CALIFORNIA LIFER NEWSLETTER

State and Federal Court Cases

by John E. Dannenberg

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

NEW LIFER HEARING ORDERED BASED ON LACK OF EVIDENCE TO DENY PAROLE; ANCILLARY LEGAL QUESTIONS REGARDING MARSY'S LAW PREJUDICE AND APPOINTED ATTORNEY FEE PREJUDICE REMANDED TO SUPERIOR COURT FOR EVIDENTIARY HEARING

In re Darryl Poole

CA1(2); No. A154517
CA Supreme Ct. No. S251034
August 31, 2018

The California Supreme Court denied review on Nov. 14, 2018. The case is thereby remanded to the Superior Court for an evidentiary hearing.

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

In re William Palmer

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

This case was reported on extensively in CLN #83. On October 23, 2018, the Board filed a petition for review with the CA Supreme Court. On November 13, the Board further filed a request for depublication of the Appellate Court decision. Oppositions to the request were subsequently filed.

On November 26, the Supreme Court granted an extension of time for the matters before it, with the following order:

> The application for an extension of time is granted to December 7, 2018. No further extensions of time are contemplated. In the reply to the answer to the petition for review, please also apprise the court of the fol-

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COURT CASES (in order)

REVIEWED IN THIS ISSUE:
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PROP. 36.....
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P. v. James Dorman

lowing. 1. What was the outcome of the December 6, 2018 parole suitability hearing for inmate Palmer? 2. Was the December 6, 2018 hearing a regularly scheduled parole hearing, or an advanced hearing pursuant to Penal Code section 3041.5, subdivisions (b)(4) or (d)(1)? 3. What formal action was taken, if any, at the Board of Parole Hearings' November 2018 Executive Board Meeting regarding proposed regulations for Parole Consideration Hearings for Youth Offenders (Cal. Code Regs., tit. 15, proposed §§ 2440-2446?)

A draft of the proposed regulations for Youth Offender hearings referred to above was released by the Board at its Nov. 2018 Executive Meeting, and is shown below. The BPH hearing calendar showed that Palmer was still scheduled for a December 6, 2018 parole hearing based on "an October 29 court order." Subsequent BPH records show that he was granted parole.

On December 10, 2018, the Court issued the following order:

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

Then, on December 18, 2018, the Court issued this ensuing order:

The time for granting or denying review in the above-

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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

www.lifesupportalliance.org

IN THE NEW YEAR

As LSA looks forward to 2019 and our ninth (!) anniversary of creation and work, looking back makes us realize how far we've come. And how far there is, yet, to go.

In some ways, it doesn't seem so long ago that LSA was started by two self-described 'pushy broads' with no money and no support, who decided that if no one else was audacious enough to take on the lifer cause, we would. The grant rate for parole was about 11%, the BPH was a seemingly impenetrable and opaque monolith and parole hearings were shrouded in mystery. All this, we hasten to add, under a very different political administration, a very different parole board and attitude.

And while only one of those 'pushy broads' remains in the fray, LSA now has support, in the form of volunteers, donors and the lifers who generously send donations and proceeds from food sales etc. while continuing to help us identify and address issues of importance to them. The BPH, under the leadership of Jennifer Shaffer (appointed in surely one of his better moves by former Governor Brown) continues to increase the transparency of the process (including clearing LSA representatives to attend parole hearings as observers), commissioners receive training in and are committed to following the law, and new legislation has provided major changes in suitability factors to be considered.

The result? The grant rate is now on the upward side of 33% +/- and in the past few years (total figures for 2018 are not yet available), even with more hearings that ever being held. A far cry from the old days; when Gray Davis was governor only 8 lifers were released in his 5 years in office.

Our interaction with the BPH has become a two-way street of information and knowledge, hopefully to the benefit of all concerned. In addition to the BPH Executive Meetings, we have a chair on the Director's Stakeholder Advisory Group (the only prisoner advocate there), attend commissioner training days, attorney training workshops, and meetings with a variety of legislative offices and CDCR personnel.

Now, as more agencies, individuals, even politicians, recognize the character of lifers, their potential for change and giving back, lifers, reentry and rehabilitation have become a new 'hot topic' and growth industry. All of which we find vaguely amusing.

And LSA has been a part of this. From support of and input on legislation, to learning more about the parole and hearing process (and passing that information along to inmates) to discussions with various divisions of CDCR, we are, in fact, a recognized stakeholder, firmly seated at the table for discussion and change. And we are the ONLY consistent voice for lifers in these discussions.

It's been a long and interesting journey, one that isn't complete yet, but that continues to show great progress and potential. Lifers are coming home. It's still a difficult process, with slips and setbacks along the way, but more and more those lifers, many long-term determinate sentenced, and, gloriously now even some LWOP prisoners, who do the work, the introspection and self-change required to set them on the right path, are coming back home.

They're coming home to a much-changed world, one they, and their families, need help in negotiating and adjusting to. And thus, our mission has expanded, to assist paroled lifers and their families, as well as those still waiting release. We're a small group, but our voice is large. Numbers wise our staff is small, but in tenacity, passion for our mission and knowledge, we're huge.

And so, in 2019 we will continue to work for our expanding cohort of prisoners and families, to help educate them, explain the complicated issues and inform them of changes and upcoming actions. Some of our supporters and workers have been blessed to have their inmates come home and yet they, and many of those paroled lifers, still work for those remaining inside the wire. Others are still waiting and working for that dream, not giving up hope or the will to keep on track.

Our best counsel: stay on track, stay positive. Look to the future, don't look back. And know you are not alone, that there are those in the outside world who are working for you, aware of your struggle and here to help.

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entitled matter is hereby extended to and including January 18, 2019…

Finally, on January 16, 2019, the Court granted review:

> The petition for review is granted. The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled proceeding filed September 13, 2018 which appears at 27 Cal.App.5th 120.

CLN will report on the outcome of the Supreme Court's decision(s) on this case when they come down.

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PROPOSED REGULATORY TEXT

Proposed additions are indicated by underline and deletions are indicated by strikethrough.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS

TITLE 15. CRIME PREVENTION AND CORRECTIONS

DIVISION 2. BOARD OF PAROLE HEARINGS

CHAPTER 3. PAROLE RELEASE

Article 14. Parole Consideration Hearings for Youth Offenders is ***added*** to read as follows:

ARTICLE 14. PAROLE CONSIDERATION HEARINGS FOR YOUTH OFFENDERS

§ 2440. Youth Offender Defined.

(a) A youth offender is an inmate who meets all of the following criteria:

(1) The inmate was convicted of a controlling offense that was committed prior to reaching age 26;

(2) The inmate was sentenced to a determinate term or a term of life with the possibility of parole; and

(3) The inmate is currently incarcerated for the controlling offense or group of offenses that includes the controlling offense.

(b) Notwithstanding (a), a youth offender is also an inmate who meets all of the following criteria:

(1) The inmate was convicted of a controlling offense that was committed before he or she attained 18 years of age;

(2) The inmate was sentenced to a term of life without the possibility of parole for his or her controlling offense; and

(3) The inmate is currently incarcerated for his or her controlling offense.

(c) For purposes of determining whether an inmate qualifies as a youth offender, the "controlling offense" is the single crime or enhancement for which any sentencing court imposed the longest term of imprisonment.

(d) Not withstanding subdivisions (a) and (b), inmates who meet one or more of the following criteria are excluded from the definition of a youth offender:

(1) The inmate is sentenced to death;

(2) The inmate is sentenced to term of life without the possibility of parole for an offense committed after he or she attained 18 years of age;

(3) The inmate was sentenced on the controlling offense for a prior felony conviction under Penal Code section 1170.12 or 667, subdivisions (b) through (i);

(4) The inmate was sentenced on the controlling offense for a one-strike sex offense under Penal Code section 667.61;

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(5) The inmate was convicted of any offense after reaching age 26 for which "malice aforethought" is a necessary element of the offense; or

(6) The inmate, after reaching age 26, committed an additional crime for which the inmate is sentenced to a term of life in prison.

(e) If two or more crimes or enhancements carry identical sentence lengths and are the inmate's longest terms of imprisonment, the controlling offense shall be determined as follows:

(1) If none of the sentences were imposed under Penal Code section 1170.12, section 667, subdivisions (b) through (i), or section 667.61, the controlling offense is whichever offense the inmate committed first in time.

(2) If one sentence was imposed under Penal Code section 1170.12, section 667, subdivisions (b) through (i), or section 667.61, the controlling offense is that offense.

(f) If a sentence is imposed on a crime under Penal Code sections 1170.12, section 667, subdivisions (b) through (i), or section 667.61, but the crime is not the controlling offense, the inmate is a youth offender notwithstanding subdivision (d) of this section.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Sections 667, 667.61, 1170.12, 3051(a), and 3051(h), Penal Code.

§ 2441. Youth Offender Determinations.

(a) The department's Correctional Case Records Services determines whether an inmate qualifies as a youth offender as defined in section 2440 of this article, and calculates Youth Parole Eligible Dates (YPED) for all inmates who qualify as youth offenders. For purposes of this article, both determinations are referred to as "youth offender determinations."

(b) A YPED is the earliest date on which a youth offender is eligible for a youth offender parole hearing under Penal Code section 3051, subdivision (b). A youth offender's YPED is set according to the following criteria:

(1) If the controlling offense is a determinate term of any length, the YPED is the first day after the youth offender has completed 14 continuous years of incarceration;

(2) If the controlling offense is an indeterminate term of less than 25 years to life, the YPED is the first day after the youth offender has completed 19 continuous years of incarceration;

(3) If the controlling offense is an indeterminate term of 25 years or more to life, the YPED is the first day after the youth offender has completed 24 continuous years of incarceration; or

(4) If the controlling offense is a term of life without the possibility of parole for a crime committed prior to reaching the age of 18, the YPED is the first day after the youth offender has completed 24 continuous years of incarceration.

(c) For purposes of subdivision (b) of this section, "incarceration" means detention in any city or county jail, local juvenile facility, state mental health facility, Division of Juvenile Justice facility, or department facility.

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(d) Youth offender determinations are subject to the department's Inmate Appeal Process under article 8 of chapter 1 of division 3 of this title and may be reviewed by the board under section 2442 of this article.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Section 3051, Penal Code.

§ 2442. Youth Offender Determination Review by the Board.

(a) If an inmate is not eligible as a youth offender under section 2440 of this article as determined by the department's Correctional Case Records Services, and the inmate has exhausted his or her administrative remedies with the department challenging the determination, the inmate may submit a one-time request for review, in writing, to the board.

(b) If an inmate has been deemed eligible as a youth offender by the department's Correctional Case Records Services but disagrees with the department's calculation of his or her YPED, and the inmate has exhausted his or her administrative remedies with the department challenging the calculation of the YPED, the inmate may submit a one-time request for review, in writing, to the board.

(c) When submitting a request for review by the board of a youth offender determination, the inmate is encouraged to submit the following documents:

(1) A brief explanation of the reason for requesting review;

(2) A copy of the inmate's birth certificate if the inmate is challenging the date of birth used by the department's Correctional Case Records Services to disqualify the inmate as a youth offender; and

(3) A copy of any relevant sentencing documents.

(d) The Chief Counsel shall review the inmate's request and send a written response to the inmate no later than 60 calendar days after receipt of the request.

(e) If the Chief Counsel determines that a change in youth offender status or YPED is warranted, the board shall issue a miscellaneous decision explaining the reasons for its determination. The board shall forward a copy of its decision to the department's Correctional Case Records Services.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Section 3051, Penal Code.

§ 2443. Scheduling of Hearings.

A youth offender shall be scheduled for a youth offender parole hearing within one year following the youth offender's YPED unless the youth offender is entitled to an earlier parole hearing under another provision of law.

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(b) Notwithstanding (a), the following shall apply:

(1) A youth offender sentenced to a determinate term shall not be scheduled for an initial youth offender parole hearing if the youth offender will be released as a result of his or her Earliest Possible Release Date within 18 months of his or her YPED.

(2) A youth offender sentenced to a term of life with the possibility of parole who first became eligible for a youth offender parole hearing on January 1, 2018, under Assembly Bill 1308 (Chapter 675 of the Statutes of 2017) and whose YPED is before January 1, 2020, shall be scheduled for his or her initial youth offender parole hearing within one year of his or her YPED or by January 1, 2020, whichever is later.

(3) A youth offender sentenced to a determinate term who first became eligible for a youth offender parole hearing on January 1, 2016, under Senate Bill 261 (Chapter 471 of the Statutes of 2015) or on January 1, 2018, under Assembly Bill 1308 (Chapter 675 of the Statutes of 2017) and whose YPED is before January 1, 2022, shall be scheduled for his or her initial youth offender parole hearing within one year of his or her YPED or by January 1, 2022, whichever is later. A youth offender shall not be scheduled for an initial youth offender parole hearing under this paragraph if he or she is scheduled to be released pursuant to his or her Earliest Possible Release Date on or before July 1, 2020.

(4) A youth offender sentenced to a term of life without the possibility of parole who first became eligible for a youth offender parole hearing on January 1, 2018, under Senate Bill 394 (Chapter 684 of the Statutes of 2017) and whose YPED is before July 1, 2020, shall be scheduled for his or her initial youth offender parole hearing within one year of his or her YPED or by July 1, 2020, whichever is later.

(c) Notwithstanding subdivisions (a) or (b), when a youth offender sentenced to a determinate term will be released prior to the date on which the youth offender will complete his or her 15th year of incarceration, the board shall not schedule a youth offender parole hearing.

(d) Subsequent youth offender parole hearings shall be scheduled for youth offenders in accordance with Penal Code section 3041.5, subdivision (b), paragraph (3), except as provided in (e).

(e) A youth offender sentenced to a determinate term shall not be scheduled for a subsequent youth offender parole hearing if he or she is within 18 months of being released pursuant to his or her Earliest Possible Release Date.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Sections 3041.5 and 3051, Penal Code.

§ 2444. Comprehensive Risk Assessments.

When preparing a risk assessment under this section for a youth offender, the psychologist shall also take into consideration the youth factors described in section 2446 of this article and their mitigating effects. The psychologist's consideration of these factors shall be documented within the risk assessment under a unique heading from the remainder of the report.

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Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Sections 3041.5 and 3051.

§ 2445. Youth Offender Parole Hearings.

(a) A panel shall conduct a youth offender parole hearing in compliance with the requirements for initial and subsequent parole consideration hearings described in this chapter and Penal Code sections 3040, et seq.

(b) In considering a youth offender's suitability for parole, the hearing panel shall give great weight to the youth offender factors described in section 2446 of this article: (1) the diminished culpability of youth as compared to adults; (2) the hallmark features of youth; and (3) any subsequent growth and increased maturity of the inmate.

(c) The panel shall review and consider written submissions that provide information about the youth offender at the time of his or her controlling offense, or the youth offender's growth and maturity while incarcerated, from a youth offender's family members, friends, school personnel, faith leaders, or representatives from community-based organizations.

(d) A hearing panel shall find a youth offender suitable for parole unless the panel determines, even after giving great weight to the youth offender factors, that the youth offender remains a current, unreasonable risk to public safety. If a hearing panel finds a youth offender unsuitable for parole, the hearing panel shall articulate in its decision the youth offender factors present and how such factors are outweighed by relevant and reliable evidence that the youth offender remains a current, unreasonable risk to public safety.

(e) If a hearing panel finds a youth offender unsuitable for parole, the panel shall impose a denial period in accordance with Penal

Code section 3041.5, subdivision (b), paragraph (3).

(f) Nothing in this article is intended to alter the rights of victims at parole consideration hearings, including youth offender parole hearings.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Sections 3041, 3041.5, 3046(c), 3051, and 4801(c), Penal Code; *In re Lawrence (2008) 44 Cal.4th 1181, 1214*.

§ 2446. Youth Offender Factors.

(a) Diminished Culpability of Youths as Compared to Adults. The diminished culpability of youths as compared to adults includes, but is not limited to, consideration of the following factors:

(1) The ongoing development in a youth's psychology and brain function;

(2) The impact of a youth's negative, abusive, or neglectful environment or circumstances;

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(3) A youth's limited control over his or her own environment;

(4) The limited capacity of youths to extricate themselves from dysfunctional or crime-producing environments;

(5) A youth's diminished susceptibility to deterrence; and

(6) The disadvantages to youths in criminal proceedings.

(b) Hallmark Features of Youth. The hallmark features of youth include, but are not limited to, consideration of the following factors:

(1) Immaturity;

(2) An underdeveloped sense of responsibility;

(3) Impulsivity or impetuosity;

(4) Increased vulnerability or susceptibility to negative influences and outside pressures, particularly from family members or peers;

(5) Recklessness or heedless risk-taking;

(6) Limited ability to assess or appreciate the risks and consequences of behavior; and

(7) Transient characteristics and heightened capacity for change.

