CALIFORNIA LIFER NEWSLETTER

State and Federal Court Cases

by John E. Dannenberg

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

STATUS OF *IN RE ROY BUTLER*

In re Roy Thinnes Butler

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

There is no material change in the case status as of 10/14/17. No oral argument date has been set.

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

BPH REGULATION ALLOWING BOARD TO CONSIDER "SERIOUS MISCONDUCT IN PRISON OR JAIL" IN DETERMINING PAROLE SUITABILITY IS RULED TO BE SUFFICIENTLY CLEAR

Menefield v. BPH

___Cal. App. 5th___; C083356

June 21, 2017

This case is about the validity of a regulation governing a circumstance the Board of Parole Hearings can consider when determining whether a person convicted of a crime punishable with an indeterminate life sentence is unsuitable for parole. 15 CCR § 2402(c)(6)provides that an inmate's "serious misconduct in prison or jail" can tend to show his or her unsuitability for parole. In a petition for writ of mandate, lifer James Menefield challenged the validity of 15 CCR § 2402(c)(6). Menefield argued that the regulation lacks clarity because it does not define "serious misconduct" and fails to inform prisoners that they may be denied parole for committing minor or administrative infractions.

Table of Contents

CALIFORNIA LIFER NEWSLETTER

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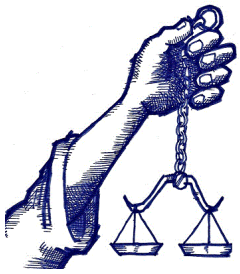
COURT CASES (in order)

Reviewed in this issue:

In re Roy Butler
Menefield v. BPH
In re Danny Sanders
In re Luis Loza
In re Sekou Thompson
Willie Grant v. Swarthout
In re Johnny Villalobos
Towery v. California
P. v. Emigdio Valdez
P. v. Thomas Thomas
P. v. Philip Sterns

The trial court below had denied relief. Agreeing, the Court of Appeal now held that a regulation is drafted with "clarity" if the meaning of the regulation will be easily understood by those directly affected by it. § 2402(c) sets forth the circumstances tending to show unsuitability for parole, although it does not define "serious misconduct." But the Court observed that life prisoners are generally familiar with the term because it is defined in a related regulation, section 3315, which is also applicable to life prisoners. Thus, the term is clear to those directly affected by it.

Moreover, life prisoners are on notice that minor and administrative misconduct can be considered when determining parole suitability. § 2402(c) is not an exhaustive list of factors showing unsuitability for parole and the Board is allowed to consider all relevant and reliable available information. In addition, subd. (d) contains a separate list of factors tending to show suitability for parole, including an inmate's "institutional behavior indicating an enhanced ability to function within the law." Thus, the Court concluded, § 2402 as a whole adequately informs life prisoners and the Board that minor and administrative misconduct can be considered when determining a life prisoner's unsuitability for parole.



Petitioner's challenge to section 2402(c)(6) in the trial court was based on the contention he raises here, namely, that the board failed to substantially comply with the Administrative Procedure Act's clarity standard. Petitioner argued that because the regulation does not define the term "serious misconduct," life prisoners do not know what type of conduct can result in the denial of parole. Further, he contended, this lack of clarity has resulted in life prisoners being denied parole for minor institutional misconduct. With regard to this contention, the trial court ruled that the regulation was clear because California Code of Regulations, title 15, section 2402 states that the board can consider all institutional misconduct when making a parole suitability determination and because the term "serious misconduct" is defined in a related regulation.

The court reasoned that "[s]ection 2402, subdivision (b) indicates that all 'relevant, reliable information available to the panel shall be considered in determining suitability for parole.' " This includes the circumstances listed in California Code of Regulations, title 15, section 2402, subdivision (c), which includes, among other things, an inmate's

Cont pg 4.....

PUBLISHER'S NOTE

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

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

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

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

EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility

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GO FIND A UNICORN

Every week we received a stack of letters, phone calls and emails from inmates, their family and friends, decrying the fact that Prop. 57 'isn't fair,' in not impacting (most) lifers, screening out third strikers and barring LWOP inmates. Followed by an equally large number of complaints about the narrow nature of elderly parole, YOPH parole, the existence of LWOP sentences in general, and, most recently, the non-retroactive status of SB 620 on gun enhancements.

Everyone is crying foul. Prop. 57, by all reliable accounts, written nearly in toto by Governor Brown himself, has dozens of groups and individuals claiming authorship, and at the same time, claiming CDCR has 'twisted' implementation of the initiative to suit the department's own purposes. There's an old saying that success has a hundred fathers, but failure is an orphan, and so it is with Prop. 57.

At the most recent and last public hearing on the regulations to implement the changes in Prop. 57 more than 90 speakers complained about everything in the provisions, and most, while claiming to have a hand in authorship of the initiative, alleged that it wasn't coming out the way they planned. There's a surprise.

It's long been established that voter initiative, which ballot propositions are, is the worst, most ineffective, least stable and satisfactory way to govern, yet we in California keep trying. Few initiatives come out as the backers think they will or the voters believe they were intended, leaving everyone disgruntled.

Prop. 57 never was meant to apply to lifers on a large scale, nor were 3 Strikers mentioned, and least one think that any group should be included by supposition or intimation, think again. Courts have held litigators cannot guess or surmise legislative or voter intent, unless that intent is clearly stated. Should Prop. 57 include 3 Strikers? Probably, but it never promised to do so.

And now the carping has begun on recently passed legislation on elderly parole (complaints range from inmates have to be too old, or served too much time), automatic referral of juvenile LWOP to parole hearings (they have to serve too long) and striking of gun enhancement sentences (not retroactive). More and more, we're being asked, "What good is it if it doesn't affect me, get my prisoner an early release, not let everyone come home?" Nothing but complaints.

What good is it if it doesn't affect you? Well, it might provide some relief to someone else, and why would you begrudge anyone relief from a life sentence? And if this version doesn't hit you, perhaps the next one will (remember SB 260 and 261, which progressed YOPH age limits from 18 to, now with the passage of AB 1308, 26 years of age?). Most things are a process, including changes in sentencing and law.

Looking for something to take years off your sentence, send you home right away? Expecting, demanding that golden key that spring open cell door and let you dance out, light-footed and carefree? You might as well go find a unicorn.

Most of the many prisoners we meet in various institutions, especially those who are realistic and working hard on becoming suitable for parole, will own up to the fact that it was largely their actions/decisions that brought them to prison and it will be their decisions and work on changing their beliefs and actions that will get them out. There isn't any magic to it, just hard work.

Laws relating to lifers are changing every year, and looking back over about a decade the change is dramatic and powerful; more lifers than ever are coming home. Every inmate should be as ready as possible to take advantage of changes in law and policy that will help him or her rehabilitate and get back into society. But that takes work, not magic.

If the latest bunch of laws and changes doesn't have you packing your property to send home next week, take a look at what is offered you thorough these changes and possible next steps. Make yourself ready, so that when that door starts to open, you're ready to dash through it and show your suitability.

Work on yourself. And stop complaining about what the world isn't doing for you. If you're looking for an easy out, some piece of legislation or court ruling to rescue you, you probably aren't ready.

If you're ready to put in the effort, you'll come home. And if you aren't, if you're still looking for the magic key that will send you home right away, then you might as well look for a unicorn too, maybe even one jockeyed by a leprechaun and trotting on a field of gold.

From pg. 2

"serious misconduct in prison or jail." This subdivision, however, does not provide an exclusive list of factors and instead provides "merely [']general guidelines[']' to consider." The relevant and reliable information to be considered also includes that set forth in California Code of Regulations, title 15, section 2402, subdivision (d)(9), which provides that " '[i]nstitutional activities indicat[ing] an enhanced ability to function within the law upon release' " can be considered when determining suitability for parole. Given these provisions, the court ruled that "a life prisoner [is] on notice that [the board] may consider minor or administrative misconduct in making a parole suitability determination." Further, " 'serious misconduct' is defined in [California Code of Regulations, title 15,] section 3315, thus providing clarity as to its definition." As a result, the trial court sustained the board's demurrer to petitioner's clarity claim without leave to amend. Petitioner did not challenge the regulation on the ground that it was constitutionally vague.

The Court first found that the challenged regulation did not lack clarity.

Petitioner contends the trial court erroneously sustained the demurrer to his claim that section 2402(c)(6) lacks clarity, arguing the same grounds he argued before the trial court -- namely, that "serious misconduct" is not defined in the regulation and the board has interpreted the regulation to deny life prisoners parole for minor or administrative misconduct. We agree with the board that section 2402(c)(6) is clear because the term "serious misconduct" is defined in a related regulation. Further, California Code of Regulations, title 15, section 2402 indicates that the circumstances set forth in subdivision (c) are not an exhaustive list. Accordingly, California Code of Regulations, title 15, section 2402 as a whole adequately informs the board and life prisoners that minor and administrative misconduct can be considered when determining a life prisoner's unsuitability for parole.

The Administrative Procedure Act (Gov. Code, § 11340 et seq.) requires that agencies draft regulations "in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style. . . ." (Gov. Code, § 11346.2, subd. (a)(1).) A regulation is drafted with "clarity" when it is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Gov. Code, § 11349, subd. (c).) "A regulation shall be presumed not to comply with the 'clarity' standard if," among other things, "the regulation uses terms which do not have meanings generally familiar to those 'directly affected' by the regulation, and those terms are defined neither in the regulation nor in the governing statute." (Cal. Code Regs., tit. 1, § 16, subd. (a)(3).) Persons who are presumed to be " 'directly affected' " by a regulation are those who are legally required to comply with or enforce the regulation or who receive a benefit or suffer a detriment from the regulation that is not common to the public in general. (Cal. Code Regs., tit. 1, § 16, subd. (b).)

Here, the persons " 'directly affected' " by the regulation are life prisoners who will come before the board for a determination of their suitability for parole, and the board, which interprets the regulation when determining an inmate's suitability for parole. We conclude that the regulation is clear to both these persons " 'directly affected' " by the regulation.

The Court reasoned that life prisoners are gen-

erally familiar with the meaning of the term "serious misconduct in prison or jail" because a similar term is defined in another regulation also applicable to life prisoners.

> California Code of Regulations, title 15, section 3315 (section 3315) enumerates an extensive and nonexclusive list of institutional rule violations deemed "serious." It also includes an inmate's procedural and due process rights to an investigation, hearing, and punishment for any serious rule violation he or she is alleged or found to have committed. (§ 3315.) This regulation " 'directly affect[s]' " the same persons affected by section 2402(c)(6) because both regulations apply to prisoners in correctional institutions, including life prisoners who will go before the board. Because the same class of individuals is " 'directly affected' " by section 2402(c)(6) and section 3315, and section 3315 defines what it means to have committed "serious rules violations," section 3315 provides life prisoners with a general meaning of what it means to have committed "serious misconduct in prison or jail."

Menefield challenged the "sharing" of meanings between two separate regulations.

> Petitioner acknowledges that section 3315 defines "[s]erious [r]ule [v]iolations," but argues that this regulation does not indicate whether the term shares the same meaning as the regulation he challenges. This is not the standard for determining clarity under the Administrative Procedure Act. The question before us is whether "the regulation uses terms which do not have meanings generally familiar to those 'directly affected.' " (Cal. Code Regs., tit. 1, § 16, subd. (a)(3).) "Serious misconduct in prison or jail" does have a meaning generally familiar to life prisoners because these prisoners are subject to disciplinary rules regarding their conduct, which include a prohibition against serious rule violations as defined in section 3315. Section 3315 provides life prisoners with an understand-

ing of misconduct considered serious in an institutional facility, thus also providing them with a sufficient basis for understanding the intended meaning of the term "serious misconduct in prison or jail" for the purposes of parole eligibility.

The Court also considered how the Board would consider the regulatory language.

The regulation is also clear to the board, which interprets and applies it. Petitioner argues that the unclear meaning of "serious misconduct in prison or jail" allows for an arbitrary and capricious interpretation of the regulation by the board, which has resulted in hearing officers basing a denial of parole on a prisoner's minor or administrative misconduct. We disagree.

In assessing whether "the inmate poses 'an unreasonable risk of danger to society if released from prison,' and thus whether he or she is suitable for parole," the board is guided by California Code of Regulations, title 15, section 2402. (*In re Prather* (2010) 50 Cal.4th 238, 249.) Included in California Code of Regulations, title 15, section 2402 is a list of circumstances tending to show unsuitability for parole -- including certain types of commitment offenses, unstable social background, and serious misconduct in prison or jail. (Cal. Code Regs., title 15, § 2402, subd. (c).) California Code of Regulations, title 15, section 2402 also contains a separate list of circumstances tending to show suitability for parole -- such as an inmate's rehabilitative efforts and demonstration of remorse, the mitigating circumstances of the crime, and his or her institutional behavior indicating an enhanced ability to function within the law. (Cal. Code Regs., title 15, § 2402, subd. (d).) "[T]he regulation explains that the . . . circumstances 'are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel.' " (*In re Lawrence* (2008) 44 Cal.4th 1181, 1203.) "[T]he paramount consideration for . . . the [b]oard . . . under the governing statutes is whether the inmate currently poses a threat to public safety . . . ." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254; Prather, at pp. 251-252.)

