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.*

## CDCR REGULATION DENYING PROP. 57 RELIEF

## TO REGISTERED SEX OFFENDERS OVERRULED

***In re Gregory Gadlin***

CA2(5); No. B289852
CA Supreme Ct. No. **S254599**
March 11, 2019

This case includes the following issue: Under Proposition 57 (Cal. Const., art. I, § 32), may the California Department of Corrections and Rehabilitation categorically exclude from early parole consideration all prisoners who have been previously convicted of a sex offense requiring registration under Penal Code section 290?

CLN has reported numerous published cases, reaching opposing conclusions, on this hot topic. All earlier decisions are presently on review and hold pending the outcome of this lead case. The status in the CA Supreme Court is that oral argument was held on October 7, 2020, with specific attention requested of the parties to "be prepared to discuss whether the issue presented in this case regarding inmates with prior convictions requiring registration applies equally to inmates incarcerated for current nonviolent convictions requiring registration."

Following oral argument and submission, the Court then requested supplemental briefing on the question, "Did the California Department of Corrections and Rehabilitation exceed its authority under article I, section 32 of the California Constitution by promulgating regulations excluding from nonviolent offender parole consideration inmates currently convicted of nonviolent offenses requiring registration pursuant to Penal Code section 290?"

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**CALIFORNIA LIFER NEWSLETTER**

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***REVIEWED IN THIS ISSUE:***

*In re Gregory Gadlin*
*In re Richard Nelson*
*P. v. Joseph Bentley*
*P. v. Freddie Cole*
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*P. v. Gene McCallum*
*PROPOSITION 57*
*P. v. Jesus Lizarraga*

Briefing and replies to the above supplemental question were filed on October 26, 2020, and the matter remains submitted awaiting the Court's ruling. CLN will report the Supreme Court's decision.

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

***In re William Palmer ("Palmer II")***

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

This case is fully briefed, and oral argument was heard on November 3, 2020. CLN will report the Supreme Court's decision.

## CDCR ORDERED TO REDUCE POPULATION AT SAN QUENTIN BY HALF, TO MITIGATE COVID VIRUS PROPAGATION

***In re Ivan Von Staich***

--- CA5th ---; CA1(2); No. A160122
CA Supreme Ct. No. **S265173**
October 27, 2020

In a published decision, the Court of Appeal granted Ivan Von Staich's habeas petition with the following summary order.

> The writ is granted. Petitioner shall immediately be removed from San Quentin State Prison by transfer to a CDCR facility that is able to provide the necessary physical distancing and other measures to protect against COVID-19, or to another placement meeting these criteria. Respondents are also ordered to expedite the removal from San Quentin State Prison-by means of release on parole or transfer to another correctional facility administered or monitored by CDCR-of the number of prisoners necessary to reduce the population of that prison to no more than 1, 775 inmates. If necessary to achieve this reduction, respondents are ordered to revise their expedited release programs to include inmates over age 60, who have served at least 25 years of their sentences and are eligible for parole,

*cont. pg. 7*



*cont.*

## *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

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## THAT WAS THE YEAR THAT WAS

Perhaps our favorite meme for 2020 appeared at Halloween, of a reveler dressed for Halloween in a bedsheet, with eyeholes and a mask, holding a sign, "This Year Has Been Boo Sheet!" Yes, it has.

As we at LSA, publisher of CLN, head toward the 11th anniversary of our organization, we find ourselves in a far different place than past years, and not just in terms of CoVid restrictions, though certainly those have greatly impacted our work and our plans. When the world was normal, we spent nearly every weekend in various prisons, offering workshops and courses, interspersed with seminars for lifer families. In fact, on March 14, just days before CDCR locked down entry to prisons, we held an in-person workshop at Folsom.

And although we can't, at least yet return to those in-person groups, we haven't given up on working with lifers to help them understand how to reach suitability and exhibit that quality to the parole panels. Our in-person groups have become correspondence courses, correspondence consultations and an un-expected opportunity to provide cognitive behavior therapy courses.

While we all hoped the virtual shutdown of groups, classes and opportunities for prisoners would be short-lived, as the weeks and then months wore on it became obvious this would be a long-term situation, and a way around the roadblock had to be found. For several years our workshops on writing apology letters to victims, The Amends Project, and our 2-part course on finding and understanding causative factors, Connecting the Dots, had been much in demand and effective in helping lifers become suitable for parole.

And since 2018 we had been conducting a 12-week RAC accredited program, RISE (Rehabilitate, Implement, Succeed and Excel) at CMF, specifically for lifers headed to the parole board. All those, as well as the family seminars, came to a screeching halt in March. So, while our mission hasn't changed, our actions have evolved, practices changed, and opportunities presented.

First, our correspondence level has increased—what used to be about 250 letters a month has increased from those inside has risen to about 350…that's lots of stamps, paper and envelopes, not to mention the time of our intrepid volunteers in responding. Some responses are relatively easy, responding to inquiries for which we have prepared handouts, fact-sheets and summaries. Some are a bit harder, and some we just can't do—please remember, we are not attorneys, can't do legal research for you, contact your family, or provide support letters.

Our correspondence with families has also increased, sometimes up to 100 emails a day, plus phone calls. And our callers and communicants have changed a bit as well, as we seem to have become the go-to place for information, how to contact agencies and how does this all work. Those non-lifer contacts have markedly increased, since we began a daily email (to

nearly 3,000 email addresses) dealing with the CoVid situation, which has caught the attention of those families whose loved one may not be a lifer, but is nonetheless in that same leaky CoVid boat. But lifers remain our focus.

To try and keep our assistance to lifer headed to those video parole panels, we've converted both The Amends Project and Connecting the Dots into correspondence courses, serious study courses that require homework and sincere response. So far, we've sent those out to over 100 men and women. A CoVid stress workbook created by the Veterans Administration and sent to us gave us a chance to make that tool to deal with current problems available, in both English and Spanish, to both those in prison and their families, free of charge. To date, we've sent out about 300 of those.

Early summer presented us with an unexpected 'opportunity'/responsibility, as we came into possession of curriculum for 2 cognitive behavioral therapy in-cell study courses, created (wait for it) by CDCR mental health clinicians, but, for some unfathomable reasons (well, we can speculate) not made widely available. So, after trying to convince Sacramento to 'encourage' individual prisons to do so, we simply stepped up to the plate and began distributing those ourselves.

Requests from nearly 600 individuals have been fulfilled, we've also shared the material with several clinicians at several prisons (there really are some caring and concerned professionals in CDCR, when you can find them) who are now using it at their locations, and we've made it available to attorneys, for their clients.

Oh, and certificates are available for the correspondence courses and the mental health courses, just to let the board know who's serious about rehabilitation. We've discussed both these projects with the board, so they have a bit of background when these certificates show up, and that they understand those documents don't just come from the gumball machine, but are earned from real work and self-study.

We've moved to new offices, to accommodate our growing cadre of volunteers, some former lifers, who are helping us with policy and practice, as well as those responding to the study replies. We're doing more consulting, with other like-minded groups and individuals, preparing groundwork for the coming legislative session and future bills. And we're looking for other ways to reach inside the institutions, perhaps by video or DVD presentations at those prisons that are forward thinking enough to make those options possible.

Our family seminars will most likely be held by video meeting beginning after the first of the year, and 2 more correspondence course are in the works, along with a new DRP-funded class (a new version of RISE) at CSP-SAC, when things open up to allow entry or SAC decides how it wants to proceed on distance learning. And once we can, we'll be back at CMF to resurrect the original RISE program.

And, like everyone behind the wire, we're dealing with CoVid, social distancing (easier out here than in there), changed work schedules, masks, gallons of hand sanitizer and constant worry. In that respect, we're really are in this together.

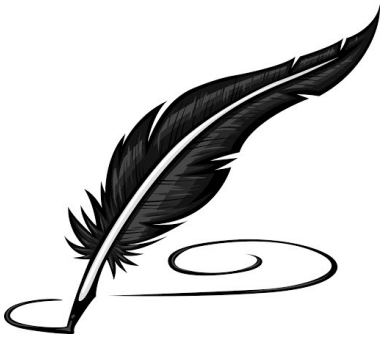
This year has marked some major changes, forced everyone to think outside the box and be creative in both practices and ways to stay stable and positive. We hope we've helped both the inmate population and their families in this effort-that's our goal and what we continue to hope to do.

Nearly 11 years ago, this organization was formed to understand parole and pass that understanding along, mostly so the founders could help their LOs inside. In the course of

that effort, we've discovered an essential truth—when you help others, you end up helping yourselves and your LOs as well.

Keep that in mind as you wear your mask, clean after those too dumb to understand how to be pro-social and find ways to continue your self-improvement, personal growth, and rehabilitation. And keep letting us know what you know, what you need to know and how we can help. We won't always be able to do everything, have all the answers or tell you what you want to hear, but it will be real, well researched and aimed at helping the lifer population become the 'former-lifer' population.

That's who we are, what we do and what we'll continue to do, and we'll be back inside as soon as the lockdown lifts. And while this year has indeed been "Boo Sheet," what we've learned in 2020, we'll use to make 2021 more successful.



# WE'RE GOING QUARTERLY

*Fewer but bigger issues*

In the many years that CLN has been in existence it's gone from a few pages stapled together and published periodically, relating the disposition of numerous lifer writs and cases, to a 50-60 page bound edition, primarily bi-monthly, covering legal decisions, BPH rules and policies and legislation. Starting out at a subscription rate of $18 per year, as costs have risen, so has the subscription rate, though for the last 6 years we've held that cost at $35 per year for those still in prison and for those in their first year of parole.

That cost has been underwritten by the subscription rate for 'free worlders' and supplemented by advertising from selected sources, usually attorneys we have confidence in. And we're intent on keeping that subscription rate at the current level as long as possible.

But in addition to production and mailing costs there is the cost in time to write, format and proof each edition, costs that no can provide reimbursement for. Keeping to a bi-monthly schedule was increasingly difficult, a fact that was, like many things, brought to an hour of decision by the ripples from the restraints to business and people caused by CoVid.

After much deliberation and consideration, we've decided to change our publication schedule to quarterly, rather than bi-monthly. And while this CoVid-fraught year is not indicative of the publication schedule going forward, for the remainder of this year and continuing on our aim will be to get CLN in the hands of subscribers about mid-month in March, June, September and December.

We anticipate each issue will be larger than the bi-monthly issues of past years, as we'll be covering events and actions of 3 months. However, this year's publication schedule shakes out, and that remains to be seen, we will pick up coverage where the previous issue left off, so that no month and no changes or important issues will be missed.

*from pg. 2* such as life prisoners eligible for parole and second or third strike prisoners, even if such prisoners are serving a sentence for a violent offense. Respondents shall ensure that inmates fitting the specifications of the Elderly Parole Program receive the "special consideration" for release prescribed by that program (§ 3055). Given the gravity of the emergency at San Quentin, the speed at which transmission of the coronavirus may take place in its outdated facilities, and the ease with which it appears respondents can modify their existing policies and programs to expedite releases and transfers in accordance with the views we have expressed, this decision shall be final in this court 15 days from the date it is filed. (Cal. Rules of Court, rule 8.387(b)(3)(A).) Any dispute that may arise regarding application of our opinion shall be brought to the Marin County Superior Court.

This ruling obviously carries major concerns for housing in prisons vis-à-vis exposure to contagious diseases, such as Covid-19. **BUT**, the State Supreme Court opened a case number and took the position *sua sponte* of considering whether to grant review of the Appellate Court ruling, giving itself 90 court days to do so (until February 17, 2021). An open question is whether the decision of the Court of Appeal can be enforced *before* the CA Supreme Court decides whether to grant review on its own motion or not.

In the meanwhile, Von Staich came up for a scheduled parole hearing on October 16, 2020, and was found suitable. However, it is doubtful that his timely release would moot the Court of Appeal decision.

CLN will reserve writing up the *Von Staich* decision until it becomes final as to the California Supreme Court.

## THE QUESTION OF WHETHER SB1437 RESENTENCING RELIEF IS AVAILABLE FOR CONVICTIONS OF (1) VOLUNTARY MANSLAUGHTER, OR, (2) ATTEMPTED MURDER, REMAINS UNSETTLED PENDING REVIEW BY THE CALIFORNIA SUPREME COURT

There is a growing body of Court of Appeal published case law dealing with the question of whether resentencing relief is available for those convicted of voluntary manslaughter or attempted murder. While it is settled law that SB1437 applies by its express statutory language to those convicted of *murder*, the attempts by prisoners to gain relief from convictions of the lesser offenses of *voluntary manslaughter* or *attempted murder* have been generally unsuccessful.

CLN is devoting this summary of some of the recent cases in the manslaughter/ attempted murder category because the question potentially affects literally thousands of inmates serving long sentences for these crimes. If the facts of your case are reflected in one of these examples, it may give you guidance as whether you should, or should not, bother to attempt gaining court relief.

### *Voluntary Manslaughter*

Some Courts of Appeal have issued published opinions addressing the issue of whether an individual convicted of voluntary manslaughter is eligible for relief under SB 1437 and summaries for these opinions are below.

*People v. Cervantes* (2020) 44 Cal.App.5th 884; B298077
1/30/2020 (Petition for review/ depublication denied.)

**Holding: A defendant convicted of voluntary manslaughter is not eligible to petition for resentencing pursuant to PC § 1170.95.**

In 2012, Cervantes entered a no contest plea to voluntary manslaughter (PC § 192 (a)) after being charged with murder and was sentenced to 13 years. In 2019, he filed a section 1170.95 petition for resentencing. The trial court denied the petition, ruling Cervantes was not eligible for relief under section 1170.95.

PC § 1170.95 (a) provides, in relevant part, "A person convicted of *felony murder or murder* under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have petitioner's *murder conviction* vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] . . . [¶] The petitioner was convicted of first degree or second degree *murder* . . . ." In interpreting a statute, if the statutory language is not ambiguous, then the plain meaning of the language governs. Here, the language of the statute unequivocally applies to murder convictions. There is no reference to the crime of voluntary manslaughter in PC § 1170.95. The plain reading of the statute is consistent with the legislative goal of correcting the unfairness of the felony murder rule, which is not applicable to the crime of voluntary manslaughter.

Excluding those with voluntary manslaughter convictions from eligibility for resentencing pursuant to PC § 1170.95 does not violate equal protection or substantive due process as contended by Cervantes. The Court of Appeal disagreed. The first step in a due process analysis is to determine whether the defendant is similarly situated with those who are entitled to the statutory benefit. Voluntary manslaughter is a different crime, and carries a different punishment, than murder. Normally, offenders who commit different crimes are not similarly situated for equal protection purposes. Nor was it an irrational discrimination to provide relief for murderers, but deny it to those who commit the less serious offense of manslaughter. When the Legislature reforms one area of the law, it is not required to reform other areas of the law. Here, the legislative focus was on the unfairness of the felony murder rule. The Legislature could rationally decide to change the law in this area and not be currently concerned with crimes not involved with that rule. A criminal defendant has no vested interest in a specific term of imprisonment or in the designation of a particular crime he or she receives. The court also rejected Cervantes's substantive due process claim because there was a rational relationship between the objectives of SB 1437 and the methods chosen to achieve those objectives. The goal of eliminating the sentencing disparity caused by the felony murder rule was properly achieved by the PC § 1170.95 petition procedure to vacate those murder convictions.

*People v. Flores* (2020) 44 Cal.App.5th 985, D075826. 2/3/2020
(Petition for review/depublication denied.)

**Holding: A person charged with murder and convicted of voluntary manslaughter pursuant to a plea agreement cannot invoke the resentencing provision of SB 1437.**

In 2013, Flores and codefendants were charged with the murder of John Doe during the commission of a robbery. Flores pleaded

guilty to voluntary manslaughter as part of plea agreement. In 2019, the trial court denied her petition for resentencing under SB 1437, finding the resentencing provision (PC § 1170.95) was available only to qualifying persons convicted of murder, not voluntary manslaughter.

Affirmed. SB 1437 was enacted for the express purpose of amending the felony murder rule and the natural and probable consequences doctrine as it relates to murder. SB 1437 added PC § 1170.95, which permits a person to petition the sentencing court to have a murder conviction under one of these theories vacated and to be resentenced. Through its repeated and exclusive references to murder, the plain language of PC § 1170.95 limits relief only to qualifying persons who were convicted of murder. Had the Legislature intended to make PC § 1170.95 available to defendants convicted of manslaughter, it easily could have done so. In addition, the Court of Appeal declined to broaden the reach of PC § 1170.95 because Flores did not establish absurdity to justify straying from the unambiguous language of PC § 1170.95. Because of the difference between murder sentences and manslaughter sentences, the court found no merit to Flores's claim that successful petitioners would be released from custody while those convicted of manslaughter remained incarcerated. It was reasonable for the Legislature to limit the scope of reform measures to maintain the state's financial integrity.

*People v. Turner* (2020) 45 Cal.App.5th 428 , D075788, (Petition for review/ depublication denied.) 2/19/2020

**Holding:.A defendant who faced murder liability under the natural and probable consequences doctrine, but pleaded guilty to manslaughter in lieu of trial, is not eligible for resentencing under PC § 1170.95 (SB 1437).**

In 2005, Turner and two codefendants got in a physical altercation with the victim. One of the codefendants pulled out a handgun, and shot and killed the victim. All three were charged with first degree murder. Turner pleaded guilty to voluntary manslaughter. In 2019, Turner filed a petition pursuant to PC § 1170.95 seeking to vacate his voluntary manslaughter conviction. The trial court denied the petition. Turner appealed, arguing SB 1437 extends to individuals who were charged with murder under a theory of felony murder or murder under the natural and probable consequences doctrine but pleaded guilty to manslaughter to avoid trial.

Affirmed. The petitioning prerequisites listed in PC § 1170.95, subdivision (a) and the available relief defined in subd. (d) (vacating a "*murder* conviction") indicate the Legislature intended to limit relief to those convicted of murder because the statute explicitly refers to murder convictions. The statute is unambiguous. Turner's reliance on subd. (a) (2), which requires a defendant to declare that he or she "was convicted of first degree or second degree murder following a trial *or accepted a plea offer* in lieu of a trial," ignores the introductory language of subdivision (a), which limits petitions to persons convicted of murder. The legislative history of SB 1437, and its predecessor Senate Concurrent Resolution 48, confirms that Turner is not eligible for resentencing under PC § 1170.95. This construction does not produce

absurdity or undermine the Legislature's goal of calibrating punishment to culpability.

Nor does SB 1437 does provide an avenue to challenge the factual basis for petitioner's conviction. The Court of Appeal acknowledged that, in hindsight, Turner would have fared better by pleading guilty to murder. Turner was charged with murder presumably based on the theory that the murder was the natural and probable consequence of a gang assault. However, he pleaded guilty to voluntary manslaughter, which is an intentional and unlawful killing without malice usually based on a sudden quarrel, heat of passion, or imperfect self-defense. Neither felony murder nor the natural and probable consequences doctrine are theories on which one can commit voluntary manslaughter. If there is a problem with Turner's conviction, it may lie in the adequacy of the factual basis for his plea. Before a court can approve a conditional plea of guilty or no contest to a felony, it must satisfy itself that there is a factual basis for the plea. (PC § 1192.5.) But the Court of Appeal concluded that the adequacy of the factual basis was not properly before it. If there is a remedy regarding the lack of factual basis in this case, it lies in a petition for writ of habeas corpus, supported by transcripts of the preliminary hearing and plea colloquy.

*People v. Sanchez* (2020) 48 Cal.App.5th 914 , E072647, (Petition for review/ depublication denied.) 5/7/2020

**Holding:**

**Penal Code section 1170.95 relief is not available to those offenders who pleaded guilty to voluntary manslaughter and the statute does not violate equal protection principles.**

In 2010, Sanchez was charged with first degree murder but he ultimately pleaded guilty to voluntary manslaughter. In 2019, he petitioned for resentencing under PC § 1170.95. The trial court denied the petition, concluding PC § 1170.95 provides relief for murder convictions only. Sanchez appealed. Held: Affirmed. Sanchez argued that PC § 1170.95, subdivision (a)(2) contained an ambiguity that must be interpreted in his favor to avoid surplusage. Moreover, he argued legislative intent supported interpreting PC § 1170.95 as applying to those convicted of voluntary manslaughter. This court agreed with other Court of Appeal decisions holding PC § 1170.95, by its plain language, does not apply to those convicted of manslaughter. (*People v. Flores* (2020) 44 Cal.App.5th 985, 997; *People v. Turner* (2020) 45 Cal.App.5th 428, 438; *People v. Cervantes* (2020) 44 Cal.App.5th 884, 887.) This does not violate equal protection. The court disagreed with Sanchez's argument that the distinction between those who pleaded guilty to murder and those who pleaded guilty to voluntary manslaughter is not reasonable in light of the Legislature's intent to save money on the costs of incarceration. This is the type of fiscal line-drawing and policy decision that the Legislature is free to make. It does not demonstrate that it was irrational to distinguish between those convicted of murder by plea and those convicted of voluntary manslaughter by plea.