(c) Subsequent Growth and Increased Maturity of the Inmate While Incarcerated. The subsequent growth and increased maturity of the inmate while incarcerated includes, but is not limited to, consideration of the following factors:

(1) Considered reflection;

(2) Maturity of judgment including, but not limited to, improved impulse control, the development of pro-social relationships, or independence from negative influences;

(3) Self-recognition of human worth and potential;

(4) Remorse;

(5) Positive institutional conduct; and

(6) Other evidence of rehabilitation.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Sections 667, 667.61, 1170.12, 3051, Penal Code; *Graham v. Florida (2010) 560 U.S. 48, 130 S.Ct. 2011; Miller v. Alabama (2012) 132 S.Ct. 2455; People v. Caballero (2012) 55 Cal.4th 262, 282 P.3d 291, 145 Cal.Rptr.3d 286; Moore v. Biter (2013) 725 F.3d 1184; Roper v. Simmons (2005) 543 U.S. 551; People v. Franklin (2016) 63 Cal.4th 261; Montgomery v. Louisiana (2016) 136 S. Ct. 718.*

BPH ENJOINED BY ORANGE COUNTY SUPERIOR COURT FROM ADVANCING LIFER'S HEARING DATE

Rackauckus vs. BPH

Orange County Superior Court No. 30-2018-00985610
August 2, 2018

In a novel case, the Superior Court of Orange County issued a preliminary injunction barring the BPH from advancing the parole hearing of lifer Lawrence Cowell. After the BPH in fact issued such an order to advance Cowell's hearing (following an earlier 3 year denial), District Attorney Rauckaukus of Orange County objected, claiming the BPH had no authority in so doing. The BPH countered that it had made the decision to advance via a Deputy Commissioner, per the BPH's normal policies.

The Court's decision rested on a single factor, namely, that the BPH's alleged "policy" and "screening criteria" for such an advancement were "adopted" by the BPH in 2013 at an executive meeting where such a policy to have a Deputy Commissioner be able to make such a decision, by screening factors to be set by the BPH, became BPH policy solely because no Commissioner present at that meeting objected. In other words, the alleged "policy" was "approved" by the acquiescence of those Commissioners pre-

sent – even though no such screening factors were put forth, and no approval of this policy was submitted for regulatory approval via the Administrative Procedures Act.

The legal focus was on Penal Code § 5076.1(b), which permits the BPH to so use deputy commissioners, but only when "those decisions shall be made in accordance with policies approved by a majority of the total membership of the Board."

The Court found that despite the Board's having shown where it discussed such a policy in an Executive Meeting in 2013, the Board could not make an evidentiary showing that it ever promulgated such policies. The Court further suggested that such policies were the stuff of an Administrative Procedures Act regulatory application, and left it to the BPH to figure out what to do to comport with existing laws regarding regulatory changes.

The Court issued the injunction, and the Board did not appeal the order. At the present time, Cowell's next hearing is scheduled at his 3 year anniversary of his prior denial.

CLN readers should note that this is NOT a published decision (indeed, it is a Superior Court, not an Appellate Court ruling), and is not citable. But it may put a kink in the BPH's ability to advance hearings – or deny advancements – without so much as an approved policy defining how such decisions are to be made.

CHIU RELIEF DENIED

In re Jason Romero

CA2(8); No. B288243
October 9, 2018

CLN has reported recently on cases where lifers whose first degree murder conviction rested on a "natural and probable consequences" theory, could be challenged under recent CA Supreme Court cases in *People v. Chiu* (2014) 59 Cal.4th 155 and *In re Martinez* (2017) 3 Cal.5th 1216, wherein it was held that "natural and probable consequences" is not proper grounds for a first degree murder conviction. The remedy is to petition the courts to make such a factual finding from the record, and lower the conviction level.

In this case, Romero did file a habeas petition, because the trial court had in fact instructed the jury on the "natural and probable consequences" theory. However, in reviewing the record of the trial, the appellate court here found that such instruction was only harmless error, since the record established beyond a reasonable doubt that the jury's first degree verdict was based on other properly given instructions.

> In 2012, we affirmed a judgment against Jason Romero which sentenced him to 50 years to life for first degree murder under an aiding and abetting theory. In 2014, the California
>
> Supreme Court held in *People v. Chiu* (2014) 59 Cal.4th 155, 158–159 (*Chiu*), that an aider and abettor may not be convicted of first degree murder under the natural and probable consequences doctrine. In 2016, Romero filed a petition for writ of habeas
>
> corpus seeking reversal of his conviction under *Chiu*. In 2017, the court held in *In re Martinez* (2017)

> 3 Cal.5th 1216 (*Martinez*) that *Chiu* error requires reversal unless the reviewing court
>
> concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory in convicting the defendant of first degree murder. The high court returned the matter for us to
>
> reconsider Romero's conviction in light of *Chiu* and *Martinez*. We find the trial court instructed the jury in error under *Chiu*, but the error was harmless beyond a reasonable doubt because the record shows the jury relied on a direct aiding and abetting theory, which remains a legally valid theory on which to base a first degree murder conviction. We thus deny the petition for writ of habeas corpus.

The record of the case shows there were three defendants in the murder trial. One, the driver, was acquitted outright. The other two, including Romero, were prosecuted under different theories. Romero was prosecuted under direct aiding and abetting, while his crime partner was prosecuted under a natural and probable consequences theory.

The trial record showed that the prosecutor argued the liability for Romero as direct abetting only. However, the court's instructions allowed for *any* first degree theory – *almost*. Moreover, when the jury asked a question, the court was explicit on instructing them on solely the direct and abetting theory. This conclusion sealed Romero's fate on this habeas petition.

> Romero contends the jury instructions allowed the jurors to convict him of first degree murder under the natural and probable consequences theory of aiding and abetting, notwithstanding the prosecution's argument that he was liable under a direct aiding and abetting theory. We find beyond a reasonable doubt that the jury based Romero's conviction on the theory that he directly aided and abetted the murder, not on a natural and probable consequences theory. The record supports our conclusion, including the prosecutor's arguments, the jury's question, and the trial court's answer.
>
> The trial court provided instructions consistent with multiple theories of culpability, including first and second degree murder, felony-murder, and both aiding and abetting theories. The trial court did not specify, however, which theory of culpability was to be applied to which defendant when it gave its standard instructions at closing.
>
> As a result, Romero contends it is possible the trial court's instructions allowed the jury to convict him of aiding and abetting based on a natural and probable consequences theory, notwithstanding the People's arguments that only direct aiding and abetting applied. Romero argues the trial court's instructions trump the parties' arguments. We do not disagree with Romero's assertion that the court's instructions are statements of law and the jury is entitled to disregard a party's arguments. However, Romero fails to account for the trial court's subsequent instruction in response to a jury question.
>
> The record shows the trial court instructed the jury to only consider a direct aiding and abetting theory as to Romero when it responded to a jury question. During deliberations, the jury asked whether it could find Romero guilty of first degree

murder as an aider and abettor, even if it concluded Venegas was not the perpetrator. The court answered the question as follows: "In order to convict Mr. Romero under an aiding and abetting theory, the People must prove that he aided and abetted a perpetrator. That perpetrator may be any other person. An aider and abettor may be convicted of murder in the 1st or 2nd degree. For the elements of aiding and abetting, please refer to instructions 400 and 401."

> CALCRIM No. 400 describes the general principles of aiding and abetting and was given to the jury as follows: "A person may be guilty of a crime in two ways: (1), he may have directly committed the crime. I will call that person the perpetrator; (2), he may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it. Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."
>
> CALCRIM No. 401 is a companion to CALCRIM No. 400, and describes direct aiding and abetting. The trial court instructed the jury pursuant to CALCRIM No. 401 as follows: "To prove that [a] defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets the crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."
>
> Notably, the trial court did not refer the jury to CALCRIM Nos. 403 and 520, which explain the theory of natural and probable consequences. The trial court's answer was a clear indication to the jury that it should base its verdict regarding Romero on direct aiding and abetting principles. Moreover, as we previously noted, the jury's question "suggested that while the jurors may have had some doubt that Venegas was the shooter, they had no doubt Romero was guilty of first degree murder." (*Venegas, supra*, B233131, at pp. 10–11.) By indicating it believed Romero was guilty of first degree murder, the jury's question runs contrary to a natural and probable consequences theory, which does not require a similar intent to kill.

It was this factual record from the trial that distinguished Romero's case from those of *Chiu* and *Martinez*.

> These facts distinguish this matter from the cases relied upon by Romero, including *Chiu* and *Martinez*. In *Chiu* and *Martinez*, the record disclosed facts which affirmatively showed the jury relied on an improper theory of culpability. In *Chiu*, the court found facts that "indicate [d] that the jury may have been focusing on the natural and probable consequence theory of aiding and abetting and that the holdout juror prevented a

> unanimous verdict on first degree premeditated murder based on that theory." (*Chiu, supra*, 59 Cal.4th at p. 168.) In *Martinez*, the evidence supported a guilty verdict under either a direct aiding and abetting theory or a natural and probable consequences theory. In addition, the prosecutor argued the natural and probable consequences theory to the jury at length and the jury asked a question about it during its deliberations. (*Martinez, supra*, 3 Cal.5th at pp. 1226–1227.) Here, there are no facts in the record which affirmatively indicated the jury considered the natural and probable consequences theory.

Accordingly, Romero's habeas petition was denied.

REQUEST TO VACATE SENTENCE OF JUVENILE LWOP DENIED; PAROLE HEARING IS NOW AUTOMATIC

In re Louis Montes

CA4(2); No. E069533
October 31, 2018

> Defendant and petitioner Louis Ramon Montes was convicted in 2003 of special circumstances murder, along with related crimes, and was sentenced to life without possibility of parole (LWOP) for crimes committed when he was 17 years old. After the United States Supreme Court ruled that mandatory LWOP sentences for juveniles was prohibited in *Miller v. Alabama* (2012) 567 U.S. 460, 465 (*Miller*), the California Supreme Court ruled in *People v. Franklin* (2016) 63 Cal.4th 261 and *In re Kirchner* (2017) 2 Cal.5th 1040, that juveniles sentenced to LWOP were entitled to a hearing in order to have an opportunity to present information as to juvenile characteristics and circumstances. Montes filed a petition for writ of habeas corpus seeking such a hearing. We issued an order to show cause (OSC) why relief should not be granted. We now grant the petition in part and order the matter remanded with directions to the trial court to conduct a hearing at which Montes has the opportunity to present evidence of mitigating evidence tied to his youth at the time the offense was committed.

The questions presented were two-fold. One, was Montes entitled to have his sentence vacated and be resentenced to a parolable term, and, two, was a remand necessary to allow him to establish juvenile factors that should be considered in his eventual parole hearing?

As to resentencing, the court decided that the newly enacted laws for juvenile LWOP offenders mooted the need for resentencing.

> Montes was sentenced to LWOP when he was 17 years of age. After he was sentenced, the United States Supreme Court held that the Eighth Amendment to the federal Constitution prohibits a mandatory LWOP sentence for juvenile offenders and requires that a sentencing court consider the offender's age and the characteristics attendant to it. (*Miller, supra*, 567 U.S. 460, 465.) Shortly thereafter, the California Supreme Court held in *People v. Caballero* (2012) 55 Cal.4th 262 that the prohibition on life without parole sentences for all juvenile nonhomicide offenders established in *Graham v. Florida* (2010) 560 U.S. 48 applied to sentences that were the "functional equivalent of a life without parole sentence," including Caballero's term of 110 years to life. (*Caballero*, at p. 268.)
>
> It is now settled that a sentencing court must consider a juvenile offender's age and the characteristics attendant to it

prior to imposing a LWOP sentence. (*Miller, supra*, 567 U.S. at p. 465; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1377.) The *Miller* holding was deemed to be substantive, and retroactive. (*Montgomery v. Louisiana* (2016) 577 U.S. [193 L.Ed.2d 599, 136 S.Ct. 718, 734].)

Our Legislature has attempted to conform to these decisional mandates by enacting section 3051. That section originally applied only to juveniles sentenced to 15 or 25 years to life, but, effective January 2018, entitles a juvenile offender serving a sentence of LWOP to parole eligibility. (§ 3051, subd. (b)(4).) That subparagraph provides that a person convicted of a controlling offense before he or she turned 18, and for which the sentence is LWOP, shall be eligible for release on parole by the Board of Parole Hearings (BPH) during his or her 25th year of incarceration at a youth offender parole hearing.

Subdivision (e) of section 3051 requires that the offender shall be provided "a meaningful opportunity to obtain release," requiring the BPH to review and revise regulations regarding determinations of suitability. Subdivision (f)(1) of section 3051 permits the BPH to consider psychological assessments conducted by psychologists hired by the BPH to assess the youth offender's growth and maturity, while subdivision (f)(2) allows family members and others with knowledge of the individual before the crime or his or her growth and maturity after the crime to submit statements.

The Legislature also enacted section 4801, subdivision (c), which requires the BPH to review a prisoner's suitability for

CIRCUMSTANCE BEYOND OUR CONTROL

Into every life some rain must fall. And, apparently, into the life of every publication some unavoidable delay must happen. As our subscribers probably are aware, CLN is produced entirely by volunteers, from content to layout and format. Our volunteers work on creating each issue as efficiently as we can.

But recently we fell victim to a larger concern. Because of building renovations in December our volunteers were unable to access our formatting computer—which means while we had text, we had no way of creating a reproducible publication. Those building renovations are now complete and we're back in business, but not before the unavoidable complication of missing the Nov-Dec issue of CLN.

Which is why this issue covers much ground. However, to provide our subscribers what we promised, we are extending the subscription dates of all subscribers by one issue, to be certain every subscriber receives the promised number of issues per subscription.

We apologize for the inconvenience—and believes us, it was pretty traumatic for us too!

parole where the controlling offense was committed when he or she was 25 or younger and compels the BPH to give great weight to the diminished culpability of juveniles.

The People argue that these legislative acts render all *Miller* claims moot. (*People v. Franklin, supra*, 63 Cal.4th at pp. 268-269.) In Franklin, the court addressed the question directly and determined that "Penal Code sections 3051 and 4801—recently enacted by the Legislature to bring juvenile sentencing in conformity with *Miller*, *Graham*, and *Caballero*—moot Franklin's constitutional claim." (*Franklin*, at p. 268.) Nevertheless, the court determined that *Franklin* raised "colorable concerns as to whether he was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth." (*Id*. at p. 269.) The court thereafter remanded the matter to the trial court to permit that court to determine whether *Franklin* was given an adequate opportunity to make a record of his youth related factors. The same course of action is necessary in this case.

The need to generate special considerations of youth offenders at the time of their sentencing serves to preserve their right to special consideration for parole.

For juveniles sentenced to LWOP whose diminished culpability was not considered by the trial court, there is no record of mitigating evidence tied to defendant's age, youthful attributes, and capacity for reform and rehabilitation. Without such evidence, or a presumption, or an opportunity to develop a record as to those factors, subdivision (e) of section 3051, which provides that the youth offender parole hearing to consider release and requires it to provide for a "meaningful opportunity to obtain release," is illusory.

This situation is not cured by the fact that subdivision (f) of section 3051 permits the BPH to consider psychological evaluations and risk assessment administered by licensed psychologists employed by the board, because, while they may "take into consideration the diminished culpability of youth as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual," they may be performed years after the crime and, as in this case, years after the offender has reached adulthood. With each passing year, the relevant information necessary for these reports may become more difficult to obtain or unavailable.

A current evaluation which may "take into consideration the diminished culpability of youth" is not the functional equivalent of a sentence that takes into account the mitigating factors of youth. Additionally, the requirement that the BPH "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity" (§ 4801, subd. (c)), becomes impossible because there were no findings on this issue at the original sentencing. In other words, the text of the statute presupposes that information regarding the juvenile offender's characteristics and circumstances will be available at a youth offender parole hearing. (*People v. Franklin, supra*, 63 Cal.4th at pp. 284, 286-287.) Without a mechanism to obtain such evidence, or a presumption that the factors were present, the statutory amendments to section

> 3051 may ultimately prove inadequate to cure the *Miller* defect.

Moreover, no regulations were promulgated to gain such information.

> Additionally, no regulations that were required to be promulgated following enactment of sections 3051 and 4801 have been adopted to date. They have been "continuously delayed by the California Legislature's decisions to amend Penal Code sections 3051 and 4801. Sections 3051 and 4801 were amended in 2015 through Senate Bill No. 261 (2015-2016 Reg. Sess.) (hereafter SB 261), which became effective on January 1, 2016, and in 2017 through Assembly Bill No. 1308 (2017-2018 session) (hereafter AB 1308) and Senate Bill No. 394 (2017-2018 session) (hereafter SB 394), both of which became effective on January 1, 2018." (Calif. Regulatory Law Bulletin, 2018-18 CRLB 159, May 4, 2018.)
>
> Thus, while the statutory scheme, on its face, appears to have addressed the Eighth Amendment flaws in the sentencing of youths to LWOP terms by making them eligible for a parole hearing, the lack of procedures by which persons like Montes have the opportunity to develop a record for their eventual parole hearings of their youth and characteristics at the time of the crime, may still work a de facto violation of the constitutional command.

Despite the State's argument that remand was not necessary, the Court found that it was, in the absence of any other mechanism to protect Montes' right to full and fair hearing upon parole eligibility.