Accordingly, the Court found there was no unlawful lack of clarity in the challenged regulations.

According to the regulations, serious misconduct tends to show an inmate is unsuitable for parole and thus a risk to public safety. (§ 2402(c)(6).) Conversely, no or limited institutional misconduct tends to show suitability for parole, thus showing the inmate does not pose a risk to public safety, because the inmate has demonstrated an ability to conform his or her behavior to the law. (Cal. Code Regs., title 15, § 2402, subd. (d)(9).) Keeping in mind that the regulations at issue are "general guidelines" and the board is allowed to consider all "relevant [and] reliable information available," we conclude the board's consideration of minor misconduct does not stem from any arbitrary or capricious interpretation of section 2402(c)(6). We thus conclude that the term "serious misconduct in prison or jail" does not lack clarity.

BASED ON LACK OF SUPPORTING EVIDENCE, COURT OF APPEAL REVERSES DENIAL OF PAROLE FOR ALLEGED "LYING" TO BPH PANEL

In re Danny Sanders

CA1(5); A148167
August 11, 2017

Petitioner Danny Renee Sanders brings this habeas corpus petition to challenge a July

16, 2015 decision by the Board of Parole Hearings (Board) denying him release on parole. At the parole hearing, the Presiding Commissioner conceded that after his pre-hearing review of the record "I thought you had a good chance of going home." However, both commissioners (1) found that during the hearing petitioner had lied to them about the information he had provided to the psychologist who prepared the risk assessment; (2) based this finding on their experience and a phone call made during the hearing; and (3) stated that, as a result of the lie, they were no longer willing to credit any information petitioner had provided. As a consequence, parole was denied. Because the record reflects no evidence supporting the determination petitioner lied, and because of the decisive role played by that determination in the parole denial, we conclude petitioner is entitled to a new parole suitability hearing.

In this novel case, Sanders responded to a Panel question about his violence by admitting prior other violence, which the Panel had no record of. It questioned him on this, and he said he had told the FAD psychologist about it. But the Panel didn't believe him because such events would have been reported by the psych, and used to raise his risk assessment. The story unfolds as follows.

Petitioner stated he murdered the victim due to his lack of impulse control. He also said he was hurt because he felt rejected, and his rage took over. Petitioner admitted he was dating someone else at the time, and when asked why he killed the victim if that was true, he said he was enraged since "she had the nerve to challenge [him], to say [he] owed her something, and, at that time, [he] wasn't having it." Referring to the victim's comment about knowing where petitioner was laying his head, petitioner said at that time he would "handle any kind of threat, big or small, with the same level of violence," since that was how he was raised. While he denied that at that time he would shoot someone for threatening him, petitioner affirmed that he "would use violence."

Presiding Commissioner John Peck then asked petitioner, "Are there other dead bodies that I don't know about?" Petitioner's answer exceeded the question's scope: "No. I mean, I've shot a couple of people," and stated that these incidents occurred between 1973 and 1975. Petitioner said he shot "[s]ome guy on 73rd and Lockwood" who had said "I just stabbed a dude around the corner, so don't you be next," and when petitioner saw a knife he "shot him three times with a .38." Petitioner also said he shot a man in a park "[b]ecause he pulled out a gun and was telling [petitioner] what he would do to [petitioner]." He denied killing either of these men.

When asked why at that time he would respond so violently to people, petitioner said his mother responded violently with him, in that she would chase him down and beat him, making him grow up with a pattern of violence. As for his grandparents, petitioner relayed an incident when his grandfather fired shots after petitioner's mother and father tried to take him, and his grandmother stood there with her pistol saying, "I'm not going to let them take you." Petitioner described himself at that time as a "monster" and stated he had been carrying a firearm since he was 17 years old.

Petitioner was asked why the violent acts he had discussed at the hearing (the shootings and battery acid/drug injection) were not listed in the Risk Assessment

(psychological report). Petitioner said the psychologist asked him about other acts of violence, and he had told her there were other incidents of violence and discussed both the street and park shootings. Presiding Commissioner Peck stated his belief that "that would've been an elevating factor in [petitioner's] psychopathy rating." The current psychological report before the Board concluded petitioner presented a low risk of violence.

The Panel was plainly incensed by this alleged "lie" to them about having told the FAD psych about this other prior violence, and used it to deny Sanders for five years.

Following its deliberations, the hearing panel found petitioner posed an unreasonable risk to public safety and was unsuitable for release on parole.

In articulating the reasons for its decision, the panel focused on petitioner's statement that he had told the examining psychologist that he had been involved in the violent acts petitioner disclosed at the hearing. Commissioner Peck stated: "That's a lie. Because the doctor's going to put it in the report. I've been doing this for a long time. I even called. If someone reports something, even if it's not listed . . . as an arrest, is it going to be listed? And the answer is yes. Every bit of information is going to be listed. Because those reports are written so we can make an analysis. . . . She's making a report for us to make an assessment on whether you're dangerous or not. That was a huge lie. And an unnecessary lie. You could have easily told me, I never told her. You know something, she never asked. . . . [I]f she didn't have that information, then I may not take that low to be a low." Commissioner Peck said this posed a credibility problem, and indicated he had some problems with petitioner's version of the life crime since "it's pretty clear that in all the reports that Betty was afraid of you" because of "what you did to her," "[a]nd if you don't know that by you beating someone and putting a gun in their face that they're going to leave you, if you don't understand that's domestic violence, then you don't have any insight into your life crime at all."

Commissioner Peck said he did not believe petitioner: "You have no credibility. You can't come in and lie to a Panel." He said he could not believe petitioner's childhood abuse because "[y]ou lie." He continued, "when I prepped your case I thought you had a pretty good chance of going home. I wasn't overly thrilled with your version of the life crime but I was hoping that you would come to some additional insights that you could tell us today. I was hoping you'd be honest." However, Commissioner Peck said, "the nexus to current dangerousness is this . . . . if you can't be honest with us, if you can't be truthful, if you don't have insight . . . you are at great risk to re-offend given those circumstances if they were to arise again."

Commissioner Peck also stated, "[y]ou can't even follow the rules which I probably wouldn't have taken into a whole lot of consideration if I could believe you. But you've had three [CDCR-115s] since the last hearing. Granted they're not violent, but they're not following the rules. . . . If you don't follow the instructions of the correctional officers, what makes me think you're going to follow the rules of a parole agent?"

After complimenting petitioner on his educational and vocational programming, and for taking appropriate self-help courses and opening up in individual counseling, Commissioner Cassady echoed the Presiding Commissioner's concerns about petitioner's credibility: "Once we've been lied to once, then we don't know when it's occurring again." Regarding the acts of violence petitioner had revealed at the hearing, Commissioner Cassady said that for petitioner

"to indicate that they were taken into consideration when the Psychiatric Evaluation was prepared is just too much for either of us to believe," since the clinician, who was well-trained, would at least have mentioned them.

The panel denied parole for a five-year period, for the reasons mentioned earlier in its decision.

The Panel indicated in its decision that it had made a phone call to someone to check on Sanders' story. But the Court found this reference inadequate to make a finding of evidence to support a denial decision.

The articulated driving force behind the Board's parole suitability decision was the panel's determination that petitioner was not credible. Specifically, the panel concluded petitioner had lied when he said he told the examining psychologist about the acts of violence disclosed at the hearing. The Board's basis for this credibility finding was "arbitrary or procedurally flawed." (*Shaputis, supra*, 53 Cal.4th at p. 221.)

While his statement that "I even called" suggests Commissioner Peck made a telephonic inquiry about this subject during a break in the parole suitability hearing, the record is bereft of evidence about who may have been called, what that person was asked, and what information was relayed. It certainly is not clear that the phone call was made to the examining psychologist, and that she denied that petitioner had told her about those other acts of violence.

Our review of the record before the Board does not reveal any evidence, much less "some evidence," supporting the Board's finding that petitioner did not disclose his prior violent acts to the psychologist.

More fundamentally, from a due process perspective, the Board's reliance on the contents of an ex parte communication occurring during the suitability hearing was improper under the regulations governing such hearings. At least 10 days before the parole suitability hearing, an inmate is entitled to review the materials that will be examined by the Board. (Pen. Code § 3041.5, subd. (a)(1); Cal. Code Regs., tit. 15, § 2247; see also *In re Olson* (1974) 37 Cal.App.3d 783.) Section 2247 states that "[n]o panel shall consider information not available to the prisoner unless the information is designated confidential under § 2235." The Board did not designate the phone call confidential, or follow requisite regulatory procedures applicable to reliance on confidential information. (§ 2235.) The contents of the telephone call were not made available, or detailed, at the hearing, much less revealed to petitioner at least 10 days beforehand. The Board's consideration of, and reliance on, information apparently gleaned during an off the record telephone call during the hearing manifestly violated the applicable regulations. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." (*Morton v. Ruiz* (1974) 415 U.S. 199, 235.)

The Court declined to follow the Attorney General's suggestion that the Board's experience in these matters made them credible.

The Attorney General contends the Board members' experience (details of which are not cited to nor are part of our record) supports the panel's conclusion that the examining psychologist would not have omitted such significant acts of violence from the report. Although the commissioners' experience may have led them to expect that a risk assessment would include such acts,

the record does not disclose a basis for concluding that it was mandatory for the psychologist to include them in the report. Additionally, the record fails to reveal how a commissioner would know such information was absent from a report. In short, accepting the Attorney General's contention on the record before us would require us to endorse a decision that is based on speculation. (*Shaputis, supra*, 53 Cal.4th at p. 219 [decision may not be based on "mere guesswork"]; *Lawrence, supra*, 44 Cal.4th at p. 1213 [decision "must be supported by some evidence, not merely by a hunch or intuition"].)

The Board's assumption that the FAD would have reported everything the inmate said was rejected by the Court.

Further, while Commissioner Peck indicated that "[e]very bit of information is going to be listed" in the psychologist's report, our review of the record reveals otherwise. For example, as petitioner aptly observes, prior risk assessments do not recount each and every criminal or violent act identified in the California Department of Justice's transcript of petitioner's criminal history. The mental health evaluation prepared for petitioner's June 2002 hearing omits mention of eight items listed in petitioner's criminal history transcript, including petitioner's convictions for disturbing the peace and carrying a concealed weapon. The 2012 comprehensive risk assessment is even less detailed than the 2002 evaluation, and merely obliquely references petitioner's "documented criminal history as an adult, primarily for misdemeanors for which he paid fines and served days in county jail." As for the risk assessment prepared for the 2015 hearing, the examining psychologist referenced only three of petitioner's prior crimes, not mentioning petitioner's four other convictions or the weapon-related offenses.

From the record before us, it cannot be determined whether the hearing panel's

conclusion that petitioner lied about his conversation with the psychologist is correct, or whether, as petitioner asserts, he told the psychologist information about his prior violent acts. If petitioner did not, in fact, reveal those acts to the psychologist, then the Board would have had reason to discount the psychologist's low risk assessment. (See *In re Shippman* (2010) 185 Cal.App.4th 446, 461–462 [Board appropriately discounted supportive psychological evaluations, where petitioner failed to open up to clinicians about the true nature and extent of his controlling behavior and violence towards women].) If, as petitioner claims, he did reveal his prior violent acts, yet the psychologist decided to omit them from her report, any "perceived failure of the evaluator cannot be laid at [petitioner's] feet." (*In re Nguyen* (2011) 195 Cal.App.4th 1020, 1036.)

Therefore, we are constrained to find that the record lacks some evidence to support the Board's finding that petitioner lied about his disclosures to the examining psychologist, which provided the impetus for the parole denial. However, that is not the end of our analysis. If it is possible to conclude the Board would have reached the same decision absent that finding, we must uphold the parole denial. (*Rosenkrantz, supra*, 29 Cal.4th at p. 677; *In re Dannenberg* (2005) 34 Cal.4th 1061, 1100.)

<u>The Court found that the record did not support a finding that Sanders would have been found unsuitable on *other* validly supported reasons, and therefore reversed and remanded for a new hearing. In that new hearing, the Board may well make a new and proper record of any findings it makes as to the alleged reporting by Sanders of this prior violence to the FAD psych, if the facts support such a finding.</u>

In *Rosenkrantz,* after the Supreme Court found the Governor's finding "regarding petitioner's asserted lying about aspects of the crime in order to minimize his culpability" was not supported by some evidence, the court nevertheless upheld the parole denial since "the Governor's decision made clear that he would have reached the same conclusion regarding parole suitability even without the determination that petitioner had lied about such matters." (*Rosenkrantz, supra*, 29 Cal.4th at p. 677.) Similarly, this court upheld a parole denial after deciding that any error in the Board's reliance on the commitment offense was harmless, where it was clear from the Board's decision that it would have denied parole on other grounds, and the Board's reference to the commitment offense was peripheral to its decision. (*In re Reed* (2009) 171 Cal.App.4th 1071, 1086–1087 (Reed).)