*People v. Paige* (2020) 51 Cal.App.5th 194 , A157494, (Petition for review/depublication denied.) 6/25/2020

**Holding:**

**Relief pursuant to PC § 1170.95 is not available to defendants who were charged with murder but convicted of voluntary manslaughter under a plea agreement.**

Paige filed a petition requesting that his manslaughter conviction be vacated based on the changes to the law of murder made by SB 1437. He argued that he accepted a plea offer in lieu of a murder trial, and that he could not now be convicted of murder after SB 1437 invalidated the natural and probable consequences and felony murder doctrines. The trial court denied the petition, because Paige, although charged with felony murder, pleaded guilty to voluntary manslaughter. On appeal Paige argued that the court erred in denying his petition.

Affirmed. PC § 1170.95 unequivocally applies only to murder convictions. It provides potential resentencing to "[a] person convicted of felony murder or murder under a natural and probable consequences theory" if after the change in the law, the defendant could not be convicted of murder. Paige based his argument on PC § 1170.95, subdivision (a)(2), which states that as a prerequisite to qualify for relief, a petitioner must declare that he "was convicted of first or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder." But this is only one of the conditions that must apply before a defendant convicted of felony murder or natural and probable consequences murder may seek relief. The "plea offer" reference in subdivision (a)(2) refers to first or second degree murder, not voluntary manslaughter. This interpretation comports with the Legislature's intent to make "statutory changes to more equitably sentence offenders in accordance with their involvement in homicides." The court agreed with other Court of Appeal decisions addressing this issue, relying heavily on *People v. Turner* (2020) 45 Cal.App.5th 428.

**Restricting the application of PC § 1170.95 to defendants convicted of murder does not violate equal protection of the law.**

Paige also argued that an interpretation of PC § 1170.95 that affords relief to defendants convicted of felony murder but not voluntary manslaughter, when both groups of defendants "are subject to prosecution under the felony murder rule merely because they were minor participants in a robbery, who acted without reckless indifference to human life, and a codefendant shot and killed someone," violates the equal protection provisions of the federal and California Constitutions because it treats differently persons similarly situated without a rational basis for doing so. The Court of Appeal disagreed, agreeing with and adopting the reasoning in *People v. Cervantes* (2020) 44 Cal.App.5th 884, and *People v. Sanchez* (2020) 48 Cal.App.5th 914 on this point.

***Attempted Murder***

A recurring issue in Court of Appeal opinions is whether SB 1437 applies to attempted murder liability under the natural and probable consequences doctrine, and there is currently a split in authority. The California Supreme will consider this issue in *People v. Lopez* (2019) 38 Cal.App.5th 1087, review granted 11/13/2019 (S258175/B271516). The court will also address the following issue: In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) 50 U.S. 99 and *People v.*

*Chiu* (2014) 59 Cal.4th 155?

In *Lopez,* the Court of Appeal held that SB 1437 does not affect the defendants' convictions for attempted premeditated murder under the natural and probable consequences doctrine.

The California Supreme Court has granted review, with briefing deferred, of Court of Appeal cases with opinions addressing the attempted murder issue (including cases with unpublished decisions).

A list of published cases where review has been granted is below.

- *People v. Munoz* (2019) 39 Cal.App.5th 738, review granted 11/26/2019 (S258234/ B283921). The Court of Appeal held that SB 1437 does not apply retroactively to nonfinal cases on direct appeal and does not apply to the offense of attempted murder.

- *People v. Larios* (2019) 42 Cal.App.5th 956, review granted 2/26/2020 (S259983/ F078759). The Court of Appeal held that the resentencing procedure in PC § 1170.95 provides no relief for the crime of attempted murder where defendant's conviction is final.

- *People v. Medrano* (2019) 42 Cal.App.5th 1001, review granted 3/11/2020 (S259948/ F068714, F069260). In this direct criminal appeal where the defendants were convicted of attempted murder and the jury was instructed on the natural and probable consequences doctrine, the Court of Appeal held that the PC § 1170.95 resentencing procedure does not apply to individuals convicted of attempted murder and that the defendants were entitled to relief on direct appeal under *In re Estrada* (1965) 63 Cal.2d 740. For two of the defendants, the court reversed the attempted murder convictions. The court reasoned that SB 1437 "precludes any imposition of vicarious liability under the natural and probable consequences doctrine if the charged offense requires malice aforethought. Because malice cannot be imputed to a defendant who aids and abets a target offense without the intent to kill, the natural and probable consequences doctrine is no longer a viable theory of accomplice liability for attempted murder." The court also concluded the prosecution may retry the defendants on the attempted murder counts.

- *People v. Sanchez* (2020) 46 Cal.App.5th 637, review granted 6/10/2020 (S261768/ F076838). The court followed *Medrano,* which held that SB 1437 eliminates the natural and probable consequences doctrine as a viable theory of accomplice liability for attempted murder.

- *People v. Cerda* (2020) 45 Cal.App.5th 1, review granted 5/13/2020 (S260915/ B232572). In the nonpublished portion of its opinion, the Court of Appeal rejected defendants' arguments that (1) SB 1437 should apply to attempted murder; (2) the natural and probable consequences doctrine should not apply to attempted premeditated murder; and (3) SB 1437 should apply retroactively without complying with its petition procedure. In the published portion of the opinion, the Court of Appeal concluded that the evidence was sufficient to support the kill zone theory of liability after reconsidering the case in light of *People v. Canizales* (2019) 7 Cal.5th 591.

- *People v. Dennis* (2020) 47 Cal.App.5th 838, review granted 7/29/2020 (S262184/ G055930). In this direct appeal from Dennis's criminal convictions, the Court of Appeal concluded SB 1437 does not bar his convictions for attempted murder under the natural and probable consequences theory. "The legisla-

tion reaches the crime of murder but has no application to attempted murder." However, the court also concluded that the jury instruction on attempted premeditated murder on a natural and probable consequences theory constituted a Sixth Amendment violation because it allowed the jury to find the attempted murders were premeditated without requiring the jury to find that attempted premeditated murder was the natural and probable consequence of the target offense (following the reasoning in *Alleyne* ). The court vacated the special findings that the attempted murders were willful, deliberate, and premeditated and remanded the matter to give the prosecution the opportunity to decide whether to retry Dennis on the special findings under jury instructions consistent with the opinion in this case. The court also noted that the premeditation finding would fall as a matter of state law if the California Supreme Court extends the reasoning and holding of *Chiu* to attempted murder.

*People v. Mejia* (2019) 40 Cal.App.5th 42, review granted 1/2/2020 (S258796/G052967). This case does not discuss SB 1437. The Court of Appeal held that the trial court prejudicially erred by instructing the jury on premeditated attempted murder under the natural and probable consequences doctrine based on a codefendant's premeditation and deliberation, relying on *Chiu* and declining to follow *Favor.* The court "conclude[d] the true finding of premeditated and deliberation as an aider and abettor cannot be based on the natural and probable consequence doctrine." The court vacated the premeditation and deliberation special finding and remanded the case to give the prosecution the opportunity to decide whether to retry Mejia on the special finding as a direct perpetrator.

**Recent published case addressing SB 1437 and attempted murder:**

On 6/25/2020, the Sixth District held that SB 1437 does not apply to the offense of attempted murder. (*People v. Alaybue* (2020) 51 Cal.App.5th 207 (H047221).) The court also held that SB 1437 is constitutional, and reversed the trial court's order denying Alaybue's SB 1437 petition so that the court may reconsider the petition, but only as to the murder convictions. A petition for review was not filed in this case .

## *PEOPLE V. GALLARDO* DOES NOT APPLY RETROACTIVELY TO FINAL CONVICTIONS

***In re Richard Nelson***

---Cal.App.5th---; CA 5 No. A158376
October 21, 2020

The Court held that *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), which limited a sentencing court's factfinding abilities with respect to prior conviction enhancement allegations, does not apply retroactively on collateral review of final convictions. It also concluded that the sentencing court here did not violate *Gallardo*'s proscriptions in any event. Accordingly, the Court denied the petition for writ of habeas corpus.

A jury convicted Richard Allen Nelson (petitioner) of assault with a deadly weapon upon a peace officer (Pen. Code, § 245, subd. (c); count 1), eluding a pursuing peace officer with willful or wanton disregard for safety (Veh. Code, § 2800.2; count 2), and resisting or deterring an executive officer (§ 69; count 3). Following a bifurcated court trial, he was found to have suffered five prior "strike" convictions (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)), and he was sentenced to 75 years to

life in prison. (*People v. Nelson* (Oct. 7, 2004, F043776) [nonpub. opn.] ). On appeal, we modified the judgment so that execution of sentence on count 2 was stayed (§ 654), but otherwise affirmed. (*People v. Nelson, supra*, F043776.) The California Supreme Court denied review.

On September 27, 2018, petitioner filed a petition for writ of habeas corpus in Kern County Superior Court, challenging his sentence. On December 27, 2018, the petition was denied.

On June 4, 2019, petitioner filed the instant petition for writ of habeas corpus with this court. In it, he alleged (1) because his five prior felony convictions arose from a single course of conduct, they constituted only one strike; (2) in determining whether the prior convictions constituted strikes, the trial court relied on documents and evidence that were not part of the record of conviction; (3) in determining whether the strike allegations were proven, the trial court relied on uncertified documents; and (4) the trial court imposed an unlawful sentence on count 3. On September 26, 2019, this court summarily denied the petition.

Petitioner sought review in the California Supreme Court. On January 2, 2020, review was granted. The Supreme Court transferred the matter back to this court, with directions to vacate our summary denial and to order the Secretary of the Department of Corrections and Rehabilitation to show cause why petitioner is not entitled to relief pursuant to *Gallardo*, and why *Gallardo* should not apply retroactively on habeas corpus to final judgments of conviction. On January 7, 2020, we vacated our prior summary denial and issued the order to show cause. We also directed the Secretary to address the issue of whether reliance upon admissions in the plea form violates the proscriptions of *Gallardo*. The Secretary (respondent) filed a return to the order to show cause on January 30, 2020. Petitioner filed traverses on March 20 and 25, 2020.

As to the first question, retroactivity, the Court noted a plethora of prior published decisions on precisely this topic, reaching opposing results, all of which are pending review by the California Supreme Court. As to retroactivity, this Court agreed it was not retroactive – this joining the fray pending in the Supreme Court.

But even if the Supreme Court affirms retroactivity of *Gallardo*, the Court found the factual record in the case would not entitle Nelson to relief. Here, Nelson's guilty plea record cemented his fate as to his requested relief. The facts are reported below, to serve as a comparison to other cases on this question.

> Under California's three strikes law, "[a] prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison constitutes a prior conviction of a particular serious or violent felony [i.e., a strike] if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of a particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7." (§ 667, subd. (d)(2); accord, § 1170.12, subd. (b)(2).)

Petitioner's prior Oregon convictions consisted of robbery in the first degree, burglary in the first degree with a firearm, two counts of attempted assault in the first degree with a firearm, and assault in the second degree with a firearm. During the court trial on the prior conviction allegations in petitioner's Kern County case, the parties recognized the elements of the Oregon offenses differed from the elements of the corresponding California offenses. When, as here, the other state's stat-

utes do not, on their face, demonstrate that a defendant's conviction under those statutes qualifies as a strike under California law, the record of the prior conviction must be examined before a determination can be made whether the prior conviction qualifies as a strike. (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1027; *People v. Saez, supra*, 237 Cal.App.4th at p. 1195.)

One of the documents before the sentencing court as part of the record of the Oregon convictions, and on which the court relied to decide whether those convictions constituted strikes, was petitioner's "MOTION FOR ORDER ACCEPTING PLEA OF GUILTY." Item number 15 of an affidavit signed by petitioner and notarized by his then defense counsel was preprinted: "I plead 'GUILTY' and request the Court to accept my plea of 'GUILTY' and have entered my plea of 'GUILTY' on the basis of the following acts I committed[.]" Handprinted immediately following this was: "In Polk County on or about 5/24/93 I unlawfully and without permission entered a dwelling . . . with the intent to commit the crime of theft. I was armed with a handgun and threaten[] to shoot the homeowner to overcome his resistance to theft; I caused physical injury to him by striking him with the pistol. I attempted to cause serious physical injury to 2 men outside th[] dwelling by firin[] a pi [] at []."(Some capitalization omitted.) This document was signed and notarized on September 29, 1993, the same day defendant was permitted to plead guilty and was sentenced.

In *Gallardo*, the California Supreme Court determined that pursuant to *Descamps* and *Mathis*, "a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict *or admitted by the defendant in entering a guilty plea* . . . ." (*Gallardo, supra*, 4 Cal.5th at p. 124, italics added.) In its holding, the court reiterated: "The [sentencing] court's role is . . . limited to identifying those facts that were established by virtue of the conviction itself — that is, facts the jury was necessarily required to find to render a guilty verdict, *or that the defendant admitted as the factual basis for a guilty plea.*" (*Id*. at p. 136, italics added, fn. omitted.)

> It is readily apparent that petitioner's statement of his own conduct contained in the "MOTION FOR ORDER ACCEPTING PLEA OF GUILTY" constituted the factual basis for his guilty plea. As such, it could properly be considered by the sentencing court — even under Gallardo — in determining the nature of the Oregon convictions. (See *Scott, supra*, 49 Cal.App.5th at pp. 1019-1020, rev.gr.)

Accordingly, the Court denied Nelson any relief.

## SUMMARY DENIAL OF RESENTENCING PETITION UPHELD IN LIGHT OF DISQUALIFYING FACTUAL RECORD

### *P. v. Joseph Bentley*

--- Cal.App.5th ---; CA 2(6) No. D076909
September 29, 2020

This is one of those resentencing petitions where a claimed procedural error would not survive under a review of the facts showing the prisoner was plainly not eligible for relief, as a matter of law.

> Where, as a matter of law, a defendant is not eligible for resentencing pursuant to Penal Code section 1170.95, his petition therefor, may be summarily denied. Joseph Bentley appeals the trial court's order denying his petition for resentencing. He contends the trial court erred when it summarily denied the petition without continuing it, so that his counsel could obtain and review the transcript of his original trial. He contends the same error deprived him of due process and of the effective assistance of counsel. We affirm the order denying resentencing.

The factual record supported the Court's opinion that Bentley was not found guilty by either the felony murder rule or the natural and probable consequences rule.

> In 2002, a jury convicted appellant of the first degree murder of Alvin Green and the attempted willful, deliberate and premeditated murders of Lenist Johnson, Jason Payne and Devon Brown, all in a gang-related shooting. Appellant and a codefendant confronted members of a rival gang in a shopping center parking lot. The rival gang members quickly left in their car. Appellant and his codefendant chased them. With appellant driving, his codefendant leaned out of the passenger side window and fired 25 to 30 shots at the victims' car. One of the bullets struck Green in the neck, killing him. The jury also found true a special circumstance allegation that the murder "was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person . . . with the intent to inflict death." (§190.2, subd. (a)(21).)

Bentley's attorney applied for an extension of time to gain access to lower court records, but the Court summarily denied the petition without the requested continuance.

> In 2019, after Senate Bill No. 1437 (2017-2018 Reg. Sess.) was enacted, appellant filed a petition for resentencing. The trial court appointed counsel to represent him and set a briefing and hearing schedule. The prosecutor opposed the motion contending, that appellant was not eligible for resentencing. Appellant's counsel requested an extension of time in which to reply to the opposition, and a continuance of the hearing because he could not get a copy of appellant's trial transcript before the hearing date. The trial court denied both requests. It then denied appellant's petition and concluded that he was not eligible for resentencing.

The Court of Appeal found that trial court had properly exercised its discretion in denying the continuance.

> The trial court has broad discretion to determine whether good cause exists to continue a hearing date. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)
>
> "In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request. [Citations.] One factor to consider is whether a continuance would be useful. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 1013, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 (*Doolin*).)
>
> The trial court did not abuse its discretion here because neither an extension of time nor a continuance would have been useful to appellant. As a matter of law, appellant is not eligible for resentencing under section 1170.95 because he was not convicted of felony murder or murder pursuant to a natural and probable consequences theory.

As to the summary denial, the Court of Appeal found that the trial court's reliance on the clear record below supported terminating the petition at this early stage.

> Section 1170.95, subdivision (a) allows a "person convicted of felony murder or murder

under a natural and probable consequences theory" to have his or her "murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. (2) The petitioner was convicted of first degree or second degree murder following a trial . . . . (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019."

Amendments to sections 188 and 189 were enacted simultaneously with section 1170.95. The amendments to section 188 require that a principal act with express or implied malice. Amendments to section 189 change the definitions of first and second degree murder. Section 189, subdivision (a) now provides, "All . . . murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree." Subdivision (e) of section 189 provides, "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: (1) The person was the actual killer. (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

Here, the jury at appellant's trial expressly found true the special circumstance allegation that Alvin Green's murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle with the intent to inflict death. Appellant drove the motor vehicle from which the firearm was discharged. He decided to chase the victims' car as it drove away, which allowed his codefendant to fire the fatal shot from the passenger seat. When the jury found the special circumstance allegation true with regard to appellant, it found that he aided and abetted the shooter "with the intent to kill . . . ." (§190.2, subd. (c).)

This satisfies the mandate of section 189, subdivision (e)(2). Appellant could properly be convicted of first degree murder even pursuant to the recent amendments to sections 188 and 189. (§1170.95, subd. (a)(3).)

The Court frankly summarized its findings, in denying Bentley relief.

We conclude that any error in not granting a continuance was harmless because this ruling did not, and could not, prejudice appellant. (*Doolin, supra*, 45 Cal.4th at p. 450.) And, no deprivation of the right to the effective assistance of counsel is here present.

Appellant made a choice in 2002 to engage in a vehicular pursuit of rival gang members. This allowed his codefendant to shoot at the fleeing rival gang members. The jury expressly found that he did so with the intent to kill. The Legislature did not intend that appellant should have lenity. Appellant is fortunate that the codefendant was a poor shot. Had he killed one other gang rival, appellant could have been facing the death penalty.

Disposition:

The judgment (order denying section 1170.90 petition for resentencing) is affirmed.

## IS A PRISONER ENTITLED TO APPOINTED COUNSEL FOR APPEAL OF AN SB1437 RESENTENCING PETITION?

### *P. v. Freddie Cole*

--- Cal.App.5th ---; CA 2(2) No. B304329
CA Supreme Court Case No. S264278
August 3, 2020

Freddie Cole had been denied his SB1437 resentencing petition in the superior court. On appeal of this denial, he requested and was given counsel, who, after reviewing the record, found no arguable issues and filed a *Wende* brief. Cole was given 30 days to file his own supplementary brief, but did not do so. The Court of Appeal deemed his appeal abandoned and dismissed it.

The State petitioned for review, arguing Cole was not even entitled to appointed counsel because the appeal was not of a *conviction*. The State Supreme Court granted review and hold pending a similar question developing from *P. v. Lewis* (see CLN #91, pp. 26-29.) Here, the issue is more sharply focused on appeals to SB1437 denials, so we discuss the current case to aid the reader in preparing for what will come down later when *Lewis* is decided by the Supreme Court.

> This appeal presents a problem that is both commonplace and elusive. When counsel appointed to represent a criminal defendant during the initial appeal of his conviction concludes that there are no reasonably arguable issues to present to the Court of Appeal, *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) delineates the procedures both counsel and the Court of Appeal are to follow. What procedures apply when the appeal is from the denial of postconviction relief (rather than, as in *Wende*, the defendant's first appeal of right)? Do *Wende's* procedures still apply? And if not, on what basis may a Court of Appeal prescribe the procedures that counsel and the court are to follow? A handful of courts have addressed the first question, but the second has yet to be confronted.
>
> We publish to provide our views and guidance on both questions. Taking the second question first, we hold that *Wende's* constitutional underpinnings do not apply to appeals from the denial of postconviction relief; consequently, the procedures we and other courts have prescribed are grounded solely in our supervisory powers to control the proceedings before us. We further hold that, in the exercise of these powers, counsel appointed in such appeals is required to independently review the entire record and, if counsel so finds, file a brief advising the appellate court that there are "no arguable issues to raise on appeal"; the defendant has a right to file a supplemental brief; and this court has the duty to address any issues raised by the defendant but otherwise may dismiss the appeal without conducting an independent review of the record. Because the defendant who has appealed the denial of postconviction relief in this case has not filed a supplemental brief, we dismiss this appeal as abandoned.