> Most recently, in *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1131, the California Supreme Court ordered a remand to provide the defendant with an opportunity to supplement the record with information relevant to his eventual youth offender parole hearing. The Supreme Court reasoned that affording the defendant with such a hearing would address his further claim that without an adequate opportunity to make a record of youth-related circumstances at the time of his offenses, his eventual parole hearing will not provide him with a " 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " (*Id*. at p. 1132, citing *Graham v. Florida, supra*, 560 U.S. at p. 75.)

Here, Montes was sentenced to LWOP in 2004. He claims that his counsel did not fully investigate or present evidence relating to his diminished culpability as a juvenile offender. Under recent statutory amendments, he will be statutorily provided a youth parole hearing, but the BPH will not have a record of the sentencing court's consideration of the offender's age and the characteristics attendant to it. In other words, his sentence may still not conform to *Miller*.

The People argue that remand is not authorized where the defendant's sentence was final before the enactment of section 3051 because the legislation guarantees a parole hearing for persons like Montes whose cases were final before *Miller* was decided. The People note that recent decisions remanding nonconforming sentences to the trial court to give the offender an opportunity to present mitigating evidence relating to their youth were all being reviewed on direct appeal. We are aware that conducting a hearing so long after the original sentence has been pro-

nounced is problematical, but cannot reconcile the original sentencing which violated the Eighth Amendment at the time it was imposed with the recent enactment providing for evaluations and assessments prepared for the youth parole hearing, that do not address *Miller* criteria. We are aware that the Supreme Court has granted review in a recent case, where, under similar facts, our colleagues in Division Three of the Fourth Appellate District, remanded the matter to the superior court to give the defendant an opportunity to present evidence of his youthful characteristics. (*In re Cook* (2017) 7 Cal.App.5th 393, review granted Apr. 12, 2017, S240153.)

Nevertheless, we are concerned that the procedures for current evaluations and assessments of Montes in connection with a future parole hearing will not satisfy the constitutional mandate that the sentencing court have considered the youth factors in imposing sentence on a defendant who was a juvenile at the time of commission of the crime. Until our Supreme Court rules differently, or until the Legislature enacts a mandatory presumption that in all cases such as this, the factors of diminished culpability of juveniles will be deemed to be present, we conclude that the *Franklin* remedy of a limited remand is required, despite the passage of years since the pronouncement of judgment.

Accordingly, the court denied resentencing but ordered a remand for youth factors determination.

The petition for writ of habeas corpus is granted in part and denied in part. The court denies Montes's request to vacate the judgment. Montes's sentence remains valid as Penal Code section 3051 has made him eligible for parole during his 25th year of incarceration. The court grants Montes's request for a *Franklin* hearing. The matter is remanded with directions to the trial court to conduct a hearing at which Montes has the opportunity to make a record of mitigating evidence tied to his youth at the time the offense was committed. The hearing must be conducted no later than 90 days from the date this opinion is final in this court.

PROP. 36 CASES

PROOF-BEYOND-A-REASONABLE-DOUBT FINDING KILLS PROP. 36 RELIEF

P. v. Steven Kaulick

CA2(3); No. B285815
December 28, 2018

In Steven Kaulick's second appeal requesting relief via Prop. 36, the trial court now used the correct standard of proof: "beyond a reasonable doubt." However, Kaulick's challenge to this remanded outcome now failed because evidence in the record supported the trial court's new finding.

This is defendant Steven Joseph Kaulick's second appeal arising out of his petition for resentencing of his three strikes conviction (Pen. Code, § 1170.126, enacted as part of the Three Strikes Reform Act (Proposition 36)). (See *People v. Kaulick* (Jan. 4, 2017, B265040 [nonpub.]) (*Kaulick I*).) In *Kaulick I*, we reversed the trial court's order denying Kaulick's petition for resentencing after concluding the court erred in applying a "preponderance of the evidence," as opposed to a "beyond a reasonable doubt," standard of proof to find Kaulick intended to inflict great bodily injury during his third-strike offense, a finding that rendered him ineligible for resentencing un-

der Proposition 36. We remanded the matter to allow the court to apply the correct standard of proof in determining whether Kaulick was eligible for resentencing.

On remand, the court found beyond a reasonable doubt that Kaulick intended to inflict great bodily injury on the victim of his third-strike offense and again denied Kaulick's petition for resentencing. On appeal, Kaulick contends: (1) insufficient evidence supports the court's finding that he intended to inflict great bodily injury during his third-strike offense; (2) the court violated his Sixth Amendment rights when it found he intended to inflict great bodily injury, a finding that was not established by virtue of his underlying third-strike conviction; and (3) the court violated his Sixth Amendment right to a jury trial by making a factual finding that he claims "increased the penalty to which he was subjected." We affirm.

The Court first reviewed the legal history of the proper standard of proof to be used in determining Prop. 36 relief in the superior court.

"[U]nder the original [Three Strikes] law, a defendant previously convicted of two qualifying strikes was subject to a life term if he was subsequently convicted of any new felony, regardless of whether it was a serious or violent one." (*People v. Frierson* (2017) 4 Cal.5th 225, 230 (*Frierson*).) Proposition 36, however, changed the sentence prescribed for a third-strike defendant whose current offense is not a serious or violent felony. (*Ibid*.) Under Proposition 36, a third-strike defendant whose current offense is not a serious or violent felony would be sentenced as a second-strike offender, unless an exception that renders the defendant ineligible for sentencing under Proposition 36's ameliorative penalty provisions applies. (*Ibid*.) Proposition 36 requires the prosecution to prove and plead a disqualifying exception. (§ 1170.12, subd. (c)(2)(C).)

Proposition 36 also allows defendants already serving a life term for a third-strike to petition for resentencing. (§ 1170.126, subd. (b).) A defendant is eligible for resentencing under Proposition 36 only if he is serving a life term for felonies that are not serious or violent. (§ 1170.126, subd. (e)(1).) In addition, a defendant may be rendered ineligible for resentencing by a number of disqualifying factors. For example, a defendant is ineligible for resentencing if "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§ 667, subd. (e)(2)(C)(iii); see § 1170.126, subd. (e)(2).) " '[T]he petitioning defendant has the initial burden of establishing eligibility, and if that burden is met, then the prosecution has the opportunity to establish ineligibility on other grounds.' [Citation.]" (*Frierson, supra*, 4 Cal.5th at p. 234.)

After we issued *Kaulick I*, the California Supreme Court decided Frierson, in which it held the prosecution must prove beyond a reasonable doubt that a defendant is ineligible for resentencing under Proposition 36. (*Frierson, supra*, 4 Cal.4th at pp. 234–236.) The prosecution may do so either by proving the defendant's third-strike offense constitutes a serious or violent felony or by establishing the defendant engaged in disqualifying conduct during the commission of that offense. (*Ibid*.)

> We review a trial court's finding that a defendant is ineligible for resentencing for substantial evidence. (*People v. Perez* (2018) 4 Cal.5th 1055, 1059 (*Perez*).) We examine the entire record in the light most favorable to the People, resolving all conflicts in the evidence and drawing all reasonable inferences in support of the court's order. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) We apply this standard whether direct or circumstantial evidence is involved. (*People v. Avila* (2009) 46 Cal.4th 680, 701.) Therefore, before we may set aside the court's eligibility determination, it must be clear that " ' "upon no hypothesis whatever is there sufficient evidence to support [it]." ' " (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

On its review of the superior court's finding of intent to commit great bodily injury (GBI), the Court of Appeal found there was substantial evidence in the record supporting the court's finding.

> Kaulick contends insufficient evidence supports the court's finding that he intended to inflict great bodily injury on the victim of his third-strike offense, false imprisonment by violence. We disagree.

The Court first reviewed the legal definition of GBI.

> "Great bodily injury" is defined as "a significant or substantial physical injury." (§ 12022.7, subd. (f).) "This definition does not require that the victim suffer ' "permanent," "prolonged," or "protracted" disfigurement, impairment, or loss of bodily function.' [Citation.]" (*People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755.) Generally, lacerations, bruises, abrasions or a loss of consciousness are sufficient for a finding of " 'great bodily injury.' " (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047–1048 [lacerations, bruises or abrasion]; *People v. Wade* (2012) 204 Cal.App.4th 1142, 1149 (*Wade*) [loss of consciousness].) Further, it is not necessary to show the victim's injuries required medical treatment to establish the existence of great bodily injury. (*Wade*, at p. 1149.) The intent to inflict great bodily injury "may be inferred from the circumstances attending the act, including the manner in which the act was done and the means used." (*People v. Phillips* (1989) 208 Cal.App.3d 1120, 1124 (*Phillips*).)

The facts supported the GBI finding.

> Substantial evidence supports the court's finding that Kaulick intended to inflict great bodily injury on the victim when he committed false imprisonment by violence. The victim testified that immediately after she entered his apartment, Kaulick grabbed her, covered her mouth, and started strangling her. According to the victim, Kaulick dug his fingers "deep" into her throat with one of his hands while he used the other hand to squeeze the back of her neck. The victim couldn't breathe while Kaulick had his hands around her neck. Although the victim tried to break free from Kaulick several times, he repeatedly pulled her back to him so he could continue to strangle her. The victim testified that after her second attempt to break free from Kaulick, he had "his fingers in [her] throat very hard," and that after she looked him in the face, he started "strangling [her] even harder," to the point where she "completely just

start[ed] to los[e] consciousness." Even as the victim started to lose consciousness, Kaulick continued to strangle her. This evidence amply supports a finding that Kaulick intended to inflict great bodily injury on his victim—that is, that he intended to cause her to lose consciousness by strangulation. (See *Wade, supra*, 204 Cal.App.4th at p. 1149.)

Kaulick argues the court erred in finding he intended to inflict great injury because the victim never passed out or suffered any prolonged injuries, and he never "struck" her during the attack, even though "he was certainly in a position to have done so had he been so inclined." The fact that Kaulick did not engage in additional forms of violence during the attack, or that the victim may not have completely lost consciousness or suffered any prolonged injuries as a result of the attack, does not mean there is insufficient evidence to support a finding that he intended to inflict great bodily injury on the victim. The manner in which Kaulick carried out the attack—his repeated attempts to strangle her, the fact that he increased the amount of force he used to strangle her as the attack progressed, and his threats to kill her—clearly supports a finding that he intended to inflict great bodily injury on the victim. (See *Phillips, supra*, 208 Cal.App.3d at p. 1124.)

Kaulick also argued that the trial court's finding violated his Sixth Amendment rights.

Kaulick next contends the court violated his Sixth Amendment rights when it found he intended to inflict great bodily injury on the victim of his third-strike offense, a finding that rendered him ineligible for resentencing under Proposition 36. Kaulick argues the court's eligibility finding violated his Sixth Amendment rights because "the court relied on judicial fact-finding beyond the elements of the [underlying] conviction." Kaulick also argues the court violated his Sixth Amendment right to a jury trial when it found he was ineligible for resentencing because the court, rather than a jury, made a factual finding that Kaulick claims increased the penalty to which he was subjected, the same argument he raised in *Kaulick I*.

The Court rejected this argument.

Kaulick's third-strike offense is false imprisonment by violence. To convict Kaulick of that crime, the prosecution needed to prove: (1) Kaulick intentionally restrained his victim by violence or menace; and (2) Kaulick restrained the victim against her will. (*People v. Williams* (2017) 7 Cal.App.5th 644, 672.) "Violence is ' " ' "the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint." ' " ' [Citation.]" (*Ibid*.)

Notably, the prosecution was not required to prove that Kaulick intended to inflict great bodily injury on his victim to convict him of false imprisonment by violence. The prosecution also did not allege any allegations or enhancements that required them to prove such conduct. Accordingly, when Kaulick was convicted of his third-strike offense, the jury never made a finding that he intended to inflict great bodily injury on his victim. In other words, that Kaulick intended to commit great bodily injury during his third-strike offense is not a fact established by Kaulick's judgment of conviction. Thus, when the trial court reviewed Kaulick's resentencing petition, it could not determine from the

face of the judgment whether Kaulick intended to inflict great bodily injury on his victim during the commission of his third-strike offense. Rather, the court had to conduct its own examination of the record from that case to determine beyond a reasonable doubt whether Kaulick intended to inflict great bodily injury. The court's finding did not violate Kaulick's Sixth Amendment rights.

With respect to Kaulick's claim that the court's finding violates the Sixth Amendment because that finding could not be established by the face of Kaulick's judgment of conviction for his third-strike offense, that claim is foreclosed by *Perez* and *People v. Estrada* (2017) 3 Cal.5th 661 (*Estrada*). In *Estrada*, the Supreme Court held that a trial court, in determining whether a defendant is ineligible for resentencing based on one of the disqualifying factors identified in sections 667, subdivision (e)(2)(C)(iii) and 1170.126, subdivision (e)(2), is not limited to facts necessarily established by the defendant's judgment of conviction. (*Estrada*, at pp. 672–673.) Instead, when determining whether a defendant is eligible for resentencing, the court may "consider[ ] conduct beyond that implied by the judgment." (*Id*. at p. 671.) Although the court in *Estrada* did not base its decision on constitutional grounds, the court later held in *Perez* that a trial court's reliance on conduct beyond that implied by the judgment in determining eligibility for resentencing under Proposition 36 does not violate a defendant's Sixth Amendment right to a jury trial. (*Perez*, *supra*, 4 Cal.5th at pp. 1059, 1063 [acknowledging *Estrada* did not address a defendant's Sixth Amendment rights but "now hold[ing] that the Sixth Amendment does not bar a trial court from considering facts not found by a jury beyond a reasonable doubt when determining the applicability of a resentencing ineligibility criterion under Proposition 36"].) The court, therefore, did not violate Kaulick's Sixth Amendment rights when it based its eligibility determination on facts that were not established by the face of the judgment of conviction for his third-strike offense.

The court also did not violate Kaulick's right to a jury trial when it, and not a jury, made a factual finding that rendered him ineligible to obtain a reduced sentence under Proposition 36. "Under the Sixth Amendment, any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*Perez*, *supra*, 4 Cal.5th at p. 1063, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Alleyne v. United States* (2013) 570 U.S. 99.) As the California Supreme Court recognized in *Perez*, however, "a factual finding that results in resentencing ineligibility does not increase the petitioner's sentence; it simply leaves the original sentence intact." (*Perez, supra*, 4 Cal.5th at p. 1064; see also *Dillon v. United States* (2010) 560 U.S. 817 [a defendant does not have a Sixth Amendment right to have facts found by a jury beyond a reasonable doubt with respect to issues that limit the defendant's ability to have his lawful sentence reduced].) Accordingly, Kaulick does not have a Sixth Amendment right to have a jury find facts that would determine his eligibility for resentencing under Proposition 36. (*Perez*, at p. 1064.)

In conclusion, the Court denied Kaulick's request for relief.

PROOF-BEYOND-A-REASONABLE-DOUBT OF GBI FINDING IS REUIRED IN ORDER TO DENY PROP. 36 RELIEF

P. v. Edward Macias

CA2(7); No. B287199
December 20, 2018

In a case similar to the *Kaulick* case above, the Court of Appeal found that the superior court had erred when using a preponderance of the evidence standard in determining whether GBI precluded availability of Prop. 36 relief. Here, although the state had argued that this error was harmless, the Court of Appeal ordered a new hearing under the proper standard of proof.

> Edward Macias petitioned for recall of sentence under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126). The superior court denied the petition, finding Macias was ineligible for relief because his current sentence had been imposed for an offense committed with the intent to cause great bodily injury to another person. On appeal Macias contends the court erred in applying a preponderance -of-the-evidence, rather than the beyond-a-reasonable-doubt, standard of proof. The People concede the court erred in using a preponderance-of-the-evidence standard but argue the error was harmless because it is not reasonably probable that the court, employing the proper standard of proof, would not have ruled that Macias intended to cause great bodily injury when committing the underlying crime. We reverse and remand for a new eligibility hearing utilizing the proper standard of proof.

The facts, taken from the court record, showed that Macias had assaulted a woman at a laundromat.

> As Cynthia Moreno arrived at a laundromat in Whittier on September 16, 2006, she encountered Macias standing inside near the entrance. Moreno knew Macias from the neighborhood; the two occasionally said hello to each other. Macias asked Moreno if she had any spare change. She replied she did not and walked away. Approximately 15 minutes later Macias approached Moreno and, without speaking to her, grabbed her by the neck and threw her to the ground. He then stepped on Moreno and kicked her five to seven times on the back and neck. Macias stopped kicking Moreno only when a bystander approached and told him to stop. Macias then calmly walked out of the laundromat.
>
> After the attack Moreno was crying and holding her arm. She was helped into a chair by two bystanders, and paramedics were called. Moreno was taken to the hospital where she was examined and given pain medication. During the trial four months later she testified she was still experiencing pain. Moreno also testified Macias did not speak to her immediately before or during the attack and she did not know why he attacked her. She said Macias was taller and substantially heavier than she was.

A jury made the finding of GBI, now under question for Prop. 36 relief.