In contrast to *Rosenkrantz* and *Reed*, the record before us does not permit us to determine that the Board would have denied parole absent its unsupported finding. The panel's finding that petitioner lied to them at the hearing about his disclosures to the examining psychologist more than influenced the decision—that finding framed the commissioners' remaining findings. The conclusion that petitioner had lied caused the Board to discount the otherwise supportive psychological assessment, to doubt petitioner's credibility about his statements at the hearing concerning the life crime, domestic violence and insight, and to doubt petitioner's ability to follow the rules of a parole agent (in reference to three serious disciplinary reports since his last parole hearing in 2007). Commissioner Peck suggested that after his pre-hearing review of the record he was favorably inclined to petitioner, in that he thought he "had a pretty good

chance of going home," but petitioner's purported lie at the hearing obviously led Commissioner Peck to reverse that thought. The hearing panel's determination that petitioner had lied at the hearing had a powerful and unmistakably negative effect on the commissioners' view of the subjects discussed in their decision, resulting in the parole denial.

Since we cannot conclude the Board would have reached the same decision absent its unsupported finding that petitioner had lied about disclosing his violent acts to the examining psychologist, petitioner is entitled to habeas corpus relief.

The Board's July 16, 2015 decision is vacated, and the matter is remanded to the Board for a new parole suitability hearing, consistent with due process of law and this opinion, on an expedited basis. (*In re Prather* (2010) 50 Cal.4th 238, 244; see also id. at p. 262 (conc. opn. of Moreno, J.) ["Nothing in the majority opinion disallows the practice of ordering expedited parole hearings on remand."].) In the interests of justice, this decision shall be final in this court fifteen days from the date of filing. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

PRO PER **LIFERS WIN CASES ON *CHIU* ERROR**

In re Luis Loza

CA4(3); G055190
October 11, 2017

(CLN continues to report on *Chiu* conviction challenges independent of our normal reporting on parole board litigation, because we believe many lifers with looooooong sentences may be eligible for substantial relief from their lately determined unlawful convictions.)

Under *Chiu*, it is reversible error if a defendant is convicted of first degree murder under a "natural and probable consequences" theory of liability. This case reports the successful pro per action of Luis Loza to gain just such relief.

A jury convicted petitioner Luis Loza of the first degree murder of Edward Mauricio Rendon. (Pen. Code, §187.) The jury found him not guilty of the attempted murder of a second victim (§§664/187, subd. (a)), and not guilty of street terrorism (§186.22, subd.(a).) The jury returned not true findings on allegations he committed the murder at the direction of, for the benefit of, or in association with, a criminal street gang (§186.22, subd. (b)(1)) and that he was vicariously armed with a firearm. (§12022.53, subds. (d), (e)(1)). He was sentenced to prison for 25 years to life. We affirmed the judgment on appeal and the Supreme Court subsequently denied review. (*People v. Andrade et al*. (April 9, 2007, G035759) [nonpub. opn.].)

In the instant habeas corpus proceeding, petitioner argues his murder conviction must be reversed because he was tried and ultimately convicted on a natural and probable consequences theory, and the California Supreme Court in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*) has since rejected the use of that doctrine as a basis for first degree premeditated murder liability.

The Attorney General concedes *Chiu* error applies to petitioner's case and the error was not harmless. It cannot be determined whether the jury's verdict was based on a legally valid theory.

We agree with the parties that *Chiu* error occurred in petitioner's case, and that the error was not harmless. The remedy outlined in *Chiu* is a reversal of the first degree murder conviction, "allowing the People to accept a reduction of the conviction to second degree murder or to retry the greater offense." (*People v. Chiu, supra*, 59 Cal.4th at p. 168.)

The Attorney General does not oppose the granting of relief on the foregoing claim, and has waived any issuance of an order to show cause. (*People v. Romero* (1994) 8 Cal.4th 728, 740, fn.7.)

Accordingly, the judgment as to the first degree murder conviction is hereby vacated, and the matter is remanded to the superior court with directions to allow the People to accept a reduction of the conviction to second-degree murder or to retry the greater offense. Following the People's election and at the conclusion of further proceedings, the superior court is directed to amend the abstract of judgment accordingly, and to send a certified copy of the amended abstract to the California Department of Corrections and Rehabilitation. This decision shall be final as to this court 10 court days after its filing. (Cal.Rules of Court, rule 8.387(b)(3)(A).)

Cont. pg. 14...

From pg. 13

In re Sekou Thompson

CA2(7); B270387
September 5, 2017

Under *Chiu*, it is reversible error if a defendant is convicted of first degree murder under a "natural and probable consequences" theory of liability. This case reports the successful pro per action of Sekou Thompson to gain just such relief, at least as to the murder portion of his convictions.

In 1990, petitioner Sekou Kwane Thompson was convicted of first degree murder (Pen. Code, §§ 187, 189), exploding or igniting a destructive device causing death (former § 12310, subd. (a)), and exploding or igniting a destructive device causing bodily injury (former § 12309). He was sentenced to state prison for a term of life without the possibility of parole. In 2014, the California Supreme Court held that "an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine," and that "his or her liability for that crime must be based on direct aiding principles." (*People v. Chiu* (2014) 59 Cal.4th 155, 158-159 (*Chiu*).)

Following the decision in *Chiu*, Thompson filed this petition for writ of habeas corpus, arguing that, as a matter of law, he could not be convicted of the crime of first degree murder or the crime of exploding or igniting a destructive device under the natural and probable consequences doctrine. Thompson asserts that each of his convictions must be vacated because the jury erroneously was instructed that he could be found guilty of these crimes under the natural and probable consequences doctrine, and the record does not establish beyond a reasonable doubt that his convictions were based on a legally valid theory. We grant the petition as to the conviction for first degree murder, but deny the petition as to the convictions for exploding or igniting a destructive device causing death and bodily injury.

Thompson's multiple charges and sentence were as follows.

> "A multicount information was filed against [Thompson] and two codefendants. [Thompson's] motion to sever his trial was granted. A jury convicted him of first degree murder (count I), igniting a destructive device causing death (count III), igniting a destructive device causing bodily injury (count IV), and acquitted him of arson causing great bodily injury (count II). He was sentenced to concurrent state prison terms of 25 years to life (count I), life without possibility of parole (count III), and 7 years (count IV)." (*People v. Thompson, supra*, 7 Cal.App.4th at p. 1970.)

On his direct appeals of his convictions, he had gained some relief, but was still left with the LWOP sentence from the murder conviction

Thompson filed an appeal from his judgment of conviction. In a 1992 opinion, this court affirmed the conviction on each count, but reversed the sentences on the counts for first degree murder (count I) and exploding or igniting a destructive device causing death (count III). We remanded the matter to the trial court with directions to resentence Thompson on counts I and III, and to stay the sentence on one of those counts under section 654. (*People v. Thompson, supra*, 7 Cal.App.4th at pp. 1974-1975.)

On remand, the trial court sentenced Thompson to a term of life without the possibility of parole on count III and stayed the sentence of 25 years to life on count I pursuant to section 654. Thompson thereafter filed a second appeal from his judgment of

conviction in which he challenged his sentence of life without the possibility of parole on count III. In a 1994 opinion, this court held the trial court did not err in resentencing Thompson and affirmed his judgment of conviction. (*People v. Thompson, supra*, 24 Cal.App.4th at pp. 302-303.)

The Court first reviewed Thompson's jury instructions on the murder charges, and noted the *Chiu* problem.

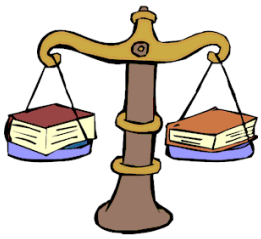
At trial, the jury was instructed that it could find Thompson guilty of a charged crime as an aider and abettor or as a co-conspirator if that charged crime was a natural and probable consequence of the crime that Thompson aided and abetted or conspired to commit. In his habeas petition, Thompson argues that, based on the holding in *Chiu*, his conviction for first degree murder must be vacated because he could not be convicted of that crime under the natural and probable consequences doctrine, and there is no basis in the record to determine whether he was convicted under a legally valid theory. Thompson also asserts that the reasoning in *Chiu* should be extended to vacate his convictions for exploding or igniting a destructive device causing death and bodily injury because those crimes require that the perpetrator act with a uniquely personal and subjective mental state, which does not warrant imposing liability on an aider and abettor under the natural and probable consequences doctrine.

The Court observed that there was no doubt that Thompson's jury had, as one of its conviction options, the now unavailable "natural and probable consequences" theory.

At Thompson's trial, the jury was instructed on three types of vicarious liability: (1) direct aiding and abetting, (2) aiding and abetting under the natural and probable consequences doctrine, and (3) membership in an uncharged conspiracy.

Specifically, standard jury instruction CALJIC 6.11was cited for *Chiu* error analysis.

CALJIC No. 6.11 defined the liability of a co-conspirator as follows: "Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if said act or said declaration is in furtherance of the object of the conspiracy. [¶] The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. [¶] A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but is also liable for the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy, even though such act was not intended as a part of the original plan and even though he was not present at the time of the commission of such act. [¶] You must determine whether the defendant is guilty as a member of a conspiracy to commit the crime originally contemplated, and, if so, whether the crime alleged in Counts 1, 2, 3, 4 was a natural and probable consequence of the originally contemplated criminal objective of that conspiracy."



Moreover, the jury was told that they did not have to agree on *which* theory of murder they used, if they voted for guilt.

The jury also received an instruction that "[i]t is not necessary that all jurors agree unanimously on one of the prosecution's three theories of first degree murder so long as each juror is convinced beyond a reasonable doubt that defendant is guilty of first degree murder."

The Court found that, notwithstanding the Attorney General's arguments to the contrary, that the record does not demonstrate that Thompson's conviction for first degree murder was based on a legally valid theory. The Attorney General argued that any error was harmless.

Thompson argues that, based on the holdings in *Chiu* and *Rivera*, the jury erroneously was instructed that it could convict him of first degree murder either as an aider and abettor or as a co-conspirator under the natural and probable consequences doctrine. Thompson further asserts that such error requires that his conviction for first degree murder be vacated because there is no basis in the record to determine whether he was convicted under a legally valid theory. We need not resolve the instructional error issue on the limited record before us in this case, as the Attorney General does not argue that the instructions were correct, but instead contends that any error was harmless on the sole ground that the record establishes beyond a reasonable doubt that Thompson was convicted of first degree murder under the felony-murder rule. This theory, if it was the basis for the conviction, was not legally valid given that the jury acquitted Thompson of arson, the underlying felony on which the felony-murder theory was based.

Several theories of harmless error were advanced, but the Court found that *none* were supported by the record.

In support of the harmless error argument, the Attorney General asserts that the jury was instructed that to find Thompson guilty of felony murder, "it had to find that petitioner intended to kill," and that to find him guilty of explosion of a destructive device causing death, "it had to find petitioner had malice aforethought." The Attorney General claims that these instructions thus demonstrate that Thompson was convicted of a "'legally valid theory that [he] directly aided and abetted [a] felony murder." This argument, however, is not supported by the record.

First, the jury was not instructed that it had to find that Thompson intended to kill or acted with malice aforethought to be found guilty of first degree murder. To the contrary, the instruction on first degree felony murder stated that "[t]he unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of the crime . . . of ARSON is murder of the first degree when the perpetrator had the specific intent to commit such crime." Likewise, the instruction on aiding and abetting liability for first degree felony murder stated that "[i]f a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of ARSON, all persons, who either directly and actively commit the act constituting such crime, or who [aid and abet] its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental." While the instructions on first degree murder by means of a destructive device stated that the perpetrator of the murder had to act with malice aforethought, they did not provide that an aider and abettor or a co-conspirator also had to possess such mental state to be found guilty of that crime. Instead, the jury was instructed that, as to each count, an aider and abettor was liable "for the natural and probable consequences of any criminal act that he knowingly and intentionally aided and abetted," and a member of an uncharged conspiracy was liable "for the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy."

Second, the Attorney General is correct that felony murder was one of the theories of first degree murder on which Thompson was tried, although we cannot determine with any certainty that the jury based its

verdict on that theory. As noted, the record before this court is very limited. Apart from the jury instructions, the only records from the trial that have been provided in this habeas proceeding are the jury's verdicts on counts I and III and a few select pages of the reporter's transcript of the prosecutor's closing argument. The verdict on count I states that the jury found Thompson guilty of "murder in the first degree in violation of section 187(a)," but it does not identify the theory of liability on which the verdict was based. Nor was the jury required to unanimously agree on the theory of liability so long as each juror found Thompson guilty beyond a reasonable doubt of first degree murder. (*People v. Moore* (2011) 51 Cal.4th 386, 413.) Furthermore, the limited record that we have of the prosecutor's closing argument shows that the prosecutor did rely on the natural and probable consequences doctrine as one of the theories of liability for first degree murder. In particular, the prosecutor argued to the jury that it could convict Thompson of first degree murder if it found that he conspired either to commit arson or to use a destructive device and that murder was a natural and probable consequence of the conspiracy.