The facts of Cole's case are summarized, showing direct involvement in the murder.

> In 2007, a jury convicted Freddie Cole (defendant) of (1) murder (Pen. Code, § 187, subd. (a)), and (2) arson of an inhabited structure (§ 451, subd. (b)). That same year, the trial court sentenced defendant to prison for 35 years to life. This was a "third strike" sentence under our state's Three Strikes Law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(j)), plus 10 years because each of his two prior strikes also constituted prior serious felonies (§ 667, subd. (a)(1)); one of defendant's prior "strikes" was also for arson of an inhabited structure. We affirmed his convictions

and sentence in 2008. (*People v. Cole* (Aug. 7, 2008, B202387) [nonpub. opn.].)

The procedures followed by Cole in his SB1437 petition are summarized, showing direct what the Court faced.

> In April 2019, defendant filed a petition seeking resentencing under section 1170.95. In the form petition, defendant checked the boxes for the allegations that he had been charged with murder, that he was convicted "pursuant to the felony murder rule or the natural and probable consequences doctrine," and that his murder conviction would be invalid under the "changes made to Penal Code §§ 188 and 189, effective January 1, 2019." In explaining why his murder conviction would be invalid under the 2019 changes to sections 188 and 189, defendant did not check the box alleging that he "was not the actual killer." He also requested counsel.

The trial court had disagreed, as noted by the Court of Appeal.

> On January 15, 2020, and after appointing defendant counsel, the trial court summarily denied defendant's petition. Based upon the recitation of facts in our opinion affirming his conviction, which showed defendant had acted alone in splashing gasoline on the porch of the apartment where the murder victim lived moments before the fire started and had repeatedly threatened to "burn this mother fucker down and everybody that's in it," the trial court concluded that defendant was "the actual killer" and hence categorically ineligible for relief under section 1170.95.

Cole filed a timely notice of appeal.

> Pursuant to the California Rules of Court and our district's routine practice of appointing counsel to represent defendants appealing from the denial of postconviction relief, we appointed appellate counsel for defendant. (Cal. Rules of Court, rule 8.300(a)(1).) Citing *Wende*, *supra*, 25 Cal.3d 436, counsel filed an opening brief setting out the procedural history and relevant facts of this case, and a declaration indicating that counsel had "reviewed the entire record" and had informed defendant "of his right to file a supplemental brief." Counsel has invited us to "independently review the entire record on appeal for arguable issues."
>
> We sent a letter to defendant advising him that he had 30 days to file a supplemental brief.
>
> Defendant has not filed a timely supplemental brief.

The questions on appeal were summarized by the Court:

> The questions presented in this appeal are straightforward: (1) What procedures must appointed counsel and this court follow when counsel determines that an appeal of an order denying postconviction relief lacks arguable merit, and (2) By what authority do we prescribe those procedures?

Because the decision in this case, like the one in *Lewis*, is under review by the CA Supreme Court, CLN will not discuss the appellate Court's logic in its decision on these questions, but will await the Supreme Court's resolution. Meanwhile, in the event a CLN reader is denied the appointment of counsel for an appeal of a superior court denial of SB1437 resentencing relief, they should file a petition for review of said denial of counsel with the CA Supreme Court, citing to this *Cole* decision that is pending review (S264278).

## PRISONER NOT ENTITLED TO SB1437 RESENTENCING RELIEF WHEN HIS UNDERLYING CONVICTION WAS A PLEA BARGAIN

***P. v. Cristopher Falcon***

--- Cal.App.5th ---; CA 2(8) No. B296392
November 9, 2020

Appellant Christopher Falcon entered a plea of no contest to second degree murder in violation of Penal Code section 187, subdivision (a), in 2011. Following the enactment of Senate Bill No. 1437 (§ 1170.95), appellant filed a petition seeking resentencing on the theory that he entered a plea of no contest to avoid a conviction of first or second degree murder under the natural and probable consequences doctrine. The trial court denied the petition, finding that appellant failed to make a prima face case. Appellant appeals from the order denying that petition. We affirm the court's order.

On April 20, 2020, we granted respondent's request that we take judicial notice of the joint preliminary hearing transcript for the joint preliminary hearing of appellant and co-defendant Mancera. As we explain in this opinion, a trial court may properly consider the petitioner's preliminary hearing transcript in deciding a petition for resentencing. We now deny appellant's April 16, 2020 motion to strike the portions of respondent's brief that rely on the preliminary hearing transcript.

Falcon's conviction was the result of a plea bargain for second degree murder, from which he now petitioned for resentencing.

Appellant Christopher Falcon entered a plea of no contest to second degree murder in violation of Penal Code section 187, subdivision (a), in 2011. Following the enactment of Senate Bill No. 1437 (§ 1170.95), appellant filed a petition seeking resentencing on the theory that he entered a plea of no contest to avoid a conviction of first or second degree murder under the natural and probable consequences doctrine. The trial court denied the petition, finding that appellant failed to make a prima face case. Appellant appeals from the order denying that petition. We affirm the court's order.

Falcon made the following assertions in his SB1437 petition.

> Appellant contends he made a prima facie showing that he fell within the provisions of section 1170.95 when he filed his form petition, signed under penalty of perjury. In that petition he declared that an information was filed against him which permitted the prosecution to proceed under a theory of felony murder or under the natural and probable consequences doctrine; he pled no contest to second degree murder because he believed he could have been convicted of first or second degree murder under the felony murder or natural and probable consequences doctrine; and he could not now be convicted of second degree murder due to changes to section 188.

The trial court examined the record below.

Appellant contends he made a prima facie showing that he fell within the provisions of section 1170.95 when he filed his form petition, signed under penalty of perjury. In that petition he declared that an information was filed against him which permitted the prosecution to proceed under a theory of felony murder or under the natural and probable consequences doctrine; he pled no contest to second degree murder because he believed he could have been convicted of first or second degree murder under the felony murder or natural and probable consequences doctrine; and he could not now be convicted of second degree murder due to changes to section 188.

The trial court relied upon several portions of the record, which the Court of Appeal reviewed for both legality as well as sufficiency.

The first paragraph of count 1 of the information, as stipulated to by appellant's coun-

sel, states: "On or about July 2, 2009, in the County of Los Angeles, the crime of MURDER, in violation of PENAL CODE SECTION 187(a), a Felony, was committed by ANTHONY MANCERA and CHRISTOPHER ROBERT FALCON, who did unlawfully, and with malice aforethought murder SERGIO SANTIAGO, a human being." Nothing in this paragraph suggests appellant was being prosecuted under the natural and probable consequences doctrine or the felony murder rule; to the contrary it suggests he was being prosecuted as a principal. The information contains a firearm enhancement alleging that Mancera personally discharged a firearm resulting in death, which would make appellant an aider and abettor.

The trial court accordingly turned to the record of conviction for clarification concerning the prosecutor's theory of the case and the evidence against appellant. As we discuss in more detail below, while the trial court improperly considered evidence offered at Mancera's trial, the same evidence is found in appellant's preliminary hearing transcript. A witness testified at appellant's preliminary hearing that about five seconds after Mancera and appellant approached the victim and his companion, appellant told Mancera to get his gun out. Mancera did so, and shot the victim. Appellant stated: "This is how we do it." At the preliminary hearing an expert on gang evidence also testified that the statement, "This is how we do it", was an affirmation that the shooting was a proper response to the victim's lack of respect.

Appellant's comments immediately before and after Mancera's shooting show that appellant encouraged Mancera to take out his gun during a planned confrontation with the victim, and then approved Mancera's fatal shooting of the victim. His statement was further illuminated by expert gang evidence. This would be ample evidence to convict appellant as a direct aider and abettor if he were tried after the amendments to section 188. (CALJIC 3.01 ["A person aids and abets the [commission] of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime."].) Thus, the trial court did not err in finding appellant had failed to make a prima facie showing.

Appellant contends the trial court erred in relying on the records of co-defendant Mancera's trial. The Court of Appeal agreed, but find the error harmless, because the same information was available from the legally acceptable preliminary hearing record.

Falcon also claimed he was improperly denied appointment of counsel for his appeal. But the superior court below, and now the appellate Court, found Falcon had not stated a prima facie case on appeal, and therefore was not eligible for appointed counsel.

> Appellant was not convicted on a theory of felony murder or under the natural and probable consequences doctrine. As we discuss, evidence at the preliminary hearing, which occurred before appellant entered his plea, shows that appellant directly aided and abetted co-defendant Mancera; there can be no doubt that was the prosecution's theory of the case. Thus, appellant is ineligible for relief as a matter of law. Accordingly, he was not entitled to appointment of counsel, which, we hold, is mandatory only after the court has determined that a prima facie showing has been or can be made.

Accordingly, the order denying Falcon's resentencing petition was affirmed.

## A CDCR RECOMMENDATION FOR SENTENCE MODIFICATION DOES NOT TRIGGER A RIGHT TO APPOINTED COUNSEL

***P. v. Virginia Frazier***

--- Cal.App.5th ---; CA 2(7) No. B300612
October 13, 2020

The Secretary of CDCR (Secretary) recommended the trial court recall Virginia Frazier's 23-year prison sentence imposed more than a decade earlier and resentence her pursuant to PC § 1170, subd. (d)(1), citing Frazier's exemplary postconviction conduct. The court entered an order summarily declining to recall Frazier's sentence. On appeal Frazier contends the court violated due process by making its decision without appointing counsel for her. The Court of Appeal disagreed.

The Court related Frazier's prior convictions and sentence.

> In November 2007 Frazier attacked her boyfriend with a steak knife and slashed his arm, which he had raised defensively to protect himself during the assault. A jury convicted Frazier of one count of assault with a deadly weapon and found true the special allegation that Frazier had personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)).
>
> In a bifurcated proceeding on specially alleged prior conviction allegations, Frazier admitted she had suffered three prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and three prior serious felony convictions within the meaning of section 667, subdivision (a)(1). The court dismissed two of Frazier's qualifying strike convictions in the interest of justice and sentenced her to 23 years in prison, eight years for the aggravated assault (the upper term of four years, doubled under the three strikes law), plus five years for the great bodily injury enhancement and five years for each of her two, separately tried, prior serious felony convictions. (§ 667, subd. (a)(1).)

The Court next related CDCR's recommendation for resentencing.

> On May 31, 2019 the Secretary sent a letter and supporting case summary to the trial court pursuant to section 1170, subdivision (d)(1), recommending the court recall Frazier's sentence and resentence her. The Secretary informed the court that Frazier, nearly 70 years old, had demonstrated exemplary behavior while in prison; had completed a 24-week Alcoholics Anonymous program and multiple educational courses, including classes addressing conflict resolution and responses to violence; and had served as a role model for other students in the prison population. Frazier's only disciplinary issue during her more than decade-long incarceration was a refusal to perform an assigned duty in September 2017.

<u>The trial court was not swayed.</u>

> On July 3, 2019 the trial court issued a minute order stating, "The court has received and reviewed the letter from the [Secretary] dated 5/31/19 requesting a review and resentencing of defendant pursuant to Penal Code section 1170, subdivision (d)(1). The court declines to exercise its discretion pursuant to that section. The original sentence is to remain in full force and effect." Frazier appealed.

The appellate Court's discussion sweeps many types of discretionary appeals and whether any of these trigger the right to appointed counsel. In fact, almost all do not. The following discussion is provided in depth by CLN to guide future petitioners of all kinds of post-conviction relief (that are not part of their direct appeal rights) that they must make

do without appointed counsel.

**The Secretary's Filing Of A Section 1170, Subdivision (D)(1), Recommendation For Recall And Resentencing Does Not Trigger A Due Process Right To Counsel For An Indigent Defendant**

Emphasizing the Sixth Amendment guarantees a right to counsel at all critical stages of a criminal proceeding, Frazier asserts the Secretary's recommendation for recall and resentencing pursuant to section 1170, subdivision (d)(1), is a "critical stage" that, as this case demonstrates, can mean the difference between an inmate receiving an ameliorative sentence (including, perhaps, immediate release based on time served) and potentially spending the rest of her life in prison. However, as discussed, the Sixth Amendment right to counsel at critical stages of a criminal proceeding through sentencing does not apply to postjudgment collateral challenges (see *Coleman v. Thompson, supra*, 501 U.S. at p. 752; *Pennsylvania v. Finley, supra*, 481 U.S. at p. 555), including statutory petitions seeking a more ameliorative sentence (see *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064 [retroactive application of Proposition 36, the Three Strikes Reform Act of 2012, is a legislative act of lenity that does not implicate Sixth Amendment rights]; *People v. Howard* (2020) 50 Cal.App.5th 727, 740 [same]), at least prior to the actual recall of sentence. (See *People v. Rouse* (2016) 245 Cal.App.4th 292, 298 [once sentence recalled under Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18), resentencing hearing is critical stage at which defendant enjoys both Sixth Amendment and due process right to counsel].)

Implicitly recognizing this Sixth Amendment jurisprudence, Frazier contends the right to counsel following the Secretary's letter recommending recall and resentencing is rooted in the same due process concerns that afford a habeas corpus petitioner the right to counsel following the court's issuance of an order to show cause. Filed by the Secretary and not the inmate, the section 1170, subdivision (d)(1), recommendation, she asserts, is the "functional equivalent of a prima facie showing" for relief. Or, stated differently, she argues, the recommendation is akin to "an order to show cause [in that] an impartial governmental entity has declared that there is legitimate cause for relief." Both analogies are flawed.

In a habeas corpus proceeding the right to counsel and a hearing is triggered only after the petitioner has made a prima facie factual showing that, if unrebutted, demonstrates entitlement to relief. (See *People v. Duvall* (1995) 9 Cal.4th 464, 475 [issuance of an order to show cause in habeas proceeding "signifies the court's preliminary determination that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief"]; *In re Clark, supra*, 5 Cal.4th at p. 770 [same]; see also *People v. Shipman, supra*, 62 Cal.2d at p. 232 ["in the absence of adequate factual allegations stating a prima facie case, counsel need not be appointed" to represent a petitioner in the trial court on petition for writ of *error coram nobis*].)

The Secretary's request for recall and resentencing pursuant to section 1170, subdivision (d)(1), in contrast, provides no statutory entitlement to relief to the inmate even when the court credits the postconviction facts identified in the Secretary's recommendation materials. (*McCallum, supra*, __ Cal.App.5th at pp. __ [pp. 12-14]; see § 1170, subd. (d)(1) [the court "may" recall the sentence and resentence].) As we recently explained in *McCallum,* at pages __ [pp. 14-16], the Secretary's recommendation letter is but an invitation to the court to exercise its equitable jurisdiction. (*Id*. at p. __ [p. 21].) It furnishes the court with the jurisdiction it would not otherwise possess to recall and resentence; it does not trigger a due process right to a hearing (*id*. at p. __[p. 16]), let alone any right to the recommended relief. (*Ibid*.)

Frazier also contends if, as we have held, a summary refusal to follow the Secretary's recommendation under section 1170, subdivision (d)(1), is appealable pursuant to section 1237, subdivision (b), as an order after judgment affecting substantial rights (see *McCallum, supra*, __ Cal.App.5th at p. __, fn. 7 [p. 11, fn 7]; cf. *People v. Loper* (2015) 60 Cal.4th 1155, 1158), it necessarily follows that the due process right to counsel attaches to protect those substantial rights in the trial court.
(See generally *Avitia v. Superior Court* (2018) 6 Cal.5th 486, 494 ["a right is substantial when denial of the right results in a denial of due process"].)

**Frazier's argument sweeps too broadly. There simply is no constitutional right to counsel or a hearing in connection with every postjudgment request with the potential to affect a substantial right.** An inmate seeking recall and resentencing under Proposition 36 (the Three Strikes Reform Act of 2012) (§ 1170.126), for example, has a right to appeal from the summary denial of a petition for recall and resentencing following a finding the petitioner is ineligible for relief because that determination is an order after judgment affecting the petitioner's substantial rights (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 601), but there is no due process right to a hearing in connection with the trial court's eligibility determination. (*People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7–8 [due process does not require a hearing on the defendant's eligibility for Proposition 36 relief]; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1341 [same].) It is only after the petitioner's eligibility has been established and the statutory mandate for resentencing triggered (see § 1170.126, subd. (f) [if eligible, "the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety"]) that due process protections, including the right to a hearing, attach to the determination whether the defendant will be awarded the relief sought. (See *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1297 [due process requires prosecution be given notice and opportunity to be heard on issue of Proposition 36 petitioner's unreasonable risk of dangerousness].)

Similarly misguided is Frazier's attempt to compare a petition filed by an inmate pursuant to section 1170.95, following the Legislature's amendments to the felony murder rule and the natural and probable consequences doctrine as it pertains to murder, with the Secretary's section 1170, subdivision (d)(1), recommendation. Again, unlike section 1170, subdivision (d)(1), section 1170.95 creates an affirmative right to relief—recall of sentence and resentencing—for eligible inmates convicted of certain murder offenses who could not be convicted under the amended statutes. (See § 1170.95, subd. (d)(3) [requiring hearing "to determine whether the petitioner is entitled to relief"].) Moreover, section 1170.95, subdivision (c), expressly authorizes appointment of counsel upon the court's finding the petitioner has made a prima facie showing that he or she is entitled to relief. (See *People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted, Mar. 18, 2020, S260493; see also *People v. Cooper* (2020)

54 Cal.App.5th 106, 118-120 [disagreeing with Verdugo only as to when the legislatively mandated right to counsel attaches].) Section 1170, subdivision (d)(1), in contrast, contains no statutory mandate for appointment of counsel.

**The Record Does Not Demonstrate the Court Abused Its Discretion**

Frazier observes that, without appointing counsel and affording an inmate the opportunity to be heard, the court can summarily deny the re-

quest for recall and resentencing without explanation, leaving the court of appeal, as here, without a developed record and the ability to provide any meaningful review. That alone, she contends, is an abuse of discretion, for there is nothing in the record that suggests the denial of the Secretary's request was rationally related to lawful sentencing. (*Dix v. Superior Court, supra*, 53 Cal.3d at p. 456.)

However, nothing in section 1170, subdivision (d)(1), requires the court to state its reasoning when declining to exercise its discretion in response to the Secretary's recommendation. It is a fundamental tenet of appellate review that we presume on a silent record the court properly exercised its discretion. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 944; *People v. Lee* (2017) 16 Cal.App.5th 861, 867 ["if the record is silent" on the court's awareness of its discretionary authority in sentencing, we must presume the court understood the scope of its discretion and affirm]; *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527 ["in light of the presumption on a silent record that the trial court is aware of the applicable law, including statutory discretion at sentencing, [the reviewing court] cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of [its] discretion"].)

In affirming the court's order, we do not suggest the court's discretion to summarily decline to exercise its discretion under section 1170, subdivision (d)(1), is unfettered. As we recently held, an inmate may seek to present information to the court to supplement or enhance the material submitted by the Secretary. When that occurs, it is an abuse of discretion for the court to deny the Secretary's recommendation without permitting the inmate to do so. (*McCallum, supra*, __ Cal.App.5th at p. __ [p. 24].)

In addition, we need not, and do not, decide whether at some point prior to an actual resentencing hearing a due process right to counsel may attach under section 1170, subdivision (d)(1) —for example, if the court elects to conduct an evidentiary hearing to aid it in exercising its discretion whether to recall the sentence. We hold only that the filing of the Secretary's recommendation letter inviting the court to exercise its jurisdiction pursuant to section 1170, subdivision (d)(1), to recall a sentence, without more, does not trigger a due process right to counsel.

## CDCR RECOMMENDATION FOR SENTENCE MODIFICATION TRIGGERS A DUE PROCESS RIGHT TO PRESENT EVIDENCE IN SUPPORT OF CDCR

***P. v. Gene McCallum***

--- Cal.App.5th ---; CA 2(7) No. B301267
October 30, 2020

Unlike in the *Frazier* case above, petitioner Gene McCallum came to court with an attorney. But the trial court denied McCallum's CDCR recommendation for sentence modification without taking evidence McCallum wished to offer. On appeal, the Court of Appeal held that while McCallum had no absolute right to a hearing, his due process right to support CDCR's recommendation with his own evidence was abrogated when the trial court declined to hear such evidence.