> A jury found Macias guilty of assault by means likely to produce great bodily injury (former § 245, subd. (a)(1), now § 245, subd. (a)(4)). The trial court found true the special allegations Macias had suffered two prior strike convictions—one for robbery (§ 211) and one

for making a criminal threat (§ 422). In denying Macias's motion to dismiss one of the prior strike convictions, the court stated, "[Macias] did perjure himself on the stand. His testimony was fundamentally implausible and the jury didn't buy it. . . . The officer who arrested him [after the assault] said he was totally coherent. And yet the defendant took the stand and said everything the officer said was a lie. . . . He contradicted the officer's attributions to him as to the statements that he made. . . . This was a totally uncalled for, unjustified assault [in] this case. The independent witnesses were particularly credible." The trial court sentenced Macias under the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) to an indeterminate state prison term of 25 years to life.

Macias filed for Prop. 36 relief.

On December 26, 2012 Macias filed a petition for recall of his sentence and resentencing under Proposition 36, which amended the three strikes sentencing scheme to provide, in general, that a recidivist is not subject to an indeterminate life term for a third strike felony that is neither serious nor violent, unless the offense satisfies other criteria identified in the statutes. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); see *People v. Frierson* (2017) 4 Cal.5th 225, 229 (*Frierson*).) It also permitted some inmates serving a three strikes sentence to petition for the recall and modification of their current sentence on the ground they would not have been subject to an indeterminate life sentence had Proposition 36 been in effect at the time of their sentencing. (§ 1170.126, subd. (b).) Macias argued in his petition that his third strike conviction for aggravated assault rendered him eligible for recall of his sentence.

Macias argued he never intended GBI, and that there was no court finding of it. The State disagreed, but acknowledged that the trial court had used only the preponderance of the evidence standard in its GBI finding.

The Court of Appeal reviewed the Prop. 36 law as to GBI exclusions.

An inmate is eligible for resentencing if his or her current sentence was not imposed for a violent or serious felony and was not imposed for any of the offenses described in clauses (i) to (iv) of section 1170.12, subdivision (c)(2)(C), or clauses (i) to (iv) of section 667, subdivision (e)(2)(C). (§ 1170.126, subd. (e); see also *People v. Estrada* (2017) 3 Cal.5th 661, 667.) Those clauses describe certain kinds of criminal conduct, including offenses during which the "the defendant . . . intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

The Court noted that the requisite standard of proof in this circumstance was later defined by the CA Supreme Court.

The resentencing provision of Proposition 36 does not expressly identify the standard of proof to be applied to determine an inmate's eligibility for resentencing. At the time of the hearing on Macias's petition for recall of sentence, most courts of appeal that had addressed the issue had held the correct standard of proof was preponderance of the evidence. Applying that standard the superior court found Macias had committed the assault with the intent to cause great bodily injury to Moreno, thus making him ineligible for resentencing under Proposition 36.

One month after the trial court's ruling the Supreme Court decided *Frierson, supra*, 4 Cal.5th 225, which held the People must establish ineligibility for resentencing beyond a reasonable doubt. (*Id*. at p. 240; accord, *People v. Perez* (2018) 4 Cal.5th 1055, 1059 ["Proposition 36 permits a trial court to find a defendant . . . ineligible for resentencing only if the prosecutor proves [the] basis for ineligibility beyond a reasonable doubt"].)

The actual determination of GBI to proof beyond a reasonable doubt must be made in the first instance by the superior court, and the Court of Appeal remanded for such a hearing.

The People concede the superior court erred when it employed a preponderance standard of proof in determining Macias was ineligible for relief under section 1170.126, subdivision (e)(2), but contend the error was harmless because it is not reasonably probable the court using the heightened, reasonable doubt standard of proof would not have found that Macias intended to cause great bodily injury during the assault.

Section 12022.7, subdivision (f), defines great bodily injury as a "significant or substantial physical injury." Although minor or moderate harm is insufficient to constitute great bodily injury (see CALCRIM No. 3163), "the injury need not be so grave as to cause the victim '"permanent," "prolonged" or "protracted"' bodily damage." (People v. Cross (2008) 45 Cal.4th 58, 64.) "[T]he intent to inflict [great bodily] injury may be shown by, and inferred from, the circumstances surrounding the doing of the act itself." (*People v. Phillips*

(1989) 208 Cal.App.3d 1120, 1124; see also *People v. Massie* (2006) 142 Cal.App.4th 365, 371 ["[t]he intent with which a person acts is rarely susceptible of direct proof and usually must be inferred from facts and circumstances surrounding the offense"]; *In re Sergio R*. (1991) 228 Cal.App.3d 588, 601 ["[t]he intent to inflict great bodily injury need not be proven by direct evidence. Such intent may be inferred or presumed. '"It is black-letter law that a party is presumed to intend to do that which he voluntarily or willfully does in fact do and also presumed to intend the natural, probable and usual consequences of his own acts"'"].) An individual's "intent 'is a question of fact to be determined from all the circumstances of the case . . . .'" (*Hudson v. Superior Court* (2017) 7 Cal.App.5th 1165, 1171.)

The record reflects Macias's unprovoked attack was serious. However, he made no threats or other comments indicating his intent immediately before or during the brief assault. Moreover, although Moreno was still experiencing pain four months later, her injuries were relatively minor, treated at the hospital only with pain pills. The testimony indicated Macias's demeanor that day had been inconsistent—he was speaking incoherently prior to the attack, acted erratically during the attack, and was calm immediately after the attack and when questioned by police officers. Macias also gave three conflicting accounts of his involvement in the attack, first telling police he had not been at the laundromat that day, then stating he had been there but had not been involved in the incident and finally testifying at trial that he had been in an altercation with Moreno but she had initiated it.

> Although the superior court could certainly infer from this evidence that Macias intended to cause Moreno great bodily injury, there is a reasonable probability a finder of fact authorized to weigh credibility and determine state of mind, which we are not, would conclude the requisite intent had not been proved beyond a reasonable doubt. That determination is properly made by the superior court in the first instance.

PROP. 36 RELIEF DENIAL UPHELD BECAUSE CORPORAL INJURY TO A CHILD CONSTITUTES GBI, BEYOND A REASONABLE DOUBT

P. v. James Dorman

CA2(7); No. B286517
December 19, 2018

This case is similar to the *Macias* case above, except that the remedy was to affirm the superior court's denial of Prop. 36 relief without a new hearing, based upon a finding that having used the wrong standard of proof was harmless beyond a reasonable doubt.

> James Kalfred Dorman petitioned for recall of sentence under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126). The superior court denied Dorman's petition, finding he was ineligible for resentencing because his current sentence had been imposed for an offense (inflicting corporal injury on a spouse, cohabitant or parent of the offender's child) committed with the intent to cause great bodily injury. On appeal Dorman contends the court erred in finding him ineligible because it used the preponderance-of-the-evidence standard of proof, rather than the beyond-a-reasonable-doubt standard. The People concede the court used the wrong standard of proof, but argue

> the error was harmless because it is not reasonably probable the court, employing the proper standard, would not have ruled that Dorman intended to cause great bodily injury when committing the underlying domestic violence crime. We agree the error was harmless and affirm.

The factual record relied upon by the superior court in evaluating Dorman's petition for Prop. 36 sentencing relief as to the existence, or not, of proof of GBI, was set forth by the Court of Appeal.

> Kimberly B. was Dorman's girlfriend and the mother of his two children. On November 20, 1994 Dorman charged Kimberly, who was sitting on a couch in their apartment, and kneed her in the chest. Dorman was angry that Kimberly had shown attention to one of their children after he fell down. Kimberly was knocked back by the force of the blow, experienced pain and had trouble breathing.
>
> Dorman struck Kimberly again the next day, punching her once in the face with his closed fist as she walked through the door to the apartment after running errands. Dorman admonished Kimberly, "You shouldn't have left me." The force of Dorman's punch knocked Kimberly to the floor. She suffered two cheekbone fractures and a broken tooth and received an injection of pain medication for her injuries later that day when admitted to Glendale Adventist Hospital. A radiologist who subsequently examined Kimberly testified the fractures were consistent with a blow to the cheek area that would have required "quite of bit of force."
>
> After striking Kimberly, Dorman urged her to look inside their bedroom. Dorman had thrown a hammer through the screen of the bedroom television set and broken a mirror. He had also defaced portions of the apartment with obscene language and scrawled "die bitch" onto a window in the children's bedroom.
>
> During a later interview with a detective investigating the assault, Kimberly revealed that Dorman had threatened to kill her during the November 21st incident, warning: "You better shut up. You're lucky I don't kick your butt and kill you now." Kimberly also said Dorman had threatened to kill her if she went to police and had assaulted her every two or three days since his release from prison that summer.

The jury verdict and sentencing included convictions on only part of the charges.

> Dorman was charged with two counts of inflicting corporal injury on a spouse, cohabitant or parent of the offender's child (§ 273.5, subds. (a), (b)). The jury was unable to reach a verdict on the count involving the November 20 offense but convicted Dorman on the second count related to the November 21st attack. The jury also found true the special allegations that Dorman had suffered two prior strike convictions for burglary (§ 459). Dorman was sentenced under the three strikes law to an indeterminate state prison term of 25 years to life.

Dorman's Prop. 36 petition alleged that he was eligible for such relief.

> Dorman argued in his petition he was eligible for recall of his sentence because his third strike conviction for inflicting corporal injury on a cohabitant was not a serious or violent felony within the meaning of the three strikes law and neither of his prior strike convictions dis-

qualified him. The superior court issued an order to show cause why the petition should not be granted. The People opposed the petition, asserting Dorman was ineligible for resentencing under section 1170.126, subdivision (e)(2), because,"[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) The People also argued Dorman was unsuitable for resentencing.

The superior court found by a preponderance of the evidence that Dorman was ineligible for resentencing because he had intended to cause great bodily injury to Kimberly when he struck her on November 21, 1994.

The Court of Appeal had little trouble finding that the superior court had used the wrong standard of proof in its Prop. 36 relief denial.

> The resentencing provision of Proposition 36 does not expressly identify the standard of proof to be applied to determine an inmate's eligibility for resentencing. At the time of the hearing on Dorman's petition for recall of sentence, most courts of appeal that had addressed the issue had held the correct standard of proof was preponderance of the evidence. Applying that standard the superior court found Dorman had committed the underlying act of domestic violence with the intent to cause great bodily injury to Kimberly, thus making him ineligible for resentencing under Proposition 36.
>
> Approximately one month after the trial court's ruling the Supreme Court decided *Frierson, supra*, 4 Cal.5th 225, which held the People must establish ineligibility for resentencing beyond a reasonable doubt. (*Id*. at p. 240; accord, *People v. Perez* (2018) 4 Cal.5th 1055, 1059 ["Proposition 36 permits a trial court to find a defendant . . . ineligible for resentencing only if the prosecutor proves [the] basis for ineligibility beyond a reasonable doubt"].)

The Court of Appeal found, however, that Dorman had to prove that he was likely to have gotten a better outcome, in order to prevail on his appeal.

> The Supreme Court's holding in Frierson that the proper standard of proof is beyond a reasonable doubt was based on an interpretation of state law. (Frierson, supra, 4 Cal.5th at pp. 235-239.) Accordingly, the superior court's error in applying a preponderance-of-the-evidence standard is evaluated under the harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, which requires the defendant to show it is reasonably probable a more favorable result would have been reached in the absence of the error. (See *People v. Gonzalez* (2018) 5 Cal.5th 186, 201; *People v. Mendoza* (2016) 62 Cal.4th 856, 902.)
>
> Dorman did not carry his burden of showing there is a reasonable probability the superior court would have granted his petition under Proposition 36 if the court had applied a beyond-a-reasonable-doubt standard.

The Court of Appeal carefully reviewed the details of the convicted offenses, and found that they met the definition of GBI beyond a reasonable doubt, thus rendering any error by the superior court in using the wrong standard of proof below harmless.

> The evidence in the record, described in full and accurate detail by the superior

court, establishes beyond a reasonable doubt that Dorman inflicted great bodily injury on Kimberly and that he intended to do so. The court's error in applying the incorrect standard of proof was harmless.

PROP. 36 RELIEF DENIAL FOR POSSESSION OF A FIREARM IS UPHELD

P. v. Eric Warner

CA1(4); No. A145663
December 20, 2018

Eric Warner (Warner) appealed the trial court's denial of his petition to recall his sentence under Prop. 36. (See Pen. Code § 1170.126.) Specifically, Warner claimed he was eligible to be resentenced on his conviction for unlawful possession of a firearm by a felon (§ 29800, subd. (a)(1)). In addition, Warner claimed—relying on *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*)—that he was subjected to an unauthorized sentence under the Three Strikes law, because his two prior convictions should have been treated as one strike rather than two. The trial court concluded that Warner was ineligible for resentencing on the firearm conviction and that Vargas was inapplicable on these facts. The Court of Appeal now agreed.

Warner's criminal record was in two segments. After the second set of offenses, he was sentenced under Three Strikes to 100-life. This was reduced on his first appeal to 55-life. It was from this term that Warner now appealed for Prop. 36 relief.

> In 1986, Warner entered into a plea bargain in San Francisco County Superior Court pursuant to which he pled guilty to one count of robbery (§ 211) and one count of kidnapping (§ 207) in return for concurrent three-year prison sentences and the dismissal of ten other counts of forcible sexual offenses. Thereafter, in June 1999, Warner was charged by the San Mateo County District Attorney (District Attorney) with murder (§ 187, subd. (a)) and being a felon in possession of a firearm (former § 12021, subd. (a)(1); see now § 29800, subd. (a)(1).) The information specifically alleged that Warner had suffered two prior strike convictions arising out of San Francisco, and that, with respect to the murder charge, Warner had personally used a firearm within the meaning of section 12022.53, subdivision (d). A jury found Warner guilty of both charges and determined the personal use of a firearm allegation to be true. Warner admitted the prior convictions, waiving a jury trial on this issue, and the trial court found them both to be strikes. He was then sentenced under the Three Strikes law to 100 years to life in state prison—consecutive terms of 45 years to life for second-degree murder, 25 years to life for using a firearm, 25 years to life for being a felon in possession of a firearm, and five years for a prior conviction.
>
> In 2001, we reviewed Warner's second-degree murder conviction and concluded that it had been tainted by instructional error. We reversed the conviction, giving the District Attorney the option to retry the charge or have it deemed voluntary manslaughter. (*People v. Warner* (April 18, 2001, A090430) [nonpub. opn.] (*Warner I*).) On remand, the offense was reduced to voluntary manslaughter (§192, subd. (a)), and Warner was resentenced to 55 years to life.

His November, 2014 Prop. 36 petition claimed two errors. He sought resentencing with respect to his 2000 conviction for being a felon in

possession of a firearm, and also claimed that, pursuant to the Supreme Court's recent decision in *Vargas, supra*, 59 Cal.4th 635, his 1986 convictions for robbery and kidnapping had been improperly treated as two strikes instead of one.

As to his ineligibility under Prop. 36 because of his weapons possession, the Court of Appeal carefully parsed the record for the evidence relied upon by the superior court below.

> The record of conviction in this case reveals the following pertinent facts with respect to the possession offense. In February 1999, Warner and his mother resided in a single rented room at the Ramirez residence. Julio Ramirez, who was "especially close" to Warner, reported that for "some time" prior to the shooting that resulted in Warner's manslaughter conviction, it appeared to him that Warner " 'felt paranoid, very paranoid of people wanting, like, to steal from him or people disrespecting him, clowning him as he would put it.' Two days before the shooting, [Warner] showed Julio Ramirez the handgun used in the shooting. [Warner] had obtained it to protect himself." (*Warner I, supra*, at p. 2.) On the day of the shooting, Warner and the victim were in the living room of the Ramirez residence, watching a boxing match with several other individuals. When the victim refused to pay Warner ten dollars—which Warner asserted the victim owed him—Warner "reached into his pocket and shot the victim in the head 'point blank.' " (*Id*. at pp. 2-3.)
>
> Warner admitted firing the gunshot which killed the victim and the jury found beyond a reasonable doubt that Warner used a firearm in the commission of the shooting offense. Thus, at the time of that crime, Warner was clearly armed with a firearm. Although, ultimately, he was not sentenced on the personal use enhancement (because his conviction was reduced from second degree murder to voluntary manslaughter), the jury's finding in this regard remains a part of the record.
>
> In addition, our second appellate opinion in this matter describes the circumstances underlying Warner's sentencing with respect to his conviction for being a felon in possession of a firearm as follows: "In the first sentencing, Warner was given consecutive terms for second degree murder and for being an ex-felon in possession of a firearm. (*People v. Warner, supra*, A090430.) The first sentencing court found that he did entertain multiple criminal objectives because the evidence showed that *earlier in the day, Warner possessed the weapon later used against his homicide victim*. At resentencing, the court determined—based on similar factual findings—that section 654 was not implicated by its decision to impose consecutive terms for these two offenses." (*Warner II, supra*, at p. 5, italics added.)
>
> The clear implication from the record of conviction is that Warner had ready access to the firearm and that it was available for his use at an earlier time on the same day as the killing during which he actually used it. In particular, we note that Warner had obtained the gun for personal protection; had showed it to Ramirez two days prior to the shooting; and had it in his pocket on the day of the shooting, which took place in his home on the same day as the possession offense. Thus, substantial evidence supports the trial court's conclusion that his firearm conviction was based on actual rather than constructive possession—

> that is, that he was armed with a firearm for purposes of the Reform Act during his possession offense. Indeed, when discussing the underlying purposes of the Reform Act in a similar context, one appellate court has opined: "It is clear the electorate's intent was not to throw open the prison doors to all third strike offenders whose current convictions were not for serious or violent felonies, but only to 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. '[T]he threat presented by a firearm increases in direct proportion to its accessibility. Obviously, a firearm that is available for use as a weapon creates the very real danger it will be used.' " (*Osuna, supra*, 225 Cal.App.4th at p. 1038.) That is, of course, exactly what happened here. We see no error in the trial court's eligibility determination.