The Attorney General nevertheless asserts that, because the jury was instructed that murder by means of a destructive device is first degree murder and then returned guilty verdicts on counts III and IV for exploding a destructive device causing death and bodily injury, "the jury necessarily found petitioner, who was not the actual perpetrator, guilty on the valid felony-murder theory." This argument, however, lacks merit. Murder by means of a destructive device is not felony murder under section 189. Rather, it is a kind of willful, premeditated, and deliberate killing, which requires a showing that the perpetrator acted with malice aforethought. (§ 189; see also *People v. Stanley, supra*, 10 Cal.4th at p. 794; *People v. Morse* (1992) 2 Cal.App.4th 620, 655.) Moreover, contrary to the Attorney General's contention, the jury's guilty verdicts on counts III and IV also do not show that the jury necessarily found Thompson guilty of first degree felony murder. Exploding or igniting a destructive device is not an enumerated felony under section 189 for purposes of the felony-murder rule. While arson is one of the enumerated felonies, the jury found Thompson not guilty of arson in count II. The record therefore does not establish that Thompson was convicted of first degree murder under the felony murder theory.

The fact that the jury returned guilty verdicts on counts III and IV also does not demonstrate that the jury found that Thompson directly aided and abetted a murder by means of a destructive device. The mental state required for the crime of exploding or igniting a destructive device is not the same as the mental state required for the crime of murder by means of a destructive device, and the jury was so instructed. In addition, the record does not show beyond a reasonable doubt that the jury found Thompson guilty of exploding or igniting a destructive device under direct aiding and abetting principles. The jury was instructed on the natural and probable consequences doctrine as to each of the charged crimes, including counts III and IV. Thus, the jury could have found Thompson guilty on those counts if it found that he directly aided and abetted an undefined target crime and that the explosion or ignition of a destructive device causing death and bodily injury was a natural and probable consequence of the crime that Thompson aided and abetted.

Accordingly, the Court granted Thompson's habeas petition.

On this record, we cannot conclude beyond

a reasonable doubt that the jury based its verdict on a legally valid theory of first degree murder. The appropriate remedy for this type of instructional error is to vacate the first degree murder conviction and allow the People to either accept a reduction of the conviction to second degree murder or retry the greater offense of first degree murder under a legally valid theory. (*Chiu, supra*, 59 Cal.4th at p. 168.) If the People do not retry Thompson within the time prescribed by law, the trial court must modify the judgment to reflect a conviction of second degree murder on count I and resentence Thompson on that count accordingly. We therefore grant Thompson's petition for writ of habeas corpus as to his conviction for first degree murder.

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FEDERAL HABEAS TIME LIMIT EXTENDED WHERE FILING DELAY WAS DUE TO PRISON PAPERWORK DELAY

Willie Grant v. Swarthout

Ninth Circuit US Court of Appeals; 13-55584
July 7, 2017

In an important ruling for California prisoners, the Ninth Circuit US Court of Appeals, in a published decision, held that a state prisoner filing a federal habeas corpus petition was entitled to equitable tolling of the AEDPA statute of limitations where he acted diligently while waiting for a prison account certificate from his prison counselor.

Willie Grant filed a *pro se* federal habeas petition challenging his state first degree murder conviction. The state moved to dismiss the petition as barred by the AEDPA one-year statute of limitations. Grant argued he was entitled to equitable tolling from the time he requested a certificate showing the amount of money in his prison account (which was required for him to file his petition *in forma pauperis*) until the time he received the certificate. If equitable tolling applied, his petition would have been timely. The US District Court dismissed the petition as untimely, finding Grant was not entitled to equitable tolling because he requested the prison account certificate on the 354th day of the 365-day limitations period, and had not shown that he was diligent throughout the entire 354 days prior to the filing of his state habeas petition.

The Ninth Circuit reversed, holding that a petitioner is entitled to equitable tolling where he demonstrates an extraordinary circumstance prevented timely filing and that he acted diligently. With respect to diligence, the relevant consideration is whether the petitioner was diligent during the time the extraordinary circumstance prevented timely filing, and the district court improperly considered whether Grant was diligent before the extraordinary circumstance arose. Here, Grant could not file his federal petition without the prison account certificate. The time during which he was waiting for the prison account certificate was an extraordinary circumstance that justified equitable tolling because Grant was entirely dependent on prison officials to provide him with the certificate. Grant acted diligently while waiting for his certificate and filed his petition the day he received his certificate. He was entitled to equitable tolling and his federal petition was therefore timely.

> The panel reversed the district court's order dismissing as untimely California state prisoner Willie Ulysses Grant's federal habeas corpus petition, and remanded for further proceedings, in a case involving a prisoner's right to equitable tolling for the period during which he was prevented from completing his federal habeas petition by an extraordinary circumstance.
>
> The panel held that a petitioner is entitled to use the full one-year statute-of-limitations period for the filing of his state and federal habeas petitions and that he need not anticipate the occurrence of cir-

cumstances that would otherwise deprive him of the full 365 days that Congress afforded him for the preparation and filing of his petitions. The panel therefore held that it was improper for the district court to fault the petitioner for filing his state petition for postconviction relief late in the statute-of-limitations period in reliance on his having a full year to file both his state and federal petitions, as promised by AEDPA.

The panel held that Grant exercised reasonable diligence during the 20-odd day duration of an extraordinary circumstance, where he requested from the prison trust office, on the day he received notice of the California Supreme Court's denial of his state postconviction petition, the prison account certificate required to file a federal habeas petition in forma pauperis and filed a second request when he did not hear back from prison officials for two weeks. Because it is obvious that Grant was diligent after he received the prison account certificate, the panel did not resolve whether a petitioner needs to prove that he was diligent after the extraordinary circumstance has ended.

The panel disagreed with the state that Grant did not experience an extraordinary circumstance sufficient to justify tolling. The panel wrote that where a prisoner is dependent on prison officials to complete a task necessary to file a federal habeas petition and the staff fails to do so promptly, this constitutes an extraordinary circumstance.

The panel concluded that Grant is entitled to equitable tolling from the time he requested the prison account certificate until he received the certificate, and that his petition was therefore timely.

We therefore conclude that Grant is entitled to equitable tolling from the time he requested his prison account certificate on November 21, 2011 until he received that certificate on December 19, 2011. His petition was therefore timely. The district court's order granting respondent's motion to dismiss is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

JUVENILE OFFENDER WITH LIFE SENTENCE ENTITLED TO USE HABEAS CORPUS TO GAIN *FRANKLIN* HEARING

In re Johnny Villalobos

CA2(7) .; B279545
August 16, 2017

In 2010, a jury convicted petitioner Johnny Villalobos of first degree murder, and found true a special allegation asserting that he had personally and intentionally discharged a firearm, causing great bodily injury and death. He was sentenced to 50-life for first-degree murder with use of a gun. At sentencing, Villalobos did not present any evidence related to his age at the time of the offense.

In October 2016, Villalobos filed habeas corpus petition requesting a hearing under *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) to make a record of information relevant to his eventual youth offender parole hearing. (See Pen. Code, §§ 3051, 4086.) The trial court denied the petition, concluding it lacked jurisdiction to issue a writ of habeas corpus because Villalobos had not challenged the legality of his incarceration. The court did, however, invite Villalobos to "submit whatever documents he feels will be relevant at his eventual youth offender parole hearing. . . . [¶] . . . . If petitioner feels that procedure is insufficient, he may request a further hearing, detailing why testimony is necessary under the circumstances."

Villalobos then filed a petition for writ of habeas corpus in the Court of Appeal seeking an order requiring the trial court to hold a hearing pursuant to *Franklin*. The Court granted the petition.

The Court reviewed the development of the *Franklin* rule requiring a hearing for youthful life offenders to make a record of their youthful characteristics in the sentencing court record, to be available for use by the BPH at an eventual parole hearing in 25 years.

> In response to *Caballero*, "the Legislature passed Senate Bill No. 260, which became effective January 1, 2014, and added sections 3051, 3046, subdivision (c), and 4801, subdivision (c) to the Penal Code." (*Franklin, supra*, 63 Cal.4th at pp. 276-277 ["the Legislature passed Senate Bill No. 260 explicitly to bring juvenile sentencing into conformity with *Graham, Miller*, and *Caballero*"].) The purpose of the act was to "'establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity.' [Citation]." (*Franklin, supra*, 63 Cal.4th at p. 277.) When adopted in 2013, the statute and the associated Penal Code provisions applied only to persons who were under 18 years of age at the time of their offense. In 2015, however, the Legislature amended each of the Penal Code provisions to make them applicable to persons who were under 23 years of age at the time of their offense. (Ibid. [citing Stats. 2015, ch. 471].)

Section 3051, which our Supreme Court has characterized as "the heart of Senate Bill No. 260," requires the Board of Parole Hearings (the Board) to "conduct a 'youth offender parole hearing' during the 15th, 20th, or 25th year of a juvenile offender's incarceration. [Citation.]. . . . A juvenile offender whose controlling offense carries a term of 25 years to life or greater is 'eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (*Franklin, supra*, 63 Cal.4th at p. 277.)

Section 3051, subdivision (f) describes various types of evidence the Board may consider at a youth offender parole hearing. Subdivision (f)(1) provides, in relevant part: "In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, . . . shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." Subdivision (f)(2) further provides that "Family members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime or his or her growth and maturity since the time of the crime may submit statements for review by the board."

Section 4081 further provides that when reviewing the parole suitability of a prisoner who was under 23 years of age at the time of the offense, the Board must "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

The relief order for *Franklin*-eligible lifers was recounted by the Court.

> In *Franklin, supra*, 63 Cal.4th 26, a juvenile offender who had been convicted of shooting and killing another teenager argued that his sentence of 50 years to life in prison (comprised of two mandatory terms of 25 years to life) qualified as a de facto life

sentence in violation of the Eighth Amendment. The Court held that the defendant's constitutional challenge to his sentence had been mooted by the Legislature's enactment of sections 3051 and 4086, explaining: "[S]ection 3051 has superseded [defendant's] sentence so that notwithstanding his original term of 50 years to life, he is eligible for a 'youth offender parole hearing' during the 25th year of his sentence. Crucially, the Legislature's recent enactment also requires the Board not just to consider but to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.' [Citation.] For those juvenile offenders eligible for youth offender parole hearings, the provisions of Senate Bill No. 260 are designed to ensure they will have a meaningful opportunity for release no more than 25 years into their incarceration." (*Id*. at p. 277.)

The Court further held, however, that although the defendant "need not be resentenced," it was unclear "whether [he] had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin, supra*, 63 Cal.4th at p. 284.) The Court explained that "the statutes . . . contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. . . . Assembling such [information] . . . is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Id*. at pp. 283-284.)

The Court further explained that because the defendant had been sentenced before Senate Bill 260 was enacted, "the trial court understandably saw no relevance to . . . evidence [of youth-related factors] at sentencing." (*Franklin, supra*, 63 Cal.4th at p. 269.) In light of the "changed legal landscape," the Court concluded the case should be remanded "so that the trial court may determine whether [the defendant] was afforded sufficient opportunity to make such a record at sentencing." (*Ibid*.) The Court further directed that if the "the trial court determines that [the defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony . . . . [The defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [Citation.]" (*Id*. at p. 284.)

First, the Court concluded that habeas corpus was an appropriate legal vehicle to raise a *Franklin* claim.

The Attorney General argues that the form of relief Villalobos seeks in this case, an opportunity to make a record of information relevant at his eventual youth offender parole hearing, is not available through a petition for writ of habeas corpus. The Attorney General contends "habeas corpus is limited"

to cases in which the petitioner is challenging either the "custodian's legal authority to hold [him]," or the conditions of his confinement. According to the Attorney General, because the remedy Villalobos is seeking here does not fall into either category, he cannot proceed by way of habeas corpus

The Attorney General raised this same argument in *In re Cook* (2017) 7 Cal.App.5th 393 (*Cook*), which is now under review in the Supreme Court (review granted April 12, 2017, No. S240153.) The petitioner in *Cook* initially argued that under *Miller*, his sentence of 125 years to life in prison violated the Eighth Amendment. After the appellate court denied the petition, the Supreme Court granted review, and held the case pending its decision in *Franklin*. Following *Franklin*, the Court transferred the case back to the appellate court "with directions to vacate [the] decision and consider . . . 'whether petitioner is entitled to make a record before the superior court of "mitigating evidence tied to his youth."'" (*Cook, supra*, 7 Cal.App.5th at p. 397.) On remand, the petitioner filed supplemental briefing requesting a *Franklin* hearing. The Attorney General opposed, arguing that "relief by writ of habeas corpus [wa]s unavailable to [p]etitioner because he [wa]s not challenging the legality of his restraint." (*Id*. at p. 399.)

