdemeanor. Having one less felony conviction is undeniably a potential benefit, such that the issue is not moot. The question of defendant's eligibility for resentencing is therefore not one that " 'involves only abstract or academic questions of law' " and is not moot. (*People v. Delong* (2002) 101 Cal.App.4th 482, 486.)

In sum, defendant was not disqualified from resentencing under section 1170.18, subdivision (i) by virtue of the fact that his robbery conviction was punished by an indeterminate life term under the Three Strikes law, since robbery itself is not "[a] serious and/or violent felony offense punishable in California by life imprisonment or death" under section 667, subdivision (e)(2)(C)(iv)(VIII). We will therefore reverse the trial court's order denying defendant's section 1170.18 petition and remand this case for a determination of whether resentencing defendant for his petty theft with a prior "would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

NINTH CIRCUIT HOLDS THAT A THREE-STRIKE FEDERAL HABEAS PETITION IS NOT A "SUCCESSIVE PETITION" TO THE UNDERLYING CONVICTION

Clayton v. Biter

---Fed.4th---; 9th Cir.; 15-71566
August 21, 2017

In a published, but probably unimportant procedural case for CA lifers, the Ninth Circuit U.S. Court of Appeals ruled that a challenge to a feder-

al habeas petitioner's denial of Prop. 36 relief based on procedural due process allegations could not be procedurally shortstopped on grounds it was a "successive petition" not cognizable under longstanding court decisions. Overruling the district court below, the Ninth Circuit held that even though the underlying claim might ultimately be deemed meritless, that decision must be made independently of a cognizability procedural bar.

In 1997, Martin Biter was convicted of carjacking, robbery, and evading a police officer. The California state trial court imposed a Three Strikes life sentence based on defendant's prior serious felony convictions. Defendant's sentence was affirmed on direct appeal and his federal habeas petition was denied. After the Three Strikes Reform Act passed in 2012, defendant sought resentencing (Pen. Code, § 1170.126, subd. (b)). Without a hearing, the superior found defendant ineligible for resentencing. This decision was affirmed on appeal.

Defendant sought habeas relief in the district court, alleging he was unconstitutionally denied procedural due process by the denial of a hearing. The district court dismissed the petition, finding it was a successive petition, and that defendant was challenging his original sentence for the second time. When defendant sought permission to file a successive petition (28 U.S.C. § 2244, subd. (b)), the Ninth Circuit requested briefing on whether it was in fact a successive petition.

The Ninth Circuit, in reversing the district court below, held that "habeas petitions that are second-in-time are not necessarily second or successive." Petitions that challenge new or intervening judgments are not successive petitions, even where the intervening judgment leaves in place an earlier challenged conviction and sentence.

In California, an appeal may be taken from a post-judgment order "affecting the substantial rights of the party" (PC § 1237), and this applies to the denial of a resentencing petition under PC § 1170.126 (*Teal v. Superior Court* (2014) 60 Cal.4th 595). The denial of defendant's resentencing petition was a new judgment distinct from the original conviction. Because the petition did not attempt to challenge defendant's original conviction, it was not subject to the "second or successive" petition bar under section 2244, subdivision (b)(2).

The California Attorney General argued that Biter's application to file a successive petition should be denied because his claim is not cognizable. However, cognizability plays no role in the court's adjudication of such an application; it is the province of the district court to consider cognizability of a habeas petition. Under Rule 4 of the Rules Governing § 2254 Cases, district courts adjudicating habeas petitions are instructed to summarily dismiss claims that are clearly not cognizable. Dismissal on the basis of cognizability is appropriate if the allegations in the petition are vague, conclusory, palpably incredible, or patently frivolous or false. However, Rule 4 applies only to district courts. Thus, in reviewing an application for a successive petition, the circuit court does not assess the cognizability of that petition. In a footnote, the Ninth Circuit noted that "[f]ederal due process challenges to state adjudications of state substantive rights are generally cognizable. *Swarthout v. Cooke*, 562 U.S. 216, 221, 131 S.Ct. 859, 178 L.Ed.2d 732 (2011)[.]"]

Accordingly, the question of whether Biter's procedural due process rights were violated when he was summarily denied Prop. 36 relief (i.e., without any hearing), must be addressed by the district court on remand.

PROP. 36 APPEALS CHALLENGING "ARMED ALLEGATION" CONTINUE TO BE REJECTED BY THE COURTS OF APPEAL

While the two-year grace period offered by Prop. 36 for Three-Strike prisoners to file petitions

for resentencing has now expired, appeals from earlier petition denials continue to come down from the Courts of Appeal. Central to many such petitions is the claim that the underlying offense ought not to have been disqualified from resentencing because the "armed allegation" was not factually supported in the record.

Almost all of those "armed allegation" petitions have been denied because the evidence of arming was quite evident from the plain record. Even though reports of such denials today cannot help anyone wishing to file a new petition – the grace period for such petitions having expired – the issue remains important for all such Third-Strike lifers when facing parole suitability hearings before the Board of Parole Hearings in years to come. That is to say, if you think that the Board will "buy" your claim of not being armed, when you plainly were, you may be waiting a long time to become found suitable for parole.

To be sure, some of these claims were filed in desperation by Third-Strike lifers hoping against hope that they could unshackle themselves from their life sentences. But the following cases from the Appellate Court files demonstrate just how lame most of these claims are. It is important, for future parole considerations, that the prisoners involved (and others similarly situated) understand that they were indeed armed, and be prepared to explain to the Board how they have overcome this aspect of their prior behavior – a behavior that today continues to terrify a public agonizing for remedies against gun violence.

POSSESSION OF THREE FIREARMS SATISFIES "ARMED" ALLEGATION

P. v. Zandle Bode

CA4(3); G053283
November 6, 2017

The underlying facts are derived from *People v. Bode* (Nov. 24, 1999, G023474) [nonpub. opn.], in which we affirmed the

convictions at issue in this case. That opinion shows defendant's troubles started when he threatened two people with a gun. The police were summoned to defendant's apartment, but when they knocked on the door, he did not answer. So, they parked a patrol car in front of the apartment and used the vehicle's public address system to identify themselves and request any occupants to come outside. (*Id*. at p. 2.)

"Armed with a shotgun, defendant opened a window and said, 'I have a shotgun and a mini .14 [rifle] with 40 rounds that can take you out.' The officers called for the Anaheim SWAT team and a tactical negotiation unit. A member of the tactical team telephoned defendant's apartment. Defendant told the officer that, 'nobody's coming into my house without a warrant' and he threatened to 'kill the first pig that comes through the front door.' Two members of the tactical negotiation unit talked by telephone with defendant during the next several hours. He eventually surrendered. A search of his home yielded three loaded guns: An assault rifle, a 12 gauge shotgun, and a .38 caliber handgun." (*People v. Bode, supra*, G023474, at pp. 2-3.)

As relevant here, the jury found defendant guilty of resisting arrest (§ 69), making a criminal threat (§ 422), and three counts of possessing a firearm while a felon (§ 12021, subd. (a)). However, the jury found not true allegations defendant personally used a firearm during those offenses. (§ 12022.5.) After finding defendant had suffered two prior strike convictions (§§ 667, subds. (d), (e)(2), 1170.12, subds. (b), (c)(2)) and served three prior prison terms (§ 667.5, subd. (b)), the trial court sentenced him to concurrent terms of 25 years to life in prison on each of his five felony convictions. It then added one year each for two of the prison priors, bringing his aggregate sentence to 27 years to life.

Bode petitioned for resentencing because the jury found him *not guilty* of *use* of a firearm. However, he overlooks the fact that they found him guilty of being a felon *in possession* of three firearms. He asserts in his petition that the court may not supplant the verdict of the jury that he did not *use* a firearm.

The Court of Appeal disagreed.

> On November 1, 2013, defendant filed a petition to have his sentence recalled and to be resentenced pursuant to Proposition 36. It failed. The trial court determined defendant was ineligible for resentencing on his conviction for making a criminal threat because that crime is a serious felony. And the court found defendant was ineligible for resentencing on his convictions for resisting arrest and possessing a firearm as a felon because he was armed with a firearm during those offenses. ….
>
> Defendant was sentenced in 1997, well before Proposition 36 was passed. The issue we must decide is whether the trial court correctly determined he was ineligible for resentencing on the basis he was armed with a firearm during his third-strike offenses. In defendant's view, the trial court erred as a matter of law in looking beyond the face of the judgment of his 1997 case in making this determination. The way he sees it, "The trial court must base its determination of whether a defendant is eligible for relief under [Proposition 36] solely on [his] conviction offense and any enhancements admitted by the defendant or found true by the trier of fact. It may not make its own factual determination to find the defendant ineligible beyond what the jury found or he admitted."