As to his second contention, Warner argued unconvincingly to the Court that his two strikes should have only been counted as one.

> Warner additionally claims that the trial court erred in refusing to strike one of his two prior strike offenses under the rationale of *Vargas, supra*, 59 Cal.4th 635. In *Vargas*, the defendant had two prior strikes—carjacking and robbery—which were based on the same act of taking the victim's car by force. (*Id*. at p. 640.) The Supreme Court held that "when faced with two prior strike convictions based on the same act, . . . the trial court [is] required to dismiss one of them." (*Id*. at pp. 640, 645.) In reaching this decision, our high court acknowledged its previous determinations that two convictions may qualify as separate strikes despite being adjudicated at the same trial and even when they could not be punished separately under section 654 because they were committed during the same indivisible course of conduct. (*Id*. at p. 638; see *People v. Fuhrman* (1997) 16 Cal.4th 930; *Benson, supra*, 18 Cal.4th 24; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1208 [" '[f]ew if any crimes . . . are the result of a single physical act' "; section 654 also applies where an indivisible course of conduct violated more than one statute].) However, the Vargas court distinguished these prior holdings from the "more extreme" situation before it in which the two prior felony convictions "were not only tried in the same proceeding and committed during the same course of criminal conduct, they were based *on the same act*, committed at the same time, against the same victim." (*Vargas*, at p. 638, italics added.)

Warner's prior admissions, however, defeated any relief.

> Here, Warner pled guilty in 1986 to robbery (§ 211) and kidnapping (§ 207). The record reflects that these two charges were originally part of a 12-count complaint….
>
> Although portions of the complaint are missing from our record on appeal—in particular, the allegations underlying the robbery count—we accept Warner's assertion that the robbery was committed at the same time and against the same victim. However, even if the robbery and the kidnapping were part of the same course of conduct—making multiple sentences inappropriate under section 654—they were clearly not based

on the same act. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211; *People v. Lindberg* (2008) 45 Cal.4th 1, 24.) In contrast, the gravamen of a kidnapping charge is the forcible movement of another person without that person's consent. (See *People v. Majors* (2004) 33 Cal.4th 321, 326-327.) One is a crime against a person, while the other involves the act of taking personal property from another. Thus, by its express terms, the *Vargas* exception does not apply on these facts.

Warner appears to concede as much, but argues that the *Vargas* rule should be extended to situations where two prior convictions occurred in a single incident and were resolved in a single proceeding prior to the enactment of the Three Strikes law in 1994. Specifically, Warner asserts that he was unaware at the time of his 1986 plea that the two convictions would later be treated as separate strikes under the Three Strikes law, a situation under which even "the most prescient of counsel could not have foreseen the extent of [his] liability." (See *People v. Wilson* (2013) 219 Cal.App.4th 500, 516 (*Wilson*).) He further avers that additional facts needed to be found before a decision could be made as to whether his prior robbery and kidnapping convictions should now be treated as a single indivisible event for sentencing purposes. We are not convinced.

The Court also was not swayed by Warner's argument that prior CA Supreme Court decisions were inconsistent on this point.

In *Benson*, the Supreme Court expressly concluded, " 'based on the plain language of the statute, that the Legislature and the voters through the initiative process clearly intended that *each conviction* for a serious or violent felony counts as a prior conviction for sentencing purposes under the Three Strikes law, even where the convictions were based upon conduct against a single victim committed at the same time with a single intent, and where pursuant to section 654 the defendant was punished for only a single crime.' " (*Benson, supra*, 18 Cal.4th at p. 30, italics added.) In that case, the defendant had been convicted in 1980 of residential burglary and assault with intent to commit murder based on an incident in which the defendant—after returning a vacuum he had borrowed from a neighbor—went back to the neighbor's apartment stating he had left his keys and then proceeded to force her to the floor and repeatedly stab her. (*Id*. at p. 27.) Even though the trial court had stayed one of the convictions pursuant to section 654 because both offenses were based on the same course of conduct, the Supreme Court held it appropriate to treat each prior conviction as a strike. (*Id*. at pp. 26-27.)

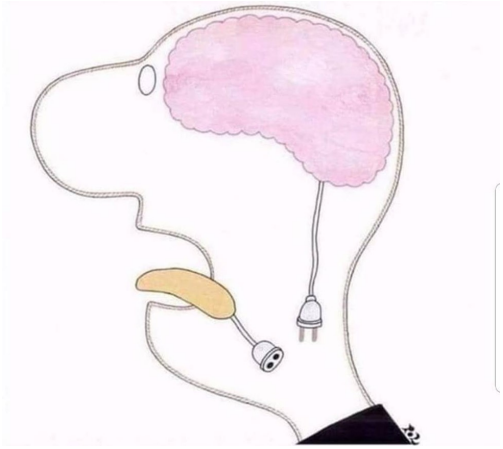
In reaching this decision, the *Benson* court opined: "[T]here clearly was a rational basis upon which the electorate and the Legislature could direct the courts, in cases involving a defendant with two prior felony convictions who thereafter commits a subsequent felony, to count each prior felony conviction as a strike, in effect declining to extend the leniency previously afforded the defendant when sentence on a prior felony conviction was stayed under section 654. In the present case, defendant re-

ceived the benefit of section 654 when he was sentenced for the felonies he committed in 1979; *it was only when defendant reoffended after the enactment of the Three Strikes law that he faced the prolonged incarceration of which he now complains*. The Three Strikes law provided him with notice that he would be treated as a recidivist if he reoffended. [Citation.] He chose to ignore that notice and commit a subsequent felony." (*Benson, supra*, 18 Cal.4th at pp. 34 -35.)

The *Vargas* court never questioned this analysis. It simply distinguished *Benson* as a case involving "multiple criminal acts (albeit committed in a single course of conduct) and not, as here, multiple criminal convictions stemming from the commission of a single act." (*Vargas, supra*, 59 Cal.4th at p. 648.) As the present case is on all fours with *Benson*, we see no reason to depart from its reasoning based on the fact—also present in *Benson*—that the prior convictions predated the Three Strikes law and thus, at the time of his prior plea, Warner was not fully aware of the extent of his potential future liability. Moreover, Warner's assertions to the contrary notwithstanding, this is not a case where additional facts needed to be found in order to determine whether *Vargas* should be applied. Rather, as discussed above, the elements of the crimes underlying Warner's prior convictions for robbery and kidnapping themselves establish that he committed multiple criminal acts in a single course of conduct. Thus, neither of the rationales advanced by Warner support an extension of the *Vargas* reasoning to cover the circumstances of this case.

In conclusion, the Court found that Warner had in essence admitted to the separateness of his two prior strike acts, and thus was not entitled to any Prop. 36 relief.

Again, however, by pleading guilty to both robbery and kidnapping in 1986, Warner necessarily admitted to engaging in two separate criminal acts. Thus, no additional facts needed be found, by a jury or otherwise, to support the trial court's conclusion that Warner's prior convictions should be treated as two separate strikes. Under these circumstances, where the facts of the convictions themselves demonstrate that *Vargas* is inapplicable, the trial court obviously did not violate the Sixth Amendment or offend due process in so finding.



2018 PAROLE GRANTS HIT HIGH MARK

While we don't want to make too much of this (and provide a target for those who want to keep all lifers behind the wire forever), we can't help by note that 2018 set a high mark for parole grants, at least insofar as available statistics support. For 2018 parole panels handed down a total of 1,136 parole grants, both at initial and subsequent hearings.

Taken in historical context, that number is even more impressive, as we note in 1978 and 1979 only one lifer in each year was granted parole, and the following year, 1980, no one went home. Grants remained in the low double digits through the next two plus decades, only breaking the 3-digit mark in 2002 when 168 grants were made.

And there the grant rate seemed to flatten out, for the most part, until 2008 when the historic In Re Lawrence decision made it impossible for (former) parole panels to deny parole solely, or primarily, on the nature and fact of the crime. And while parole panels still refer to crimes as 'heinous' and 'atrocious' (and what murder/killing/kidnapping, violent crime isn't heinous?) those characteristics are now only part of the narrative, with the decision, grant or denial, required to be based on a something other than emotion and often decades-old static events.

In 2007, the year before the Lawrence decision, 119 grants were made; in 2008, the year Lawrence was decided, the grant numbers more than doubled to 293. And the following year, the first full year after Lawrence, that number almost doubled yet again, to 542.

For the next few years, grant numbers hovered around the high 490s, until 2012, when, by our estimation, the increased training and accountability required of commissioners under Gov. Brown's BPH administration, took a jump to 670. And from there it has continued, largely to increase, to the 2018 number of over 1,000.

More details on these facts and statistics both as the year-end reports are released and we find the time to data mine those publications. But in the meantime, lifers and families should quietly celebrate and appreciate the progress made. And remember, it's not that the brass ring has become easier to grab, but that it's no longer coated with oil to slip out of your hand and that programming, rehabilitated lifers are becoming more adept at grabbing that ring and holding on.

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	TAIRA	TURNER	BPH HQ	Total CMR Hrg
Suitability Hrg Total	**26**	**23**	**23**	**19**	**23**	**27**	**22**	**23**	**27**	**23**	**27**	**24**	**23**	**24**	**17**	**112**	**463**
Grants	5	8	12	8	6	11	5	1	15	11	4	12	11	8	10	0	127
Denials	12	10	8	11	16	11	12	16	6	11	12	10	9	11	6	0	161
Stipulations	9	3	1	0	0	2	4	2	6	1	6	2	3	2	0	0	41
Waivers	0	1	1	0	0	0	0	0	0	0	1	0	0	1	1	34	39
Postponements	0	1	1	0	0	2	1	2	0	0	3	0	0	2	0	75	87
Continuances	0	0	0	0	1	1	0	1	0	0	1	0	0	0	0	0	4
Tie Vote	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	3

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

Subtotal (Deny+Stip)	**21**	**13**	**9**	**11**	**16**	**13**	**16**	**18**	**12**	**12**	**18**	**12**	**12**	**13**	**6**	**0**	**202**
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	10	11	4	10	13	11	10	2	7	9	9	9	5	12	5	0	127
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	6	2	4	1	3	2	5	9	3	3	4	3	6	1	1	0	53
7 years	3	0	1	0	0	0	1	7	2	0	5	0	1	0	0	0	20
10 years	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
15 years	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**1**	**1**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**1**	**1**	**34**	**39**
1 year	0	1	1	0	0	0	0	0	0	0	1	0	0	1	1	18	23
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	6	6
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	10	10
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**0**	**1**	**1**	**0**	**0**	**2**	**1**	**2**	**0**	**0**	**3**	**0**	**0**	**2**	**0**	**75**	**87**
Within State Control	0	0	0	0	0	0	0	0	0	0	3	0	0	0	0	72	75
Exigent Circumstance	0	0	0	0	0	0	1	2	0	0	0	0	0	1	0	1	5
Prisoner Postpone	0	1	1	0	0	2	0	0	0	0	0	0	0	1	0	2	7

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	TAIRA	TURNER	BPH HQ	Total CMR Hrg
Suitability Hrg Total	**22**	**21**	**20**	**25**	**21**	**21**	**19**	**19**	**25**	**22**	**21**	**19**	**19**	**21**	**23**	**82**	**400**
Grants	5	7	8	6	5	9	7	5	10	5	2	6	4	8	18	0	105
Denials	12	12	11	14	14	9	10	12	9	13	13	10	13	9	3	0	164
Stipulations	4	2	0	3	1	1	1	1	6	3	4	0	2	4	1	0	33
Waivers	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1	29	31
Postponements	0	0	1	1	1	2	0	1	0	1	1	1	0	0	0	46	55
Continuances	1	0	0	1	0	0	1	0	0	0	1	1	0	0	0	0	5
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	7	7

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

Subtotal (Deny+Stip)	**16**	**14**	**11**	**17**	**15**	**10**	**11**	**13**	**15**	**16**	**17**	**10**	**15**	**13**	**4**	**0**	**197**
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	6	9	9	15	10	8	5	8	11	11	8	7	6	10	4	0	127
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	4	5	2	2	4	2	4	3	3	4	9	1	8	3	0	0	54
7 years	6	0	0	0	1	0	1	2	0	1	0	1	1	0	0	0	13
10 years	0	0	0	0	0	0	1	0	1	0	0	1	0	0	0	0	3
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**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**1**	**29**	**31**
1 year	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1	22	24
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	3
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	4
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**0**	**0**	**1**	**1**	**1**	**2**	**0**	**1**	**0**	**1**	**1**	**1**	**0**	**0**	**0**	**46**	**55**
Within State Control	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	43	44
Exigent Circumstance	0	0	1	1	1	0	0	1	0	1	0	0	0	0	0	0	5
Prisoner Postpone	0	0	0	0	0	1	0	0	0	0	1	1	0	0	0	3	6

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	SHARRIEFF	TAIRA	TURNER
Suitability Hrg Total	**17**	**11**	**17**	**19**	**19**	**17**	**18**	**20**	**20**	**14**	**18**	**19**	**17**	**13**	**16**	**7**
Grants	6	6	5	7	4	7	3	2	7	6	8	6	8	4	2	3
Denials	7	3	8	6	14	6	7	14	10	7	6	13	8	8	11	2
Stipulations	4	1	3	4	1	3	6	3	2	1	1	0	0	0	3	1
Waivers	0	0	1	0	0	1	0	0	0	0	0	0	0	0	0	0
Postponements	0	1	0	2	0	0	2	0	1	0	0	0	1	1	0	1
Continuances	0	0	0	0	0	0	0	1	0	0	3	0	0	0	0	0
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

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

Subtotal (Deny+Stip)	**11**	**4**	**11**	**10**	**15**	**9**	**13**	**17**	**12**	**8**	**7**	**13**	**8**	**8**	**14**	**3**
1 year	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
3 years	7	4	8	9	7	6	3	8	7	6	3	10	3	8	11	3
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	3	0	3	1	6	2	6	7	5	2	3	3	5	0	2	0
7 years	1	0	0	0	2	1	3	2	0	0	1	0	0	0	0	0
10 years	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0
15 years	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**	**1**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
1 year	0	0	0	0	0	1	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
3 years	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**0**	**1**	**0**	**2**	**0**	**0**	**2**	**0**	**1**	**0**	**0**	**0**	**1**	**1**	**0**	**1**
Within State Control	0	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0
Exigent Circumstance	0	0	0	2	0	0	0	0	1	0	0	0	1	1	0	0
Prisoner Postpone	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	1

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BARTON	CASSADY	CASTRO	CHAPPELL	DOBBS	GROUNDS	LABAHN	LONG	MINOR	ROBERTS	RUFF	SCHNEIDER	SHARRIEFF	TAIRA	BPH HQ	Total CMR Hrg
Suitability Hrg Total	**28**	**32**	**17**	**24**	**22**	**27**	**15**	**17**	**29**	**28**	**31**	**22**	**31**	**25**	**24**	**106**	**478**
Grants	9	10	8	9	3	17	1	5	12	14	7	11	13	9	5	0	133
Denials	11	13	7	10	14	9	12	10	9	11	17	10	12	12	16	0	173
Stipulations	4	8	1	3	2	1	1	1	7	0	1	0	4	4	1	0	38
Waivers	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	30	32
Postponements	3	1	1	2	2	0	1	1	1	3	4	0	2	0	2	63	86
Continuances	1	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	3
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	13	13

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

Subtotal (Deny+Stip)	**15**	**21**	**8**	**13**	**16**	**10**	**13**	**11**	**16**	**11**	**18**	**10**	**16**	**16**	**17**	**0**	**211**
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	7	14	7	9	11	5	5	4	10	8	8	7	11	13	13	0	132
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	5	6	1	4	1	5	6	4	5	3	9	1	5	3	4	0	62
7 years	3	1	0	0	4	0	2	3	0	0	1	2	0	0	0	0	16
10 years	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
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**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**2**	**0**	**0**	**0**	**0**	**30**	**32**
1 year	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	16	17
2 years	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	7	8
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	6	6
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)	**3**	**1**	**1**	**2**	**2**	**0**	**1**	**1**	**1**	**3**	**4**	**0**	**2**	**0**	**2**	**63**	**86**
Within State Control	0	0	0	0	0	0	1	0	1	0	3	0	0	0	2	60	67
Exigent Circumstance	3	0	1	2	2	0	0	1	0	3	1	0	2	0	0	3	18
Prisoner Postpone	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1

WHAT TO EXPECT FROM A STATE APPOINTED ATTORNEY

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

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

If you find yourself deciding on using the services of the state-appointed attorney provided by the BPH, there are some limitations you should be aware of, before deciding your attorney was a 'dump truck,' and some actions you have a right to expect as their client. And remember, no matter who is paying the bill, it is the inmate who is the client, not the family.