The appellate court rejected the argument, explaining that the fact the Supreme Court had transferred the matter with directions to reconsider the case "in light of Franklin strongly suggest[ed that] the . . . Court recognize[d] that the relief afforded by that opinion is available by habeas corpus." (*Cook, supra*, 7 Cal.App.5th at p. 399.) The court further explained that, "[i]n any event," the Attorney General's "view of the scope of the writ of habeas corpus" was "overly narrow. . . . A previously convicted defendant may obtain relief by habeas corpus when changes in case law expand[] a defendant's rights . . . . [Citations.] [¶] In *Franklin*, . . . the California Supreme Court in effect expanded the defendant's rights by remanding the matter to the Court of Appeal with instructions to remand to the trial court to determine whether the defendant was afforded an adequate opportunity to make a record of information relevant to a future determination under Penal Code sections 3051 and 4801. *Franklin* thus holds that a defendant has the right at the time of sentencing to present evidence and make a record of information that may be relevant at his or her eventual youth offender parole hearing. [¶] . . . [¶] . . . [T]he deprivation of the rights granted by *Franklin* is cognizable on habeas corpus." (*Id*. at pp. 399-400)

Although the Supreme Court has now granted review in Cook, we agree with its conclusion that habeas corpus is a proper mechanism to obtain the rights afforded in *Franklin*. Contrary to the Attorney General's assertions, prior holdings of the Supreme Court demonstrate that habeas review is not limited to cases in which the petitioner is directly seeking his release from confinement, or challenging the conditions of his confinement. For example, in *People v. Tenorio* (1970) 3 Cal.3d 89 (*Tenorio*) and *In re Cortez* (1971) 6 Cal.3d 78 (*Cortez*), the Supreme Court concluded that habeas relief was available to obtain a hearing on whether the trial court should exercise its discretion to strike a prior conviction allegation. In *Tenorio*, the defendant challenged a statute that prohibited the trial court "from dismissing prior convictions without the previous approval of the prosecutor" in certain categories of narcotics cases. (*Cortez, supra*, 6 Cal.3d at p. 82.) The Court concluded the statute violated the California Constitution's separation of powers provisions, and further held that "any prisoner" whose sentence had been augmented by virtue of a prior conviction while the statute was

in effect could "file a habeas corpus petition with the superior court inviting the exercise of discretion to dismiss the prior conviction. . . . Upon receipt of such a petition, the sentencing court should follow normal sentencing procedures and grant appropriate relief whenever deemed warranted in its discretion." (*Ibid*.)

In *Cortez*, the petitioner filed a petition for writ of habeas corpus seeking a hearing under *Tenorio*. Without holding a hearing or appointing counsel, the trial court issued an order denying the petition. Although the court acknowledged it had discretion to strike the prior conviction, it concluded that the record showed the prior "convictions should not be stricken." (*Cortez*, supra, 6 Cal.3d at p. 89.) Petitioner thereafter filed a habeas petition in the Supreme Court "claiming that the sentencing court had denied him his constitutional rights in not granting him a hearing at which he could be present and be represented by counsel." (*Id*. at p. 83.) The Court agreed, explaining that "[t]he trial judge's decision as to whether or not he should strike a prior narcotics conviction . . . substantially affects the rights of the defendant, since the proven or admitted prior . . . increases the period in prison during which release on parole is forbidden, and greatly lengthens the overall sentence. Thus, an opportunity to persuade a sentencing judge to exercise his discretion to strike a prior conviction in the interests of justice is extremely important to such defendants." (*Id*. at pp. 83-84.) The Court further explained that to effectuate the rights set forth in Tenorio, any prisoner "who desires an opportunity to invoke the discretion of the court to dismiss the prior convictions, may file a petition for writ of habeas corpus with the superior court. . . ." (*Cortez, supra*, 6 Cal.3d at p. 88.)

Cont. pg. 24……

From pg. 23...

The form of habeas relief at issue in *Cortez* (and *Tenorio*) did not involve a challenge to the legality of the petitioner's confinement or the conditions of that confinement. Rather, the Court found habeas relief was available to secure a hearing to present evidence and argument as to why the trial court should exercise its discretionary authority to strike a prior conviction, thereby shortening the petitioner's period of incarceration. Villalobos seeks similar relief here, requesting a hearing to present evidence and argument the Board will later consider when determining whether to exercise its authority to release him at his eventual youth offender parole hearing, thereby shortening his period of incarceration. (See *Franklin, supra*, 63 Cal.4th at p. 284 ["goal" of a *Franklin* hearing is to allow parties to make record of youth-related factors that will allow the Board to properly perform its duties under §§ 3051 and 4801].) We agree with *Cook's* conclusion that a writ of habeas corpus is a proper mechanism to effectuate the hearing rights established in *Franklin*.

Next, the Court concluded Villalobos was entitled to a *Franklin* hearing.

Having concluded that a *Franklin* hearing may be obtained through a habeas petition, we must next determine whether Villalobos has established that he is entitled to such relief.

The record shows Villalobos did not have a sufficient opportunity to place on the record the kinds of information sections 3051 and 4801 deem relevant at a youth offender parole hearing. At the time of Villalobos's final sentencing hearing, those statutes did not apply to him, and the Supreme Court had not decided *Franklin*. (See *Jones, supra*, 7 Cal.App.5th at p. 819. ["Prior to *Franklin*, . . . there was no clear indication that a juvenile's sentencing hearing would be the primary mechanism for creating the record of information required for a youth offender parole hearing 25 years in the future"].) The transcripts of Villalobos's sentencing hearings also show his counsel did not present any evidence or argument regarding the defendant's age, cognitive ability or any other youth-related factors during either of his sentencing hearings. Villalobos's probation report likewise contains no discussion of any youth-related factors, and states that the probation officer had identified no "circumstances in mitigation."

The Attorney General nonetheless contends there are two reasons a *Franklin* hearing is not warranted. First, the Attorney General argues such a hearing is unnecessary because "the record contains some evidence of youth-related mitigating factors." In support, the Attorney General cites trial testimony in which Villalobos stated, among other things, that: (1) he had a "rough childhood"; (2) he had joined a gang because he had no one in his life to care for him; (3) "gang life" involved a substantial amount of "party[ing]," including "drinking, doing drugs [and] smoking"; and (4) he had been drunk at the time he committed his offense.

This argument is without merit. The criteria relevant to a parole determination under sections 5031 and 4086 include a wide array of "youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense." (*Franklin, supra*, 63 Cal.4th at p. 269.) In *Franklin*, the Court explained that a defendant may "place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing," and that the "goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of

the juvenile offender's characteristics and circumstances at the time of the offense." (*Id*. at p. 284.) Villalobos, who was not eligible for a youth offender parole hearing at the time of his trial and sentencing, could not have reasonably anticipated the importance such evidence would play at a future parole hearing. The fact that Villalobos made brief references to his childhood during his trial testimony does not preclude him from "develop[ing] the type of record contemplated by *Franklin*." (*Jones, supra*, 7 Cal.App.5th at p. 819.)

The Attorney General also argues "a *Franklin* hearing is not warranted" because the superior court "invited [Villalobos] 'to submit whatever documents he feels will be relevant at his eventual youth offender parole hearing.' [Citation.]" Merely allowing an incarcerated defendant to submit documentation he or she believes might be relevant at a future youth offender parole hearing is far short of the remedy contemplated under Franklin. Perhaps most notably, the trial court's proposed "remedy" does not afford Villalobos the assistance of counsel in gathering and presenting evidence of his youth-related mitigating factors. The right to counsel "'applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake' [citations]," and it is well-settled that "a sentencing hearing is one such stage." (*People v. Bauer* (2012) 212 Cal.App.4th 150, 155; *People v. Hall* (1990) 218 Cal.App.3d 1102, 1105 ["It is fundamental that the right to counsel applies at all stages in a criminal proceeding where substantial rights of an accused may be affected"] [citing *Mempa v. Rhay* (1967) 389 U.S. 128, 134].) As discussed above, the purpose of the *Franklin* hearing is to allow youth offenders to make an "accurate record" of youth-related mitigating factors so that "the Board, years later, may properly discharge its obligation to 'give great weight to' [such] factors [citation] in determining whether the offender is fit" for parole. (See *Franklin, supra*, 63 Cal.4th at p. 284.) Given the critical role a *Franklin* hearing plays in determining parole eligibility at a subsequent youth offender parole hearing, we think it clear that the hearing qualifies as a "critical stage" to which the right to counsel attaches. (Cf. *Cortez, supra*, 6 Cal.3d. at p. 87 ["an effective presentation of the merits of the petition [to strike a prior conviction] depends . . . upon his having the assistance of counsel to fashion facts and arguments into a persuasive appeal to the court . . ."].)

In sum, the record shows Villalobos was not provided a sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing. We therefore direct the trial court to conduct a hearing to allow Villalobos to make such a record.

Accordingly, the Court ordered that Villalobos be given a *Franklin* hearing.

The petition for writ of habeas corpus is granted. The trial court is directed to conduct a hearing at which petitioner will be given the opportunity to make a record of mitigating evidence tied to his youth at the time the offense was committed. Petitioner shall be appointed counsel to represent him in such proceedings.

VALLEY FEVER LIABILITY CLAIM REJECTED ON IMMUNITY GROUNDS

Towery v. California

___Cal. 5th___; CA2(1); B269387
August 10, 2017

Inmate Glenn Towery sued CDC for his injuries after contracting Valley Fever in State Prison. The Court of Appeal, in a published opinion, held that the State was immune.

Cont. pg. 28.....

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	CASSADY	CHAPPELL	FRITZ	GARNER	GROUNDS	LABAHN	MINOR	MONTES	PECK	ROBERTS	RUFF	TAIRA	TURNER	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR
Suitability Hrg Total	**24**	**24**	**21**	**16**	**0**	**8**	**27**	**25**	**25**	**28**	**27**	**14**	**18**	**27**	**120**	**404**	**0**
Grants	6	3	3	3	0	1	9	3	8	6	3	7	7	12	0	71	0
Denials	13	15	16	13	0	7	11	17	10	20	9	7	8	13	0	159	0
Stipulations	5	3	1	0	0	0	4	2	3	1	7	0	2	1	0	29	0
Waivers	0	1	0	0	0	0	0	0	1	0	3	0	1	0	21	27	0
Postponements	0	1	1	0	0	0	2	3	3	1	2	0	0	0	95	108	0
Continuances	0	1	0	0	0	0	1	0	0	0	3	0	0	1	0	6	0
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	4	0

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

Subtotal (Deny+Stip)	**18**	**18**	**17**	**13**	**0**	**7**	**15**	**19**	**13**	**21**	**16**	**7**	**10**	**14**	**0**	**188**	**0**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	7	16	15	5	0	4	12	9	8	12	9	5	7	7	0	116	0
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	7	1	1	6	0	3	3	6	4	4	6	2	3	6	0	52	0
7 years	2	1	1	2	0	0	0	3	1	5	1	0	0	1	0	17	0
10 years	2	0	0	0	0	0	0	1	0	0	0	0	0	0	0	3	0
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**1**	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**3**	**0**	**1**	**0**	**21**	**27**	**0**
1 year	0	0	0	0	0	0	0	0	1	0	2	0	0	0	11	14	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	1	0	2	3	0
3 years	0	1	0	0	0	0	0	0	0	0	1	0	0	0	7	9	0
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**0**	**1**	**1**	**0**	**0**	**0**	**2**	**3**	**3**	**1**	**2**	**0**	**0**	**0**	**95**	**108**	**0**
Within State Control	0	0	0	0	0	0	0	1	0	1	0	0	0	0	91	93	0
Exigent Circumstance	0	1	1	0	0	0	2	2	1	0	1	0	0	0	1	9	0
Prisoner Postpone	0	0	0	0	0	0	0	0	2	0	1	0	0	0	3	6	0

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	CASSADY	CASTRO	CHAPPELL	FRITZ	GROUNDS	LABAHN	MINOR	MONTES	PECK	ROBERTS	RUFF	TAIRA	TURNER	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR
Suitability Hrg Total	**35**	**15**	**16**	**33**	**40**	**25**	**19**	**23**	**23**	**33**	**33**	**20**	**20**	**0**	**129**	**464**	**2**
Grants	7	2	4	6	8	4	4	3	8	9	7	5	8	0	0	75	0
Denials	23	9	11	18	27	20	12	18	10	16	16	10	9	0	0	199	1
Stipulations	1	3	0	5	3	1	2	1	4	4	5	1	2	0	0	32	0
Waivers	1	1	0	1	0	0	0	0	0	0	0	0	0	0	37	40	0
Postponements	3	0	1	3	2	0	1	1	1	3	1	2	1	0	88	107	1
Continuances	0	0	0	0	0	0	0	0	0	1	4	2	0	0	0	7	0
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	4	0

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

Subtotal (Deny+Stip)	**24**	**12**	**11**	**23**	**30**	**21**	**14**	**19**	**14**	**20**	**21**	**11**	**11**	**0**	**0**	**231**	**1**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	7	10	7	15	23	7	9	14	8	11	12	10	8	0	0	141	0
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	11	1	3	7	5	10	4	4	4	7	9	1	2	0	0	68	1
7 years	4	1	1	1	2	2	1	1	2	2	0	0	1	0	0	18	0
10 years	2	0	0	0	0	2	0	0	0	0	0	0	0	0	0	4	0
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**1**	**0**	**1**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**37**	**40**	**0**
1 year	1	1	0	1	0	0	0	0	0	0	0	0	0	0	21	24	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	4	0
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	8	8	0
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**3**	**0**	**1**	**3**	**2**	**0**	**1**	**1**	**1**	**3**	**1**	**2**	**1**	**0**	**88**	**107**	**1**
Within State Control	1	0	0	0	1	0	0	0	0	1	1	1	0	0	60	65	0
Exigent Circumstance	2	0	1	2	0	0	1	1	1	2	0	1	1	0	25	37	1
Prisoner Postpone	0	0	0	1	1	0	0	0	0	0	0	0	0	0	3	5	0

From pg. 25

Sadly, Tower, an African-American, was not.