Penal Code section 1170, subdivision (d)(1), authorizes the trial court to modify a defendant's sentence upon a recommendation from the Secretary of the Department of Corrections and Rehabilitation (Department), the Board of Parole Hearings, or the district attorney to "recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced . . . ." After serving 12 years of his third strike sentence of 30 years to life for residential burglary, the Secretary of the Department recommended McCallum's sentence be recalled

and McCallum be resentenced based on his violation-free conduct while in prison and his completion of nine college classes, a substance abuse program, and other counseling and self-awareness programs. Upon receiving the recommendation from the Secretary, McCallum's attorney requested the court hold a case management conference to discuss the Secretary's recommendation, and if necessary, to set a briefing and hearing schedule.

McCallum was denied summarily and without a hearing.

The trial court considered the Secretary's recommendation and supporting materials, but in a minute order it declined to exercise its discretion to recall McCallum's sentence. The court acknowledged McCallum's efforts to take substance abuse counseling and academic classes while in prison, but it noted McCallum's family and community support was "tenuous, with no identifiable base of support." The court did not hold a case management conference or hearing, and it did not provide McCallum or the People an opportunity to submit additional information for the court's consideration. McCallum contends on appeal he had a due process right to a hearing, and further, the trial court abused its discretion in failing to allow him to submit additional information on changed circumstances since he was first sentenced. McCallum asserts he would have submitted, among other information, documentation showing he had been accepted into a substance abuse and mental health inpatient counseling program upon his release, providing the community support the court found lacking.

The Legislature did not require a hearing.

We conclude the statutory language of section 1170, subdivision (d)(1), read in the context of section 1170 as a whole, shows the Legislature did not intend to require a trial court to hold a hearing before acting on a recommendation by the Secretary for recall and resentencing. It is up to the Legislature to address in the first instance whether an inmate should be afforded a hearing in response to a recommendation by the Secretary for recall and resentencing.

Nonetheless, McCallum had a strong liberty interest in a hearing on the Secretary's recommendation.

However, in light of McCallum's substantial right to liberty implicated by the Secretary's *recommendation* to recall McCallum's sentence (*People v. Loper* (2015) 60 Cal.4th 1155, 1158, 1163 (*Loper*)), the trial court abused its discretion in denying McCallum an opportunity to present information relevant to the Secretary's recommendation.

Further, the trial court based its rejection of the Secretary's recommendation in part on a finding that McCallum had no family or community support, apparently relying on information provided by the Secretary showing McCallum did not have visitors during his 12 years in prison. Whether McCallum would have family and community support upon his release is precisely the type of information that would be known to McCallum, not the Department. We reverse and remand for the trial court to allow McCallum and the People an opportunity to present additional information relevant to the Secretary's recommendation, and for the trial court in light of this information and any briefing provided by the parties to exercise its discretion whether to recall McCallum's sentence. If the court recalls McCallum's sentence, he would have a right to be present at a resentencing hearing.

**The Trial Court's Ruling on the Secretary's Recommendation**

The trial court "read and considered" the

Secretary's recommendation and supporting documents, and in a July 8, 2019 minute order the court "decline[d] to exercise its discretion to recall the sentence under [section] 1170(d)." The court noted McCallum's criminal history showed his "extensive drug use, theft crimes of increasing severity and physical violence," as well as five violations of parole. The court acknowledged "McCallum has endeavored to take several academic classes, including substance abuse court." But the court concluded it was "not inclined to exercise its discretion to recall Mr. McCallum's sentence based on these classes. Further, family and community support for Mr. McCallum is tenuous, with no identifiable base of support." The minute order reflects McCallum was not present in court "and not represented by counsel." The court clerk served copies of the minute order on McCallum, his attorney, and the Secretary.

On September 6, 2019 McCallum timely appealed

**Governing Law and Standard of Review**

"Section 1170(d) is an exception to the common law rule that the court loses resentencing jurisdiction once execution of sentence has begun." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455 (*Dix*); accord, *People v. Delson* (1984) 161 Cal.App.3d 56, 62 (*Delson*) ["[S]ection 1170, subdivision (d) represents a limited statutory exception to the general rule that a trial court loses jurisdiction to reconsider a denial of probation or vacate or modify the sentence when a defendant is committed and execution of sentence begins."].) Section 1170, subdivision (d), enacted in 1976 as part of the Determinate Sentencing Act (*Dix*, at p. 455), provides "the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, the county correctional administrator in the case of county jail inmates, or the district attorney of the county in which the defendant was sentenced, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if they had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." (§ 1170, subd. (d)(1).) Section 1170, subdivision (d)(1), provides further as to resentencing that the court "shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice."

In deciding whether to recall a sentence under section 1170, subdivision (d)(1), the trial court may exercise its authority "for any reason rationally related to lawful sentencing." (*Dix*, *supra*, 53 Cal.3d at p. 456.) Further, section 1170, subdivision (d)(1), expressly authorizes the court in resentencing a defendant to consider "postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarcera-

tion is no longer in the interest of justice."

We review the trial court's decision whether to recall a defendant's sentence for an abuse of discretion. (*Delson, supra*, 161 Cal.App.3d at p. 62 [trial court did not abuse its discretion in refusing to set a hearing on Department's recommendation under § 1170, former subd. (d), for recall of defendant's sentence and resentencing based on postsentence diagnostic report]; see *People v. Gibson* (2016) 2 Cal.App.5th 315, 324-325 [applying abuse of discretion standard to trial court's decision whether to recall a defendant's sentence as a youth offender under § 1170, subd. (d)(2), describing the subdivision's language allowing recall and resentencing as "permissive"].) "'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]"' [Citation.] The abuse of discretion standard 'involves abundant deference' to the court's ruling." (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 242-243; accord, *People v. Miracle* (2018) 6 Cal.5th 318, 346-347.) We review questions of statutory construction de novo. (*ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 188; *John v. Superior Court* (2016) 63 Cal.4th 91, 95; see *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 587 [reviewing interpretation of § 1170, subd. (e), de novo].)

**McCallum Is Not Entitled to a Hearing Under Section 1170, Subdivision (d)(1)**

"Our primary task 'in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent.'" (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1041; accord, *In re A.N.* (2020) 9 Cal.5th 343, 351-352.) "'"We interpret relevant terms in light of their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose."' [Citations.] 'If we find the statutory language ambiguous or subject to more than one interpretation, we may look to extrinsic aids, including legislative history or purpose to inform our views.'" (*In re A.N.*, at pp. 351-352; accord, *ZB, N.A. v. Superior Court, supra*, 8 Cal.5th at p. 189 ["We consider the provisions' language in its 'broader statutory context' and, where possible, harmonize that language with related provisions by interpreting them in a consistent fashion. [Citation.] If an ambiguity remains after this preliminary textual analysis, we may consider extrinsic sources such as legislative history and contemporaneous administrative construction."].)

Section 1170, subdivision (d)(1), is silent as to whether the trial court must hold a hearing prior to ruling on the Secretary's recommendation for recall and resentencing. We therefore interpret subdivision (d)(1) in light of the language used in other subdivisions of section 1170. (See *Digital Realty Trust, Inc. v. Somers* (2018) ___ U.S. ___ [138 S.Ct. 767, 777] ["'[W]hen Congress "'includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes

that Congress intended a difference in meaning.'"]; *Bruns v. E□Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 727 [interpreting statutory provision excluding period civil action was stayed from five-year limit for civil case to be brought to trial not to include a partial stay where Legislature in companion provision explicitly referred to a partial stay, explaining the difference "shows the Legislature knows how to specifically reference a partial stay, in addition to a complete stay, when that is its intent"]; *People v. Trevino* (2001) 26 Cal.4th 237, 242 ["When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning."].)

A review of section 1170 shows the Legislature was well aware of what language to use to require the trial court to hold a hearing before acting on a recommendation or petition to recall a sentence. For example, section 1170, subdivision (e), authorizes the Secretary to recommend recalling an inmate's sentence if the inmate is "terminally ill with an incurable condition" or "permanently medically incapacitated." (§ 1170, subd. (e)(2)(A), (C).) Subdivision (e)(3) of section 1170 provides that upon receiving a positive recommendation from the Secretary, "the court shall hold a hearing to consider whether the prisoner's sentence should be recalled." Section 1170, former subdivision (f), likewise provided that within one year after a defendant's prison term commenced, the Board of Prison Terms was required to review the sentence to determine "comparative disparity" relative to other defendants' sentences. (*Dix, supra*, 53 Cal.3d at p. 458.) The subdivision provided that within 120 days of the trial court being notified of a determination of disparity, the "court '*shall* schedule a hearing and [after considering the Board's information] may recall the sentence and commitment . . . and resentence the defendant in the same manner as if the defendant had not been sentenced previously . . . .'" (*Dix*, at p. 458, quoting § 1170, former subd. (f)(1).)

**The Trial Court Abused Its Discretion in Rejecting the Secretary's Recommendation Without Allowing McCallum To Present Additional Information Relevant to the Secretary's Recommendation**

McCallum contends the trial court abused its discretion in rejecting the Secretary's recommendation without first allowing him to submit information necessary for the court to exercise its discretion whether to follow the recommendation. The People respond there was no abuse of discretion because the trial court considered the Secretary's extensive cumulative case summary describing McCallum's postconviction conduct in prison, but it determined his record was not sufficient to support recall of his sentence. McCallum has the better argument. Once McCallum requested an opportunity to respond to the Secretary's recommendation by requesting a case management conference and possible briefing and presentation of evidence, the trial court's decision simply to ignore McCallum's request to provide input on the Secretary's recommendation was an abuse of discretion.

The Supreme Court's decision in *Loper, supra*, 60 Cal.4th 1155 is instructive. The *Loper* court considered whether a defendant could appeal a trial court's ruling denying

the recommendation by the Department to recall the defendant's sentence pursuant to the compassionate release provisions of section 1170, subdivision (e). The Supreme Court held the defendant had a right to appeal the trial court's denial of compassionate release pursuant to section 1237, subdivision (b), because the court's denial "was an order made after judgment that affected [the] defendant's substantial rights." (*Loper*, at pp. 1158, 1168.) In reaching this conclusion, the Supreme Court disapproved two opinions that held the defendant could not appeal denial of his motion to recall his sentence under section 1170, former subdivision (d) (and the predecessor statute), on the basis the statute did not authorize the defendant to initiate a request to recall a sentence. (*Loper*, at pp. 1166-1167, disapproving *People v. Druschel* (1982) 132 Cal.App.3d 667 and *People v. Niren* (1978) 76 Cal.App.3d 850, 851.) The *Loper* court analogized a defendant's right to seek recall of his or her sentence under section 1170, subdivision (d)(1), to a defendant's right to invite a trial court to exercise its power to strike a count or allegation of an accusatory pleading, explaining, "'"[T]he court must consider evidence offered by the defendant in support of his assertion that the dismissal would be in furtherance of justice."'" (*Loper*, at p. 1167, quoting *People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).)

Although McCallum could not invite the trial court to recall his sentence absent a recommendation by the Secretary (unless he had made the request within 120 days of his commitment), here the trial court had jurisdiction to recall McCallum's sentence because the Secretary made precisely such a recommendation. Thus, as in *Carmony*, upon a request by McCallum, the trial court was required to consider evidence in support of the Secretary's recommendation.

Allowing McCallum to submit additional information showing his rehabilitation and reentry plans is also consistent with the Legislature's express findings and declarations for section 1170, amended in 2016 (effective January 1, 2017) as part of Assembly Bill No. 2590 (2015-2016 Reg. Sess.), explaining "the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice." (§ 1170, subd. (a)(1).) Further, Assembly Bill No. 2590 amended section 1170, subdivision (a)(2), to declare that the Department should make available for inmates "educational, rehabilitative, and restorative justice programs that are designed to promote behavior change and to prepare all eligible offenders for successful reentry into the community" and develop "policies and programs designed to educate and rehabilitate all eligible offenders."

Moreover, the only evidence before the court that arguably supported its finding McCallum had "tenuous" family and community support was the fact presented in the cumulative case summary that McCallum did not have visitors during his 12 years in prison. As McCallum's attorney pointed out at oral argument, a defendant may have no visitors for a variety of reasons unrelated to family and community support, including the distance from the defendant's home to his or her place of incarceration (here at San Quentin State Prison in Northern California). Indeed, had the trial court allowed McCallum to submit additional in-

formation before declining to recall his sentence, the court likely would have learned the facts were to the contrary—that McCallum had been accepted into an inpatient substance abuse and mental health counseling program with vocational training upon his release. This type of information about an inmate's reentry plans would typically be in the possession of the defendant, not the Department. The court also appears to have ignored (or minimized) the reference in the cumulative case summary to a February 6, 2019 letter from an unknown source "pledging full support of McCallum to ensure a successful parole by assisting with a residence, insurance, transportation, and work with and stay in contact with all release support programs." Again, McCallum would have been in the best position to provide additional details on what support this unnamed source intended to provide upon McCallum's release. The trial court's rejection of the Secretary's recommendation without an opportunity for McCallum to present this information was an abuse of discretion. (*People v. Miracle, supra*, 6 Cal.5th at pp. 346-347; *People v. Gibson, supra*, 2 Cal.App.5th at pp. 324-325; *Delson, supra*, 161 Cal.App.3d at p. 62.)

**DISPOSITION**

The trial court's order declining to recall McCallum's sentence is reversed. The matter is remanded to the trial court to allow the parties to submit information relevant to the Secretary's recommendation and to provide briefing on whether the trial court should follow the Secretary's recommendation. Upon receipt of this information, the court is to exercise its discretion whether to recall and resentence McCallum.

## PROPOSITION 57 NOT RETROACTIVE

***P. v. Jesus Lizarraga***

--- Cal.App.5th ---; CA 2(5) No. B299939

October 22, 2020

Defendant Jesus Lizarraga was 17 years old when he shot a rival gang member; he was tried and sentenced as an adult. The Court of Appeal affirmed his initial appeal. (*People v. Lizarraga* (Dec. 7, 2015, B258261) [nonpub. opn.].) After the first appeal was final, Lizarraga filed a petition for writ of habeas corpus under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) and requested an opportunity to make a record relevant to his eventual youth offender parole hearing. The trial court granted the petition and set a date for an evidentiary hearing. Lizarraga next proceeded to file a motion in the trial court for a transfer hearing in juvenile court pursuant to the newly-enacted Public Safety and Rehabilitation Act of 2016 (Proposition 57). The trial court denied the motion, finding Lizarraga's case was final and Proposition 57 was not retroactive.

On this second appeal, the Court concluded that Lizarraga's case was final when he requested the transfer hearing, and Proposition 57 does not apply to final judgments. It also found that Lizarraga's equal protection challenge was without merit.

***FACTUAL AND PROCEDURAL BACKGROUND***

In 2014, a jury convicted Lizarraga of second degree murder and found that he personally used a firearm in connection with the shooting of a rival gang member. The trial court sentenced him to 40 years to life in state prison. We affirmed the judgment as modified. The California Supreme Court denied review, and we issued the remittitur on March 9, 2016. On March 29, 2016, the trial court modified the judgment in keeping with the remittitur and ter-

minated proceedings.

Eight months later, on November 8, 2016, California voters passed Proposition 57, prohibiting prosecutors from charging juveniles with crimes directly in adult criminal court. Approximately a year and a half after that, in July 2018, Lizarraga filed a petition for writ of habeas corpus seeking a *Franklin* hearing which the trial court granted.

Prior to the scheduled hearing, Lizarraga filed a "Notice of Motion and Motion to Remand Case to Juvenile Court in light of Proposition 57. Proposition 57, "The Public Safety and Rehabilitation Act of 2016," among other things, repealed the statutory provision permitting the direct filing of juvenile cases in adult criminal court. Under Proposition 57, once the case is in juvenile court, "if the prosecution wishes to try the juvenile as an adult, the juvenile court must conduct what we will call a 'transfer hearing' to determine whether the matter should remain in juvenile court or be transferred to adult court." (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303 (*Lara*).)

The People opposed the motion to transfer, arguing that Lizarraga's case was already final when Proposition 57 took effect, and he was not entitled to a transfer hearing under *Lara*. The trial court denied the motion, because it found that "the *Franklin* hearing is not a resentencing," and "this particular case has been final for quite some time." Lizarraga timely appealed.

Lizarraga made three arguments on appeal: (1) he was entitled to a transfer hearing under Proposition 57 because his case was not final, (2) even if his case was final, Proposition 57 still applies; and (3) the denial of a Proposition 57 transfer hearing to youth offenders with final sentences is a violation of equal protection clauses of the state and federal constitutions.

***Proposition 57***

" 'Historically, a child could be tried in criminal court only after a judicial determination, before jeopardy attached, that he or she was unfit to be dealt with under juvenile court law.' " (*Lara, supra*, 4 Cal.5th at p. 305.) "Amendments to former sections 602 and 707 in 1999 and 2000, some by initiative, changed this historical rule. Under the changes, in specified circumstances, prosecutors were permitted, and sometimes required, to file charges against a juvenile directly in criminal court, where the juvenile would be treated as an adult." (*Ibid*.)

Proposition 57 largely returned California to its historical rule. (*Lara, supra*, 4 Cal.5th at p. 305.) "Proposition 57 amended the Welfare and Institutions Code so as to eliminate direct filing by prosecutors. Certain categories of minors . . . can still be tried in criminal court, but only after a juvenile court judge conducts a transfer hearing to consider various factors such as the minor's maturity, degree of criminal sophistication, prior delinquent history, and whether the minor can be rehabilitated." (*Id*. at pp. 305–306.)

In 2018, our Supreme Court decided *Lara*, which held that Proposition 57 "applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Lara, supra*, 4 Cal.5th at p. 304.) As to juveniles that had cases pending on appeal prior to the passage of Proposition 57, the defendant's conviction and sentence are to be conditionally reversed and the juvenile court is to conduct a transfer hearing. (*Id*. at p. 310.)

***Lizarraga's Judgment Was Final***

Lizarraga argues that his case was not final because the trial court granted his habeas petition and scheduled a *Franklin* hearing. As Proposition 57 applies retroactively to cases that are not yet final, he contends he is enti-

tled to a transfer hearing.

Our response is threefold: First, the *Franklin* hearing aside, Lizarraga's case was final in June 2016, upon expiration of the time to seek review in the United States Supreme Court. A "judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Vieira* (2005) 35 Cal.4th 264, 306; see also *In re Pine* (1977) 66 Cal.App.3d 593, 595, citing *In re Dabney* (1969) 71 Cal.2d 1, 11 [a "conviction only [becomes] final for retroactivity purposes . . . when the period during which [the defendant] might have applied for certiorari ended.") The United States Supreme Court, rule 13 provides that a petition for writ of certiorari is timely filed within 90 days after entry of judgment of a state court of last resort. The record does not show that Lizarraga filed a petition for writ of certiorari. His judgment was thus final on June 7, 2016—90 days after the California Supreme Court denied review. Lizarraga nearly concedes as much.

Second, we find inapt Lizarraga's reliance on *People v. Hargis* (2019) 33 Cal.App.5th 199 (*Hargis*). *Hargis* held that a defendant was entitled to a transfer hearing after he appealed his conviction and his case was remanded for a *Franklin* hearing. Proposition 57 was enacted one week after the appellate opinion was filed affirming the judgment and remanding the matter. (*Id.* at p. 202.) The *Hargis* court found that the case was not yet final. In addressing the applicability of Proposition 57, the Court of Appeal concluded "it is indisputable that defendant, who was 16 years old at the time of the offenses of which he was convicted, is entitled to a juvenile fitness/transfer hearing pursuant to Proposition 57, as he was charged directly in adult court and his judgment was not final at the time the new law was enacted." (*Id.* at pp. 204–205.)

The present case is quite different. The *Hargis* court correctly observed that the case was not final. The Court of Appeal had remanded the matter for a *Franklin* hearing, i.e. further proceedings were to take place in the trial court in the very same case that had been appealed. Here, Lizarraga filed a petition for habeas corpus some four years after his direct appeal was final. He essentially argues that whenever a *Franklin* hearing is scheduled – even years after the case has become final – the finality is undone and all intervening changes in the law are in play. *Hargis* does not say that. To the extent *Hargis* could be read in such a manner, we respectfully disagree.