The Court then resolved the distinction between

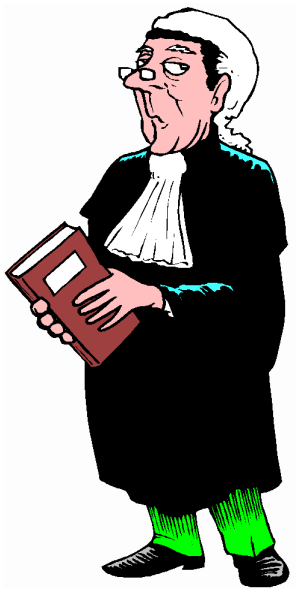
being in possession of a firearm, and *being armed* with a firearm, as applied to the facts of Bode's case.

Defendant's argument is premised on language in *Johnson, supra*, 61 Cal.4th 674. In describing the general purpose of Proposition 36 in that case, the Supreme Court stated, "[T]he parallel structure of [Proposition 36's] sentencing and resentencing provisions appears to contemplate identical sentences in connection with identical criminal histories, unless the trial court concludes that resentencing would pose an unreasonable risk to public safety." (*Id.* at p. 687; point reiterated at p. 691.) Defendant takes that to mean someone like himself, who was convicted before Proposition 36 was passed, cannot be denied the benefits of the law unless the jury convicted him of an offense or found an enhancement true that necessarily encompasses one of the law's exceptions. If that were true, defendant would be eligible for resentencing because the elements of his third-strike offenses for resisting arrest and possessing a firearm as a felon do not necessarily prove he was armed with a firearm during the commission of those offenses for purposes of Proposition 36. (See *People v. White* (2014) 223 Cal.App.4th 512, 524 [pointing out "a convicted felon may be found to be a felon in possession of a firearm if he or she knowingly kept a firearm in a locked offsite storage unit even though he or she had no ready access to the firearm and, thus, was not armed with it" within the meaning of Proposition 36].)

Unfortunately for defendant, his interpretation of the initiative was rejected by the Supreme Court in *Estrada, supra*, 3 Cal.5th 661. In that case, the trial court ruled Estrada was ineligible for resentencing under Proposition 36 because the transcript of his preliminary hearing revealed he was armed with a firearm during his third-strike offense. (*Id.* at pp. 665-666.) In so doing, the trial court relied on facts underlying related counts that were dismissed as part of *Estrada's* plea agreement. (*Ibid.*) This procedural posture presented two questions for the Supreme Court on appeal: First, may the trial court "consider facts beyond those encompassed by the judgment when making an eligibility determination" pursuant to Proposition 36, and if so, may it "consider the subset of those facts connected to dismissed counts when making that determination." (*Id.* at p. 668.)

Regarding the first issue, Estrada invoked *Johnson's* statement about the "parallel structure" of Proposition 36's sentencing and resentencing provisions. As defendant does here, *Estrada* asserted that if the judgment of conviction governs the applicability of Proposition 36 in cases arising after the initiative was passed, then the judgment of conviction should govern the applicability of Proposition 36 in cases decided before the initiative was passed. The Supreme Court disagreed, noting "nowhere in *Johnson* did we suggest that [Proposition 36's] general purpose compelled identical treatment of past and prospective offenders, despite a clear indication that the statutory design was premised on the existence of certain distinctions in their treatment. Rather, we stated only that the substantive criteria that render a future offender eligible for a third strike sentence are the same substantive criteria that render a past offender ineligible for a reduction in sentence. [Citations.] So the passage from *Johnson* does not buttress *Estrada's* position." (*Estrada, supra*, 3 Cal.5th at pp. 672-673.) Indeed, *Estrada* ruled, "Precluding a court from considering facts not encompassed within the judgment of conviction would be inconsistent with the text, structure, and purpose of [Proposition 36] – and would, by consequence, impose an unnecessary limitation." (*Id.* at p. 672.)

The Estrada court also sanctioned the trial court's consideration of facts relating to dismissed counts, so long as "those facts also underlie a count to which the defendant pleaded guilty." (*Estrada, supra*, 3 Cal.5th at p. 674.) That aspect of the court's ruling is not directly pertinent here because defendant was convicted by a jury, not as part of a plea bargain. However, in light of Estrada, it is clear the trial court was entitled to go beyond the face of defendant's judgment and look at the entire record of his convictions in determining whether he was eligible for resentencing under Proposition 36. (*Id.* at pp. 668-673; accord, *People v. Cruz* (Oct. 3, 2017, B276571) __ Cal.App.5th __.) We therefore reject defendant's claim to the contrary.



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Board's Information Technology System

Commissioners Summary
All Institutions
September 01, 2017 to September 29, 2017

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	FRITZ	GROUNDS	LABAHN	MINOR	MONTES	PECK	ROBERTS	RUFF	TARLA	TURNER	BPH HQ	Total C/MR Hrg
Suitability Hrg Total	17	4	26	27	29	25	29	26	24	23	29	25	14	31	16	96	441
Grants	6	2	5	4	3	5	6	9	6	6	8	8	4	7	6	0	85
Denials	10	2	10	20	19	16	17	11	13	11	12	9	9	22	6	0	187
Stipulations	0	0	5	1	2	3	5	3	1	1	6	3	0	2	1	0	33
Waivers	0	0	1	0	0	0	0	0	0	3	1	2	0	0	2	38	47
Postponements	1	0	4	2	2	1	0	2	4	2	2	1	0	0	1	53	75
Continuances	0	0	1	0	3	0	1	1	0	0	0	2	1	0	0	0	9
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	5

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

Subtotal (Deny+Stip)	10	2	15	21	21	19	22	14	14	12	18	12	9	24	7	0	220
1 year	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	4	1	12	14	13	12	12	8	11	9	15	5	7	18	7	0	148
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	4	0	2	4	7	7	6	3	3	3	2	4	2	5	0	0	52
7 years	2	1	1	3	0	0	4	3	0	0	0	3	0	0	0	0	17
10 years	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	0	2
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	0	1	0	0	0	0	0	0	3	1	2	0	0	2	38	47
1 year	0	0	1	0	0	0	0	0	0	3	0	2	0	0	2	19	27
2 years	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	6	7
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	12	12
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	1	0	4	2	2	1	0	2	4	2	2	1	0	0	1	53	75
Within State Control	0	0	0	0	0	1	0	1	2	0	1	0	0	0	1	45	51
Exigent Circumstance	1	0	4	2	2	0	0	1	1	1	0	1	0	0	0	8	21
Prisoner Postpone	0	0	0	0	0	0	0	0	1	1	1	0	0	0	0	1	4

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	FRITZ	GROUNDS	LABAHN	MINOR	MONTES	PECK	ROBERTS	RUFF	TARA	TURNER	BPH HQ	Total CMR Hrg
Suitability Hrg Total	10	20	16	21	23	29	20	16	23	26	14	21	26	18	27	100	410
Grants	5	8	8	4	6	9	4	5	7	3	2	2	5	8	13	0	89
Denials	3	6	6	13	14	18	16	8	11	15	4	11	18	6	12	0	161
Stipulations	1	3	0	2	2	1	0	3	2	4	5	4	2	1	1	0	31
Waivers	0	0	0	1	0	0	0	0	0	2	0	2	0	0	0	32	37
Postponements	0	2	1	1	1	1	0	0	3	2	2	1	1	2	1	56	74
Continuances	1	1	1	0	0	0	0	0	0	0	1	1	0	1	0	0	6
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	12	12

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

Subtotal (Deny+Stip)	4	9	6	15	16	19	16	11	13	19	9	15	20	7	13	0	192
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	1	6	3	9	12	10	8	4	8	9	7	7	6	5	10	0	106
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	2	2	1	5	4	8	5	4	5	6	1	5	7	2	3	0	60
7 years	1	1	2	1	0	1	3	3	0	3	1	3	6	0	0	0	25
10 years	0	0	0	0	0	0	0	0	0	1	0	0	1	0	0	0	2
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	0	0	1	0	0	0	0	0	2	0	2	0	0	0	32	37
1 year	0	0	0	1	0	0	0	0	0	2	0	1	0	0	0	19	23
2 years	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	4	5
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8	8
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	0	2	1	1	1	1	0	0	3	2	2	1	1	2	1	56	74
Within State Control	0	1	0	0	1	0	0	0	2	0	1	0	0	0	1	49	55
Exigent Circumstance	0	1	1	1	0	1	0	0	1	2	1	0	0	2	0	5	15
Prisoner Postpone	0	0	0	0	0	0	0	0	0	0	0	1	1	0	0	2	4

.....cont. from pg. 25

Alternatively, defendant argues the jury's not-true finding on the firearm allegations barred the trial court from finding he was armed with a firearm for purposes of Proposition 36.