African-Americans are well known to have genetically increased susceptibility to this disease. The Court recounted Towery's experience with this disease at North Kern State Prison, in California's Central Valley.

Valley fever is an infectious disease contracted by inhaling an airborne fungus present in various areas of the Southwestern United States. The disease causes serious illness in less than 5 percent of persons who are infected. However, the serious, "disseminated" version of the illness can result in debilitating conditions, such as bone and joint infections, skin disease, soft tissue abscesses, and meningitis. If untreated, the disease is fatal once it progresses to meningitis.

Epidemiological studies have shown that, for unknown reasons, certain races are at higher risk of developing the disseminated version of the disease. The risk for African-Americans is 10 times greater than for the general population. From 1991 to 1993, 70 percent of the reported cases of valley fever in California occurred in Kern County.

In 2006, the State Department of Public Health published a formal study on valley fever and recommended various preventative measures. The majority of those measures were not implemented in any State prison facility. Then, in April 2013, the federal receiver that is currently overseeing the state prison system issued a policy that directs California prisons to exclude all inmates who are at a higher risk of contracting valley fever, including African-American inmates. The stated reason for the receiver's analysis was because the State had " 'moved slowly' " to develop a reasonable plan to respond to the valley fever problem.

Towery was incarcerated in the Kern Valley State Prison from March 2009 to April 2013, when he was released. He first started experiencing symptoms of valley fever in about 2010, but the disease was not diagnosed until shortly after Towery was hospitalized in October 2012 for an enlarged heart. Towery continues to suffer from the disease. He must take daily medication. He is unable to exercise and is susceptible to illnesses such as pneumonia and flu. He suffered a seizure in January 2014.

Towery alleges that the State intentionally chose to take no action to protect African-American inmates against valley fever despite knowing that they are at disproportionate risk of contracting the serious form of the disease. He claims that the State's alleged intentional course of conduct occurred "in connection with a well-documented history [of] race-based policymaking and discrimination," and that the State chose inaction "because of, not merely in spite of, the fact that [Towery] was African-American."

Towery first sued for damages.

Towery filed his initial complaint on January 31, 2014. It alleged four causes of action: (1) failure to provide inmate with safe or habitable prison; (2) premises liability; (3) negligent assignment to prison facility; and (4) unfair business practices. The State filed a demurrer raising various defenses, including public entity immunity under sections 815 and 844.6. The trial court sustained the demurrer on the basis of the immunity statutes, with leave to amend the first three causes of action.

Towery filed a first amended complaint (FAC) on December 19, 2014. The FAC included the first three causes of action from the initial complaint as well as two additional causes of action for: (1) alleged deprivation of constitutional rights under color of state law (42 U.S.C. § 1983); and (2) alleged

violation of the Bane Act (Civ. Code, § 52.1).

The State again demurred, and the trial court again sustained the demurrer with leave to amend.

> With respect to the federal civil rights claim, the State argued that it was not a "person" that could be subject to liability (see 42 U.S.C. § 1983; *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 829 (*Venegas I*)), and that Towery lacked standing to pursue injunctive relief because he was no longer an inmate. With respect to the Bane Act claim, the State argued that Towery's SAC did not allege facts amounting to "threats, intimidation or coercion." (Civ. Code, § 52.1, subd. (a).) The trial court sustained the demurrer with respect to Towery's federal civil rights claim and denied it with respect to the Bane Act claim.
>
> The State then filed motions for summary judgment and for judgment on the pleadings. In its motion for judgment on the pleadings, the State argued that the immunity for public entities under section 844.6 applied to Towery's Bane Act claim, and that its motion was procedurally proper because it had not previously raised the issue of immunity with respect to that claim.
>
> The trial court granted the motion for judgment on the pleadings and entered a final judgment on December 22, 2015.

The Court first found that the Bane Act (Civil Code § 52.1) does not provide an exception to the State's immunity for conduct that allegedly injured Tower.

> Section 815, subdivision (a) states that, unless an exception is otherwise provided by statute, a "public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Under this section, "in the absence of some constitutional requirement, public entities may be liable only if a statute declares them to be liable." (*Cochran v. Herzog Engraving Co*. (1984) 155 Cal.App.3d 405, 409.) Thus, in California "sovereign immunity is the rule" and "governmental liability is limited to exceptions specifically set forth by statute." (*Ibid*.)
>
> Consistent with this principle, a statute of general application that merely creates a liability applicable to public entities is not sufficient to override a specific immunity provision. That is because "the very purpose of the Act is to afford categories of immunity where, but for its provisions, public agencies or employees would otherwise be liable under general principles of law." (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 985 (*Caldwell*).) Thus, under the Act, specific immunities prevail over general rules of actionable duty. (*Ibid*.) This priority is reflected in section 815, subdivision (b), which states that "[t]he liability of a public entity established by this part . . . is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person."
>
> Section 844.6 is a specific immunity provision that applies to injuries to prisoners. Subject to some specific statutory exceptions, section 844.6, subdivision (a)(2) provides that a public entity is not liable for "[a] n injury to any prisoner."
>
> Towery does not argue that any of the specific statutory exceptions apply here. Thus, under the plain language of sections 815 and 844.6, the State cannot be liable for Towery's alleged injuries. No other statute contradicts this conclusion.

In this published opinion, the Court reviewed other cases to support its conclusion. But it held that the immunity law overrides everything else.

Make no mistake, we recognize the human and social significance of this case; however, we are bound by the law. Civil Code section 52.1 does not address the immunity established by Government Code section 844.6. Nothing in Civil Code section 52.1 indicates an intent to abrogate this specific immunity provision. The immunity that it creates therefore applies to Towery's Bane Act claim. (See *Caldwell, supra*, 10 Cal.4th at p. 986 [the specific immunity provided by Government Code section 820.2 "cannot be abrogated by a statute which simply imposes a general legal duty or liability on persons, including public employees"].) …

We therefore reject Towery's argument that the Legislature intended to exclude claims under Civil Code section 52.1 from the public entity immunity provided by Government Code section 844.6. If the Legislature had intended such an exclusion, it could have explicitly said so when enacting the Bane Act, either by including such a provision in that act or by amending Government Code section 844.6. It did not do so, and we therefore give effect to the plain language of Government Code section 844.6.

The judgment is affirmed. The State is entitled to its costs on appeal.

PROP. 36 APPEALS CONTINUE TO BE REJECTED BY THE COURTS OF APPEAL

WEAPON FOUND IN CELL SATISFIES "ARMED" ALLEGATION

P. v. Emigdio Valdez

___Cal. 5th___; CA3; C077882
April 20, 2017

In 2001, Emigdio Valdez was convicted of possession of a sharp instrument in prison (PC § 4502, subd. (a)) and assault by an inmate by means likely to cause great bodily injury (§ 4501). The trial court found true three prior strike allegations. (§§ 667, subds. (b)-(i), 1170.12), and sentenced Valdez to consecutive terms of 25- life on each count. In an unpublished opinion, this conviction was upheld on appeal.

Valdez now appeals from the trial court's denial of his petition for recall of sentence under the Three Strikes Reform Act of 2012 (Prop. 36). As to each conviction, he asserts that: (1) the trial court was not authorized to make findings of fact and the People were required to plead and prove any disqualifying facts in the prosecution of his commitment offense; (2) substantial evidence did not support the trial court's determinations regarding his ineligibility; and (3) the trial court employed the wrong standard of proof, in that it should have applied the "clear and convincing evidence" standard rather than the "preponderance of the evidence" standard. Valdez also asserts that, if the Court concludes that he is eligible for resentencing on one conviction but ineligible on the other, he should be resentenced on the eligible offense.

In the published part of this opinion the Court concluded that there was substantial evidence supporting the trial court's determination that Valdez was "armed" with the sharp instrument in prison. He had the weapon available for use while he possessed it in his cell and the fact that the weapon was seized from his cell by correctional officers while he was away taking a shower does

not make him eligible for resentencing under Prop. 36. Possession of a weapon can be a continuing offense. Consequently, a person is armed with a weapon for purposes of the Prop. 36 resentencing exception if the evidence from the record of conviction establishes that he or she was present with the weapon and had it available for use *at any time* he or she had actual or constructive possession of it within the time period for which the defendant was charged and convicted.

> Defendant asserts that the trial court's determination that he was armed with a deadly weapon when he violated section 4502, possession of a sharp instrument in prison, was not supported by substantial evidence. We disagree.
>
> The trial court found that defendant was armed with a deadly weapon within the meaning of section 667, subdivision (e)(2)(C)(iii). The court stated that, in this context, to be " 'armed with a deadly weapon' " means that a person has "the deadly weapon available for use, either offensively or defensively." In concluding that the circumstances here satisfied this requirement, the trial court stated: "Here, defendant . . . and [his] cellmate . . . were only gone briefly from their cell, to take a shower; otherwise, the two and only those two spent most of their time in that cell. As the possession was ongoing, and defendant . . . most of the time was present in the cell and so near to the weapon as to have it available to him offensively or defensively during the times of his possession, he clearly was 'armed' with the deadly weapon when he was committing the offense." Accordingly, the court concluded that defendant was ineligible for resentencing on this conviction under the Act.

The Court went on to discuss many cases involving incidental possession as satisfying an "armed" allegation. The bottom line is that if you have such a weapon in your cell, you own it and you are armed, in the eyes of the law.

> "A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*).) " ' "[I]t is the availability—the ready access—of the weapon that constitutes arming." ' " (*People v. White* (2014) 223 Cal.App.4th 512, 524 (M. White), quoting *Bland*, at p. 997, & *People v. Mendival* (1992) 2 Cal.App.4th 562, 574.)
>
> In *Bland, supra*, 10 Cal.4th 991, our high court described the issue presented in the case as follows: "is a defendant convicted of a possessory drug offense subject to this 'arming' enhancement when the defendant possesses both drugs and a gun, and keeps them together, *but is not present when the police seize them from the defendant's house*?" (*Id*. at p. 995, italics added.) Police investigating the defendant's possible involvement in the theft of auto parts searched his house and found rock cocaine in his bedroom closet. (*Ibid*.) Under the bed, they found an assault rifle. (*Ibid*.) At the time of the search, the defendant was in custody inside a police vehicle parked outside of his house. (*Ibid*.) The opinion does not make note of specifically where defendant was located prior to being placed in the patrol vehicle. The Court of Appeal affirmed the underlying convictions, but reversed the three-year arming enhancement, concluding that the defendant was not armed because he was outside of the house when the weapon was found. (*Id*. at p. 996.)
>
> In reversing the Court of Appeal's decision, the California Supreme Court observed that, by focusing on the defendant's proximity to the weapon at the time the police found it, the Court of Appeal erred because its temporal focus was too narrow. (*Bland, supra*, 10 Cal.4th at p. 996.) Our high court explained: "[W]hether defendant was 'armed

in the commission' of the continuing offense of drug possession—*it is immaterial whether defendant was present when police seized the assault rifle together with the cache of crack cocaine*, so long as he had the firearm *available for use* in furtherance of the drug offense *at any time during his possession of the drugs*. From evidence that the assault weapon was kept in [the] defendant's bedroom near the drugs, the jury could reasonably infer that, *at some point* during the felonious drug possession, defendant was physically present with both the drugs and the weapon, giving him ready access to the assault rifle to aid his commission of the drug offense." (*Id*. at p. 1000, italics added.) In its reasoning, the court emphasized the continuing nature of drug possession. (*Id*. at pp. 999-1000, 1002, 1004.) To summarize, the court wrote: "[W]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer (1) that the defendant knew of the firearm's presence, (2) that its presence together with the drugs was not accidental or coincidental, and (3) that*, at some point* during the period of illegal drug *possession, the defendant was present with both the drugs and the firearm and thus that the firearm was available for the defendant to put to immediate use* to aid in the drug possession. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was 'armed with a firearm in the commission' of a felony within the meaning of section 12022." (*Bland*, at pp. 1002-1003, fn. omitted, italics added.) Thus, in the context of ongoing or continuous possession, our high court does not require the weapon be readily "available" or available for "immediate use" at the very moment the weapon is found.

Here the possessory crime is the possession of a sharp instrument in prison. Possessory offenses, such as drug possession or possession of a deadly weapon, are " 'continuing offense[s], one[s] that extend[] through time" and create criminal liability "throughout the entire time the defendant asserts dominion and control." (*Bland, supra*, 10 Cal.4th at p. 999.) Thus, even if it is true that the weapon was not in defendant's actual physical possession at the precise time it was discovered, this does not necessarily undermine a finding that he was armed with the deadly weapon at other relevant times so as to support the trial court's determination. The instant case, where the weapon is stored in an inmate's cell, is an example of continuing or ongoing possession. Indeed, the discovery of the weapon in defendant's cell presents a stronger case for a finding that he was armed than the circumstances in *Bland* because defendant, an administrative segregation prisoner, spent the vast majority of his time in the cell where the weapon was discovered, whereas it is not clear how much time the defendant in *Bland* spent in his bedroom where police discovered the assault rifle.