Third, we reject defendant's argument that the grant of a *Franklin* hearing essentially created a new sentencing hearing thus effectively vacating the earlier finality. We acknowledge that a grant of habeas corpus to resentence a defendant may change the finality date for purposes of retroactivity of later passed ameliorative laws. Lizarraga relies on this principle when he cites to *People v. Garcia* (2018) 30 Cal.App.5th 316, where the defendant was ordered resentenced and then successfully applied for a transfer hearing. When a defendant is resentenced, there is no longer a final judgment of conviction because there is no existing sentence. (See *People v. Buycks* (2018) 5 Cal.5th 857, 893 [where there is a full resentencing, the court may consider changes in the law providing for a reduced sentence].) Here, Lizarraga was not resentenced, instead, the court set only a limited hearing at which defendant was entitled to present evidence for use at a future parole hearing. Defendant was not exposed at the *Franklin* hearing to any increase in sentence—or any decrease for that matter.

***Proposition 57 Does Not Apply to Final Judgments***

Lizarraga argues that even if his judgment is final, he is still entitled to a transfer hearing because Proposition 57 applies retroactively to all juvenile offenders. He contends that *Lara*

did not consider this issue but only addressed the retroactivity of Proposition 57 in relation to cases that were not final. We do not read *Lara* so narrowly—the Supreme Court's opinion established that Proposition 57 is not fully retroactive.

In *Lara*, the Court applied an "inference of retroactivity" pursuant to *In re Estrada* (1963) 63 Cal.2d 740 (*Estrada*) and held that Proposition 57 applied to defendants whose judgments were not final. (*Lara*, *supra*, 4 Cal.5th at p. 309.) *Estrada* stands for the proposition that, "when the Legislature amends a statute for the purpose of lessening the punishment, in the absence of clear legislative intent to the contrary, a criminal defendant should be accorded the benefit of a mitigation of punishment adopted before his criminal conviction became final." (*In re Chavez* (2004) 114 Cal.App.4th 989, 999 (*Chavez*).) In arguing that we should extend Proposition 57's application to defendants whose judgments are final, Lizarraga relies on the following statement from *Chavez*: "There is nothing in *Estrada* that prohibits the application of revised sentencing provisions to persons whose sentences have become final if that is what the Legislature intended or what the Constitution requires." (*Id.* at p. 1000.) *Chavez* does not assist defendant. There, the appellate court concluded that the Legislature intended that a new statute reducing the sentence for filing false tax returns be applied to two current inmates whose cases were final. (*Id*. at pp. 991–992.) The court reviewed the amendment's extensive legislature history and held that the conclusion was "unavoidable" that the Legislature "intended the amendment to apply to persons sentenced under the anomalous statute." (*Id.* at p. 999.)

At most *Chavez* stands for the proposition that if the Legislature so intends, an amendment to a criminal statute may apply to those defendants whose cases are already final, and that *Estrada* does not mandate otherwise. *Chavez*, of course, has nothing to do with Proposition 57, and preceded *Lara* by 14 years. Our Supreme Court has now held that Proposition 57 applies to those whose convictions are not yet final. Even if the literal words do not necessarily foreclose a finding that the proposition applies to those defendants whose cases are final, the fair reading of the Supreme Court's holding is that it does not.

Finally, if the Supreme Court left the issue open, *Chavez* teaches that before a court can apply a statute retroactively to final judgments, it must discern a legislative purpose to do so. Lizarraga points to nothing in the legislative history (the ballot pamphlet) that suggests the electorate intended to order new transfer hearings for every juvenile offender convicted in adult court since 1999 (when the transfer statutes were first changed).

***There is No Equal Protection Violation***

Lizarraga argues that denying him Proposition 57 relief violates his right to equal protection under the state and federal constitutions. He contends that giving Proposition 57 only partial retroactive effect creates two classes of similarly situated youth offenders: those whose sentences were not yet final on November 9, 2016 when Proposition 57 went into effect, and those whose sentences were final on that date. One group of defendants will serve their sentences in state prison; the other group will have the opportunity to obtain rehabilitative services in the juvenile system. (See *People v. Vela* (2018) 21 Cal.App.5th 1099, 1105 ["There is no 'sentence,' per se, in juvenile court. Rather, a judge can impose a wide variety of rehabilitation alternatives . . . ."].) In Lizarraga's view, no compelling state interest or even a rational basis justifies this unequal treatment.

We reject this claim because our Supreme Court has held that no "equal protection viola-

tion aris[es] from the timing of the effective date of a statute lessening the punishment for a particular offense." (*People v. Floyd* (2003) 31 Cal.4th 179, 188 (*Floyd*).) *Floyd* considered the retroactivity of Proposition 36, which "amended state law to require that certain adult drug offenders receive probation, conditioned on participation in and completion of an appropriate drug treatment program, instead of receiving a prison term or probation without drug treatment." (*Id.* at p. 183.)

In *Floyd*, the defendant was sentenced shortly *after* Proposition 36 was passed into law, so his conviction was not yet final at the time of passage. (*Floyd*, *supra*, 31 Cal.4th at p. 183.) The defendant argued that the ameliorative law was retroactive to him because his conviction was not final. (*Id.* at pp. 183–184.) Alternatively, he argued that to deny application of Proposition 36 to him violated the equal protection of the laws. (*Id.* at p. 184.) The Supreme Court disagreed on both counts.

Unlike *Lara,* where the court would conclude that Proposition 57 applies to all judgments not yet final, the Supreme Court in *Floyd* did not go even that far; instead, it held that the proposition was prospective only. (*Floyd*, *supra*, 31 Cal.4th at p. 182.) For reasons that are not particularly germane to the present appeal, the court concluded that the proposition itself stated the voters' intent to give only a prospective application to the law. (*Ibid.*) Defendant's crime had been committed many years before the passage of Proposition 36.

In *Floyd,* the defendant's alternative argument was that to not apply the proposition to him when his judgment was not final at the time of passage would violate his equal protection rights. The Supreme Court was not persuaded. " 'The Legislature properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.' [Citations.] The voters have the same prerogative. [Citation.]" (*Floyd, supra,* 31 Cal.4th at p. 188.)

Finally, the Court pointed out that the defendant in *Floyd* offered no authority for his equal protection argument. In an observation tellingly applicable to the present appeal, the court stated, "Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim—including this court." (*Floyd*, *supra*, 31 Cal.4th at p. 188.)

Lizarraga argues that *Floyd'*s holding is limited to statutes that apply prospectively, not those that are partially retroactive. That principal emerges nowhere in *Floyd.* We find incongruous the argument that prospective laws do not constitutionally discriminate against those defendants whose convictions are not final at the time of passage but do violate the rights of those defendants whose convictions have long been final. More to the point, the Supreme Court has foreclosed that argument: The "'14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.' " (*Floyd*, *supra*, 31 Cal.4th at p. 191, citing.) "Retroactive application of a punishment-mitigating statute is not a question of constitutional right but of legislative intent." (*People v. Henderson* (1980) 107 Cal.App.3d 475, 488, fn. 5.) Lizarraga's equal protection rights were not violated.

Accordingly, the order denying Lizarraga's motion to remand under Proposition 57 was affirmed.

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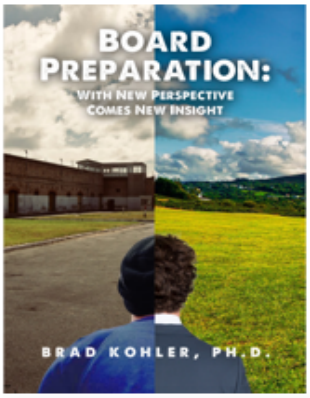


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## Board's Information Technology System

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

### Summary of Suitability Hearing Results per Commissioner

| | ANDERSON, JR | BARTON | CASSADY | CASTRO | CHAPPELL | DE LA TORRE | DOBBS | GROUNDS | GUTIERREZ | LONG | MINOR | RUFF | SAN JUAN | SCHNEIDER | SHARRIEFF | SULLIVAN | TAIRA | THORNTON | BPH HQ | Total CMR Hrg | Hrgs Conducted w/ more than 1 CMR | Actual Hrgs Conducted |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Suitability Hrg Total** | 13 | 16 | 17 | 25 | 15 | 24 | 10 | 14 | 6 | 27 | 18 | 27 | 18 | 23 | 0 | 0 | 14 | 22 | 319 | 608 | 28 | 580 |
| Grants | 4 | 5 | 8 | 8 | 4 | 4 | 2 | 2 | 5 | 7 | 6 | 7 | 5 | 9 | 0 | 0 | 5 | 7 | 0 | 88 | 6 | 82 |
| Denials | 6 | 3 | 7 | 14 | 8 | 7 | 5 | 9 | 1 | 12 | 8 | 15 | 10 | 11 | 0 | 0 | 8 | 5 | 0 | 129 | 14 | 115 |
| Stipulations | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 2 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 1 | 0 | 6 | 0 | 6 |
| Waivers | 1 | 4 | 0 | 0 | 1 | 3 | 0 | 2 | 0 | 0 | 0 | 3 | 0 | 1 | 0 | 0 | 0 | 1 | 48 | 64 | 2 | 62 |
| Postponements | 2 | 4 | 2 | 3 | 2 | 9 | 1 | 1 | 0 | 5 | 4 | 2 | 1 | 2 | 0 | 0 | 1 | 8 | 259 | 306 | 6 | 300 |
| Continuances | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 2 |
| Tie Vote | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 1 |
| Cancellations | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 12 | 12 | 0 | 12 |

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

| | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Deny+Stip)** | 6 | 3 | 7 | 14 | 8 | 7 | 6 | 9 | 1 | 14 | 8 | 15 | 12 | 11 | 0 | 0 | 8 | 6 | 0 | 135 | 14 | 121 |
| 1 year | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 3 years | 2 | 0 | 3 | 10 | 6 | 3 | 2 | 7 | 1 | 9 | 5 | 8 | 5 | 9 | 0 | 0 | 7 | 2 | 0 | 79 | 6 | 73 |
| 4 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 5 years | 0 | 2 | 4 | 3 | 2 | 4 | 4 | 1 | 0 | 5 | 2 | 4 | 5 | 2 | 0 | 0 | 1 | 3 | 0 | 42 | 4 | 38 |
| 7 years | 2 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 2 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 7 | 2 | 5 |
| 10 years | 2 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 | 7 | 2 | 5 |
| 15 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

### Waiver Length Analysis per Commissioner

| | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Waiver)** | 1 | 4 | 0 | 0 | 1 | 3 | 0 | 2 | 0 | 0 | 0 | 3 | 0 | 1 | 0 | 0 | 0 | 1 | 48 | 64 | 2 | 62 |
| 1 year | 1 | 1 | 0 | 0 | 1 | 1 | 0 | 1 | 0 | 0 | 0 | 2 | 0 | 1 | 0 | 0 | 0 | 1 | 25 | 34 | 0 | 34 |
| 2 years | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 14 | 18 | 2 | 16 |
| 3 years | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 6 | 9 | 0 | 9 |
| 4 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 1 |
| 5 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 2 | 0 | 2 |

### Postponement Analysis per Commissioner

| | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Postpone)** | 2 | 4 | 2 | 3 | 2 | 9 | 1 | 1 | 0 | 5 | 4 | 2 | 1 | 2 | 0 | 0 | 1 | 8 | 259 | 306 | 6 | 300 |
| Within State Control | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 221 | 223 | 0 | 223 |
| Exigent Circumstance | 2 | 0 | 2 | 1 | 1 | 1 | 0 | 1 | 0 | 1 | 4 | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 16 | 31 | 0 | 31 |
| Prisoner Postpone | 0 | 4 | 0 | 1 | 1 | 8 | 1 | 0 | 0 | 4 | 0 | 1 | 1 | 2 | 0 | 0 | 1 | 6 | 22 | 52 | 6 | 46 |

## Board's Information Technology System

Commissioners Summary
All Institutions
September 01, 2020 to September 30, 2020

### Summary of Suitability Hearing Results per Commissioner

| | ANDERSON, JR | BARTON | CASSADY | CASTRO | CHAPPELL | DE LA TORRE | DOBBS | GROUNDS | GUTIERREZ | LONG | MINOR | RUFF | SAN JUAN | SCHNEIDER | SHARRIEFF | SULLIVAN | TAIRA | THORNTON | BPH HQ | Total CMR Hrg | Hrgs Conducted w/ more than 1 CMR | Actual Hrgs Conducted |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Suitability Hrg Total** | **26** | **19** | **27** | **0** | **27** | **33** | **20** | **25** | **30** | **36** | **26** | **26** | **30** | **35** | **26** | **30** | **29** | **34** | **263** | **742** | **10** | **732** |
| Grants | 6 | 5 | 7 | 0 | 7 | 8 | 9 | 5 | 10 | 11 | 6 | 10 | 11 | 11 | 7 | 7 | 10 | 8 | 0 | 138 | 4 | 134 |
| Denials | 14 | 6 | 16 | 0 | 15 | 14 | 7 | 17 | 16 | 14 | 11 | 12 | 11 | 15 | 10 | 15 | 13 | 21 | 0 | 227 | 4 | 223 |
| Stipulations | 0 | 0 | 0 | 0 | 1 | 0 | 2 | 0 | 1 | 3 | 1 | 1 | 2 | 3 | 3 | 1 | 0 | 0 | 0 | 18 | 1 | 17 |
| Waivers | 1 | 1 | 0 | 0 | 2 | 1 | 2 | 1 | 1 | 3 | 3 | 1 | 1 | 2 | 1 | 0 | 0 | 1 | 77 | 98 | 0 | 98 |
| Postponements | 5 | 7 | 4 | 0 | 2 | 10 | 0 | 2 | 2 | 4 | 5 | 2 | 4 | 4 | 5 | 7 | 6 | 4 | 150 | 223 | 1 | 222 |
| Continuances | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 1 |
| Tie Vote | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 1 |
| Cancellations | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 36 | 36 | 0 | 36 |

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

| | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Deny+Stip)** | **14** | **6** | **16** | **0** | **16** | **14** | **9** | **17** | **17** | **17** | **12** | **13** | **13** | **18** | **13** | **16** | **13** | **21** | **0** | **245** | **5** | **240** |
| 1 year | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 3 years | 6 | 2 | 10 | 0 | 7 | 8 | 4 | 10 | 9 | 10 | 9 | 10 | 8 | 13 | 12 | 9 | 10 | 11 | 0 | 148 | 2 | 146 |
| 4 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 5 years | 6 | 3 | 6 | 0 | 4 | 4 | 4 | 7 | 5 | 5 | 2 | 2 | 3 | 5 | 1 | 6 | 3 | 5 | 0 | 71 | 3 | 68 |
| 7 years | 1 | 1 | 0 | 0 | 5 | 2 | 1 | 0 | 3 | 0 | 1 | 1 | 2 | 0 | 0 | 1 | 0 | 3 | 0 | 21 | 0 | 21 |
| 10 years | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 5 | 0 | 5 |
| 15 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

### Waiver Length Analysis per Commissioner

| | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Waiver)** | **1** | **1** | **0** | **0** | **2** | **1** | **2** | **1** | **1** | **3** | **3** | **1** | **1** | **2** | **1** | **0** | **0** | **1** | **77** | **98** | **0** | **98** |
| 1 year | 1 | 1 | 0 | 0 | 1 | 0 | 1 | 1 | 0 | 1 | 1 | 1 | 1 | 1 | 0 | 0 | 0 | 0 | 43 | 53 | 0 | 53 |
| 2 years | 0 | 0 | 0 | 0 | 1 | 1 | 1 | 0 | 1 | 2 | 2 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 20 | 30 | 0 | 30 |
| 3 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 11 | 12 | 0 | 12 |
| 4 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 1 |
| 5 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 2 | 0 | 2 |

### Postponement Analysis per Commissioner

| | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Postpone)** | **5** | **7** | **4** | **0** | **2** | **10** | **0** | **2** | **2** | **4** | **5** | **2** | **4** | **4** | **5** | **7** | **6** | **4** | **150** | **223** | **1** | **222** |
| Within State Control | 0 | 2 | 2 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 104 | 110 | 0 | 110 |
| Exigent Circumstance | 2 | 2 | 0 | 0 | 0 | 1 | 0 | 1 | 2 | 2 | 3 | 0 | 2 | 0 | 1 | 1 | 3 | 0 | 30 | 50 | 1 | 49 |
| Prisoner Postpone | 3 | 3 | 2 | 0 | 2 | 7 | 0 | 1 | 0 | 2 | 2 | 2 | 2 | 4 | 4 | 6 | 3 | 4 | 16 | 63 | 0 | 63 |

## Board's Information Technology System

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

### Summary of Suitability Hearing Results per Commissioner

| | ANDERSON JR | BARTON | CASSADY | CHAFFEE | DE LA TORRE | DOBBS | GROUNDS | GUTIERREZ | LONG | MINOR | RUFF | SAN JUAN | SCHNEIDER | SHARRIEFF | SULLIVAN | TAIRA | THORNTON | BPH HQ | Total CMR Hrg | Hrgs Conducted w/ more than 1 CMR | Actual Hrgs Conducted |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Suitability Hrg Total** | 28 | 16 | 27 | 34 | 26 | 0 | 30 | 34 | 29 | 26 | 33 | 28 | 29 | 36 | 22 | 28 | 23 | 217 | 666 | 2 | 664 |
| Grants | 8 | 5 | 7 | 5 | 4 | 0 | 7 | 10 | 11 | 8 | 11 | 5 | 3 | 2 | 8 | 9 | 3 | 0 | 106 | 0 | 106 |
| Denials | 12 | 4 | 13 | 16 | 15 | 0 | 20 | 15 | 16 | 14 | 14 | 10 | 12 | 15 | 10 | 13 | 13 | 0 | 212 | 1 | 211 |
| Stipulations | 2 | 1 | 1 | 1 | 0 | 0 | 1 | 9 | 0 | 0 | 0 | 5 | 5 | 2 | 3 | 1 | 2 | 0 | 33 | 1 | 32 |
| Waivers | 1 | 2 | 2 | 1 | 5 | 0 | 1 | 0 | 0 | 0 | 1 | 5 | 3 | 0 | 0 | 0 | 2 | 61 | 84 | 0 | 84 |
| Postponements | 4 | 4 | 2 | 9 | 2 | 0 | 1 | 0 | 1 | 4 | 5 | 2 | 5 | 17 | 1 | 4 | 3 | 125 | 189 | 0 | 189 |
| Continuances | 1 | 0 | 2 | 2 | 0 | 0 | 0 | 0 | 1 | 0 | 2 | 1 | 1 | 0 | 0 | 1 | 0 | 0 | 11 | 0 | 11 |
| Tie Vote | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Cancellations | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 31 | 31 | 0 | 31 |

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

| | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Deny+Stip)** | 14 | 5 | 14 | 17 | 15 | 0 | 21 | 24 | 16 | 14 | 14 | 15 | 17 | 17 | 13 | 14 | 15 | 0 | 245 | 2 | 243 |
| 1 year | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 3 years | 9 | 4 | 9 | 9 | 7 | 0 | 8 | 22 | 9 | 12 | 7 | 9 | 10 | 15 | 9 | 9 | 8 | 0 | 156 | 1 | 155 |
| 4 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 5 years | 5 | 1 | 4 | 3 | 7 | 0 | 8 | 2 | 4 | 1 | 6 | 4 | 7 | 2 | 2 | 4 | 4 | 0 | 64 | 1 | 63 |
| 7 years | 0 | 0 | 1 | 4 | 1 | 0 | 4 | 0 | 2 | 1 | 1 | 2 | 0 | 0 | 2 | 1 | 3 | 0 | 22 | 0 | 22 |
| 10 years | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 3 |
| 15 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

### Waiver Length Analysis per Commissioner

| | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Waiver)** | 1 | 2 | 2 | 1 | 5 | 0 | 1 | 0 | 0 | 0 | 1 | 5 | 3 | 0 | 0 | 0 | 2 | 61 | 84 | 0 | 84 |
| 1 year | 1 | 2 | 2 | 1 | 2 | 0 | 1 | 0 | 0 | 0 | 1 | 4 | 1 | 0 | 0 | 0 | 1 | 36 | 52 | 0 | 52 |
| 2 years | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 13 | 17 | 0 | 17 |
| 3 years | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 10 | 13 | 0 | 13 |
| 4 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 5 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 2 | 0 | 2 |

### Postponement Analysis per Commissioner

| | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Postpone)** | 4 | 4 | 2 | 9 | 2 | 0 | 1 | 0 | 1 | 4 | 5 | 2 | 5 | 17 | 1 | 4 | 3 | 125 | 189 | 0 | 189 |
| Within State Control | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 84 | 86 | 0 | 86 |
| Exigent Circumstance | 1 | 2 | 2 | 4 | 0 | 0 | 1 | 0 | 1 | 2 | 3 | 0 | 1 | 0 | 1 | 4 | 2 | 20 | 44 | 0 | 44 |
| Prisoner Postpone | 2 | 2 | 0 | 5 | 2 | 0 | 0 | 0 | 0 | 2 | 2 | 2 | 4 | 17 | 0 | 0 | 0 | 22 | 60 | 0 | 60 |

# BOARD BUSINESS & EN BANCS

Like parole hearings, monthly BPH Executive Board meetings, the business meeting of the Board, have been held by teleconference for several months now. In part because of this, the meetings, which usually comprise two days, with the Monday being used for reports and presentations and the Tuesday for En Banc hearings, have largely been reduced to one day, Tuesday, for En Bancs. The only real exception to that was in Octobber, traditionally a training month for commissioners and deputy commissioners, a pattern that continued even during CoVid.