In *Estrada*, the Supreme Court expressly declined to address the legal effect of an acquittal on a defendant's eligibility for relief under Proposition 36. (*Estrada, supra*, 3 Cal.5th at p. 666, fn. 6.) However, regardless of that issue, defendant's argument fails for a more basic reason. Although the jury found not true the allegation he used a firearm during his crimes, that finding did not provide a definitive answer to the question presented in his Proposition 36 petition, i.e., whether he was armed with a firearm when he committed his third-strike offenses. As respondent points out, the firearm-use allegation requires proof the defendant displayed his guns in a menacing manner or intentionally shot them (§ 12022.5; *Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 1000-1001), whereas the armed-with-a-firearm disqualifier under Proposition 36 merely requires proof the defendant had ready access to a firearm for offensive or defensive purposes (*People v. Bland* (1995) 10 Cal.4th 991, 997; *People v. White, supra*, 223 Cal.App.4th at p. 524).

Since access to the weapon is the key consideration under Proposition 36, the defendant need not physically carry a firearm on his person to be armed for purposes of the initiative. (*People v. Superior Court (Cervantes)* 225 Cal.App.4th 1007, 1013.) "'"[I]t is the availability – the ready access – of the weapon that constitutes arming."' [Citations.]" (*People v. White, supra*, 223 Cal.App.4th at p. 524.) Therefore, the jury's not-true finding on the firearm-use allegations did not prevent the trial court from finding defendant was armed with a firearm for purposes of Proposition 36. (See *People v. Cruz*, *supra*, __ Cal.App.5th at p. __ [jury's not-true finding on allegation defendant used a weapon during his third-strike offense did not preclude a finding he was armed for purposes of Proposition 36]; compare *People v. Arevalo* (2016) 244 Cal.App.4th 836 [defendant's acquittal on weapons charge and not-true finding on armed allegation precluded trial court from finding him ineligible for Proposition 36 relief on the basis he was armed with a firearm during his third-strike offenses].)

Still, defendant maintains there is insufficient evidence to support the trial court's determination he was armed with a firearm during his third-strike offenses. In reviewing that claim, we apply the deferential substantial evidence test. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331; see generally *People v. Trinh* (2014) 59 Cal.4th 216, 236 [trial court's factual findings are reviewed for substantial evidence].) Under that test, we do not reweigh the evidence or resolve evidentiary conflicts but simply look to see if the court's decision is supported by evidence that is reasonable, credible and of solid value. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87; *People v. Alexander* (2010) 49 Cal.4th 846, 917.) Reversal is not required unless upon no hypothesis whatever is there substantial evidence to support the court's decision. (*People v. Cravens* (2012) 53 Cal.4th 500, 508.)

In challenging the trial court's armed finding, defendant points out the record fails to show exactly where his firearms were located when the police found them in his apartment. However, according to our prior opinion, which is in play because it is part of the record of defendant's convictions (*People v. Cruz, supra*, __ Cal.App.5th at p. __), defendant threatened one couple with a gun, and then, when the police asked him to come outside, he told them, "'I have a shotgun and a mini .14 [rifle] with 40 rounds that can take you out.'" (*People v. Bode, supra*, G023474, at p. 2.) He also threatened to kill the police if they tried to make a warrantless entry into his apartment, which contained an assault rifle, a 12-gauge shotgun, and a .38-caliber handgun, all of which were loaded. (*Id*. at p. 3.) On these facts, it is reasonable to infer defendant had ready access to all three of those weapons when he committed his third-strike offenses.

Lastly, defendant contends there is insufficient evidence he possessed the specific firearms the jury convicted him of possessing. However, we need not decide

whether there is substantial evidence to support the jury's verdict on defendant's third-strike convictions. We simply have to decide if there is substantial evidence to support the trial court's determination that, as to those convictions, defendant was armed with a firearm for purposes of Proposition 36. Because the record provides substantial evidence defendant had ready access to three different firearms when he resisted arrest and possessed a firearm as a felon, the trial court properly denied his petition for resentencing for those crimes. No cause for reversal has been shown.

GUNS IN SAFE IN BEDROOM SATISFIES "ARMED" ALLEGATION

P. v. Anthony Bravo

CA2(5); B279784
December 11, 2017

Defendant Anthony Bravo was convicted by a jury in 2006 of assault weapon possession (Pen. Code, former § 12280, subd. (b), count 1), firearm possession by a felon (former § 12021.1, count 2), and ammunition possession by a felon (§ 12316, subd. (b)(1), count 4). The trial court found defendant had prior convictions, including two strikes, and had served prior separate prison terms. (§§ 667, subds. (b)-(i), 667.5, subd. (b), 1170.12, subd. (a)-(d).) Defendant was sentenced to three 25-years-to-life terms with the sentences on counts 2 and 4 stayed (§ 654). This court affirmed the judgment. (*People v. Bravo* (Oct. 11, 2007, B190558) [nonpub. opn.].)

[Bravo] filed a petition for recall of sentence pursuant to section 1170.126. The trial court denied the petition. The court found, by a preponderance of the evidence, that defendant was statutorily ineligible because he was armed with a firearm during the commission of the offense. (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii); 1170.126, subd. (e)(2).) We affirm the denial order.

After he was arrested at his home, a police search located a stash of guns and ammunition.

Officers in the backyard saw appellant standing at an upstairs window from which the screen had been removed.

Officers ordered appellant to come out of the room, which turned out to be the master bedroom. He gave various reasons for not coming out, such as using the bathroom and getting dressed. After about 45 minutes, appellant came out. He was arrested.

Officers searched the house, including the master bedroom. They found a safe with a combination lock under the window where appellant had been standing. They pried the safe open and found a TEC-9 machine pistol, a J&R M-68 assault rifle, and a .45 caliber handgun. The .45 had been reported as stolen to the Glendale Police Department. The other two weapons were not registered and were not legal for civilians to own. Also in the safe were several loaded and unloaded ammunition magazines, a box of .45-caliber ammunition, a box of 9 millimeter ammunition, a Taser, a file containing papers, and $55,000 in currency.

The master bedroom contained only male clothing.

The jury, and later the Prop. 36 court, determined that Bravo was in possession of firearms, and was thus "armed."

Defendant challenges the trial court's finding he was armed during the offense. Our review is for substantial evidence. (*People v.*

Newman (2016) 2 Cal.App.5th 718, 727.) Substantial evidence in the record supports the trial court's ineligibility finding.

"Armed with a firearm" in this context means having a firearm available for use, offensively or defensively. (*People v. Bland* (1995) 10 Cal.4th 991, 997.) "'[I]t is the availability—the ready access—of the weapon that constitutes arming.' [Citation.]" (*People v. Bland, supra*, 10 Cal.4th at p. 997.) Moreover, "[A] defendant is armed with a weapon even though it is not carried on his person, when he is aware it is hidden in a place readily accessible to him. [Citations.]" (*People v. White* (2016) 243 Cal.App.4th 1354, 1362.)

Here, there was substantial evidence defendant resided in the master bedroom and did not share it with Vasquez. The master bedroom contained only men's clothing in a size that would have fit defendant. A drawer in a connecting bathroom contained utility bills and registration documents in defendant's name. The two other bedrooms in the house contained female clothing and personal items.

If the safe was in a bedroom defendant exclusively occupied, it can be inferred that defendant knew the safe's combination. As well, even if Ortiz's testimony that Vasquez knew the combination is credited, it would be reasonable for the trial court to conclude defendant, in whose bedroom the safe was found, also knew the combination.