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

If you plan, through preference or finances, to utilize a state-appointed attorney there are some basic tasks both you and the BPH expect from them. Among those:

- Meet with their clinet at least 45 days before the hearing, in a confidential setting
- Have reviewed the C-file and hearing packet prior to the meeting
- Make sure that any potential communications problems (i.e. language, cognitive issues or hearing) have been identified and remedies applied for both the meeting and hearing
- Bring CDCR Form 1003 (to stip or waive the hearing or change attorneys) with them and see that it is filed, if necessary (see sidebar on Form 1003)
- Identify issues or documentation of possible concern at the hearing
- Inform the prisoner of hisrights and what to expect at the hearing
- They should also respond to client (and family's) letters or calls in a timely manner
- Oh, and did we mention actually showing up at the hearing (yeah, that's been an issue) and actively advocating for the inmate's rights..

Recently, the BPH informed attorneys they (BPH) hope to be able to provide an increase in the stipend provided state attorneys; but they will also be expecting each attorney to meet performance goals.

While all of this is still in the planning stage, you can be sure we're watching, and as the board has indicated they're interested in input, we're happy to oblige.

In the past we've run attorney surveys in newsletters and we thank all who have sent in those surveys. We'll run those again, after a short pause, updated to cover any new developments from the BPH. Sidebar: if you're sending in the survey please observe two caveats: 1) the attorneys we're reviewing are parole attorneys, not the attorney at your trial and 2) please include the NAME of the attorney. Yep, we get

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FORM 1003

BPH Form 1003 is the means by which inmates can request substitution of counsel, usually replacing the state attorney with a privately hired one. It is important to note, if you are contemplating doing this, that this form must be used and all the following requirements met.

- Must be signed by both inmate and private counsel
- Must be submitted at least 45 days prior to hearing date.
- Private counsel must be ready to proceed with scheduled hearing date.
- If submitted within 45 days of hearing, board will deny or approve.
- If submitted during week of hearing, presiding hearing officer will deny or approve request.

Never let any attorney pressure your inmate into a stipulation if that isn't what he/she wants to do. There's a difference between advice and pressure; one is allowed and expected, the other is unethical. While prisoners should listen to and consider an attorney's advice, the ultimate decision is his/hers. As mentioned before, it's the prisoner, not the attorney who is being assessed by the parole panel, and while an attorney can help a lot or hinder some, the ultimate decision of suitability does not rest on the attorney's performance

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BOARD BUSINESS

The last two months of 2018 and the first month of 2019 Executive Meetings of the BPH were, with one interesting exception, fairly mundane, featuring updates on previous actions. That exception was the referral for re-consideration of more than a half-dozen parole decisions made in October and November due to malfunction of the recording system used to prepare transcripts.

The November meeting also saw BPH Executive Director Jennifer Shaffer alert the board to an upcoming significant increase in workload, via the number of hearing scheduled. Due to the influx of third strikers and others now demanding BPH consideration under the expansion of Prop 57 and other laws, Shaffer noted commissioners literally have their work cut out for them, particularly in the next couple of years. One reason, we surmise, for the increase in the number of commissioners recently from 12 to the current 15.

Shaffer also reported to the board and the public on a process meant to streamline hearings through Structured Decision Making. Although not a template or a boilerplate process, Structured Decision Making apparently allows parole panels to, basically, triage various aspects of a hearing, bringing into focus those aspects of an individual's situation that are particularly germane to suitability.

Shaffer noted this process has not been adopted by the BPH, but indicated the administration is continuing to study the process and results and will present further information and training to commissioners in the future. Watch this space.

December's meeting saw the first, and so far, largest, batch of hearings referred for procedural errors because of the recording machinery glitch. Eight hearing decisions, both grants and denials, were vacated by the board because the recorder malfunction precluded the production of adequate transcripts. An additional decision was vacated for the same reason in January.

In a report later during the December meeting, the board was assured new equipment and processes were now in place, which would hopefully preclude future such issues. Those inmates who will see a new hearing as a result of the recording-transcript issues, and the original decision that was vacated were: **Francis Brewer** (denial), **Reggie Davis** (granted), **Levi Ford** (granted), **Jose Garcia** (granted), **Chester Jordan** (granted), **Isadore Piper** (denied), **Sergio Ponce** (granted) and **Terrance Rubin** (denied). In addition, in January **Sergio Martinez** found his grant vacated on the same grounds.

At the December meeting Shaffer announced Commissioner Terri Turner had resigned, after 7 years as a commissioner. First appointed in 2011, Turner, during her tenure on the board, presided at over 2,000 hearings and handed out 700 grants of parole. Turner's spot was almost immediately filled by (now former) Governor Brown, who appointed Excel Sharrieff (see elsewhere for bio).

Notable during the January meeting was a report from FAD head Dr. Cliff Kusaj, on new FAD clinicians hired in recent months, in anticipation of the uptick in hearings. It wasn't just that 10 new FAD members were hired, but more striking was where those individuals had previously been working. Heretofore, a substantial number of FAD clinicians came to BPH via Patton or Atascadero state hospitals. A majority of those recently hired, Kusaj reported, had actually been practicing in several prisons, San Quentin to CCWF. He also noted that during the recently completed FAD training sessions, clinicians heard from paroled lifers, relating their experiences in prison, challenges on reentry, and even on their perceptions of their interviews with FAD clinicians for their CRA reports.

EN BANC, NOVEMBER-JANUARY

After several months of numerous pardon and commutation decisions facing the BPH in the waning months of 2018, the last 2 months of the year, as well as the kick off for 2019 were notable for the decrease in those cases. Although there were still those cases to consider, their numbers were dramatically down from previous months.

In November the BPH recommended the Governor grant pardons to **Tammy Linn, Marlon O'Keith** and **Elizabeth Vasquez**. In December, **Susan Burton**, well known to both the board and those in advocacy for founding A New Way of Life housing and program for women former inmates, also received a thumbs up from the commissioners in her pardon quest. January's meeting was surprisingly void of pardon applications.

Other en banc hearings saw mixed results. A trio of applications for recall of sentence under PC 1170 (e), compassionate release, were indicative of those mixed results, with **Geraldine Darden** and **Runako Magee** being recommended for the process in November, but that relief denied for **Thomas Hightower** in December.

Several inmates granted dates saw those grants reconsidered on the basis of alleged institutional misconduct or new confidential information. In November, grants to **Douglas Collier** and **Donald Dawson** were vacated and new hearings slated. But the news for **Sammy Hernandez** was better, as his grant was affirmed, despite alleged new institutional misconduct. In December **Clark Clyde's** grant was vacated on the basis of alleged institutional misconduct. The grant for **Jamie Van Cleave** was also vacated to comply with penal code requirements, but a previous decision to schedule a rescission hearing for **Mark Mancebo** was reversed yet again, allowing his grant to stand.

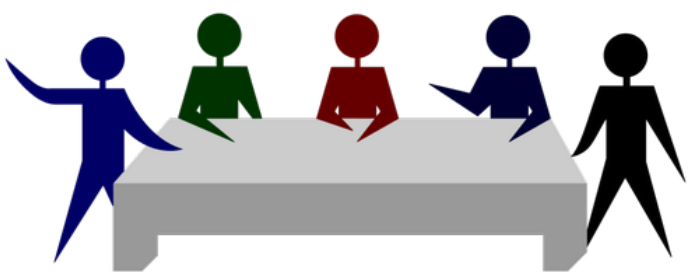
January's en bancs, referred to the board by the BPH chief counsel, were a recurring theme of new confidential information, institutional misconduct and legal compliance allegations, again, with mixed results. Grants for **Danny Fossinger**, **Cesari Hardiman** and **Darrell Williams** were all vacated, under the allegations of misconduct or confidential information.

Hardiman's case is particularly interesting, as the reason for the referral and reversal was the discovery that two of the support letters read into the record at his hearing were, in fact, forgeries. Although both Hardiman's attorney and the creator of the phony letters, a relative of Hardiman, affirmed the inmate was not aware the documents were not true, the board nonetheless voted to vacate the date and explore his suitability again. Surely a cautionary tale for future hearings.

Denials for **Christopher Kazas**, **Cresencio Quiroz** and **Kevin Thomas** were vacated, reportedly to allow new hearings to comply with the provisions of In RE: Lawrence and the waiver of hearing granted to **Kiet Tran** was rescinded, with a new hearing slated.

Governor referrals to the board in November for **Andrew Rooks** and **Marvin Crosby** provided a split result, with the grant for Rooks being affirmed, while Crosby's grant was vacated, and a new hearing ordered. Governor referrals in January provided a rarity; the Governor referred a denial of parole to the board for reconsideration. **Aaron Sprague**, denied parole but referred for another look by out-going Governor Brown, was that denial vacated and a new hearing scheduled. Notable about this action is the rarity of a denial being reviewed and referred for en banc. While the Governor has the right to review any decision of the parole board, it's hard to find even relatively recent incidents when a Governor felt a denial was improvident. But **Kelly Linsey's** grant, also referred by the Governor, was rescinded.

And lastly, two tie votes considered at the November meeting were decided, again in something of a split. The decision on the parole of **Michael Jackson** continued to be as troublesome for the entire board as for the original parole panel, which produced a tie vote. The first vote of the whole board, the grant parole, failed to garner a majority of the commissioners, who eventually rallied enough votes to deny parole for 3 years. But the tie vote for **Maribel Maldonado** faired better, with the majority voting to grant parole.



COMMISSIONER TURNER EXITS

Commissioner Terri Turner, first appointed to the BPH in 2011 and most recently reappointed in the summer of 2017, retired from the Board in December. Turner, who BPH Executive Director Jennifer Shaffer noted has presided over more than 2,000 hearings, was both a Deputy Commissioner and a parole agent prior to becoming a commissioner.

Turner was known as a genuine presence, striving to make contact with inmates appearing before her, and considering all factors before making her decision. Although her grant rate was in the higher half of commissioners, she was never an easy mark, her experience in dealing with both inmates and parolees serving her well in considerations.

LSA supported Commissioner Turner in her last several confirmation hearings, and while we never completely agreed with all her decisions (nor would be expect to), we give a nod to her willingness to consider all sides and factors and treat all prisoners with dignity and propriety. We're sorry to see her go.

NEWEST COMMISSIONER, ONE OF BROWN'S LAST APPOINTMENTS

Barely a month before his last day in office (that was January 7), now former Governor Jerry Brown made a quick appointment to fill a BPH commissioner seat vacated by the retirement of long-serving commissioner Terri Turner. On December 5 Brown appointed Deputy Commissioner Excel Sharrieff to the board.

Excel Sharrieff, a deputy commissioner since 2017 also served a Sharrieff was lead hearing officer at Amtrak from 2016 to 2017 and the City of Los Angeles from 2015 to 2016. He served as a judge pro tempore at the Los Angeles County Superior Court from 2006 to 2017 and prior to that services Sharrieff was an attorney in private practice from 1999 to 2016.

JERRY BROWN REMAINS CONSISTANT IN REVERSALS

But the negative numbers are at historic lows

The last summation of lifer parole reversals made by (now former) Gov. Jerry Brown om 2018 reveals that, while the number of those reversals is dramatically down, the 'triggers' for reversal by Brown have remained consistent throughout his term. In 2018 Brown reversed a total of 28 grants of parole, out of over 1000 grants, the smallest percentage of reversals in recent memory.

The most striking common factor in the reversals was, again, victimology, or the characteristics of the victims. Of the 28 lifers who saw their dates 'taken' by Brown, 15 had women victims. The gender of the victim has long been one of the primary triggers for Brown's intense scrutiny and wrath. Of the 5 women lifers who were reversed, two were convicted of killing their husbands, while 2 others were convicted of crimes involving their children.

In previous years Brown has included stinging messages in his reversal letters referencing the 'sacred duty' of spouses and parents in protecting their family members, but his reversal missives in this report were more direct and less esoteric. But the vulnerability of victims remained of concern to the end of the former Governor's term. In addition to the factors noted above, 2 other inmates who were convicted in the deaths of children and one whose victim was disabled were reversed, along with one inmate convicted of the killing of a police officer, also long a Brown issue.

Length of commitment nor age at the time of the crime offered much mitigation for the former Governor, as 14 of the reversals were for inmates who fell under YOPH guidelines. Another 14 were over 50 years of age, with 5 of those actually over 80 years old, the oldest being 85. Length of incarceration ranged from 52 to 17 years, most serving in excess of 25 years.

One inmate, granted commutation from LWOP to 25 to life by Brown in 2017, was subsequently granted parole, but reversed by Brown, who noted he did not feel the inmate's insight was sufficient. In fact, insight, either lack of or insufficient, was the most common reason stated by Brown for his decision to reverse. He also called out several individuals for lack of understanding their reasons for criminal actions or, in Brown's view, implausible explanations.

And as we have long noted, the efforts of victims' families to block parole appear to have more impact on the Governor (at least the most recent ex-governor) than the parole panels. In a half dozen of the reversals Brown noted the opposition of victims' family members to the parole grants. There has long been speculation (in which we participate) that the parole panels, held to certain factual standards by laws, are less likely to act on emotion than the Governors, who, under the reversal powers bestowed on them, have a lower legal standard to meet in making these decisions.

And while we don't intend to assign motives to Brown's decisions, it certainly appears he just might hold a grudge, as 6 of the 2018 reversals had been reversed before by Brown, at least one inmate experiencing his third denial. Interestingly, little mention was made in this crop of denial letters of the results of the CRAs, a detail Brown heretofore often relied on.

In all, the reversals in 2018 were encouraging on a couple of fronts; first, the relatively small number of the reversals. At 28 reversals out of 1136 grants, the reversals calculate at about 2.5%--the lowest on record. And the toned-down moralistic tone of the reversals letters was also, shall we say, refreshing.

Where do we go from here? Newly-inaugurated Governor Gavin Newsom, in office some 6 weeks at this writing is a somewhat unknown player. While his first actions were alarming, reversing several grants bequeathed to him by Brown, our sources tell us this is probably an anomaly, brought about by time constraints and some lack of understanding among his legal staff of the California parole process (many of the new Governor's staff were recruited from out of state).

As things go forward, we're aware that legal staff is receiving considerable input from various sources (and we'll be one of them) on the character of California lifers and the prospects for parole. We don't intend to countenance any back-sliding.

THE COMMUTATIONS KEEP ROLLING

Santa wasn't alone in dropping gifts Christmas Eve, 2018. Late in the day on December 24 California Governor Jerry Brown released his latest, last and largest, batch of pardons and commutations, granting pardons to 143 applicants and changing the sentences, via commutation, of 138 current prisoners. That group brings the total number of pardons issued by Brown, during his current 8-year run as Governor, to an astounding 1,189 and commutations to 152, many of those LWOP.

Following up on his pre-Thanksgiving pardon/ commutation package, Brown's just-before-Christmas action brought reaction from both sides of the 'justice' debate, advocates and restorative justice champions hailing the Governor for his progressive actions, while DAs and victims' advocates largely decried the actions, claiming the Governor both re-victimized victims and made the public less safe. Brown, however, saw it differently.

"The atmosphere, the gangs, the hopelessness, sentences that are so long ... the no-exit attitude has made it virtually impossible to have any strong rehabilitative atmosphere. This has given me the interest, where I can, in instilling hope," Brown told the San Francisco Chronicle. The Governor, who, during his first 8 years as California's top elected official, presided over a major change in sentencing in 1977 which provided fixed terms for most felony convictions. Brown has said he would not sign that law today.

"I didn't fully understand the implications of where it would lead," he said, referring to what became mandated lengthy sentences, particularly for gun crimes and second and third strikers. "I thought about the idea of making things clear, certain and fair" with specified sentences for each crime would facilitate both a more just system and reduce crime. "I never thought that when you tell a man that you know when he's getting out, he loses the incentive to transform his life," thus leading to more recidivism, more prisoners and more prison crowding.

Reading through the commutation letters for each prisoner, not only those on the Christmas Eve list, but previous commutation groups, a trend is clear. Brown was making a concentrated effort to impact those who subjected to the harshest sentences. Of the 138 commutation of sentences on Christmas Eve, more than half, 68, were LWOP inmates.

Many of those, as well as others in the commutation list, will come under YOPH guidelines at hearings, as they were under 26 at the time of their crime, the youngest singled out by Brown was 14 at the life crime. Among the 21 women prisoners whose sentences were changed by the Governor, Brown noted many had been the victim of Intimate Partner Battering. He also noted a handful who are now elderly and/or suffering from major medical ailments, severe enough to impact their ability to function in daily life, let alone criminal activities.