At the October meeting the board branched out a bit, still holding their proceedings by distance, but allowing video proceedings for training presentations. However, in August and September, the meetings were single-day affairs, devoted to en banc considerations.

October's training sessions involved presentations by Dr. Cliff Kusaj, head of the FAD, giving a recap of CRAs conducted in calendar year 2019, a thorough report of which is presented elsewhere in this issue, and presentations on the Impact of Trauma from Dr. John Briere, USC and Cognitive Behavior Interventions, the latter from the Division of Rehabilitative Programs. While Dr. Briere's presentation was quite informative and interesting, the report from DRP was rather typical, in that the presentation of what is offered bore little resemblance to what is in fact available.

The board also learned details of BPH's new training plans and program for state appointed attorneys, via the non-profit Parole Justice Works group, which endeavors to provide state attorneys greater insight into issues facing lifers at their hearings and how to address those issues with their clients. It's a bold and forward looking project, making inroads into helping both state attorneys and lifers, and, interestingly, objected to by, it appears from comments, the association of district attorneys, whose spokesperson maintained the board did not inform stakeholders or seek their input on this new contract or effort. Funny, not sure where the DAs were, but we've been aware of the project for some time.

At the September meeting Board Executive Officer Jennifer Shaffer introduced the newest commissioner, William Sullivan, and announced Commissioner Castro would be stepping down from the position of Commissioner to reclaim his spot in the Deputy Commissioner ranks.

In October, Shaffer also announced Gov. Newsom had once again extended the executive order calling for parole hearings to be held by tele or video conference through the end of November. This will probably be extended through the end of 2020.

En Banc Results:

In August, on referral from the Board's Chief Counsel, based on allegations of institutional misconduct following a parole grant, **Michael Murphy**'s grant was vacated and a new hearing scheduled. Also in a counsel referral the denial of **Cotton Joe Jones** was vacated and a new hearing ordered, to comply with recording requirements.

The Governor referred 7 parole grants for en banc consideration in August, all 7 of which were opposed by district attorneys from the various counties, from San Diego to Shasta County. Of those 7 referrals, the board affirmed grants for **Peter Burza, Alfredo Maloney, Michael Messenger, Lenny Rideout, John Rowe** and **Francisco Rubio. Romel White,** also referred by the Governor, and **Joe Gonzales** face new hearings, White because the board concluded his grant was improvident and sided with the dissenting panel member in Gonzales' tie vote.

In September issues with the recording equipment continued to plague the board, and the members voted to vacate the denials of **Ricky Adams** and

**Edward Aguirre** and schedule new hearings to allow for complete recording of the proceedings. The panel also decided in favor of denial for **Sabastian Ortiz** in a tie vote situation.

Two referrals by counsel found differing results, when the board vacated the grant to **Andre Batten** on allegations of new confidential information, but affirmed the grant of **Patrick Rushing,** referred on allegations of security threat group participation.

The Governor again referred 7 grants for review, and again DAs across the state opposed the grants. In this month the results were decidedly mixed, with grants affirmed for **Quintin Augustus, Gregory Coglianese, Johnny Griffin and Melvin Price,** but rescission hearings ordered for **Henry Ford, Jr., Virgil Frye** and **Edward Prokop.**

In October yet another tie vote resulted in the en banc board granting parole to **Rodney McNeal** but referring the grant to **Michael Kelley** to rescission hearing based on allegations of institutional misconduct.

Governor Newsom in October referred 10 grants for the entire board's review and in what is becoming a predictable and monotonous performance, all but one were again opposed by the various DAs. Some of the DAs, with often many cases on each en banc calendar, seem to have a boilerplate script, just change the name and a few details, and move on.

Nonetheless, the board approved grants for **Boupha Bounpraseuth, Adam Jennings, Floyd Mitleider, John Park, Ronald Parrick, James Runion and Gary Wesley.** Wesley, from San Francisco County, was the only potential parolee not opposed by the DA. Grants were sent to rescission hearings, however, for **Samuel Arciniega** and **Eric Donaldson.**

# THE ANNUAL KUSAJ REPORT ON CRAs

The October BPH business meeting usually means training sessions for commissioners and this year was no different, though those reports were held virtually by teleconference. Dr. Kusaj's, head of the board's Forensic Assessment Division, presented his annual update report on CRAs conducted in the previous year. And while, as Dr. Kusaj noted, many of the statistical information points haven't changed much from previous reporting periods, there are some issues that merit both reaffirming and some new 'insights,' to coin a phrase.

In 2019 the FAD completed some 3,3 86 CRAs, and much in line with prior years, most inmates ended up with a moderate risk assessment. Specifically, 25% of those all prisoners evaluated received a low risk rating, 47% were rated moderate and 28% were deemed to be a high risk to recidivate. These figures are much in line with previous years, though the number of low risk ratings was somewhat smaller. Kusaj, in his remarks, attributed this perhaps to an increase in the number of third strikers under review. More on that later.

In terms of gender, there is a decided difference, with women receiving a low risk assessment in 40% of those evaluated, 41% moderate and high only 19%. Men, however, were rated as low risk only 25% of the time, moderate 47%, and 28% received a high-risk rating.

Kusaj provided definitions of all three categories and noted 72% of those evaluated represented a non-elevated risk. This is something perhaps some should tell Governor Newsom, who, when reversing parole grants, often likes to cite a moderate CRA as delineating 'elevated risk." And maybe we're just the ones to do that.

Like all reports from Dr. Kusaj, this one is heavy on stats and numbers. But within those numbers is considerable information that we're extracting in as minute a detail as we can. Among the immediate takeaways—problems with insight should "not be an over-riding consideration" in parole decisions, according to Kusaj. Translation: finding an inmate has a lack of or insufficient insight should not be the only or overriding reason parole is denied.

Also per the report, the presence of risk factors

(mental health issues, anti-social behavior, substance abuse) are less important to evaluating overall risk than the current relevance of those factors at the time of the interview and hearing. Meaning: if an individual has had problems with those and other issues in the past, they should be of great concern only if those issue continue to have 'current relevance.' This falls in line with the board's stated premise of evaluating the risk and rehabilitation of any given prisoner's current situation.

There's much more in this report and we're sussing it out. For a full summary and details, including those enticing statistics, send us a request and 3 stamps, we'll send you the summary and a copy of the power-point slides used in the presentation.

# CLEARING THE CONFUSION ON ELDERLY PAROLE

Unsurprisingly, after the passage of AB 3234 changing elderly parole, there still remains considerable confusion about what elderly parole consideration means, who it applies to and when. We'll try to sort it out.

In short, there are currently 2 elderly parole tracks, one for third strikers, and one for…other lifers. Yes, under AB 3234, passed and signed this legislative session, the threshold for elderly parole consideration is age 50 and 20 years of continuous incarceration…unless you're a third striker, or your life crime included a police officer as victim. For that inmate cohort, the threshold is, as is has been, age 60 and 25 years of continuous incarceration.

Why the difference, why don't the new guidelines apply to everyone? The legislature.

In 2014 BPH, in concert with the 3 federal judge panel (3JP) overseeing population reduction in the California prisons, agreed on the first requirements for elderly parole; 60 years old, 25 years of incarceration. If any inmate, absent LWOP and condemned, had reached those thresholds and had not yet had a parole hearing, one would be scheduled ASAP, and the factors of age impacting parole would be given special consideration.

According to the BPH, those factors include "the inmate's advanced age, long-term confinement, and diminished physical condition, if any, when determining the inmate's suitability for parole. In addition, these same factors are also taken into consideration by the Board's forensic clinical psychologists when they prepare risk assessments for elderly parole hearings." That agreement was the basis for 2 state subsequent laws codifying elderly parole.

So why the difference in what 'elderly' means? Again, the legislature. In 2017, when AB 1448 made elderly parole a law, there was much discussion of lowering the age and incarceration length in the bill, but those changes would have rendered the bill unpassable. Perhaps it was a matter of vanity—the average age of state legislators is just over 50, and no one likes to be considered "elderly" (We understand…) and thus balked at labeling prisoners, across the board, as elderly and debilitated, which resulted in the terms for elderly consideration remaining at those standards agreed by the BPH and 3JP.

However, this year, probably based on the need to pass a budget and cut the CDCR funding, legislators decided to make the changes. But in making those changes, they also added restrictions on which prisoners would qualify—cutting out those sentenced to LWOP and those with a peace officer as a victim. But, because BPH had already agreed to include those cohorts in the elderly program via 3JP, and because that agreement is with a federal agency, it will continue, alongside the elderly program mandated by AB 3234.

Why the difference? Why would the legislators exclude 3Xers and those with peace officer victims? Politics. Pure (strange word to use for politics) and simple. The legislature had to give itself come kind of cover, and some kind of concession to those (think DAs, victim groups, special interest groups, say…police fraternities) who oppose the changes,

in order to get the bill passed.

As with most bill, AB 3234 will officially take effect on January 1. 2021. In the months since the bills passed and when it takes effect, CDCR and BPH will cull out those who will be impacted by the new provisions of 3234, estimated to be less than 500 inmates. Those individuals will see their first parole hearing, to be held because of and under the umbrella of elderly parole, held by December 2023.

And that is the other aspect of 3234 that is confusing. While the new guidelines for elderly parole will move forward the initial hearing date for those affected, it will not change hearing dates for those, regardless of their age, who have already had an initial hearing, whether under elderly parole or not. Which means if you've had a hearing, under whatever hearing type you were entitled to (YOPH for example) and been denied (or you probably wouldn't be reading this in CLN), and now, under the new standard could qualify for elderly parole, your next hearing will NOT be advanced simply because of the law change.

However, when your next hearing naturally comes around, you will be entitled to elderly considerations in evaluating your current risk and the same considerations should be included in your next CRA. What isn't clear, as yet is if the FAD will be updating CRAs for those inmates who might still be going to their next hearing with a less than 3-year-old CRA, but who now qualify for elderly parole. Clarification will undoubtedly be forthcoming.

Other than age, the set-in-concrete requirement for elderly parole consideration is the length of incarceration, and be it 20 (under 3234) or 25 (3JP), it must be continuous years; no in and out, no cumulative, not a few years here and a few more there. If you served a term years ago and didn't quite retire your CDCR number before returning, you can't put those two—or more—terms together to make the grade.

| Elderly Parole Under | AB 3234 |
|---|---|
| Age | 50 years |
| Incarceration | 20 years continuous |
| Advance hearing date? | Only if it is an initial hearing*** |
| Exclusions | Third strikers, LWOP, condemned, peace officer victims |

***hearings for those who immediately qualify will be held by December 31, 2023

| Elderly Parole Under | AB 1448* |
|---|---|
| Age | 60 years |
| Incarceration | 25 years continuous |
| Advance hearing date? | Only if initial hearing |
| Exclusions | Third strikers, LWOP, condemned |

*now superseded by AB 3234

| Elderly Parole Under | 3JP/PH agreement** |
|---|---|
| Age | 60 years |
| Incarceration | 25 years |
| Advance hearing? | Only if initial |
| Exclusions | LWOP, condemned |

**still in effect for third strikers

# THE FACE OF THE BOARD

There was a time, well remembered, when a common and valid complaint about the Board of Parole Hearings, (or The Adult Authority, or Board of Prison Terms, previous names for the BPH) was that it was a bastion of old, white men, usually retired from law enforcement. That was demonstrably true and whether that fact impacted the board's parole decisions is arguable, but provable is that not as many grants were given in those days.

Fast forward to today, when for the first time this calendar year the board will be a panel of 17 members, and what's that face look like now? Can't provide pictures currently, as due to CoVid issues a couple of the most recently appointed commissioners haven't been able to have their official portraits included on the BPH site, but we'll quickly run down the demographics.

Of the 17 commissioners, 7 are women. There are 6 attorneys, 2 licensed social workers (LSW) and at least 10 members represent various ethnicities other than white. Certainly, law enforcement and CDCR has representation, as 9 have past CDCR experience (other than being DCs), though not all in custody positions, and 3 previously served other law enforcement agencies, again, not all on the custody side.

Obviously, those numbers add up to more than 17, meaning several individuals represent several of those categories. And that can't be considered anything but positive. Very short bio of each commissioner follows, listed alphabetically.

Arthur Anderson: a commissioner since 2011, his prior positions were with the California Highway Patrol.

Robert Barton: commissioner since 2017, previously California's Inspector General.

Patricia Cassady: appointed to the board in 2013, previously served as a DC and private law practice.

Kevin Chappell: Appointed in 2013, previously a warden at SQ.

Minerva de la Torre: appointed in July 2020, previously a parole commissioner in Nevada, an LSW and former parole agent.

Dianne Dobbs: a commissioner since 2017, formerly a DC and in private law practice.

Randolph Grounds: appointed in 2016, formerly a warden at SVSP and a probation officer.

Maria Gutierrez: appointed in 2019, previously an assistant sheriff at LA County Sheriff's department.

David Long: a commissioner since 2018, previously a warden at CAC and ISP, also VP of Defy Ventures.

Michele Minor: appointed in 2014, previously held several positions in CDCR's juvenile justice side.

Michael Ruff: appointed in 2017, he served on CDCR's special projects and high security teams and several custodial positions at several institutions.

Deborah San Juan: a commissioner since 2017, an LSW who previously worked at DAPO and the CDCR juvenile justice positions.

Neil Schneider: appointed in 2018, previously a community college professor and veteran of the Sacramento Police Department.

Excel Sharrieff: a commissioner since 2018, previously a DC and in private law practice.

William Sullivan: the newest commissioner, appointed in August, 2020, formerly a warden at CCI and several other positions at other prisons

Troy Taira: appointed in 2019 after previously serving as a commissioner in 2016-17 and previously in several administrative law judge positions.

Mary Thornton: appointed in 2019, previously a DC and a DA.

# NOODLING THE NUMBERS

Ok, we admit it. We're sort of mesmerized by numbers and stats. They can tell you quite a bit and while numbers alone can't give you the whole story, they can certainly point out some trends.

We've come across some interesting figures lately, all of course somewhat related parole, but covering some trends we aren't usually able to consider.

As of June, 2020 roughly 31% of those in CDCR custody were serving long-term sentences, indeterminate sentences (ISL). Those with LWOP sentences numbered 5,079 (4% of the population); while third strikers numbered 6,810 (5%) and 'regular' lifers, numbering 27,068 or 22% of the inmate population.

About 80% of those ISL prisoners were convicted of the most serious crimes (murder, 1st & 2nd, other life-sentence crimes), about 20% were 3 strikers. A quarter of the ISL population is over 50 years of age; fully 5,000 were over 65.

Of the over 5,000 hearings scheduled by the BPH thorough September of 2020, nearly 55% were not held, due to waivers, cancellations, postponements and stipulations. Grant rates, however, are at historic highs, as 798 grants had been handed down from January through the end of September.

And in spite of that, the remarkably low rate of recidivism among lifers has maintained. CDCR figures show that for those released in fiscal year 2014-2015 (the latest time from for which figures are available, as parolees are followed for a 3 year period to evaluate recidivism), only 16 individuals were convicted of another crime, 9 of which were misdemeanors.

Changes in various laws over the last few years mean more prisoners than ever are now eligible for parole consideration. YOPH, elderly parole changes and the enactment of Prop. 57 have resulted in, as of current numbers, some 7,788 inmates being added to the cohort of those eligible for parole hearings. Although not all of these will be scheduled right away, they will receive a hearing sooner, often far sooner, than would have been possible before the legal changes.

For those seeking to move their next hearing forward following a denial, what appears to be a more likely path is either through the Administrative Review process (for those given a 3 year denial) or the Petition to Advance (PTA, Form 1045A) route.

In 2019 the Board reviewed 925 inmates who had been denied for 3 years for consideration of advancement under the AR process. The board advanced 75% of those hearings and of those advanced, 51% were granted parole. In hard numbers, 925 were considered for AR; 694 were granted that advanced hearing, and 354 were granted parole.

Roughly 1,000 inmates denied parole (usually for longer than 3 years) filed PTAs in 2019, and the board approved advancement for 67% of those petitions, resulting in grants in 37% of those hearings. Again, raw numbers, 670 PTAs were approved, resulting in about 138 grants.

In 2017, for the first time (barely) in decades and in 2018, 2019 and so far in 2019, more lifers have been released on parole than are coming into the system with new life sentences. From 2013 until last year, the grant rate from the board nearly doubled. In 2013 the board at that time handed down 562 grants of parole. In 2019 that number was 1,184, the second year that grants numbered more than 1,000 (1,136 in 2018).

Another measure of how much things have changed is the number and fate of writs challenging parole denials over the years. In 2013 the board scheduled 239 hearings as the result of court orders involving denials of parole. In 2019, that number was 11. So, the next time someone tells you they can guarantee you they'll get you a new hearing via a court decision, remember those figures.

Overall, who got parole grants in 2019? Women more likely than men (47% to 34%), ISL inmates more often than DSL (35% to 25% average), hearing advanced by AR (51%) or by PTA (37%). But, as truth in advertising tells us we must note, your results may vary.

# TRUTH AND LIES

*In our last CLN issue we hoped to alert the inmate population to a couple of what, to us, certainly seemed like scams, meant to prey on the hopes and trust of prisoners and their families. Since then, we've received continued inquiries about these two individuals, and taken some heat from some who complain we're just trying to shut down those helping inmates.*

*Specifically, we're talking about what are basically solicitations from 'jailhouselawyer 360' and purported news releases from 'withoutoneplea.' So let us say it again: these two plans are con games.*

*Don't take our word for it—we reached out to BPH and CDCR, passing along the 'information' and asking if there was any credibility to these overtures. Herewith is an official memo from Jennifer Shaffer, Director of the BPH, who lays out the facts applicable to the claims made by these two.*

**On Behalf of**

**Jennifer Shaffer, Executive Officer**

**Board of Parole Hearings**

The Board is aware of multiple papers recently sent to inmates containing false information regarding parole decisions, possible legal challenges, and statements allegedly made by Board employees. We realize how important these issues are to those in the hearing process, as well as prosecutors and victims. In the interest of providing accurate and transparent information, the Board provides the following information:

- The Board accepts as true criminal verdicts from state courts. These verdicts are reflected on an abstract of judgment, a plea transcript, or sentencing transcript from the sentencing court. Documents for each person in prison are reviewed by CDCR Case Records staff. There is not a belief that these documents are fraudulent.
- If errors are found on state court documents, CDCR Case Records staff will notify the court and request an updated document in individual cases.
- The Board diligently works to apply state law and determine whether inmates appearing at a parole hearing would pose a current, unreasonable risk of danger to society. These decisions are reviewed by the Board's legal department to ensure decisions comply with the law. If a decision is found to not comply with the law it is sent to the full Board for consideration at a monthly public meeting.
- While the Board investigates applications for commutations of sentence upon request of the Governor, no Board employee has recommended a mass commutation for people who have been denied parole.
- The mechanism for judicially challenging a parole decision is by filing a writ of habeas corpus. The timing of state habeas proceedings are governed by the California Rules of Court. A court reviewing a habeas writ will deny a petition without a response, request an informal response, or order that a formal response or "return" be filed. Once the timelines specified in rule of court 4.551 are totaled, without any extensions, it would be at least six months before a court would grant a habeas petition.
- When a court orders a new parole hearing for someone, that hearing is generally scheduled six months after the court order. The Board seeks to carry out court orders as quickly as possible, but it generally takes about six months because of notice requirements, the possibility that a comprehensive risk assessment is needed, and to avoid removing a person who is already on the hearing schedule in order to free up a hearing spot.
- A person who claims they can obtain a court order and a new parole hearing for someone in six months or less is not telling the truth.