There further was substantial evidence that the firearms were available for defendant's use during the offenses of conviction, and indeed at the time that the officers were present. After police officers entered the house, defendant went straight to the master bedroom where the weapons were stored. From outside the house, officers saw defendant standing at a window. The safe was under that window. The safe contained a machine pistol, an assault rifle and a .45-caliber handgun together with ammunition. Defendant remained in the master bedroom for about 45 minutes after officers had ordered him out.

Assuming he knew the safe's combination, Defendant could have resorted to the weapons at any time during the 45 minutes he remained in the master bedroom resisting the police officers' commands that he exit.

We note that, on these facts, the conclusion that defendant was armed while officers were present follows naturally from the jury verdict. Under this verdict, it is difficult to see facts that might demonstrate mere constructive possession of firearms by defendant rather than actual possession. In convicting appellant of possession of the firearms and ammunition that were in the safe, the jury necessarily rejected Ortiz's testimony that defendant did not know of the weapons. The jury verdict means that defendant knowingly possessed the firearms found in the bedroom safe; defendant was in that bedroom for about 45 minutes. From that verdict, a conclusion that he was not armed at that time would mean that although he knowingly possessed those firearms, they were stored in a safe to which he did not know the combination. This is an unlikely conclusion, and the contrary inference that he knew the combination is a far more reasonable one.

In all, the trial court could reasonably infer defendant, who resided in the master bedroom, and who ran there when officers entered his house, knew the guns were present and had ready access to them by using the combination to the safe. This was substantial evidence defendant was armed during the commission of the offense.

POSSESSION OF RIFLE AND HANDGUN SATISFIES "ARMED" ALLEGATION

P. v. Todd Chism

CA2(1); B277235

August 3, 2017

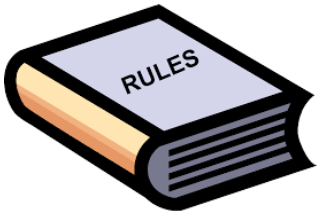
While on routine patrol in the early morning hours of June 10, 2000, Los Angeles County

sheriff deputies observed appellant driving a vehicle at excessive speeds and on the wrong side of the street. After the deputies had begun following appellant, he sped away. Appellant finally came to a stop when he crashed the car. The deputies stopped about one and one-half car lengths behind appellant's vehicle and saw him throw a rifle out of the front passenger window. The rifle was loaded with 15 live rounds. The deputies also spotted a handgun tucked into appellant's waistband as he crawled headfirst out of the same window.

A jury convicted appellant of possession of a firearm by a convicted felon (§ 12021, subd. (a)(1); count 1), unlawfully carrying a loaded firearm (§§ 12021, subd. (a)(1), 12031, subd. (a)(1); count 3), and attempting to evade a peace officer while driving recklessly (Veh. Code, § 2800.2, subd. (a); count 4). The trial court found appellant had suffered two prior convictions under the Three Strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), and sentenced him to concurrent third-strike terms of 25 years to life in prison on the evading and loaded firearm counts, with the sentence on the possession count stayed.

On January 25, 2013, appellant filed a petition in the superior court for recall of his sentence and for resentencing as a second strike offender under Proposition 36. (§ 1170.126.) Following a hearing on appellant's eligibility for relief under section 1170.126, the superior court denied the petition on the ground that appellant "was armed with a firearm" during the commission of the current offenses. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).)

Chism tried to argue semantics to get out of his life sentence. But his claim that a "facilitative nexus" was required to show that "possession" equals "armed" was rejected by the Court of Appeal.



Appellant contends that according to the plain language of the Act, the ineligibility factors listed in subdivision (iii) must be construed as in addition to, and not simply coextensive with, the elements of the current offense. He asserts that both the statutory construction and a grammatical analysis of the statute support this interpretation, and maintains that because the Act does not disqualify inmates serving sentences for mere gun possession, a "simple violation of former Penal Code sections 12021 and 12031 is not covered." He further contends that the reference to being armed with a firearm " 'during the commission of the current offense' " "only makes sense if there is another offense to which the arming attaches," or is " 'tethered,' " and the arming must have a " 'facilitative nexus' " to that underlying offense. He concludes that an interpretation of the statute that allows a person to be considered armed with a firearm while committing the crime of possession of the same firearm "would render the 'during the commission' language meaningless." We disagree.

The distinction between "possession" and "being armed" was further elaborated on by the Court of Appeal.

The basic flaw in appellant's argument is the implicit assumption that the crime of possession of a firearm always involves arming. Not so. While being armed with a firearm invariably involves possession, the reverse is not always true. Former section 12021 "made it a felony for a person previously convicted of a felony to own or have in his or her possession or under his or her custody or control, any firearm. The elements of this offense are conviction of a felony and ownership or knowing possession, custody, or control of a firearm." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052

(*Blakely*); *Osuna, supra*, 225 Cal.App.4th at p. 1029; *People v. Snyder* (1982) 32 Cal.3d 590, 592.) " 'A defendant possesses a weapon when it is under his dominion and control. [Citation.] A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others. [Citations.]' [Citation.] 'Implicitly, the crime is committed the instant the felon in any way has a firearm within his control.' " (*Osuna, supra*, at pp. 1029–1030; see also *Henderson v. United States* (2015) ___ U.S. ___, ___ [135 S.Ct. 1780, 1784] [actual possession of a firearm exists when a person has direct physical control over the firearm, whereas constructive possession occurs when a person still has the power and intent to exercise control over the firearm, while lacking such physical custody].)

" 'Armed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. (E.g., § 1203.06, subd. (b)(3); Health & Saf. Code, § 11370.1, subd. (a); *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*) [construing § 12022].)" (*Osuna, supra*, 225 Cal.App.4th at p. 1029; *People v. Pitto* (2008) 43 Cal.4th 228, 236.) " ' " '[I]t is the availability—the ready access—of the weapon that constitutes arming.' " ' " (*Valdez, supra*, 10 Cal.App.5th at p. 1347.)

However, "[a] firearm can be under a person's dominion and control without it being available for use." (*Osuna*, at p. 1030.) Accordingly, because possessing a firearm does not necessarily constitute being armed with a firearm, a defendant whose current offense is mere possession of a firearm by a felon is not automatically ineligible for resentencing by virtue of that conviction. (*Blakely, supra*, 225 Cal.App.4th at p. 1052; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1313 (*Elder*); *People v. White* (2014) 223 Cal.App.4th 512, 524 (*White*).)

ARMED WITH KNIFE SATISFIES "ARMED" ALLEGATION

P. v. Juan Cruz

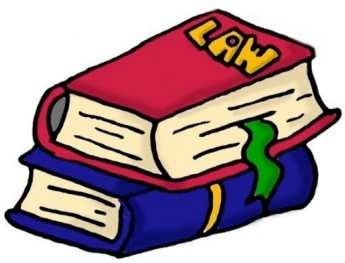
---Cal.App. 5th ---; CA2(6); B276571

October 3 2017

It doesn't have to be a gun - a knife can get you life on an "armed" allegation.

> Juan Alexander Cruz, a three strikes offender, was sentenced to 26.5 years to life in state prison. He appeals a postjudgment order denying his petition to recall his sentence pursuant the Three Strikes Reform Act of 2012 (the Act), also known as Proposition 36. (Pen. Code, § 1170.126, subd. (e)(2); *People v. Estrada* (2017) 3 Cal.5th 661, 665.) The trial court found that appellant was ineligible for resentencing because he was armed with a knife during the commission of the felony offense. (§§ 1170.12, subd. (c)(2)(C)(iii); 1170.126, subd. (e)(2).) As we shall explain, there is a crucial difference between being "armed" with a knife and "use" of a knife. Thus, a prior jury determination that appellant did not use a knife is not determinative. We are quick to observe that appellant did not receive a favorable factual ruling at his jury trial that he was not armed with a knife during the commission of the underlying felony conviction of false imprisonment by violence. We affirm.

Although Cruz was acquitted of *use* of a knife (he didn't stab anyone), he was found to be in possession, i.e., "armed", with a knife. The latter finding sealed his fate.



Appellant argues that the jury acquitted on

the ADW count. But that is not dispositive of whether he was armed during the commission of the false imprisonment. Arming "requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]" (*Osuna, supra,* 225 Cal.App.4th at p. 1032.) "A defendant is armed if the defendant has the specified available weapon for use, either offensively or defensively. [Citations.]" (*Bland, supra*, 10 Cal.4th at p. 997; *Blakely, supra*, 225 Cal.App.4th at p. 1051; *Osuna*, at p. 1029.) "'[I]t is the availability - the ready access - of the weapon that constitutes arming.' [Citation.]" (*Bland*, at p. 997.)