Some who will now be going before a parole panel sooner than expected were three strikers and several long-term determinate sentenced prisoners, who were saddled with years amounting to a toe-tag sentence. As we have noted before, in analyzing Brown's reasons for reversing parole grants, one of his triggers was the nature of the victim: women, children and/or other vulnerable individuals. Yet among this group of prisoners, there were several whose crimes involved female or child victims.

Also significant was the notice taken of VNOK opposition to any sentence change. Brown's commutation comments in these cases noted and acknowledged that opposition and the loss and damage to the victims, but pronounced the inmates' positive life change and actions overcame those objections.

In each case Brown laid out both the performance of the individual while in prison, noting those who reformed their lives while under an LWOP sentence, when there was little hope of relief. And while several of those commuted did not have pristine disciplinary records, all have accomplished major changes in their lives while incarcerated.

Perhaps reflecting his Jesuit training and background, Brown told the Chronicle, “From my background, I do believe that redemption is an essential element of being human. Many people in today’s society do not believe in either forgiveness or redemption. They believe that what you do is who you are. That philosophy is not something that I share. I don’t think it’s Christian ... and it does not comport with historical notions of justice.”

Many LWOP inmates, having already served 20 or more years, saw their sentences commuted to 25 to life, giving many of the them a chance at a parole hearing anywhere from right away to a few years. Just under a dozen will be going to hearing much sooner rather than later, Brown specifying in the commutation order that their sentences were changed to time served or sending them to immediate parole.

It should be noted that in changing the sentences of most prisoners finding relief on Christmas Eve the Governor has not thrown open the doors of prisons, allowing lifers and LWOPs to walk free. They still must prove their suitability before the Board of Parel Hearings, and, if granted parole, that decision and inmate must still face scrutiny by the Governor—albeit not Brown.

For a list of those whose sentence was commuted by Brown on Dec. 24, see elsewhere in this issue.

DECEMBER COMMUTATIONS

Prisoner name, original sentence length, commuted sentence

Patrick Acuna; LWOP; 25 to life; Eric Alvardo; 40 to life; 15 to life; Deryl Armstrong; LWOP; 39 to life; Blancha Avalos; 21 years; time served; Richard Bach; LWOP; 34 to life; Geraldo Bascomb; 27 to life; 15 to life; Daniel Batchelder; 15 years; eligible for parole Jan. 1, 2020.

Charles Batiste; LWOP; 29 to life; Joseph Bell; LWOP; 25 to life; Sean Benge; LWOP; 25 to life; Jessie Biggs; LWOP; 36 to life; John Butterfield; LWOP; 37 to life; Roy Camenish; LWOP; 37 to life; Michael Caputo; LWOP; 35 to life; Casey Carroll; LWOP; 25 to life; Daniel Carter; LWOP; 25 to life; John Cebreros; LWOP; 38 to life; Janine Chandler; 50 to life; 17 to life.

Monica Chavez; LWOP; 21 to life; Ceasar Cisneros, Jr.; 27 to life; 10 to life; Lamarr Cooks; LWOP; 27 to life; Manuel Cuevas; 25 to life; 15 to life; David Dougall; LWOP; 23 to life; Mario Duran: LWOP; 26 to life; Jose Esquevero; 27 to life; 22 to life; Roberto Esquivel; 48 to life; 22 to life; Huey Ferguson; LWOP; 26 to life; Robert Figueroa; LWOP X 2; 30 to life.

Michael Fischer; 35 to life; 30 to life; Gene Flack; LWOP; 29 to life; Gustavo Flores; 40 to life; 27 to life; Kelly Flynn; 33 to life; 22 to life; Palmira Galache; LWOP; 17 to life; Timothy Galvan; 77 to life; 20 to life; Vincente Godoy; LWOP; 20 to life; June Gravlee; LWOP; 30 to life; Earl Griffin; LWOP; 25 to life; Jose Gutierrez; 40 to life; 15 to life.

Anthony Guzman; LWOP; 38 to life; Jeffry hall; LWOP; 26 to life; Ricky Hamilton; 40 to life; 15 to life; Michael Hansen; 40 to life; 19 to life; Ceona Harvey; LWOP; 20 to life; Lloyd Herbert; LWOP; 23 to life; Janett Hernandez; LWOP; 17 to life; Jesus Hernandez; 36 to life; 21 to life; Ryan Hill; 28 to life; 17 to life; William Hoffman; LWOP; 20 to life; Jason Holland; LWOP; 30 to life.

Gerald Holton; LWOP; 25 to life; Daniel Hopper; 50 to life; 20 to life; Johanna Hudnall; 36 years; time served; Fateem Jackson; 36 years; immediate parole hearing; Tyrone Jackson; LWOP; 40 to life; Angel Isarraras; 59 to life; 17 to life’ Dean Jacobs; LWOP; 25 to life; Howard James; LWOP; 33 to life; Daniel Johnson; LWOP; 25 to life; Charles Jones; LWOP; 26 to life; Philippe Kelly; 40 to life; 20 to life.

Adnan Kahn; 25 to life; 15 to life; James King; 30 to life; 15 to life; Karen Kirksey; 14 years; release on parole; Richardo Lagunas; LWOP; 25 to life; Ventrice Laster; 48 to life; 25 to life; Tyrell Lee; 30 to life; 15 to life; Timothy Lobertto; 23 years; immediate parole hearing; Marcella Lunsford; LWOP; 15 to life; Richard Manchego; 40 to life; 13 to life; John Manning; LWOP; 25 to life; Joseph Marshall; 79 to life; 20 to life.

Christian Martinez; LWOP; 15 to life; Christina Martinez; LWOP; 13 to life; Leugardo Martinez; LWOP; 20 to life; Rosa Martinez; 13 years; hearing in July, 2020; Demetrie Mayfield; LWOP; 36 to life; Corey McNeil; 53 to life; immediate hearing; Geraldine Meyers; 40 to life; 15 to life; Esteban Nerey; LWOP; 25 to life; Kiera Newsome; 60 to life; 20 to life.

Thaisan Nguon; LWOP; 18 to life; Heng Nguyen; LWOP; 25 to life; Si Nguyen; 48 to life; 16 to life; Tin Nguyen; LWOP; 20 to life; Walter Oatis; 22 to life; 20 to life; Armen Oganyan; 32 to life; 13 to life; Kitiona Paepule; LWOP; 30 to life; Robert Pepe; 25 to life; 11 to life; Michael Petty; 19 years; immediate hearing; Lynda Pichel; 33 to life; 16 to life.

Abraham Preciado; LWOP; 25 to life; Cynthia Purcell; LWOP; 28 to life; Dianna Preston; LWOP; 16 to life; Thomas Purscelley; 40 to life; 15 to life; Dennis Reese; LWOP; 23 to life; Richard Richardson; 47 years; immediate hearing; Genaro Rios; LWOP; 37 to life; Rick Rivera; 42 to life;20 to life; Curtis Roberts; 50 to life; time served; Alfred Rodriguez; 50 to life; 15 to life; Risala Rose-Aminifu; LWOP; 27 to life.

Carl Saldano; 56 to life; 22 to life; Carlos Sanchesz; 45 to life; 19 to life; Michelle Scott; LWOP X 2; 30 to life; Tejinder Singh; 32 to life; 20 to life; Clyde Slaughter; LWOP; 20 to life; Richard Snyder; 35 to life; 10 to life; Gabriella Solano; LWOP; 20 to life; Bonset Soun; LWOP; 28 to life; David Spivey; 58 to life; 28 to life.

David Spivey; 58 to life; 15 to life; Robert Staedel;LWOP; 30 to life; Nashawn Stewart; 35 to life; 22 to life; Ngne Tang; 35 to life; 22 to life; Mannie Thomas III; 32 to life; 14 to life; Alvin Timbol; 25 to life; 14 to life; Laura Troiani; LWOP; 35 to life; Jesus Trijullo; 50 to life; 15 to life; James Tucker, LWOP; 33 to life; John Vann; LWOP; time served; Matthey Vargas; 52 to life; immediate hearing.

Miguel Vigas; LWOP; 20 to life; Anthony Wafer; LWOP; 23 to life; Ronald Wagner; LWOP; 29 to life; Demetrius Walton: LWOP; 23 to life; Jeffrey Ward; LWOP; 20 to life; Thomas Warren; LWOP; 23 to life; Charles Weyant; LWOP; 37 to life; James White; LWOP; 38 to life; Taewon Wilson; LWOP; 24 to life; Linda Woo; 25 to life; 13 to life; Nicky Woodall; LWOP; 31 to life.

A WORD ON AMENDS

One of the earliest programs LSA/CLN offered to inmates was The Amends Project, assistance in writing an appropriate and impactful apology letter to your victims and/or their family members. It's still a popular program, in fact, so popular we often get submissions without the program.

For the record, The Amends Project is a 2-hour workshop we bring to you—your yard, your prison, in person. Usually we're invited by a self-help group, but we're happy to come and speak to all the lifers, LWOPs and long-term determinate inmates in any prison, sometimes at the invitation of the CRM.

Once we've presented the workshop, the remaining part of the program is by correspondence; you send us your amends letters, we vet them, and re-

turn them to you for rethinking and re-writing, if needed. Once you've hit the mark, we'll send you a certificate of accomplishment and your successful letter, one you can take to the parole board knowing you haven't made any inadvertent missteps or awkward statements that might not convey the authentic remorse you are offering. And we can tell.

So, to those who are simply sending us your letters to critique, some pretty good, some not so much, without benefit of the workshop—please stop. We're happy to bring the whole program to your prison and then handle your letters. But it takes time and money (stamps) to respond to letters from those who haven't been through the program. And, regardless of how good your letter might be, if you aren't a registered participant in a past workshop, your letter won't be considered.

Want help with your letter? Then request our presentation. And start now, because our calendars are getting pretty busy, especially for those prisons that require travel time from our home base in Sacramento. And while you're considering asking the The Amends Project, keep in mind, the Connecting the Dots presentation is a good first step in the process—we'll come to you for that too.

Have your sponsors or CRM contact us and we'll work out a schedule. Email is the best way to handle bookings, so we'll include our email address here, so you can pass it along. Hope to see many of you in the coming weeks and months—we spend nearly every weekend and several weeknights in prison—and we wouldn't have it any other way.

Contact us at: staff@lifesupportallinace.org

PAROLE CONSIDERATION FOR THIRD STRIKERS UNDER PROP. 57

Consolidated for our readers in simple language the provisions contained in the new regulations for parole consideration for non-violent third strikers under Prop. 57. This summary is not intended as a legal resource, but offered to make the convoluted language more readable and understandable.

Background

The California Department of Corrections and Rehabilitation (CDCR) recently adopted emergency regulations that detail, among other matters, which inmates will now be eligible for parole consideration by the Board of Parole Hearings (BPH). This includes inmates serving Three Strike indeterminate sentences. The BPH estimates that between 3,000 and 4,000 nonviolent third strikers could be affected – meaning they would now be eligible to go through an initial public safety screening process, followed by a parole board hearing before any decision is made to release them. In short, the CDCR regulations confirm that Proposition 57 extends to all nonviolent state prisoners, including third strikers, and that they are now eligible for parole consideration upon completion of the full term for their primary offense.

Proposition 57 was approved by California voters in 2016. It added a provision to California's Constitution that states: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (Cal. Const., art. I, section 32, subd. (a)(1).) The full term for the primary offense is defined as "the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." Proposition 57 also directed CDCR to adopt regulations "in furtherance of [Section 32(a)]" and "certify that these regulations protect and enhance public safety." (Cal. Const., art. I, section 32, subd. (b).)

CDCR initially adopted regulations that stated that nonviolent inmates were generally eligible for early parole consideration, but excluded non-violent third strikers. CDCR contended in its statement of reasons accompanying the regulations that "life term inmates remain ineligible for parole consideration because the

plain text of Proposition 57 makes clear that parole eligibility only applies to determinately sentenced inmates, and furthermore, public safety requires their exclusion." The exclusion of third strikers from Proposition 57 was challenged in court. On September 7, 2018, the Second District Court of Appeal concluded that there was "no question" that the voters who approved Proposition 57 intended for those serving Three Strikes indeterminate sentences to be eligible for early parole consideration. It directed CDCR to void and repeal portions of the regulations inconsistent with its ruling, and also directed CDCR to make any further conforming changes necessary to "render the regulations adopted pursuant to California Constitution, article I, section 32(b) consistent with section 32(a) and this opinion." CDCR chose not to appeal from this decision. It has promulgated emergency regulations in compliance with the decision. The regulations went into effect January 1, 2019, portions of which are described and highlighted below.

Eligibility Review

The BPH generally describes its nonviolent offender parole review process on its website as follows: "A nonviolent offender parole review is a process in which the California Department of Corrections and Rehabilitation refers certain nonviolent offenders to the board for review and possible release, once the inmate has served the full term of his or her primary offense and has passed a public safety screening. Inmates are reviewed for release based on their criminal history, a review of their institutional records, and after consideration of input received from the inmate, victims, victims' families, and the district attorney's office that prosecuted the inmate. A decision is rendered after an administrative review of relevant and reliable documents; no hearing is conducted."

Article 2 of the emergency regulations provides that indeterminately-sentenced nonviolent offenders shall be eligible for a parole consideration hearing. Prior to any hearing, the inmate will go through an eligibility review to determine whether the inmate is eligible for a parole consideration hearing. Once an inmate is determined to be eligible for the process, CDCR will determine when the inmate will have served the full term of his or her primary offense. This date is called the inmate's nonviolent parole eligible date (NPED). Importantly, Proposition 57 defines the full term of the primary offense as the longest term imposed by the court, minus imposition of an enhancement, consecutive sentence, or alternative sentence. For third strikers, this means that CDCR must look solely at the full term of the primary offense, and disregard the "alternative sentence" mandated under California's Three Strikes law. Because the full term of the primary offense will in perhaps most cases be significantly less than the mandated state prison term of at least 25 years to life for third strikers, this now allows for parole consideration for as many as 4,000 nonviolent third strike inmates. These inmates were previously ineligible for parole consideration.

Inmates who are screened will be provided written notice from CDCR of their eligibility and their NPED. Eligibility determinations are subject to appeal by an inmate through CDCR's inmate appeals process. The eligibility review procedures are detailed in section 3496 of the emergency regulations. If determined eligible, the inmates will go through a second public safety screening and referral process detailed in section 3497 of the regulations. This is to occur 180 days prior to the NPED. Screening under section 3497 looks largely to the inmate's history of compliance with prison rules, with a focus on serious rules violations such as assault or battery upon a peace officer, threats to kill or cause serious bodily injury, and other rules violations specifically detailed in the regulations.

Indeterminately-Sentenced Nonviolent Offender Defined

The regulations specify who will now be eligible for parole consideration. It does so largely by defining what is considered "violent" for purposes of qualifying as a nonviolent offender. Thus, section 3495, subdivision (a), of the emergency regulations defines an "indeterminately-sentenced nonviolent offender" as an inmate sentenced to an indeterminate term and for whom **none** of the following is true:

(1) The inmate is condemned to death;

(2) The inmate is currently incarcerated for a term of life without the possibility of parole;

(3) The inmate is currently incarcerated

for a term of life with the possibility of parole for a "violent felony;"
(4) The inmate is currently serving a determinate term prior to beginning a term of life with the possibility of parole for a "violent felony;"
(5) The inmate is currently serving a term of incarceration for a nonviolent felony offense after completing a concurrent determinate term for a "violent felony;"
(6) The inmate is currently sentenced to a "violent felony" for an in-prison offense; or
(7) The inmate has completed an indeterminate term of incarceration and is currently serving a determinate term for an in-prison offense.

A "violent felony" is a crime or enhancement as defined in Penal Code section 667.5, subdivision (c). (Section 3495, subd. (b).) Although not expressly characterized as a violent felony, the emergency regulations still provide that nonviolent inmates who were convicted of sexual offenses that currently or will require registration as a sex offender under the Sex Offender Registration Act are not eligible for parole consideration. (Section 3491, subd. (b)(3).)

Impact

NEW VISITATION REGULATIONS SIMPLIFIED

Consolidated for our readers in simple language, here are the new family visiting regs, officially, though apparently not practically, in effect. This summary is not intended as a legal resource, but offered to make the convoluted language more readable and understandable.

Background

The California Department of Corrections and Rehabilitation (CDCR) recently adopted regulations that detail the process by which inmates convicted of violent offenses may now be eligible for family visits provided the inmate has demonstrated sustained, positive behavior as defined.

SB 843 was enacted into California law in 2016. Its language provided: "Inmates shall not be prohibited from family visits based solely on the fact that the inmate was sentenced to life without the possibility of parole or was sentenced to life and is without a parole date established by the Board of Parole Hearings." (Pen. Code, §6404.) CDCR's new regulations now establish and implement rules extending family visits to lifers. The regulations went into effect January 15, 2019, major portions of which are described and highlighted below.