The Board is not able to provide legal advice to inmates, stakeholders, victims, or victims' next of kin. You should talk to an attorney for legal advice. Please know that when the Board, or a Board employee takes official action concerning a significant change in process or policy, we will publicly notify inmates, attorneys, prosecutors, and advocacy groups.

# DIAZ RETIRES; ALLISON SETTLES IN

Like many things CDCR, it happened suddenly and without explanation, and with enough spin on the situation to dizzy the multitudes. On August 28 Gov. Newsom announced that deep in the midst of a viral epidemic Sec. of Corrections Ralph Diaz, head of CDCR since 2018 and a 29-year veteran of CDCR, was resigning. Effective October 1, 3 days later.

And just as heads were snapping back from that spinner, in the same news release Newsom announced the new director of CDCR (and not Acting Director) would be Kathleen Allison, most recently Undersecretary of Operations for the department. Allison, also a 30-year CDCR veteran, began her corrections career as a medical tech and progressed through Warden positions at both SATF and Corcoran, as well as a variety of positions in Sacramento.

Speculation, questions and various thoughts abound, but right now we're holding our thoughts to ourselves. Diaz, hardly solely or even primarily responsible for the CoVid streaking through the prisons, understood and was committed to a culture change in the department, to bring practices and personnel into the 21st century. He was approachable and responsive.

How Allison will handle the pandemic problems, as well getting the system back on a new normal will no doubt be topics of discussion in future issues. Allison's first communication came in early November, a letter to prisoner families primarily regarding visiting, which we have reprinted adjacent to this story.

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# Statement from CDCR Secretary Kathleen Allison on Visiting

The biggest challenge to face all of us this year has undoubtedly been the COVID-19 pandemic. It has affected our daily lives, and for our prisons, it has impacted our normal operations, including in-person visiting.

It is not lost on me that families and friends have not been able to see their loved ones face-to-face since March. Reopening for in-person visiting has been and continues to be a top priority for me. That's why the department put together a reopening plan that will guide each of our 35 institutions to safely reopen through a multi-phased approach.

Just three weeks ago, we had the lowest number of COVID-19 cases, 283, in the incarcerated population since April, and we were working toward reopening in-person visiting with some limitations. However, our numbers have been steadily rising, just like they have in the rest of the state. As of today, we are above 1,400 cases across the system.

Based on the recommendation of public health and health care partners, including the court-appointed federal Receiver, in-person visiting at CDCR institutions remains suspended at this time. Our health care professional partners deemed in-person visiting too risky due to the increase in COVID-19 both in our institutions, and across the state. Additionally, just today, California issued travel advisories, asking residents to stay local, and recommending 14-day quarantines for any inter-state travel. While this is a difficult decision to make, it is the right decision. We cannot put the health of our staff, incarcerated population, and the family and friends they care so deeply about, at risk by opening in-person visiting before it is safe to do so.

As a wife and mother, I can only begin to imagine what the last eight months have been for families who have not been able to see each other. I know how important family connections are during this difficult time, and we are working diligently to launch

video visiting at a small number of institutions by the end of the month, with the goal of expanding system-wide by the end of the year. Since families cannot connect in-person yet, I want them to be able to connect in real-time, and see and talk to one another remotely until in-person visiting can safely reopen. Additionally, communication via phone remains available, with two free calls being offered per month.

Video visiting and telephone communications are not and will never be a replacement for in-person visits. The resumption of visits has been a top priority since I took the helm of the department in October, and we will continue to work toward reopening safely, in collaboration with public health experts, in a way that is safe for all involved.

CDCR has been very transparent in our response to COVID-19, updating our website regularly and providing numerous updates to our stakeholders. We will continue to communicate openly on our COVID-19 efforts, which can be found here: www.cdcr.ca.gov/covid19.

**Secretary of Corrections**
**Kathleen Allison**

## DVI'S SENTENCE HAS BEEN COMMUTED

On September 26 CDCR effectively commuted the sentence of Deuel Vocational Institute. Not the men therein. Just the physical prison itself. On September 26 CDCR announced DVI will be 'deactivated'. Permanently. For Good.

By this time next year, DVI will be but a memory and all the current denizens still under the tender care of CDCR. will be distributed among DVI's sister institutions.

As part of this year's state budget Gov. Newsom promised the closure of one prison, with a second, as yet unannounced, to be closed next fiscal year.

As to reasons for the selection of DVI, CDCR's news release announcing the pending actions related, "DVI was chosen for closure based on cost to operate, impact of closure on the workforce, and population housing needs, and prioritization of public safety and rehabilitation."

Deactivation of DVI, a prison for 67 years, is expected to be final on September 30, 2021. Having opened in 1953 in Tracy, it is the 6th oldest prison in the state and has most recently been a reception

center for the northern part of the state. Closing DVI will save the state about $182 million annually.

Currently there are approximately 1,500 inmates are housed at DVI, along with a staff of 1,080 staff. Inmates will be transferred based on housing, custody and rehabilitative needs, and CDCR has promised all their credits will also transfer. CDCR anticipates staff currently at DVI will relocate to other prisons—CHCF, FSP, SAC, SOL, MCSP and CMF are all within what is considered reasonable distance for transfer.

The last time California closed a state prison was the Northern California Women's Facility in Stockton in 2003. CDCR has taken additional steps to reduce its reliance on out-of-state and contract facilities. In 2019, CDCR exited the last out-of-state facility, La Palma Correctional Center, in Eloy, Arizona. In 2020, CDCR ended its contracts with private, for-profit prisons Desert View, Central Valley, and Golden State Modified Community Correctional Facilities (MCCF), as well as the McFarland Female Community Reentry Facility, and the public-private contract Delano MCCF. Shafter MCCF will close by October 31, and Taft MCCF should be closed no later than May 31, 2021.

# OIG's REPORTS ON CDCR COVID EFFORTS

At the start of the CoVid outbreak the California Legislature charged the state Inspector General's office (OIG) with reviewing and assessing the efforts of the CDCR to mitigate and control the spread of the virus within the prisons. In August the OIG released the first of 3 reports, this one dealing with screening practices for those entering prisons at the start of the pandemic.

The 43 page report, replete with examples of how, despite good intentions and a decent and scientific based plan, concludes, "despite establishing directives to screen all staff and visitors who entered prison grounds for signs and symptoms of COVID-19, we found the department's screening directives to be vague, which appear to have caused inconsistent implementation among the prisons. We believe these inconsistent practices likely contributed to some staff and visitors entering prisons without having been screened."

Pardon us for a moment, while we revert to the vernacular. Well, Duh. Anyone who has dealt with CDCR knows regardless of instructions, if those instructions don't specifically say, down to the last period and absolute 1-->2-->3 directions, explained in the most minute detail, those instructions will be interpreted as many ways as there are persons charged with putting them in place. Not just prison by prison, but at the granular level, person by person, depending who's on duty.

The first OIG report notes those first moves from CDCR included "taking immediate action to prevent newly arriving incarcerated persons from entering the system; stopping visits from family and friends; limiting movement of staff and incarcerated persons between prisons; implementing a new process to screen staff and official visitors for signs and symptoms of the disease; manufacturing and providing hand sanitizer and masks for all staff and incarcerated persons; isolating individuals who showed symptoms of COVID-19 or tested positive for the disease; and creating new policies for staff and incarcerated persons with respect to maintaining physical distancing measures and wearing masks." Those first moves included suspending visiting on March 11, 2020, though some essential visitors, including contracted workers, attorneys, and OIG staff, continued to enter prisons.

And, because the business of prisons goes on, pandemic or not, thousands of staff entered each day. On March 14, 2020, the department's next step required its prisons to begin verbally screening all staff and visitors seeking entering for signs and symptoms of COVID-19. Later that month the verbal query was supplemented by temperature screenings, supposed for all incoming personnel and at all entry points.

Specifically, the OIG noted, "the department's vague screening directives resulted in inconsistent implementation among the prisons, which left

some staff and visitors entering prisons unscreened. Specifically, we found prisons took different approaches to implementing the same departmentwide Directive." Well, Duh, again.

The report explained that while some prisons funneled all cars and traffic to one or possibly 2 entry points, others screened those entering at "certain pedestrian entrances," a practice the OIG said increased the risk of entry being gained without screening. And the OIG backed up this statement by recounting instances when OIG staff members were able to enter some prisons without being screened but making no attempt to evade the screening.

The result of this inconsistency, the OIG's survey departmental staff at seven prisons showed that although the "vast majority" of staff members who replied—a range between 93 and 98 percent—responded that they had always been screened, the remaining staff members—between 2 and 7 percent—responded that they had not. On average, 5 percent of the respondents indicated that they had not always been screened. Also, screeners reported not infrequently thermometers were faulty or had batteries that malfunctioned. Screeners also reported receiving little to no training on COVID-19 screening protocols.

The second of the three reports was issued in October, this one reviewing the availability and distribution of personal protective equipment (PPE) available to CDCR and thus employees and inmates throughout the pandemic. The second report also discussed the adherence to mask-wearing guidelines.

The OIG's report summarized the result by concluding, "despite nationwide shortages early in the COVID-19 pandemic, the department was generally able to procure and maintain supplies of PPE for its staff." But, "although the department distributed cloth face coverings to its staff and incarcerated population, issued memoranda requiring their use, and also implemented physical distancing requirements, our staff observed that staff and incarcerated persons frequently failed to adhere to those basic safety protocols."

Again, surveys of staff by the OIG supported those observations. And once again, this lack of standardization only increased the risk of viral spread. "The frequent noncompliance by staff and incarcerated persons was likely caused at least in part by the department's supervisors' and managers' lack of enforcement of the requirements." And, "Unless departmental management clearly communicates consistent face covering guidelines that are enforceable, and effectively ensures that its managers and supervisors consistently take disciplinary action when they observe noncompliance, the department will continue to undermine its ability to enforce basic safety protocols, increasing the risk of additional, preventable infections of COVID-19."

Duh. Or maybe, double duh.

The OIG reported that, despite a few situations early on, PPE was available to both staff and the inmate population. In fact, CDCR purchased over 725,000 cloth masks for inmates, and initially, staff from PIA. Mass distributions were held on April 2, when 414,200 masks throughout the 35 prisons, and on April 29 another 322, 200 and throughout the system.

The OIG also notes several instances where social distancing was not enforced, not only within the inmate population, but staff, even administrative staff, was taken to task for not following directives. Unfortunately, they did not name names. Darn. We can supply some.

The third and probably final report on the OIG's investigation will cover "How it [CDCR] treats incarcerated persons suspected of either having contracted or been exposed to COVID-19." No announced schedule as yet, but we hope before end of year.

And we intend to contribute to this report, forwarding to the OIG's office the reports we've received from those inside on this very topic. If CDCR doesn't want to provide details, perhaps we can cover some of that, too.

# COVID: AT THIS MOMENT IN TIME

Everything we can say about the CoVid 19 outbreak and epidemic in the prison system changes at least daily, often several times a day. As this edition is being written, in mid-November, early December, several institutions are still experiencing out breaks, some for the second or third time, and at least 3 locations seem to be on the tipping point of a full house-on-fire.

We'll say it once again; every medical and corrections authority we've contacted, and there have been several, have agreed there was simply no way an air-borne virus could be kept completely out of the prison system. And every expert knew when that virus was able to establish a foot-hold, the results would be calamitous. Just how calamitous remained the question.

The last question was well answered by what eventuated at San Quentin (see article elsewhere in this issue), but other locations have been ravaged as well. And still others could yet be in danger. We'll try to give our readers a snapshot in time of the situation at this moment. And by tomorrow, it will have changed.

Despite CDCR basically trying to hermetically seal the prisons, beginning in mid-March, when visiting was suspended, programs put on hold and everyone basically told to hunker down and wait, the first case of CoVid 19 was reported at LAC on March 20. And while things seemed to be off to a slow start, as the cumulative number of positive cases didn't reach 100 until a month later, April16, there were some astounding jumps.

The worst day may well have been May 28-29, when the number jumped by nearly 500 overnight. At the peak, there were, on June 30, 2,609 individuals in the California prison system suffering from the virus that one day alone.

Things roller-coastered along, numbers up and down for weeks, one location after another taking their place in the hot seat as cases ramped up and died down. On September 23 the total rose to over 2,000 again, and just a month later, on October 23, everyone began to breath a bit, when the total number of active cases in the system hit a months-long low of 321. And less than 2 weeks later, the total number of positive cases was over 1,000 again.

As this issue prepared for print there are roughly over 1,500 active cases, with increases showing the last several days and expected to continue to rise. There have been 82 deaths throughout the prison system, and 7 institutions have registered total positive cases of over 1,000 men (all outbreaks of major numbers have been a men's' institutions) and two have seen over 2,000 infections. Though some, 6 in fact, have accumulated less than a dozen cases.

Perhaps the easiest way to convey the situation is by numbers. Though just numbers can't convey the misery, fear and grief CoVid has wrought, it is at least a measure of all of those.

Deaths by Prison (as of mid-November)

| | | | |
|---|---|---|---|
| San Quentin | 28 | CIW | 1 |
| CIM | 27 | COR | 1 |
| Avenal | 8 | CTF | 1 |
| CVSP | 7 | MCSP | 1 |
| CMC | 2 | PVSP | 1 |
| FSP | 2 | MCSP | 1 |
| CHCF | 1 | | |

Top Number of Cases (+/- 100 cases as of mid-November)

| | | | |
|---|---|---|---|
| ASP | 2983 | CRC | 1666 |
| SQ | 2240 | CIM | 1413 |
| CVSP | 1726 | FSP | 1342 |

In the course of the months-long battle CDCR reports having administered over 105,000 tests, often testing any given inmate several times over. SQ, where the virus rocketed out of control, eventually saw nearly 75% of those housed there at the time develop the illness, with varying results.

Will cases continue? Without a doubt. Will the quarantine continue? Just as assuredly. When will it end? Sorry, the crystal ball is down for repairs.

In the end, as the saying goes, mistakes were made, often incredibly stupid mistakes, many paid immense costs and there will be reverberations for years. The California Inspector General's office is producing a series of 3 reports on various aspects of CDCR's response to the virus outbreak, the first, on the efficacy of the initial screening measurers, has been released and we'll summarize those findings elsewhere in this issue.

And as those other reports come out, we'll get at those too. In the end, while the situation for those incarcerated is made more difficult and dangerous by the congregate nature of their living situations, you, and we out here, are left with the same weapons against this virus: wear your mask, take responsibility for keeping your surroundings and situation as clean and distanced as possible and seek help when you're sick.

# POSTMORTEM OF THE SAN QUENTIN OUTBREAK

*The following is an excerpt from a report filed by the California Correctional Health Care Services (CCHCS, the medical receiver's office), in the US District Court, for the Eastern and Northern Cal Districts regarding developments in the Plata lawsuit regulating medical care for California inmates. These remarks and findings are from CCHCS, relating to the CoVid outbreak at San Quentin, the most severe so far in any California institution.*

**Lessons Learned from San Quentin State Prison**: As of the beginning of this reporting period (May 1, 2020), the pandemic's impact on CDCR patients and staff was still in its very early stages. As of May 1, 2020, there were 388 confirmed cases within CDCR equivalent to 3.3 cases per 1,000 patients.

On that same date, there were 3.4 cases per 1,000 nationally, and 1.3 cases per 1,000 within California. One institution, CIM, accounted for two-thirds of CDCR's active cases on May 1, 2020, and a second institution, LAC, accounted for another thirty percent of CDCR's active cases. The number of cases within CDCR more than doubled between May 1 and May 15, 2020, (i.e., 327 to 679) and increased by 2.5 times between May 15 and June 1, 2020 (i.e., 679 to 1,692).

The dramatic increase in cases was largely due to an outbreak at ASP that began on May 18, 2020. Within the next two weeks, almost 600 patients at ASP tested positive for COVID-19. In retrospect, it seems likely that the outbreak at ASP had been ongoing for some time before it was identified. Nearly all of the patients at ASP were asymptomatic, and the outbreak was discovered as a result of the beginning of a modest surveillance testing program instituted in mid-May (that program has since expanded, as testing supplies increased and stabilized).

The large outbreaks at CIM and ASP, where the total number of COVID-19 positive cases during May and June 2020 approached 50 percent of each institution's population, occurred where most or all housing was in dormitory settings. At that time, it was clearly understood that COVID-19 spread by droplets, but it was not yet clear that the virus could survive and spread in an aerosolized form.

If COVID-19 spread only by droplets or direct contact, then there might not be a substantial difference in the risk of spread in a dorm setting versus a celled housing setting. If, however, COVID-19 spread by aerosolization in addition to droplet spread, then all dorm settings throughout CDCR would be particularly risky for rapid COVID-19 spread as compared with celled housing settings.

The outbreak at CIM had initially been isolated to a few dorm facilities. As the outbreak spread, however, it became clear that a previously unaffected dorm housing a large number of older, COVID-19 high-risk patients, stood in the path of COVID-19's spread at CIM. The question presented was whether to leave those patients where they were – even though they were at an increasing risk of contracting COVID-19 – or to transfer those patients to a safer institution.

During most of May 2020, new protocols for inter-institution transfers were still in draft form, and the general limitation on inter-institution transfers was still in place. Given these circumstances, it was concluded that these patients needed to remain at CIM at least until the new protocols for transfer were completed. On May 22, 2020, CCHCS issued new protocols for inter-institution transfers. Those protocols provided as follows for "routine transfers:" Non-essential transfers are discouraged. COVID screen and test if patient is to transfer. May transfer if COVID screen and test negative. Wear cloth face covering during transportation.

Because of those new protocols, which were intended to make inter-institution transfers safer and because the risk to the patients at CIM continued to increase, the decision was made on May 23, 2020, to move the COVID-19 high-risk patients out of the dorm at CIM to safer institutions. The two institutions chosen to receive these patients were COR and SQ.

The intention behind the above language in the new protocol for movement was that, once a determination was made to move a patient, that patient would then be tested and would move only if the test result was negative. As a practical matter, since test results at that time generally were available within 2-5 days, the intention was that a patient would receive a test and then move no later than 7 days after the test was administered.

However, those intentions were not expressed in the language of the protocol as absolute requirements, and many of the patients who were transferred from CIM had tests that were two, three and even four weeks or more old. The test results were negative, but the old tests meant there was a significant risk that some of the transferees out of CIM were actually COVID-19 positive.

As it turned out, 2 of the 66 patients moved to COR tested positive upon arrival at COR. The result was a moderate outbreak at COR which peaked with 153 cases on June 16, 2020 and had dropped to 8 cases as of July 20, 2020 (COR had a second outbreak that peaked with 166 cases on August 17, 2020).

As of September 29, 2020, COR has had one COVID-19 related death. A very different story resulted at SQ. Catastrophic is an appropriate description, as SQ suffered through one of the worst prison outbreaks in the country.

Upon arrival at SQ, 25 out of 122 transferees tested positive, and SQ almost immediately fell behind the virus. On June 12, 2020, the Receiver asked Dr. Brie Williams from UCSF and Dr. Stefano Bertozzi from the University of California, Berkeley, School of Public Health, to lead a team for an on-site assessment. After their June 13, 2020, visit, the team reported serious resource deficiencies in the physical plant, COVID-19 support staffing, and testing, as follows (for the full report and recommendations refer to https://amend.us/wp-content/uploads/2020/06/COVID19-Outbreak-SQ-Prison-6.15.2020.pdf):

First, the five-tier cell blocks lacked good ventilation and have virus spreading characteristics similar to a dormitory setting even though inmates are housed in cells. The virus, which Dr. Bertozzi convincingly argued was clearly spreading through aerosolization, spreads very rapidly in these conditions.

Second, at the time of the SQ outbreak, there were severe testing turnaround delays, which affected all of California at the time. Our testing vendor ultimately agreed to put our tests at a higher priority within their testing system, but the delays affected SQ's ability to manage its outbreak.

Third, early on, many patients refused testing or even being assessed for symptoms. CDCR and CCHCS worked with the PLO to overcome the resistance to testing and were largely successful in that effort. The PLO has provided similar assistance at other institutions when needed.

Fourth, and finally, the housing options at SQ made it difficult at the beginning of the outbreak to manage the population appropriately. It was difficult to separate patients in accordance with policy and best practices.