Appellant had a kitchen knife and struggled with the victim while holding it. He was "armed" with a knife. The record shows that appellant had ready access to more than one knife for offensive or defensive purposes during the commission of the false imprisonment. (*Hicks, supra*, 231 Cal.App.4th at p. 286 [substantial evidence standard applies]; *Osuna, supra*, 225 Cal.App.4th at p. 1040 [same].) We, accordingly, reject the argument that the not guilty verdict on the ADW count constitutes a finding that appellant was not armed during the commission of the false imprisonment by violence.

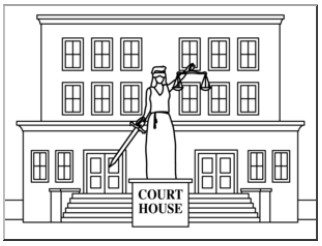
THROWING GUNS OUT OF THE CAR WINDOW SATISFIES "ARMED" ALLEGATION

P. v. Jack Jackson

CA2(4); B275830

April 17, 2017

Appellant Jack Jackson was convicted in 1997 of two counts of possessing a firearm as a felon. (PC § 29800, subd. (a)(1).) Because he had prior convictions that qualified as "strikes," he was sentenced as a "third strike" offender to 25 years to life on each count (running concurrently). In the underlying action, the trial court denied appellant's petition to be resentenced pursuant to Prop. 36, because during the commission of the offense he was armed with a firearm. In his appeal, Jackson contended the court erred in concluding his offense was ineligible for resentencing.



The appellate court recounted the basic relevant facts.

> At trial, two sheriff's deputies testified that on March 19, 1997, they were on patrol in a marked vehicle. They saw a parked car containing three men: appellant in the front passenger seat, appellant's co-defendant Richard Barry driving, and Harold Favors riding in the back seat. When one of the deputies approached the car, it sped off. During the ensuing chase, the deputies saw the front passenger -- appellant -- throw two weapons out the window. The weapons were recovered and identified as two loaded .380 handguns. Appellant was found guilty of two counts of being a felon in possession of a firearm. In *People v. Jackson* (Oct. 21, 1998, B115634) (nonpub. opn.), this court modified the judgment to include certain mandatory fines and otherwise affirmed.

Jackson's appellate argument was that he was not "armed" in the eyes of the law (Prop. 36). The court rejected that argument.

> There is no dispute that appellant was "armed with a firearm" when he committed the 1997 offenses. (See *Osuna, supra*, 225 Cal.App.4th at p. 1029 ["'Armed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively"].) Here, both deputies testified that appellant had the guns in his hand prior to dropping them out the window

of the car. Appellant contends, however, that for the section 1170.12, subdivision (c)(2)(C)(iii) exception to apply, the defendant must have been armed to further or facilitate the commission of another offense.

The contention that "disqualification for resentencing under Proposition 36 requires an underlying offense or enhancement to have been pled and proved, and that a conviction for possession of a firearm cannot constitute being 'armed' with a firearm for [resentencing] eligibility purposes" has been rejected by numerous Courts of Appeal. (*Osuna, supra*, 225 Cal.App.4th at pp. 1030-1038; accord, *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1364; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1012-1018; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1057; *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 989-995; *People v. White* (2014) 223 Cal.App.4th 512, 522-527.) Appellant has raised no new arguments not considered and rejected by existing authority.

Finally, Jackson argued (incredibly) that a third-strike felon who possesses a gun but doesn't use it, presents a *lower* threat to the public, and therefore is deserving of leniency for not having used it. Not surprisingly, the Court of Appeal flatly rejected that convoluted logic.

Appellant also contends that construing subdivision (c)(2)(C)(iii) of section 1170.12 as encompassing the offense of being a felon in possession of a firearm when the manner in which that crime was committed involved being armed would frustrate the goals of Proposition 36, which he describes as "giv[ing] lesser sentences to the less dangerous felons while making sure that the truly dangerous felons were kept behind bars." Characterizing his crime as a "minor" offense and a "low-level felony," he contends that "[h]aving a weapon readily available for use generally does not render a person truly dangerous. " As the court in *People v. Elder*, observed, "a felon's possession of a gun is not a crime that is merely *malum prohibitum*. . . . '[P]ublic policy generally abhors even momentary possession of guns by convicted felons who, the Legislature has found, are more likely to misuse them.' [Citation.] Therefore, even if the great majority of commitments for unlawful gun possession come within our interpretation of this eligibility criterion, it would not run afoul of the voters' intent." (*People v. Elder, supra*, 227 Cal.App.4th at p. 1314; see also *People v. Blakely, supra*, 225 Cal.App.4th at p. 1057 ["[T]he electorate's intent was not to throw open the prison doors for all third strike offenders whose current convictions were not for serious or violent felonies, but only for those who were perceived as nondangerous or posing little or no risk to the public. A felon who has been convicted of two or more serious and/or violent felonies in the past, and most recently had a firearm readily available for use, simply does not pose little or no risk to the public" (italics omitted)].) We find persuasive the reasoning of the courts that have overwhelmingly rejected the contention that an armed felon poses little or no risk to the public. Accordingly, we conclude the trial court did not err in denying appellant's petition for recall of his sentence and resentencing.

GUN UNDER CAR SEAT SATISFIES "ARMED" ALLEGATION

P. v. Gregory Robinson

CA2(8); B276570

August 3, 2017

Gregory Robinson was sentenced to a Three Strikes life sentence following a repeat offender criminal career.

In 1999, a jury convicted appellant Gregory

> Cortez Robinson of possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)), and also found true the allegations that he had suffered three prior "strike" convictions: two convictions for first degree burglary in 1986 and 1987, and one conviction for robbery in 1990. Pursuant to the "Three Strikes" law in effect at the time (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)), the trial court sentenced ap-

> pellant to an indeterminate term of 25 years to life.

The facts of his third strike offense reveal the gun possession.

> On November 14, 1998, police officers observed appellant driving a vehicle with significant traffic damage and no tire on the left rear rim. Appellant failed to stop for a stop sign, and continued through the intersection at 20 to 25 miles per hour. When the officers activated their overhead lights to initiate a traffic stop, appellant accelerated away at approximately 50 miles per hour. After a short pursuit, appellant drove his car into a curb, then jumped out and fled on foot. The officers chased appellant into the courtyard of a nearby apartment building and placed him under arrest. After arresting appellant, the officers searched his car. Inside the glove compartment, they found a box of live ammunition. Under the driver's seat, they found a loaded revolver.

Robinson pled that this scenario did not fulfill the "facilitative nexus" required to bar Prop. 36 resentencing. The Court of Appeal disagreed.

> Felon in possession of a firearm, former section 12021, subdivision (a), is not a serious or violent felony within the meaning of the three strikes law. (See generally, §§ 667.5, subd. (c); 1192.7, subd. (c).) Thus, whether appellant is eligible for resentencing under section 1170.126 depends upon whether his conviction for felon in possession of a firearm is properly construed as an offense during the commission of which he was armed with a firearm. (See *People v. Hicks, supra,* 231 Cal.App.4th at p. 282.)
>
> Appellant contends that although officers recovered the revolver from beneath the driver's seat of the vehicle he was driving immediately prior to his arrest, he was not "armed with a firearm" within the meaning of section 1170.126, subdivision (e)(2), because the arming did not facilitate a separate offense, but was in fact the offense. He asserts that the language of section 1170.126, subdivision (e)(2), requires that the arming be "tethered to" a separate offense that it "facilitates."
>
> Unfortunately for appellant, multiple courts of appeal have addressed this issue and all have rejected appellant's position. These cases have held that so long as the facts underlying a felon in possession of a firearm conviction show that the defendant possessed the firearm in a manner that made it readily available for use, either offensively or defensively, then the defendant was armed with a firearm during commission of the offense within the meaning of section 1170.126, subdivision (e)(2), and ineligible for resentencing pursuant to Proposition 36. *[Citations omitted.]*…
>
> In the immediate case, appellant, a felon with multiple strike convictions, possessed the revolver in a manner which made it readily available to him for either offensive or defensive use. Under the cases cited above, he is not eligible for resentencing pursuant to Proposition 36. The trial court

did not err.