Moreover, similar to the situation in *Bland*, there is a safety risk here. The *Bland* court explained that "[t]he crime scene in a drug possession case is the place where the defendant keeps his or her cache of illegal drugs. A firearm kept near the drugs creates an ongoing risk of serious injury or death from use of the weapon to protect the defendant during a drug sale, to guard against theft of the drugs, or to ward off police. Yet defendant would have us ignore the continuing nature of that risk." (*Bland, supra*, 10 Cal.4th at pp. 1001-1002.) Like in *Bland*, we should not ignore the continuing nature of the safety risk here. (*Id*. at p. 1002.) Posses-

sion of a weapon by a state prisoner creates a continuing risk of serious injury or death to other inmates and staff and jeopardizes the security of the facility. Thus, incarcerated felons who possess such weapons are particularly dangerous. And as we shall discuss post, the electorate was particularly concerned with keeping dangerous felons incarcerated when it enacted Proposition 36.

People v. Delgadillo (2005) 132 Cal.App.4th 1570 (*Delgadillo*), is another example of the situation where, even though the defendant was not present when a weapon was found, the court held that he was armed because the weapon had earlier been available for use in furtherance of the drug offenses during the commission of those crimes. In *Delgadillo*, law enforcement followed the defendant from his house and stopped him some distance away on a freeway. (*Id*. at p. 1572.) Law enforcement then executed a search warrant at his house. Two guns were found in the headboard of the defendant's bed and methamphetamine, cash, and indicia of methamphetamine sale and manufacturing were found elsewhere inside the home and in a car parked outside. (*Id*. at p. 1573.) The *Delgadillo* court followed the *Bland* court's reasoning concerning the continuing nature of drug possession, noting "the crime of drug possession is 'a "continuing" offense, one that extends through time . . . [a]nd when, *at any time* during the commission of the felony drug possession, the defendant can resort to a firearm to further that offense, the defendant satisfies the statutory language of being "armed with a firearm in the commission . . . of a felony." ' " (*Delgadillo*, at p. 1574, italics added.) Focusing the temporal analysis of arming on occasions prior to his arrest, the court held that the firearms were available for defendant to use offensively or defensively "at any time during the manufacturing process," even though that process took place over time and at different locations. (*Id*. at pp. 1574-1575, italics added.)

Similarly, here, defendant was armed with the deadly weapon during his commission of possession of a sharp instrument in prison. Contrary to defendant's contention, the possession of the weapon need not facilitate another felony, e.g., drug possession or drug manufacturing. We need only look to whether the inmate was armed during the possession of the weapon. Further, we see no need to reconsider, as urged by defendant, this court's determination in *Hicks* that "there must be a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Hicks, supra*, 231 Cal.App.4th at p. 284.) As we have noted, other courts are in accord. (T. *White, supra*, 243 Cal.App.4th at pp. 1362-1363; *Osuna, supra*, 225 Cal.App.4th at p. 1032.) Additionally, on its facts, Hicks provides another example of the fact that a defendant need not be present with the weapon when it is discovered to be deemed "armed" within the meaning of the exception rendering a defendant ineligible for resentencing under the Act.

After finding that Valdez also had intent to commit great bodily injury during an assault – another disqualifying factor under Prop. 36 – the Court denied relief.

FIRING WEAPON IN AIR SATISFIES "ARMED" ALLEGATION

P. v. Thomas Thomas

CA3; C074101

August 16, 2017

In 2003, a jury convicted Thomas of voluntary manslaughter, later reduced by the court to involuntary manslaughter, negligent discharge of a firearm, and being a felon in possession of a fire-

arm). The jury found not true two firearm use enhancements attached to count 1. (§ 12022.53, subd. (b) (personal use) & § 12022.5, subd. (a)(1) (principle use).) The jury also found that defendant had suffered two prior convictions--robbery (§ 211), and assault with a deadly weapon or with force likely to cause great bodily injury (§ 245, subd. (a)). Based on defendant's prior convictions, the trial court sentenced him to three terms of 25 years to life under the Three Strikes law (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)), to be served consecutively, and an additional term of five years each for his two prior serious and/or violent felony convictions (§ 667, subd. (a)). The convictions were upheld on appeal.

After Prop. 36 was passed, Thomas applied for relief. The superior court denied relief based on dangerousness.

> Following the electorate's passage of Proposition 36, defendant petitioned for recall of his sentence and for resentencing as a second-strike offender. The People opposed the petition, arguing defendant was ineligible for resentencing under the Act because he was armed with a firearm during his commitment offenses. The People in part relied on this court's opinion affirming the underlying convictions, the probation report prepared for initial sentencing, and the trial transcript. Certain prison disciplinary records were also presented for the court's consideration.
>
> The court found that "technically [defendant was] not ineligible because of the offenses that he was convicted of." In the court's view, however, it was "by a razors [sic] edge that [defendant did not] get disqualified" for his gun related offenses. Having found defendant arguably eligible for resentencing, the court proceeded to determine whether defendant posed an unreasonable risk of danger to public safety.
>
> In determining dangerousness, the court considered numerous factors. First, the court noted that several of defendant's past criminal convictions involved crimes of violence. Second, the court explained that defendant's recent rule violation in prison for possession of a cell phone was extremely serious since a phone could be used to obtain contraband, result in death, or otherwise undermine the overall security of the institution. Finally, the court emphasized the presence of the gun when defendant committed the current offenses. Based on the above, the court found defendant posed an unreasonable risk to society, and denied the petition. An order denying a petition for recall of sentence under section 1170.126 is an appealable order. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 597.)

The Court of Appeal reviewed the evidence and determined that the trial had erred by finding the Thomas was *eligible* for Prop. 36 relief. It held, instead, that the gun use/possession barred Thomas, and ended the appeal by denying it.

> For defendant's negligent discharge of a firearm offense, defendant admitted firing the gun into the air to scare Gorman and Black away and to aid in his escape. Based on those facts, the jury found beyond a reasonable doubt that defendant had willfully discharged the firearm in a grossly negligent manner which could have resulted in injury or death. (§ 246.3.) These facts show that the firearm was available to use, and was in fact used, as a means of defense, one of the relevant inquiries for determining whether he was "armed" during the offense. (*Osuna, supra*, 225 Cal.App.4th at p. 1029.)
>
> That the jury ultimately found that defendant did not personally use the gun to kill Hillary does not dictate a different result for purposes of his involuntary manslaughter conviction. The language of section 1170.126, subdivision (e)(2) does not indicate an "intent to require . . . the pleading and proof of an enhancement . . . in order

to trigger the disqualifying factors contained in subdivision (e)(2)(C)(iii) of section 667 and subdivision (c)(2)(C)(iii) of section 1170.12." (*Osuna, supra*, 225 Cal.App.4th at p. 1034; *Elder, supra*, 227 Cal.App.4th at pp. 1315-1316.)

And, unlike defendant argues, a facilitative nexus between the arming and the underlying offense is not required under section 1170.126. (*Osuna, supra*, 225 Cal.App.4th at p. 1032.) As explained by the *Osuna* court, while there was no facilitative nexus between being armed with a firearm and unlawfully possessing it since "having the firearm available for use did not further [defendant's] illegal possession of it. There was, however, a temporal nexus. Since [Proposition 36] uses the phrase '[d]*uring* the commission of the current offense,' and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the literal language of [Proposition 36] disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm." (*Osuna, supra*, 225 Cal.App.4th at p. 1032; italics added.) We find *Osuna*'s reasoning on this point persuasive.

The record of conviction, moreover, shows that defendant had the gun on his person from the time he left his nephew's house, to when he battered Hillary, to when he shot the gun into the air to scare Gorman and Black. The firearm was available for offensive and defensive use over the course of that entire period. Factually, then, defendant was "armed with a firearm" within the meaning of the Act even though the jury found the alleged firearm enhancements not true and there was a temporal rather than facilitative nexus between the firearm and the offense.

Based on the above, insufficient evidence supports the trial court's implicit conclusion that defendant was not "armed" within the meaning of the Act when he committed the current offenses for which he is imprisoned. (See e.g., *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331 [insufficient evidence supported trial court's determination that wire cutters used to cut security tags on merchandise were a deadly weapon that disqualified defendant from resentencing].) Substantial evidence, moreover, shows defendant had a firearm available for immediate offensive or defensive use when he unlawfully possessed the firearm, negligently discharged it, and when he struck and killed Hillary. The court therefore erred in finding defendant eligible for resentencing.

Given our conclusion that defendant was not entitled to be resentenced because he did not satisfy the threshold eligibility requirements since he was armed when he committed the underlying offenses, we need not consider the People's alternative argument, raised for the first time on appeal, that defendant intended to commit great bodily injury when he killed Hillary. Nor do we need to consider defendant's contentions that the phrase " 'unreasonable risk of danger to public safety' " is unconstitutionally vague (a claim previously rejected by this court in *People v. Garcia* (2014) 230 Cal.App.4th 763, 768-769) or that the court abused its discretion in denying his petition after finding him an unreasonable public safety risk. (*People v. Zapien* (1993) 4 Cal.4th 929, 976 [" ' "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]' ".)

The order denying defendant's petition for recall of sentence and for resentencing is affirmed.

SHANK IN FLY OF BOXERS SATISFIES "ARMED" ALLEGATION

P. v. Philip Sterns

CA5; F071361

August 9, 2017

Philip Sterns was convicted of two separate in-prison third-strike weapons offenses and received 25-life for each. He appealed under Prop. 36 to have both sentences reduced.

In the first incident, a shank was involved.

In 1998, appellant was serving a sentence in prison and correctional officers conducted a search of his cell. Appellant was removed from his cell and officers discovered a pair of boxer shorts under appellant's mattress. A small piece of sharpened metal was found in the fly of the boxers. Officers subsequently searched appellant. He was wearing boxers and a pair of shoes. An approximate nine and a half inch long metal instrument was located in the fly of his boxer shorts. The bottom end was wrapped in cotton material and the other end had a blade or sharpened portion.

In 1998, a jury convicted appellant of two felony counts of being a prisoner in possession of a sharp instrument. (Pen. Code, § 4502, subd. (a).) Two strike priors (felony convictions for first degree burglary (§ 459) in 1987 and 1991) were found true.

In the second incident, he attacked and spat on prison guards.

In 1997, appellant became combative with correctional officers at a hospital after he had been transported for observation following concerns of a drug overdose. He told an officer, "I'm going to kill your punk ass." Appellant got off the hospital bed after he was ordered to remain there. When officers attempted to push him back on the bed, appellant tried to hit one of the officers in the stomach and to bite another officer on the neck. Appellant spat in the face of a third officer

The Court of Appeal first held that the superior court did not err in finding Sterns' shank to be a "weapon" for Prop. 36 purposes.

To be armed with a weapon, a defendant must have "the specified weapon available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997.) CALCRIM No. 875 defines a "deadly weapon" as "any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

Some objects, such as dirks and blackjacks, are deadly weapons as a matter of law because "the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029.) The trier of fact may consider the nature of the object, the manner in which it was used, and all other relevant facts to determine if an object was a deadly weapon. (*Ibid*.)

Here, we reject appellant's contention that the nine and a half inch sharpened metal concealed on his person was not a deadly weapon. Appellant either created or obtained that sharpened instrument, and he concealed it on his person while in prison. The circumstances reflect that the sharpened instrument was designed to in-

flict great bodily injury, and appellant possessed it either for offensive or defensive use. The facts from appellant's record of conviction amply support the superior court's determination that appellant possessed a deadly weapon during the commission of his offense in case number SC075046A. As such, appellant was not eligible for resentencing. (§§ 1170.126, subd. (e)(2); 1170.12, subd. (c)(2)(C)(iii).) The lower court's ruling was not arbitrary, capricious or patently absurd resulting in a manifest miscarriage of justice. Accordingly, the superior court did not abuse its discretion and this claim fails.

As to the second conviction, the superior court noted Sterns' abuse as a child, his schophrenia, and his prison record. Sterns stated that he had kept weapons for his defense in the harsh prison environment, but that he had stopped this possession five years prior to the incident. The court weighed the record, but found that it couldn't conclude Sterns was *not* a danger.

The superior court found appellant eligible for resentencing under Proposition 36. However, the court denied appellant's petition to recall his sentence, determining that appellant's release would pose an unreasonable risk of danger to public safety. In rendering its decision, the court stated: "I've considered the evidence and the argument and all the paperwork. I haven't gone through the envelopes piece by piece but I reviewed the documents. [¶] I think [appellant] had a very unfortunate childhood and it's horrible, but I don't know that I've seen over 50, [CDC rules violations] in any of the [Proposition] 36 resentencings I've done. I've done I don't know, 100, 120—150. I don't know. It's an amazing amount. [¶] I think he's a danger. I think the People have met their burden. So the petition is denied."

The Court of Appeal found that, based on the evidence, the superior court did not abuse its discretion, and declined to give Sterns relief.