CDCR and CCHCS responded to the crisis by establishing an Incident Command Center at SQ, coordinated by the California Office of Emergency Services (OES), which was responsible for managing the crisis. Daily phone calls with the command center and state officials from OES, CDPH, CDCR and CCHCS ensured that any resource needs could be responded to immediately.

This emergency management structure resulted in SQ receiving substantial resources to assist in managing the outbreak including:

• A substantial number of new beds and housing options were provided in the form of many small, 10-person tents and a large 100-person tent;

• Assistance in reopening a Prison Industry Authority (PIA) building at SQ to serve as housing for 250 patients.

• The execution of a contract with VXL to provide substantial clinical resources including primary

care providers (PCP) and nursing staff;

• The execution of a contract to undertake emergency deep cleaning of SQ; and,

• The execution of a contract to provide emergency food service.

When an institution experiences a COVID-19 surge, additional staffing resources are required to assist with the increased workload as well as to back-fill staff who are off work. For example, SQ was staffed with 302 additional resources during the outbreak; 228 of which were nursing staff but there was a variety of other resources deployed including 31 additional PCPs. Staff resources at SQ also included California Health Corp, VXL, and UCSF.

The outbreak at SQ lasted a little over 2 months. In that time, 2,240 patients tested positive for COVID-19; 58 positive patients were released from custody; 2,153 patients resolved; and 27 patients died. As of September 29, 2020, SQ has only two positive patients, both testing positive within the last 14 days. The management of SQ's outbreak resulted in significant lessons learned. Most significantly, it was clear that the incident command center structure was effective, and it worked so well that CDCR and CCHCS directed all institutions to immediately establish their own incident command centers to manage outbreaks. CDCR and CCHCS continue to report to the statewide group organized by OES on COVID-19 related issues affecting CDCR institutions. Health care staff at all institutions were also directed to coordinate with their respective county public health officers to improve communications and relationships that would be critically important during outbreak management (something that did not happen well during the SQ outbreak).

In addition, daily reports detailing COVID-19 status and responses are now received from all institutions, and daily calls are now scheduled for certain institutions that are managing very large outbreaks. Additional lessons learned included the need for pre-planning regarding housing and bed availability, surge capacity for staffing, appropriate use of PPE by staff and patients, testing strategies during an outbreak, and methods of reducing the risk to COVID-19 high-risk patients.

# REOPENING? SAVE THE DATE

As we hit the press, official acceptance of CDCR's Roadmap to Reopening still has not yet been publicly announced, but we have it on good authority that the sort of bootleg copy we received a few months ago is a go, and the conditions laid out therein will be those governing reopening of the prisons. Reopening meaning the reinstatement of visiting, programs and other things that pass for 'normal' inside.

The Roadmap, which has been circulating in various circles for a few months, lays out 4 phases of opening, Phase 1, the most restrictive, being the state of things now—basically, noting going on. Various activities are made available and restrictions lifted in the remaining 3 phases, until Phase 4, promises "Return to 'new' normal program for all staff and the population." No real details indicating what the 'new' normal will be.

Of prime interest is the reopening of visiting, which the Roadmap provides can be expected in Phase 2, well, sort of. Initially visiting will reopen with one visitor per inmate for an hour visit once a month, with staggered visiting schedule, mandatory masks, tables/chairs 6 feet apart and, reportedly, no personal contact (read hugs, kisses). This phase also may include the entrance of some outside vendors, non-essential contracts—read possibly some programs.

Phase 3 could see an expansion of visiting, 2 visitors per prisoner, twice a month, remaining restrictions apply. This would also include the reopening of family visits, for one family visit per week per unit. Other restrictions regarding yard ac-

cess, dayroom access and workers would be eased as well.

The key to the Roadmap is that each prison's reopening will be decided by the local administration, in consultation with Sacramento and subject to guidelines as to where that institution is in the CoVid situation. Phase 2 calls for a 'contained' CoVid outbreak, which includes no new CoVid cases (inmate or staff) in a 'rolling 14-day cumulative case rate."

To move from Phase 2 to Phase 3 will require no new cases in a 60-day period and no current positive inmates. And going from Phase 3 to Phase 4, the establishment of the 'new normal,' calls for no new or positive cases for 90 days, but the possible continuation of precautionary measures like face masks and extra cleanings.

As of mid-November, no prison yet qualified for the move from Phase 1 to Phase 2. While several prisons show no new inmate cases in 14 days, no location currently has no positive staff members. And new cases seem to pop up at previously 'clean' locations on with troubling frequency.

While CDCR has recently made some changes to their method of reporting cases in staff, offering now a timeline indicating when new cases are reported, we still receive weekly reports of staff not adhering to the mask mandate in various institutions. And to be fair, we get infrequent reports of prisoners indulging themselves in the same behavior—unmasked, though they risk 115s in doing so.

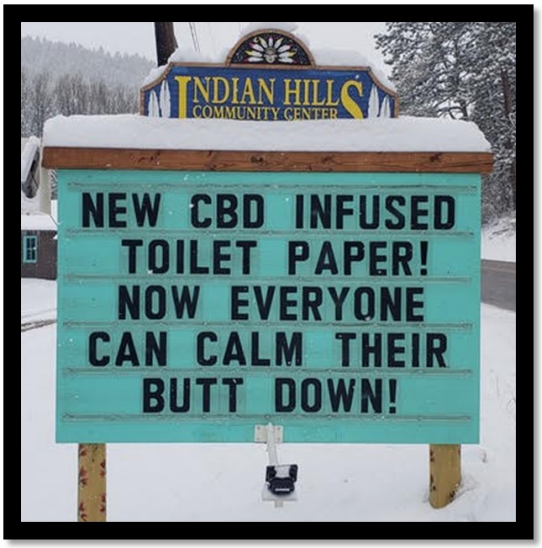
With the requirement of 14-day clear times for Phase 2 and 60 days for Phase 3 in place, it's hard to foresee visiting opening in the near future. As we go to print, in the last 14 days (covering very late October/early November) 675 inmate cases and 450 staff cases across 33 prisons had been reported. And each time a new case is reported, the 14/60 day clock starts again.

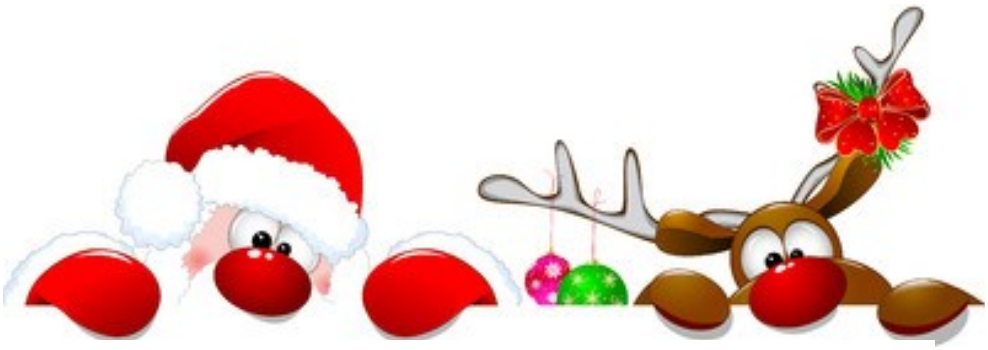
Regarding programming, the next most asked question in the 'when do things get normal again,' the news is a bit more hopeful. Again, individual institutions will decide on who to handle those issues, and, as the Roadmap notes, "the roadmap conceptualizes many potential programming options as a 'menu' for which institutions may select program delivery methods which meet current operational and safety needs, within the phased guidelines."

Included in Phase I are reductions include group sizes, staggered schedules, using outside or other 'non-traditional' areas (including idle visiting rooms), or modified time schedules, which will allow more opportunities for social distancing. The roadmap also notes substance use disorder programs will continue, access to the law library, with social distancing will be afforded to those who have looming court dates.

Phase 2 can allow 'blended instruction,' with classes dependent on available locations to allow for social distancing and class size reduction. But this phase could also allow other self-help groups were the institution can provide appropriate locations. Phase 3 would allow more groups and possible participants, again, dependent on locations available for social distancing, as the roadmap notes physical distancing would continue.

As we watch the numbers and locations were CoVid is still active, we'll be tracking which institutions seem to have the best chance of moving to the next phase. And we're ready to begin our prison programs again, as institutions allow.





## ALL I WANT FOR CHRISTMAS IS A COVID END

*(To the tune of "All I Want for Christmas is My Two Front Teeth)*

All I want for Christmas is a CoVid end
A CoVid end,
Just a CoVid end
Gee if I could only have a CoVid end
Then it would be a Merry Christmas
It seems so long since I could say
Thanks for coming, and I'd kiss ya
Gosh oh gee how happy I'd be if I didn't miss ya
All I want for Christmas a CoVid end
A CoVid end
Just a CoVid end
Then we could have a Merry Christmas

## I'LL BE HERE FOR CHRISTMAS

*(To the tune of "I'll be Home for Christmas")*

I'll be here for Christmas
You can count on me
Things are slow and times are low
Until we're CoVid free
Christmas eve will find me
Where the spotlights light gleams
I'll be here for Christmas
With freedom in my dreams

## HAVE A JOLLY COVID CHRISTMAS

*(To the tune of "Have a Holly Jolly Christmas)*

Have a jolly CoVid Christmas
It's been a strange time all this year
I don't know where we'll all go
But we'll sure be out of cheer
+++
Have a safe and masked up Christmas
And when you walk out on the yard
Just nod hello to those you know
Cause smiling will be hard
+++
Ho Ho, masks in a row
Hung where you can find them
Somebody waits for you
At the shutdown end
+++
It's a strange and CoVid Christmas
And in case you didn't hear
Oh, by golly
It's a dismal CoVid Christmas
This year

# CLEMANCY REPORT

On the eve of Veterans' Day Gov. Newsom released a list of commutations, pardons and medical reprieves of sentence to a total of 39 current and former CDCR residents. Pardons, granted to those who have served their sentence and are no longer in custody, went to 22 people, commutations of sentence length of 13 and 4 received a new clemency finding, medical reprieve of sentence.

Most of those receiving commutations were lifers, with only 1 DSL inmate and the aforementioned LWOP breaking that pattern. Most (10 of the 13) appeared to qualify for YOPH consideration, based on their age of admission to CDCR, though that factor was not mentioned in every commutation. Three were women, and only 1 commutation went to an inmate over the age of 65.

A half dozen of those whose sentences were shortened had been convicted of murder, first or second. The pre-commutation sentences ranged from 15 years determinate to LWOP. In a somewhat unusual result, most will find themselves at a parole hearing in the pretty near future, as Newsom directed immediate parole consideration. Additionally, 6 were commuted to time served, meaning they will be immediately released and one will serve about 3 more years before being released.

As to reasons for selecting them for commutation, Newsom noted in several cases recommendations from prison staff, exemplary disciplinary behavior, and in a few cases, concerns for their welfare, should they contract the CoVid virus.

Below are those who's sentenced were commuted, their new sentence and former sentence and years served in (sentence/time served).

Sandra Castaneda, immediate parole hearing ((40-L/20); Enrique Cristobal immediate release (27-L/20); Casey David, immediate release (29 years/13); David Diaz, immediate parole hearing (37-L/22); James Jacobs, immediate parole hearing (15-L/16); Patrick Leach, 8 years (15 years/5); Tyler Lord, immediate release (32-L/16); Fernando Murillo, immediate release (41-L/27); Francis Pedroza, immediate release (34-L/21); Ellen Richardson, 25-L (LWOP/25); Gary Roberson, immediate release (50-L/22); Chan Saeteurn, immediate parole hearing (25-L/17) and Anna Villa, immediate parole hearing (26-L/17).

The new medical reprieve of sentence went to 4 older inmates, all of whom were 3 strikers all with serious health concerns and ranging in age from 68 to 87 years. Those individuals were Lynn Beyett, Ronald Salles, Larry Johnson and Darlo Starr.

According to Newsom's message, these individuals have an 'elevated risk of morbidity should he (they were all men) become infected with CoVid 19." And therefore, they will be transferred to "an alternative custody placement in the community, approved by the Department of Adult Parole Operations." Thus, under these terms, those receiving the medical reprieve, will continue to serve their sentenced in the community.

The message notes the reprieve "is temporary and may be nullified at any time for any reason," in which case they would be returned to the tender care of CDCR. It seems those granted this clemency will be housed in skilled nursing facilities, due to their medical conditions.

To receive a pardon, an individual must have served his/her time and be certified as rehabilitated, as well as undergo an investigation by DAPO and the BPH. Newsom, with this list,

continues his past pattern of using his pardon powers, which wipe out convictions, to protect individuals who have long lived in the United States but have not become naturalized citizens (often because they spent years in custody) from being deported.

These deportation orders often are issued for individuals how came to the US as children and have no family, no support and no real knowledge of the countries where the federal government seeks to deport them. Such was the case for 10 of the 22 who were pardoned. Of the 22, only 4 were women.

# BALLOT RESULTS

It's been a contentious year in so many ways, and that situation was reflected in some of the ballot propositions voted on by California voters on election day. But the news here is largely good, at least for those of us in the prison advocacy field.

Of prime importance was the defeat of Prop. 20, the so-called "Cooper Initiative," that would have rolled back the considerable gains made over the years via passage of Prop. 36, 47 and 57. While the mild language explaining the proposed change promised that "People who commit certain theft-related crimes (such as repeat shoplifting) could receive increased penalties (such as longer jail terms). Additional factors would be considered for the state's process for releasing certain inmates from prison early. Law enforcement would be required to collect DNA samples from adults convicted of certain misdemeanors."

But much of the promotion of the bill focused on fear-mongering, claiming the passage would "close[s] a loophole in the law that allows convicted child molesters, sexual predators and others convicted of violent crimes to be released from prison early. Proposition 20 also expands DNA collection to help solve rapes, murders and other serious crimes, and strengthens sanctions against habitual thieves who steal repeatedly." Aside from the veracity of the language, the vengeful nature of the proposal and definite law'n'order support, passage of Prop. 20 would have inevitably resulted in the prison population swelling again, something even CDCR viewed with concern.

California voters, always a quixotic bunch, showed some 'insight' on this, defeating Prop. 20 by a nearly 56% negative vote.

Passed on a nearly 60% approval rate was Prop. 17, which will restore the right to vote to those who have completed their prison term but are still on parole, in line with many states in the nation. Those in favor pointed out not only the inclusionary and Constitutional nature of the change, but also studies that show those who are welcomed back into society in all aspects exhibit a lower recidivism rate.

And again, the opposition painted the prospective change as something to fear, claiming the proposition would "grant violent criminals the right to vote before completing their sentence including parole..[A]llows criminals convicted of murder, rape and child molestation to vote before paying their debt to society (pardon, we thought that was the prison sentence) and [D]enies justice to crime victims." That last part we don't get at all.

Also of interest, though less direct impact on current lifers, was the rejection by voters of Prop 18, a proposal to allow 17-year-olds to vote. The vote was pretty decisive, over 55% and understandable, given that we've finally recognized 17-year-olds should not be held as accountable as adults for their behavior, witness YOPH laws. Last on the crime-related propositions was Pro. 25, which would have eliminated the current cash bail system. That proposal lost at a 56% no vote, with many acknowledging that while the current system must be changed, this proposal was not the way to achieve that change.

See update elsewhere in this issue.

# KING KONG WANTS A RE-DO

We've spent the better part of 6 months collecting information on staff, mostly custody staff, who, for whatever reasons, eschew wearing masks in the midst of a CoVid pandemic. No matter that several of their fellow guards have died from the virus, no matter that the memo from Sacramento directed the wearing of masks, we've got lists of names, locations and shifts of those who refuse to do so.

Hubris? Machismo? Bad-ass attitude? Whatever, although stupidity is the word that comes to our minds. But then, CCPOA has always had more than its fair share of, shall we say, nay-sayers and mis-creants. If you catch the drift.

But a scrap of news caught our attention recently, the announcement by the president of the CCPOA, one Glen Stailey, that the union wants to return to those days of yore, when the union was the (in his words) "the '800-pound gorilla in the rooms," and had a substantial impact on California politics. Stailey made the comments in the union magazine, the in-aptly named "Peacekeeper."

As if that wasn't enough fun, CCPOA then posted an on-line political ad, showing African American Democratic Assemblyman Reggie Jones-Sawyer, backer of several recent changes in the criminal justice system, with crosshairs superimposed over Jones-Sawyer's image. The ad was removed after some raised eyebrows and voices, over the appearance of promoting violence. Imagine.

Although violent crime in California is a historic low levels and public sentiment regarding sentencing and prison releases has evolved, Stailey seems poised to try and turn back the clock, to the old 'tough on crime' days that worked so well for CCPOA, but, as it developed, less well for the state. During a hot minute in the last few years CCPOA seemed ready to move on into the 21st century, but, well, perhaps not. Stailey has indicted his intent to take the union in what he calls "a different direction."

Newsflash Mr. Stailey—you can't go back in time. We won't let you. Get the gorilla cage.

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# VIDEO VISITING

This is an evolving situation, but in late November CDCR announced the start of video visiting, now available only at 5 prisons, with plans for all institutions to be online by the end of the year. Appointments will be made by email (not VPASS), for 30-minute visits, one per inmate per month, at least initially.

The following institutions will be in the first wave: CCWF, MCSP, VSP, CIM AND SQ. New institutions are expected to be added each week, with7 visiting slots per day, per station at the institution. Right now, each prison is expected to begin with 10 stations, more to be added as the weeks pass.

Only approved visitor can participate and must be prepared to show your ID on camera at the beginning of the visits. All visiting rules, except those related to colors of clothing apply. CDCR went to great lengths to emphasize video visiting is meant to supplement regular visiting while the CoVid shutdown is in place and there are no intentions of replacing regular, in person visiting with video calls.

The visits will not be recorded, but will be monitored by staff, to be sure visiting protocols are followed. Those in disciplinary housing, AdSeg or the SHU WILL be eligible for video visiting, so long as they are approved for visiting under regular situations. There is NO cost for the video visits and visitors can use a table, Iphone or computer.

# THE MENTAL HEALTH PROJECT ROLLS ON

Update for those who are participating in LSA's Mental Health Project—the response has been great! We've sent nearly 600 packets with in-cell study courses on Anger Management, one on Depression and a workbook on dealing with CoVid stress, and so far have returned about 100 certificates. Yes, we've sent a few back, when it was very obvious that those responses were off-hand, not serious and in some cases, largely missing. This is real—you have to do the work.

If you've requested a packet and haven't received it yet, please be patient. These are mailed to you via Media Mail, saving about $5 per packet in postage over first class mail, but that process takes a bit longer.

Please note, you don't have to send the who packet back, just write the homework question number and your response and mail it off. Certificates are available for Anger Management and Depression—the CoVid stress workbook is just for your benefit.

If you have questions on how long it will take to get your certificate? Think numbers---600 packets mailed, with 2 study courses each, means 1,200 possible certificates. And 4 staffers working on those responses. If you'd like to participate, send us a query on the Mental Health Project, to LSA, PO Box 277, Rancho Cordova, CA. 95741.

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# CDCR STAFF MASK & LATE COVID UPDATE

Since the main story on CoVid contained in this issue was written several new locations are now in the midst of a severe CoVid outbreak. CDCR has apparently ramped up their responses to the current rampant outbreaks and issued a new mandate for staff masks.

CDCR's mask policy for staff, going into effect Nov. 23 and requiring surgical, not cloth masks for staff. In a separate memo distributed to staff recently, Sec. Allison noted only the surgical masks (provided by CDCR) will be acceptable wear for staff, unless an N95 is required in certain areas. Current severe outbreak prisons will begin mandatory mass testing of the inmate population, mandatory weekly staff testing, identifying and utilizing additional space for quarantine and isolation and providing N95 masks and other PPE for those who are in isolation or quarantine.

The new measures are in effect at HDSP, SATF, CTF, CVSP, CAL, PVPS and VSP, where the outbreaks are the worst. Allison's memo continued that staff ""shall not modify the procedure mask in any way, including adding words or decorations, and shall not wear any other type of covering over the procedure mask." Also, ""COVID-19 within CDCR institutions or DJJ facilities is being introduced primarily by staff coming from the community. Therefore, while added protection for the inmate population from staff is necessary." While we've known this for some time, it's refreshing to see CDCR acknowledge the obvious.

Two days before we go to print, the death toll now stands at 85. Almost undoubtedly, there will be more

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