POINTING LOADED GUN AT POLICE SATISFIES "ARMED" ALLEGATION

P. v. Monroe Ross

CA2(2); B277187

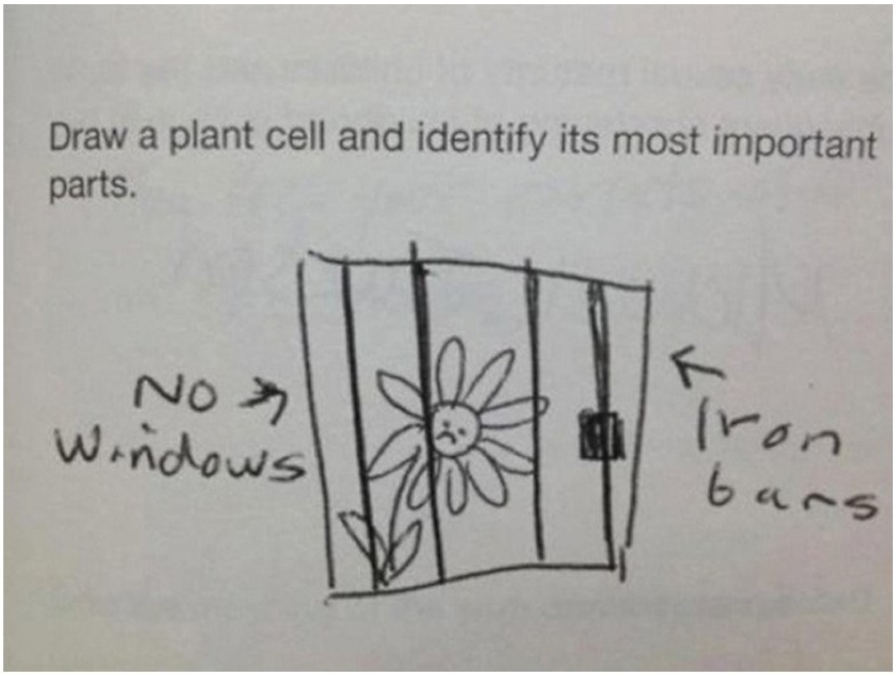
February 3, 2017

The facts of Monroe Ross' case were recounted by the Court of Appeal, in adjudicating his petition for resentencing.

> On July 6, 1994, police officers responded to a call reporting shots fired at a bar. Defendant and another man emerged from a crowd that had assembled near the scene. Defendant was ordered by an officer to approach and kneel. Instead, defendant, who was holding a gun, walked to the front of a nearby car and made a downward motion with his hand. He started to approach the officer, but then fled and was apprehended. A loaded .38-caliber revolver was found in the gutter next to the car….
>
> Defendant was convicted of possession of a firearm by a felon (former § 12021, subd. (a)(1)) and the trial court found he had suffered two prior "strikes" (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). He was sentenced under the Three Strikes law to a term of 25 years to life.

In appealing the superior court's denial of his Prop. 36 petition, Ross argued to the appellate court that in order for the resentencing bar to attach, he had to have been convicted of a *separate charge* of possession of a gun, not just have that be *an element* of the crime he was charged and convicted of. Under the facts of this case, one day Ross will have explain his actions of shooting up a bar, and displaying a loaded gun to police, to a Parole Board panel. Under the facts above, they will not accept his recent claim of not being armed.

Now from our humor files……



PROP. 57; THE FINAL (PROBABLY) VERSION

Although just released on Nov. 29, what CDCR hopes will be the final version of regulations implementing the changes wrought by Prop. 57, is already the subject of intense debate, reaction, angst, and for our part here at LSA, a feeling of time to move on to the next step. Prop. 57, a Constitutional amendment passed by voters last November, was hyped, heralded and hoped to be the solution that would provide relief for Third Strikers, the key that would set them free.

Except, that from the outset, it wasn't. That was very apparent from the language of the initiative, and those who continued to push Prop. 57 as an avenue of relief for third strikers or lifers were either intentionally misleading their audience, did not fully read and understand the proposal or were engaging in uber-wishful thinking. This is not to say that perhaps third strikers shouldn't have been included in the target populations for Prop. 57. That's another discussion. The simple fact is that they were not included.

The issue at hand is whether or not the intent of the initiative as written was to include them. And while the language of the ballot measure did not specifically exclude third strikers, it also did not specifically include them. Only the naive would assume CDCR would be expansive in their reading of such measures.

After the initial version of the regulations was released this spring CDCR, as part of the process required to make the changes into law, opened a public comment period which culminated Sept. 1 in a public hearing in Sacramento. During the public comment period, stakeholders on all sides, including inmates, submitted comments via email, regular mail, by phone and at the public hearing. CDCR notes it received over 12,000 comments on the initial reg proposal, including over 90 speakers at the September public hearing.

We'll try to cover the top 5 issues here; again, this is not a defense of the department's decisions or the regulations, but simply an explanation of the present facts and situation.

On the biggest, most controversial question relating to Prop. 57, the inclusion of Third Strikers in the Non-Violent Parole Process, the answer remains no. The rationale for this decision, made when the first version of the regulations was released, is three-fold: 1) non-violent third strikers already received relief under Prop. 36 (2012); 2) sentencing or resentencing is the purview of the courts, not CDCR and 3) Penal Code 667.5 (c) (7) defines those who are serving life sentences, including third strikers, as having committed a violent offense, and thus excluded under the language of Prop. 57 from being impacted.

Another high-profile issue was allowing inmates to earn credits retrospectively. Again, CDCR did not make changes from the originally proposed regs, which allow retrospective application of credits only for Educational Merit Credits and Extraordinary Conduct Credits. Credits for Good Conduct, Milestone Completion Credits and Rehabilitative Achievement Credits are prospective only, meaning they will only be applied for accomplishments in these areas going forward from the time of Prop. 57 implementation.

Aside for the fact that inmates could already earn similar good conduct credits through provisions in PC 2930 and 2935, CDCR bases this decision on avoiding disparate treatment of inmates, because inmates who choose other venues, such as jobs, over participation in the now-credit eligible programs when they were not credit applicable should not be penalized for those decisions. The department also acknowledges that its own records may not accurately reflect past participation in programs that now are credit-eligible, thus acknowledging credits retroactively may not fairly reflect any given prisoner's participation. The department, however, has decided to allow prisoners who wish to repeat programs they previously took if those programs

now qualify for Milestone Completion Credits.

Nor was the rate of Good Conduct credit earning increased, remaining at 20% for ISL or DSL inmates convicted of a violent offense, non-violent second or third strikers receiving 33.3% and remaining inmates can receive 50% good conduct credits. All good time credits exclude LWOP and condemned inmates. CDCR decided the present system, which assigns credit earning ability based on the gravity of the offense, was the most appropriate way to maintain public safety and adhered to the legislative intent of the good time credit statues, thus putting the ball back in the legislature's court, should that body decide to revisit the rate at which good time credits are earned.

In a similar move, no additional credits toward the date of YOPH hearings will be awarded, other than the possibility of moving forward the initial hearing, under both the guidelines of SB 260-261 credit awards under Prop. 57. These advancement credits apply only to the initial hearing; those eligible for YOPH will not be able to advance any subsequent hearing via application of Prop. 57 credits.

CDCR's decision was again, it reported, based on maintaining the "legislative intent behind the youth offender law," which gave substantial relief to many YOPH candidates, both ISL and DSL, in scheduling their first (and for DSL inmates, unexpected) hearing. The department's response noted the relief provided by YOPH laws, to bring those inmates to a parole hearing after 15, 20 or 25 years was done without regard to credits earned.

And lest anyone think the only comments CDCR received were from those who wanted to expand the reach of Prop. 57 and were denied by CDCR, there were other voices calling for more restrictive application of Prop. 57 benefits. One of the primary suggestions from that side of the fence was that CDCR expand the list of crimes considered violent, thus excluding more inmates from Prop. 57 eligibility. The department chose not to do so, instead continuing to rely on the definition of 'violent offense' laid out in the aforementioned PC 667.5(c). CDCR again took cover under the legislative umbrella, asserting it was not the department's job to define violent crime, but the purview of elected officials to do so. The offenses defined as violent in the cited penal code section are also, according to CDCR statements, "align[s] with the statutory definition used by prosecutors and the courts in charging and sentencing offenders."