Family Visits

Family visits are extended overnight visits, provided for eligible inmates and their immediate family members, commensurate with institution security and space availability. In general, each institution shall provide all necessary accommodations, except for food, at no cost to the inmates and their visitors. Only those immediate family members, including registered domestic partners, are authorized for family visits. When a verified foster relationship exists between an inmate and another person, by virtue of being raised in the same foster family, the person may be approved for family visiting with the prior approval of the institution. Family visiting is a privilege and eligibility for family visiting shall be limited by the assignment of the inmate to a qualifying work/training incentive group as outlined in section 3044 of the regulations.

Eligibility for Violent Offenders

Family visits are generally not permitted for inmates convicted of a violent offense when the victim is a minor or family member. The new regulations provide for an exception, and permit such visits under specified circumstances. The criteria by which inmates convicted of violent offenses will be evaluated looks first to whether they committed violent offenses when they were minors, or when they were

adults. Thus, an inmate convicted as a minor of a violent offense "*shall* have eligibility"; and an inmate convicted as an adult "*may* be eligible" for family visiting. (Cal. Code Regs, title 15, § 3177, subds. (b)(1)(B) & (C).) In both cases, the determination is made by a classification committee that looks to whether an inmate has demonstrated "sustained, positive behavior."

The regulations set forth the type of evidence that will be considered by the classification committee in determining that an inmate has demonstrated "sustained, positive behavior." For inmates convicted as minors, the committee will look for no serious rules violations over the past five years; and for inmates convicted as adults, the committee will look for no serious rules violations over the past ten years. Other factors considered by the classification committee in making the eligibility determination are as follows:

> [D]ocumented participation in self-help groups, e.g., Anger Management, Narcotics Anonymous, Alcoholics Anonymous. The classification committee shall consider the circumstances of the offense involving a minor or family victim in determining whether the inmate poses a threat of harm to visitors during a family visit. In making its determination, the classification committee shall consider, but is not limited to, arrest reports, probation officer reports, court transcripts, parole revocation transcripts. (*Ibid.*)

Exclusions

Inmates who committed sex offenses, regardless of whether they were minors or adults at the time of their offense, are excluded from eligibility for family visits. Inmates who fall within other certain defined categories are also excluded, including those who are:

> A. Designated Close Custody;
>
> B. Designated a condemned inmate;
>
> C. Assigned to a reception center;
>
> D. Assigned to an Administrative Segregation Unit;
>
> E. Assigned to a Security Housing Unit;
>
> F. Designated "C" status;
>
> G. Guilty of one or more Division A or Division B offenses within the last 12 months; or
>
> H. Guilty of distribution of a controlled substance while incarcerated in a state prison, under subsection 3016(d). Loss of family visiting (overnight) in accordance with subsection 3315(f)(5)(H).

Disciplinary Action – Serious Rule Violations

Regulation section 3315 relates to serious rule violations. It sets forth inmate conduct that is classified as serious. It also details the investigatory and disciplinary hearing processes, and the discipline imposed for serious rule violations, including loss of privileges such as family visiting. The new regulations contain specific language relating to violation of rules relating to distribution and use of controlled substances, controlled substance testing, and possession of certain contraband. Regulations subsections 3315(a) through 3315(f) are otherwise largely unchanged.

Distribution of a Controlled Substance. Regulation subsection 3016(d) provides that inmates shall not distribute any controlled substance. For a violation of subsection 3016(d), "there shall be a loss of visits for one year to be followed by non-contact visits for two years." (Cal. Code Regs, title 15, § 3315, subd. (f)(5)(H).) It further provides:

> In addition, the following loss of family visiting (overnight) shall apply upon conclusion of the non-contact visiting restriction:
>
> 1. Loss of family visiting (overnight) program for three

years for first offense.

2. Loss of family visiting (overnight) program for seven years for second offense.

3. Permanent exclusion from family visiting (overnight) program for third offense.

Controlled Substance Use. Regulation subsection 3016(a) provides that inmates shall not "use, inhale, ingest, inject, or otherwise introduce into their body; any controlled substance, medication, or alcohol, except as specifically authorized by the institution's/facility's health care staff." Regulation subsection 3290(d) provides that "[i]nmates must provide a urine sample when ordered to do so pursuant to these regulations, for the purpose of testing for the presence of controlled substances or the use of alcohol." For a violation of subsection 3016(a), with the except of alcohol violations, or for a violation of subsection 3290 (d), there shall be loss of visits to be followed by non-contact visits and other restrictions as follows:

1. Loss of visits for 90 days, to be followed by non-contact visits for 90 days and loss of family visiting (overnight) program for one year upon conclusion of the non-contact restriction for the first offense.

2. Loss of visits for 90 days, to be followed by non-contact visits for 180 days and loss of family visiting (overnight) program for three years upon conclusion of the non-contact restriction for the second offense.

3. Loss of visits for 180 days, to be followed by non-contact visits for 180 days and loss of family visiting (overnight) program for five years upon conclusion of the non-contact restriction for the third offense.

Contraband. Regulation subsection 3006(a) provides: "Inmates may not possess or have under their control or constructive possession any weapons, explosives, explosive making material, poisons or any destructive devices, nor shall they possess or assist in circulating any writing or voice recording which describes the making of any weapons, explosives, poisons, destructive devices, or cellular telephones or wireless communication devices capable of making or receiving wireless communications." Regulation subsection 3006(c)(20), includes within the definition of contraband: "Any cellular telephone or wireless communication device accessory and/or component including, but not limited to, a subscriber identity module (SIM card), memory storage device, cellular phone battery, wired or wireless headset, and cellular phone charger."

For a violation of regulations subsection 3006 (a) and 3006(c)(2), there shall be a loss of family visiting as follows:

1. Loss of family visiting (overnight) program for one year for first offense.

2. Loss of family visiting (overnight) program for three years for second offense.

3. Loss of family visiting (overnight) program for five years for third offense.

(Cal. Code Regs, title 15, § 3315, subd. (f)(5)(Q).)

Common Questions

Common questions include how do the new regulations affect inmates whose victim was a minor, or who have domestic violence charges, escape charges, or old distribution charges. Regulation subsection 3177(b)(1)(B) and (C), specifically provides for eligibility for those inmates whose victim was a minor or a family member. This includes domestic violence charges. The classification committee will make inquiry into the circumstances of the offense involving a minor or family victim in determining whether the inmate poses a current threat of harm to visitors during a family visit. It will also look at the inmate's participation in self-help groups, including Anger Management, NA or AA, in determining whether the inmate has demonstrated sustained, positive behavior.

Escape charges would certainly be evaluated as a serious rule violation, if not a basis for exclusion where the inmate by virtue of an attempted escape falls into an excludable designation/assignment category. (Cal. Code Regs, title 15, § 3177, subd. (b)(2).)

Finally, the regulations specifically address distribution charges, factoring in the number of offenses in determining the period one must wait before being considered for eligibility for family visits. (Cal. Code Regs, title 15, § 3315, subd. (f)(5)(H).) The classification committee will likely consider the time that has elapsed since the offense as well the regulations in making initial eligibility determinations.

Operation

The regulations are currently in effect. The Final Statement of Reasons for the regulations indicate that they will benefit CDCR staff, inmates, and the public by ensuring that CDCR is in compliance with the new state law, Penal Code section 6404. The regulations are also intended to promote positive behavior by providing the opportunity to gain eligibility for family visits that former regulations did not provide. The revisions to the eligibility criteria for family visits is anticipated to reduce violence, decrease the level of contraband, and promote an atmosphere of positive behavior and self-improvement to better prepare an inmate for successful release and/or rehabilitation.

VISITING: THE WAIT GOES ON AND ON AND ON

New regs effective Jan. 15, 2019 but prisons seem unaware.

After what already seems an unconscionably long wait, new regulations reportedly designed to open up family visits to more lifers and LWOP inmates (and other DLS inmates as well) were officially blessed as legal and fitting by the Office of Administrative Law on January 15, 2019. This, after being introduced in December of 2017, having gone through an extended public comment period culminating in a 'public hearing' in February 2018 and a seemingly un-ending review and extension of deadlines by CDCR and the afore mentioned OAL.

Word finally received via the office of Sec. of Corrections Ralph Diaz that the regs were approved first brought a sigh of relief (as the regs were said to be immediately effective), which quickly turned into a frustrating series of rejections by individual prisons. Although CDCR Headquarters in Sacramento seemed to believe all was well and the regs were being implemented, new family visiting applications (or reapplications under the provisions of the new regs) being accepted and processed.

But, oh, not so. Since the day of the supposed implementation LSA offices have been deluged with calls, emails, even text messages and letters from inmates letting us know nearly every prison from Donovan to Solano apparently hadn't received the word. Counselors, who under the new regs are not the final arbitrator of who is approved and who isn't, claim they haven't heard any news, there are no new regs, nothing has changed and don't bother us now. If you're experiencing any of these, or other family visiting problems, bear with us a little longer.

We asked for definitive information from Sacramento and after meeting with Sec. Ralph Diaz and his staff we've been assured all prisons will be completely implementing the new regs by March 6. Apparently, that old demon, labor issues reared it really ugly head again, and while no one is opposing the new regs, procedures involving labor and union issues are sacrosanct, and in this case, weren't followed.

Diaz and staff are intent, and sincere, in making sure all eligible lifers and LWOPs get a chance at family visits, recognizing both the unifying power of those visits, and the powerful 'carrot' visits can be in pris-

oner behavior. All prisons are receiving training on implementing the new regs, and while Diaz indicated he would expect each prison to bring those new rules on line as they individually receive training, he is adamant that all should be on board by the March deadline.

FIRST LOOK AT EARLY LEGISLATIVE BILLS

Although the 2019-2020 legislative session is barely underway, a trio of bills affecting prisoners, particularly lifers, have already been introduced. It will be some time before these, and any other bills yet to be introduced, make their way through the process, but here's a first look at some of the potential changes.

AB 32: This bill would prohibit the Department of Corrections from entering into or renewing a contract after January 1, 2020, with a private, for-profit prison to incarcerate state prison inmates. The bill would also prohibit, after January 1, 2028, a state prison inmate or other person under the jurisdiction of the department from being incarcerated in a private, for-profit prison facility. This would include the current 'community corrections' facilities.

AB 45: Under current law, inmates are charged a $5 co-pay for medical visits, which the Secretary of Corrections is authorized by law to collect. Indigent inmates are not charged. This law would repeal that authorization, and thus the required co-payments for inmates seeking medical attention.

SB 136: Existing law imposes an additional 3-year sentence for each prior separate prison term served by a defendant for a prior or current violent felony offense was a violent felony. For other Felonies, existing law imposes an additional one-year term for each prior separate prison term or county jail felony term, with some specific exceptions. This bill would delete the provision that requires an additional one-year term. It does not appear to be retroactive, but it's early days yet, so amendments are possible.

A few other bills offer some interesting possible impacts on the current (and future) prison population. Among them:

SB 144: Currently various fees for administering probation and diversion programs, collecting restitution orders, processing arrests, administering drug testing, facilitating medical visits, sealing or expunging records, and basically just incarcerating an inmate can be assessed to that inmate. This bill would state the intent of the Legislature to enact legislation to eliminate the range of administrative fees that agencies and courts are authorized to impose to fund elements of the criminal legal system, and to eliminate all outstanding debt incurred as a result of the imposition of administrative fees. How this would impact restitution, and how far retroactive it would be remains to be outlined.

SB 132: States the intent of the Legislature to enact legislation to ensure that transgender people in custody have equal rights and protections and to help protect the human dignity and safety of all people in custody.

SB 141: Would allow CDCR to refer indeterminately sentenced inmates (lifers) to the State Department of State Hospitals for evaluation to determine if that individual qualifies as a sexually violent predator. That referral would be made less than 6 months prior to any scheduled release date (or most likely as soon as a parole grant might be made). This process is already in place for those serving a determinate term or whose parole has been revoked.

And finally, a bit of a head-scratcher:

SB 120: This bill would state the intent of the Legislature to enact legislation to ensure public safety. (One would think this would be obvious, and not require specific legislation to codify that intent; however, perhaps some legislators are concerned lest the public think their lawmakers are 'soft on crime.')

TRAVELING THROUGH ANGER TO PEACE

It's not possible to go through life without injury/hurt from people, sometimes those closest to us. And it's a basic human response to react, even lash out, in anger and disappointment when someone hurts us. Lashing out in ways other than words often leads to criminal act.

It's long been recognized that impulsivity and anger, one fueling the other, are often factors in crimes. When anger rises, we're left with a number of choices:

ignore the incident, which is seldom healthy
lash back immediately or slowly, through words or deeds
hold a grudge, to be dealt with later
put the blame totally on the other person
maintain, to others and ourselves, our total innocence and righteousness when returning the hurtful act with unkind and damaging words or actions

Or. Take a few simple steps to ease the negativity, learn from the experience and continue to grow in rehabilitation.

Forgiveness can provide peace of mind, take the sting out of anger and relieve you of that intense need to 'get back.' Forgiveness is simple, but not easy and using it successfully depends entirely on how much we want to heal and learn how to handle difficult situations, people and events.

Consider these options:

How many times have we been told by parents or people in authority that life isn't fair? Don't expect fairness.

Take blame out of the picture. If one chooses to remain in this mind space, variations of the same problem will continue to surface until we make the decision that "enough is enough". Our happiness and peace of mind is our responsibility - totally. To continue to place blame keeps us trapped in a cycle that is very difficult to break free from.

Hurtful incidents are seldom random, but usually part of a pattern of thought and action. Holding onto anger, bitterness and resentment takes an incredible amount of personal power and energy from us and keeps us in that pattern of anger, hurt, retribution—and staring the cycle again.

Never regard the adversity simply as punishment; look for the opportunity to learn. It may arrive as an "aha" moment or gradually over a period of time, but eventually we will notice and understand that a change in some aspect of our life is necessary. It is human nature to cling to the familiar, even if causes hardship and misery.

Measure the cost of holding onto resentment and anger as opposed to the benefit of learning to let go, beginning to heal and finding some peace within ourselves; the choice is always ours.

Certainly we are going to make many choices in life, some of them may be (or may have been) poor decisions but they are ours to make and they are essential to our learning. How quickly or slowly we "catch on" determines our progress in life and the length of time we remain in a place of discomfort, physical or mental.

A crucial point to remember is that there are no fast and easy methods when ridding ourselves of the emotional baggage that comes with being wronged and wounded, and responding in kind. But instead of stewing in your resentment and attracting negativity, try letting it go, because it no longer serves your best interests.

Lastly, and probably most important is forgiving ourselves. Hand in hand with anger and bitterness is guilt—that we, also, have hurt and damaged. Guilt can be just as damaging to our emotional and mental well-being as hate and rage, so we need to exercise the same forgiveness to ourselves that we would to others, whether or not others forgive us.

We all must take our share of responsibility. But we also have to accept that the past cannot be changed, no matter how much we wish it to be. Make an honest and appropriate effort to make

amends, but also begin the process of forgiving ourselves. Nobody can do that for us. Acknowledging the reality of the past, the change of the present and future is not a sign of weakness or avoidance, but signs of great strength and growth.

In school, you learn the lesson and then take the test. In life, you take the test and then learn the lesson. To quote the Dalai Lama, "The period of greatest gain in knowledge and experience is the most difficult period in one's life."

WE REGRET TO INFORM YOU….

As hard as we've tried to avoid it, the time has come to announce a change. Unlike California Lifer Newsletter's smaller, sister publication, Lifer-Line, which comes to prisoners and other interested parties free of charge, CLN has always been a subscription only publication. This is largely because of the size and expense of production.

Usually about 50 pages and sent directly to prisoners via US Postal Service, each publication of CLN costs LSA roughly $2,500; hence the necessity for paid subscribers. Heretofore we have always provided two copies of each CLN issue to prison libraries, where hopefully more inmates, who might not be able to afford the nominal subscription fee of $35 per year, could access the publication and make use of the court case analysis therein.

But. And there's always a but. We often hear from prisoners in many institutions that CLN never seems to reach the library. We're not sure what the problem is; the mail room (perish the thought), staff unsure where to send the publication or just mystical disappearance. But it appears CLNs often don't arrive at the intended destination. And while this is irritating, the crowning glory, so to speak, is the cost to our donation-driven organization of printing and extra 70+ copies and the expense of mailing those copies. It is not inconsiderable and puts a strain on our always tight budget.

So, with regret, we've arrived at the conclusion that we can no longer send free copies to each institution. To be fair, some prisons, using the prison library budget, have actually paid for subscriptions, and those seem to arrive intact. So, going forward, those who want to access CLN sans personal subscription, should urge their institutional librarian to contact us for subscription rates.

Yes, we'll cut prisons a deal—no, not as good as the one individual prisoners get, but a deal nonetheless. The decision wasn't taken lightly, but with great regret. But after careful consideration, it appears CDCR and the State of California have deeper pockets than LSA. And given the free services we routinely provide to CDCR, perhaps asking the department to provide this resource to prisoners isn't out of line.

So, if you'd like to continue to see CLN in your prison's library, let those controlling the purse strings know. We can be contacted by phone, email or mail, and will be happy to discuss rates for institutions, including package deals for several copies to a single institution.

Have your prison librarian contact us: (916) 402-3750; lifesupportalliance@gmail.com or PO Box 277, Rancho Cordova, Ca. 95741.

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