What does all this mean? In short, third strikers, lifers and other prisoners who are serving time for crimes that are defined as 'violent,' whether or not the common definition of violence applies, will not see much impact from Prop. 57, specifically via the Non-Violent Parole Process. And while some, including YOPH candidates, can realize some forward movement of their initial parole hearing, for YOPH inmates that opportunity applies only to initial hearings.

In a press release accompanying the publication of the revised regs, Secretary of Corrections Scott Kernan commented, "Our decisions were not made lightly nor were they made in a vacuum. CDCR heard arguments representing a wide range of views, and concluded that many of the suggested changes would be contrary to existing law or would result in disparate treatment of inmates. Our intent is to incentivize inmates to participate in rehabilitative and self-help programs that will make them better individuals, and to do so in a way that enhances public safety. I remain committed to putting in place a fair credit system that acknowledges good behavior and hard work." CDCR reportedly received over 12,000 comments from the public in the time from initial release of the regs until the final public hearing on September 1, 2017.

There remains a 15-day comment period and review by the Office of Administrative Law before final approval. The department will also issue a Final Statement of Reasons, as to why these regulations best follow the spirit and intent of Prop. 57, all the while maintaining public safety. Barring any unexpected—and unlikely—delays, the regs will go into full effect, having the force of law, by mid-March.

We're pretty sure this isn't the last, definitive word on the subject, as there are, already, two opposing new ballot initiatives trying to gather enough signatures to secure a place on the November ballot. One would reportedly expand overage to include Third Strikers and the other would drastically limit many gains attained over the past few years. We'll keep you informed.

SB 620 RECAP

When SB 620, impacting gun enhancement sentences, was passed and signed earlier this year, we advised our readers the impact of the bill would not be retroactive, meaning it would have no impact on those already sentenced and serving time on gun enhancement sentences. We took the discussion a step further, talking with the bill author's staff, who confirmed the intent of the bill was only prospective and not meant to be retroactive.

And we asked several attorneys to ruminate on the bill's language, to see if there were any possible 'work arounds,' that would somehow allow those currently in prison to receive the benefit of the provisions of SB 620. Those attorneys have now reported in, with the disappointing opinion that there are few ways current prisoners can find relief under this bill. And, a recently released advisement from the ACLU agrees; there are only a few, rather uncertain possibilities.

SB 620 removes the requirement that judges impose additional sentences on those convicted of using a gun in their crime, and makes those enhancements discretionary on the part of judges. It officially goes into effect January 1, 2018, and thus no impact on anyone will be felt before that date.

The provisions apply only to those who are still in the sentencing or resentencing process; thus, if you are still in the appeal process or are for some reason sent back to court for resentencing, be sure your appeal attorney is aware of SB 620. Be aware, the passage of SB 620 itself is NOT grounds for going back to court for resentencing.

How to get your case back before the court after January? Only a few avenues appear to be available. If you are just starting your term, within 120 days of sentencing, the court can still recall your sentence under their own authority. You'll probably have to write the court asking for this consideration, as there is no formal appeal process.

If you feel the court made an error in our sentence, you can appeal that sentence. Again, the recent passage of SB 620 would not constitute an error in pronouncement of your sentence. And lastly, under PC 1170 (d), the sentencing court can consider recall of sentence if recommended by the Secretary of CDCR or the BPH.

Yeah. Don't hold your breath on the last one.

Thus, absent any successful challenges in court, which themselves could take considerable time, if and when any are filed, right now SB 620 will not impact current prisoners with long sentence enhancements for the use of firearms. That's right now. Things can change.

OTHER POTENTIAL BALLOT MEASURES

As seems inevitable in any election year, California voters may be presented with an often an opposing and often confusing array of propositions on the ballot, any one of which would potentially heavily impact prisons, prisoners, and by extension every Californian, if no other way, than through the taxes they pay. Herewith is a brief summary of several more potential questions for the voters this fall, assuming any of the proposed initiative measures gathers enough voter signatures to qualify for the ballot.

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

convictions from registering to vote and voting.

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

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

Initial estimates of the number of current inmates who would be eligible for parole under this measure are only in the double digits. This proposal is sponsored by a Pasadena Attorney.

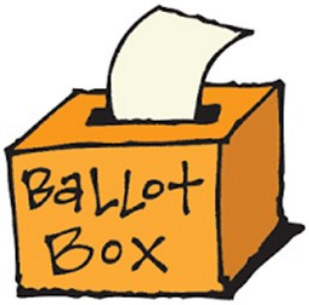
Also gathering signatures is the latest version of the Second Chance Initiative, #17-0009, "Second Chance for Youth Second Strikers." This measure would require parole hearings for "any prisoner who was under 23 years of age at the time of his or her controlling offense." The guidelines would be hearings after 15 years for determinately sentenced prisoners; those with a to life term of less that 25 years would see hearings after 20 years and lifers sentenced to more than 25 years, after the 25th year. The current language excludes condemned and LWOP inmates, nor to those who, subsequent to the age of 23, committed a crime with malice aforethought or for which they received a life sentence.

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

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

The new proposed section would provide for petitions for recall of sentence under provisions in the new proposal, should it be voted in. Changes in 1192.7, defining serious felonies, appear to be limited to removing making criminal threats from that list.

This proposal will take some study and parsing, and we'll present further clarification as the process moves along. For now, none of these proposals has yet secured a place on the November ballot.



BOARD BUSINESS & EN BANC DECISIONS

Highlights from a very short BPH monthly executive meeting in November were mainly routine reports. FAD Chief Dr. Cliff Kusaj reporting clinicians are completing most CRA reports in time for the delivery of those reports to inmates 60 days prior to parole hearings, and about half completed 90 days before hearings.

Commissioners were told that some DSL inmates, who must, under YOPH laws, been seen in hearings before 2021, will begin showing up on the hearing schedule sooner (the implication was fairly soon), in order to facilitate scheduling. The determination on who will be seen first will be made largely by programming accomplishments.

Following those announcements and public comment (LSA, suggesting there would be less confusion in the inmate population and with correctional counselors if Consultation Hearings were called something other than hearings; they aren't hearings, but the term seems to be confusing for many), the board went right to consideration of a baker's half-dozen of en banc hearings.

LaVerne DeJohnette's application form commutation of sentence from LWOP was forwarded to the Governor with a recommendation from the board in support of that change of sentence, despite opposition from the LA County DA's office, based (again) on the details of the crime and 'recent' changes. The decision to grant parole to **Manuel Cisneros**, referred to the board by the Governor, was affirmed, allowing Cisneros to parole. Cisneros' release was supported by members of his family and his attorney, Amy Emigh.

Those two decisions, however, were almost the last joy en banc inmates received from the board in November. Requests from **Donald Griffith** and **Dale Hawkins**, to be granted compassionate release, were both denied. In Griffith's case the board cited recent institutional misconduct and proposed conditions of release as concerns. Hawkins' release was opposed by the Sacramento County DA's office, who provided a lengthy recitation of prurient details of the crime, apparently still fresh in the mind of the DA who actually prosecuted the case.

Terrell Allen's parole grant, sent to en banc by the Governor, was referred for a rescission hearing, based on the Governor's concerns of lack of insight and minimalization of the crime. Allen's attorney, Keith Wattley, made the legal argument to the board that actual overturning the decision rested not simply if the Governor's had concerns, but whether or not the granting panel considered all the issues that the governor raised. Wattley maintained the panel did, but his argument failed to move the majority of the board.

Two decisions, both referred by Chief Counsel Jennifer Neill, one of which resulted in the only other inmate-favorable decision of the day. The decision to deny parole for **Mark Mancebo** was vacated, based on a factual error regarding in prison conduct. A new hearing will be held, after a board-ordered investigation is completed.

However, the grant given to **Timothy Calderon** was vacated, based on an investigative report regarding in prison conduct after the grant. Calderon will receive a new hearing on the next available calendar spot.

FRITZ DEPARTS, DOBBS ENTERS

News early in the month that Commissioner Cynthia Fritz, a commissioner since 2011, has resigned from the board, to take a position as an Administrative Law Judge with another state division. Prior to appointment as a commissioner Fritz served as a Deputy Commissioner for two years, with previous stints with the state Departments of Justice and Transportation.

Fritz was somewhat unpredictable; in 2015 her overall grant percentage was the second highest of commissioners, yet in August 2016, she doled out the second highest number of denials. Of late, her grant rate has hovered around 20%.

In what appears to be an almost simultaneous action, Governor Brown, on Dec. 8, appointed Diane Dobbs, late a Deputy Commissioner, to fill the seat so-recently vacated by Fritz.

A DC hired just this year, Dobbs was an attorney at the California Department of Consumer Affairs from 2007 to 2017 and in private practice prior to that position.at the Law Offices of Dianne R. Dobbs from 2006 to 2007.

PREPARING YOUR PAROLE PLANS

One factor parole panels examine in determining parole suitability is the appropriateness and pragmatic nature of any parole plan offered up by the prisoner in question. It behooves every inmate to give thought to his/her parole plans, not just go to your hearing assuming you'll figure it out after you're granted.

Adequate parole plans don't have to be complicated or presented in an elaborate manner, but they do need to be comprehensive, covering the areas the board is concerned about, and providing a realistic and verifiable plan of action. The board is concerned with the basics: shelter, sustenance and support. Where you'll live, how you'll make a living and who will be there to help you.

Where will you live?

- Transitional housing (preferred by the board)
- With family (also possible)
- Is the proposed location acceptable to your likely parole conditions (if you have a 290, there are restrictions)?
- Do you have verification of that residence (a letter of support or acceptance from a transitional facility)?

Do you have an ICE hold?

- If so, make plans for California (in case you aren't deported) as well as your home country.
- Same categories apply: home, job, support.

How will you support yourself (legally)?

- Do you have a marketable skill (a vocation) and an idea where you can look for work?
- Do you have sufficient funds and/or promise of financial support to live for the first 6-12 months?
- It isn't necessary to have a firm job offer

What support do you have?

- Support letters from family, friends, organizations
- How that support is going to assist you in reentry into society—what specifically is being offered?

What do you plan to do?

- What are your long term and short-term goals?
- Goals should be realistic—you aren't going to be able to support yourself right away on a business you start after release, so have a stop-gap plan.
- What support groups do you plan to continue to attend, pro-social activities you plan to engage in?

Relapse prevention plan

- Not just for substance abuse, but for other trigger issues such as anger, low self-esteem, co-

dependency.

- Know where meetings/resources are to address these issues, and commit to taking advantage of the help available.
- Know the things that trigger your issues in these areas.

Your plans don't need to be memorialized in a fancy binder, tabbed and annotated. A simple summary, with supporting documentation (letters of acceptance from transitional housing, a list of your vocations, possibly companies where you might seek employment, support letters) is sufficient. It's less about the presentation than about the facts: what's real here, that the parole panel can reasonably believe will happen and what could be pie-in-the-sky wishful and aggrandized thinking on your part.

Don't over-think or complicate the process. The board is less concerned about how many bedrooms your eventual home will have and more concerned that you have a place to stay and support to help you navigate reentry. If you don't have family to return to and haven't yet found a transitional facility, your fallback position can be the parole unit housed at each prison, that will interview you before release and be sure you have a place to stay.

While some prisoners are simply released at the end of their term, lifers, in this and many other areas, are held to a higher standard and must know where they are headed. Don't just assume you can go home; be sure not only that it works for your family, but that it's appropriate for the parole conditions likely to be imposed on you by either the board or DAPO.

If you need a list of possible transitional housing facilities to write to, send a request to LSA (and a stamp, please) and we'll send you a list with a variety of possibilities in various areas of the state. If you're within a year of a parole hearing, you should be finalizing those parole plans now.

THE BACKLASH HAS BEGUN

As noted elsewhere in this issue and in previous publications, the last several years have seen the passage of several new laws impacting the parole process and inmates in general. By in large, these new laws have provided varying degrees of relief for many long-serving inmates, who still, however, meet the suitability requirements of the BPH.

Of course, not all proposed laws along these lines have been successfully passed, but enough to make not only an impact on long-term inmates, but also capture the attention of the 'lock 'em up' crowd. And in line with the old saying that no good deed goes unpunished, there was bound to be some push-back from the opposition. That pushback has begun.

Sweetly named the "Reducing Crime and Keeping California Safe Act of 2018," the proposed ballot initiative is put forth by a coalition of police and DAs masquerading as the "California Public Safety Partnership." Sounds nice, what could go wrong?

Just about everything that was accomplished through previous Propositions 47 and 57. The language of the new proposal, now in the signature-gathering stage, purports to:

"A. Reform the parole system so violent felons are not released early from prison, strengthen oversight of parolees and tighten penalties for violations of term of parole;

B. Reform the theft laws to restore accountability for serial thieves and theft rings; and

C. Expand DNA collection from persons convicted of drug, theft and domestic violence related crimes to help solve violent crimes and exonerate the innocent."

What this proposal would really do is the following:

◊ add 15 crimes to the list of violent crimes, which would preclude early release
◊ allow DNA collection for certain crimes, including drug offenses, that were reduced to misdemean-

ors under Proposition 47 and for which mandatory DNA collection is not enforceable
- ◊ make serial theft, one or more prior convictions for shoplifting or a felony.
- ◊ Adds a penal code section defining serial theft and listing 15 specific crimes
- ◊ mandates a parole revocation hearing for anyone who violates the terms of their parole three times.

If passed, this measure would, in the words of one CDCR official be 'disastrous' for both the recent reforms under Props. 47, 57 and AB 109, but also for the prison system, which could, given the number of new felony convictions possible under the language, see the population again swell to pre-cap levels.

The proponents of the initiative are now in the signature gathering stage, and must collect 365,880 registered voters' signatures by the end of April to qualify the initiative for the November 2018 election. Now is the time to alert family and friends to this upcoming measure. Tell them to refuse to sign petitions for this initiative and if it does make the November ballot, turn out to vote NO.

RUNNIN' ON EMPTY—RUNNIN' ON DRY

Before your whip out your pen and paper to tell us we're very late in getting this last 2017 issue of CLN to you—we know. And our apologies to all our subscribers. You'll find the news of court cases, new policies and laws hasn't changed much since the first of December, but we do know that CLN is an anticipated arrival, and we hate making you wait.

Taking a cue for parole hearings, we're going to be totally honest here; we have a lot of work to do and sometimes we just can't move fast enough. Although the staff at LSA/CLN have our fingers in a lot of pies, cover a lot of territory and issues, in reality we're pretty small, numbers wise, and spread pretty thin. And, from time to time, we just simply can't keep up. And when some personal issues loom up, as they did for a couple of critical staffers this month, well, sometimes we just don't make our goals.

So apologies are due all around, as well as our New Year's resolution to kick things into high gear in the coming issue and try to get those future publications out faster and sooner. Please bear with us. We're dancing as fast as we can.

IF YOU'RE READING THIS CLN, AND IT ISN'T YOUR OWN…

If the above describes you, we hope you'll consider getting your own subscription; $35 a year is a pretty good deal to keep you up on legal and policy developments that affect some areas of importance to you. Like, maybe, your freedom.

But, if that isn't in the cards, be aware that every prison receives two copies of every CLN issue, sent to the law library. We try to make the information as widely available as possible and providing two free copies is a step for those who don't have a subscription.

And while we'd like to be able to provide additional copies, two per institution is about all our shoe-string finances can support. If you can't find past CLNs in your law library, ask the librarian to contact us… we'd like to know if those copies are not getting through and check to be sure we have the best possible address to us.

A PRAYER FOR PRISON FAMILIES

We pray for the health and safety of our imprisoned loved ones and those charged with their custody.

Give our beloved prisoners the strength of body and mind to endure and the serenity of spirit to prevail.

Keep those of us who love them steadfast and strong, that we may always be a course of comfort and support.

We ask for humanity, wisdom and fairness in the corrections and court systems and patience and hope in our own hearts.

Guide us when we ask, "Let me make a difference."

TRANSITIONAL HOUSING: A GOOD BET FOR LIFERS

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

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

Transitional housing can provide a stable base, especially for those long-serving lifers who have either lost family or lost touch with family and have no specific 'home' to parole to. It is also very useful even for those long-timers who do have family, as the shock of finally having a lifer come home is felt on both sides—by the former prisoner and his family, whether that family be Mom and Dad or wife. The change, the stress and the day-to-day of getting back into life are a huge challenge and oft times a bit of help from someone else who has walked that path is very helpful. And that help can be found in the fellowship of transitional living.

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

More and more transitional facilities are being created for and filled by paroling lifers, so that we no long-

er find across the board lifers being forced into the old substance abuse programming model. Many facilities are now lifer-friendly and welcoming.

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

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

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

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

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

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

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

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

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