Here, since 1999, appellant had over 50 CDC rules violations, ranging from fighting with other inmates, attempted battery of a correctional officer, and possession of weapons. Appellant was involved in three separate fights in 2013. Based on a preponderance of the evidence, appellant's ongoing misconduct in prison supported the superior court's determination that he posed an unreasonable risk of danger to public safety. The lower court's ruling was neither arbitrary, capricious, nor patently absurd. A manifest miscarriage of justice is not present. Accordingly, the superior court did not abuse its discretion and we will not disturb its ruling on appeal.

REPORT FROM THE DIRECTOR

As part of the board commissioner's training experience in late October, BPH Executive Director Jennifer Shaffer presented a brief overview of board actions and accomplishments, as well as changes and policies, over the past year. Amid reminisces about changes since her tenure as BPH head since 2011, Shaffer hastened to reassure commissioners and others that this reflection was not a swan song, she has no plans to leave her post in the near future. Good news for lifers.

In 2017 the board scheduled nearly 5,500 parole hearings, an 8% increase over the number scheduled in 2016. About 30% were initial hearing, that figure also up, but only 2% from last year.

The grant rate for 2017 looks on track to be about 17% (based on grants per scheduled hearings), a bit lower than in recent past years. As to why this might be the case, many speculations have considered that over the last few years, as the impact of the Lawrence and other decisions have come into play, coupled with a new outlook at the board and increased training, many long-serving lifers repeatedly denied for their crime, a class somewhat akin to 'low hanging fruit,' have now found parole relief.

A note here: there are various ways of calculating grant rates. BPH has adopted the method of using the number of grants given against the number of hearings

scheduled. However, since roughly half the parole hearings scheduled are not held, due to waivers, postponements, stipulations and the like, this method offers a seemingly low number. Others maintain it's a bit inaccurate to calculate grant rate using raw number of grants and hearings scheduled, because if a scheduled hearing is not held, there can be no grant. Calculations using the number of grants relative to the number of hearings actual held report a grant rate of about 32%. Perhaps the difference is protective semantics; a 17% grant rate sounds more conservative than a grant rate of 32%, and thus more reassuring to many. However, both calculation methods are based on the number of actual grants given.

Shaffer reported that in 2016 the board performed 1188 Administrative Reviews, about 82% of which were approved, and 2017 looks to be about the same, with estimates of about 81% AR approval rate. The parole grant rate of this group of inmates is the highest of any cohort, at about 27%. Petitions to Advance numbers were down slightly, but in 2016 about 70% of those requests were granted. Approval rates for PTAs in 2017 look to be somewhat lower, at about 60%; however, the parole approval rate for PTA hearings is static at about 24%.

Shaffer noted that for the entire year of 2016 just over 6,000 inmates were refereed by CDCR case records for Non-Violent Second Striker parole consideration by the BPH; with the passage of Prop. 57, the board received nearly 4,000 referrals over a 3-month period. Approval rate for the new referrals is somewhat lower than for the old NVSS review, most likely due in part to the small sample yet available for data collection. But Shaffer also noted those now being reviewed by the BPH on average have a higher classification and placement score, have not served a long a time and have not participated in as much programming. As the months proceed, everyone will continue to monitor these results. The Director also confirmed that in Fiscal Year 2018-19 the Board, which logistically can schedule about 5,000 hearings a year, will come close to that mark, and plans to hold 2 hearings a day at level 2 prisons and roughly 3-4 a day at higher security level prisons.

Passage of SB 394, automatically bringing LWOP sentenced for crimes before they were 18 years of age to parole after 25 years of age, initially will have little effect numerically on the board's hearing schedule, as relatively few have yet served the required 25 years. AB 1308, Shaffer noted, bringing the YOPH parole consideration to those sentenced for crimes before the age of 26, will have a more significant impact on the hearing schedule, however the board has some time to work those hearings in. How those inmates will be prioritized has yet to be determined, though such considerations as placement level scores and/or RVRs may be considered.

For discussion of the impact of AB 1448 on the elder parole process, see article elsewhere in this issue.

BOARD BUSINESS

The September business meeting of the Board of Parole Hearings followed the pattern of the last year, very brief, covering items of relative routine nature. The 'news' out of that meeting included BPH Chief Counsel Jennifer Neill's announcement that the Board has filed an appeal with the First District Court of Appeal, requesting de-publication of the *In Re Palmer* decision and a stay of that decision, pending resolution of the Butler litigation.

Palmer involved the board's failure to set a base term for YOPH inmates, a practice now abandoned by the Board. The court also expressed skepticism regarding the conclusions expressed in the CRA.

In September, BPH Executive Director Jennifer Shaffer noted that in July CDCR Case Records has screened more than 19,000 inmates for eligibility for inclusion in the non-violent offender review process under Prop. 57. Case Records subsequently referred over 3,600 inmates to the Board, with Deputy Commissioners having reviewed about 1,600 cases.

In October Shaffer noted new changes to CDCR's Inmate Locator webpage, which now provides considerably more information on each CDCR inmate. Now available is not only the name, age, admission to CDCR date and present institution of all inmates, but also a full report on BPH past and potential future actions regarding that inmate. Including upcoming (tentative) parole date, past parole decisions as well as tentative release dates for determinate sentenced prisoners.

The information now offered also provides the public with information on sentences (what is an LWOP, if an inmate qualifies as a YOPH candidate) and information on possible considerations that would affect MEPD or release date. These changes and increased transparency in possible parole hearing and/or release dates, appear to be at least in part the result of continuing confusion and controversy regarding who will and will not be affected by the provisions of Prop. 57 and just what those changes will engender. It should be noted that each page of inmate information also contains information about and a link to the webpage for Office of Victims and Survivors' Rights and Services, where victims are advised they can register to receive notification of same.

Shaffer also updated the commissioners on newly passed and signed legislation, noting that the bills (detailed elsewhere in this issue) would have relatively light impact on the board's hearing schedule. Of more impact, Shaffer noted, will be the surge of Third Strike inmates being incorporated into the hearing schedule beginning in 2019.

BPH Chief Legal Counsel Jennifer Neill reported to the commissioners that the board administration filed proposed regulations dealing with Comprehensive Risk Assessments with the Office of Administrative Law, another step of making those regulations fully official. However, as noted by Keith Wattley, counsel for the class in the Johnson v Shaffer settlement relative to the FAD, the court recently intervened in the process, siding with Wattley's allegation that provisions within the regulations detailing how inmates may challenge the CRAs were overly narrow in defining what constituted an error in the CRA.

Wattley noted the ruling would, in effect, prevent the OAL from approving the proposed regulations in present form. Neill indicated the board had yet to decide whether to appeal the ruling, or what the next legal step might be.

EN BANC DECISIONS

Among the en banc cases up for consideration by the expanded Board of Parole Hearings (now up to speed, with all 15 members appointed) in both September and October found before them referrals from Governor Brown's office to review an application for commutation of sentence. And in two of the three cases before them, and what we hope is a trend, the board recommended back to the Governor that he grant those commutation requests.

In September **Raynon Jones** sought commutation of his sentence, and despite opposition from the Los Angeles County DAs office and members of the victim's family, the commissioners recommended Governor Brown consider Jones' request. The victim's family was augmented by representatives from victims' rights groups, and the LA DA accused Jones of using 'tricks in the legal system' to achieve release. We can only assume the DA is referring to the commutation process, which, last we checked, was law, and not trickery.

Also in September, the commutation request of **Eric Carolina** was continued to the next month, to allow gathering of additional information. However, October's agenda did not include Carolina's request.

In October, a commutation request by **Jon Grobman** also received a favorable decision, although there were no speakers either in favor or in opposition to the possible commutation. Apparently the commissioners felt Grobman's record was sufficient evidence to proceed.

Absent the one positive referral for commutation, September's en banc cases met with mostly unfavorable results, two prisoners seeing their grants of parole overturned after referral to en banc by the board's legal staff. **Antonio Garcia** was referred for a rescission hearing, due to disciplinary issues that the commissioners felt might pose a risk of danger to the public. Opposing the parole grant was the victim's sister.

The grant for **Anthony Hargrew** was ordered vacated and a new hearing scheduled for the next available calendar, based on questions involving the parole panel's adequate consideration of confidential information. Also vacated, after referral from the Governor, was a grant for **Alvin Byrd**.

Bryd's parole was, to no surprise, opposed by the DA, but the victim in the crime had, as reported by letter from that individual, stated they had 'moved on' and was not in direct opposition. Nonetheless, the board voted to vacate the grant, but only after a first motion to affirm the grant did not generate the required number of commissioners to pass; however, a second, to vacate the grant and schedule another hearing, did pass.

Better news for inmate **Michael Brown**, who was granted parole in June and saw that date confirmed, despite the Governor's referral, apparently with questions on the adequacy of Byrd's remorse. The DA, piggybacking on the Governor's concerns, called Byrd's remorse 'superficial' and argued Brown could still not explain his participation in the crime. Apparently, the DA doesn't quite understand the concept of YOPH hearings; youths often do things they cannot explain, looking back with maturity.

October's en banc referrals fared better, with two inmates seeing their parole denials vacated and new hearings ordered. **Chris Davis,** denied parole in July after what his attorney, Keith Wattley, maintains was a mis-reading by the board of confidential information in his file, will be granted a new hearing. **Manuel Nunez**, denied parole at his initial hearing, will also receive a new consideration.

In a more complex case, **Natalie Guiuan**, who was denied parole by the entire board after a tie vote at her parole hearing, will get a new hearing, following this second en banc appearance (the first being to decide the tie vote) where that denial was vacated, and despite opposition from her victims.

FRUITS OF THE 2016-17 LEGISLATIVE SESSION

Now that the legislative actions of 2016-17 are done deals, we can report the final results, relative to bills and new laws directly impacting lifers, LWOP and other long-term inmates. On the whole, bills passed this session impacting prisoners were gainful for inmates, providing extension of some legislative relief to a greater segment of the inmate population, codifying important policies and providing needed sentencing changes going forward.

How these changes will affect the scheduling of parole hearings has yet to be determined. When that information is available, we will publish the details. For more information on the impact of this new legislation on both elderly parole and fire arm sentence enhancements, please see articles elsewhere in this issue.

AB 1308 requires a youth offender parole hearings for offenders sentenced to state prison for specified crimes committed when they were 25 years of age or younger, thus extending YOPH from the current 23-year-old limit up to the age of 26. Hearings are to be completed by January 1, 2020, all youth offender parole hearings for individuals who were sentenced to indeterminate life terms who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the bill.

It also requires all youth offender parole hearings for individuals who were sentenced to determinate terms who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of the bill by January 1, 2022, and would require the board, for these individuals, to conduct a specified consultation before January 1, 2019.

AB 1448 establishes the Elderly Parole Program, to review the parole suitability of inmates who are 60 years of age or older and who have served a minimum of 25 years of continuous incarceration. This bill codified the current elderly parole process in place at BPH under an agreement between the state and the 3 Judge Panel, however, as amended before passage, the bill would exempt from Elderly Parole Program eligibility third strikers, those sentenced to life in prison without the possibility of parole or condemned, and a person who was convicted of the first-degree murder of a peace officer or a person who had been a peace officer. For more on the actual impact this proposed change may have on the elderly parole program please see article elsewhere in this issue.

SB 394 makes a person convicted of a controlling offense that was committed before the person had attained 18 years of age and for which a life sentence without the possibility of parole (LWOP) has been imposed eligible for parole consideration by the board during his or her 25th year of incarceration at a youth offender parole hearing. Requires the board to complete, by July 1, 2020, all hearings for individuals who are or will be entitled to have their parole suitability considered at a youth offender parole hearing by these provisions before July 1, 2020.

While this does not change the age stipulation enacted under SB 9 a few years ago, which provided the first, partial relief to LWOP, it does make the parole process automatic for those who qualify, thus providing relief to those from counties where courts routinely and repeatedly deny petitions for resentencing under SB 9. It may also provide a base, in future legislative sessions, to extend this automatic parole review to those inmates who fall under current YOPH guidelines.

SB421/384 commencing January 1, 2021, establishes 3 tiers of registration for sex offenses based on specified criteria, for periods of at least 10 years, at least 20 years, and life, respectively, for a conviction of specified sex offenses, and 5 years and 10 years for tiers one and two, respectively, for an adjudication as a ward of the juvenile court for specified sex offenses, as specified. Commencing July 1, 2021, establishes procedures for termination from the sex offender registry for a registered sex offender who is a tier one or tier two offender and who completes his or her mandated minimum registration period under specified conditions.

The bill requires the offender to file a petition at the expiration of his or her minimum registration period and would authorize the district attorney to request a hearing on the petition if the petitioner has not fulfilled the requirement of successful tier completion, as specified. The bill would establish procedures for a

person required to register as a tier three offender based solely on his or her risk level to petition the court for termination from the registry after 20 years from release of custody, if certain criteria are met. The bill would also, commencing January 1, 2022, revise the criteria for exclusion from the Internet Web site.

SB 620, resurrected from the dust bin and passed quickly in the waning days of the session (passed on Sept. 13; the last day for passage of bills was Sept. 15) this bill allows a court, at the time of sentencing or resentencing, to strike or dismiss an enhancement otherwise required to be imposed by the above provisions of law regarding enhancements to sentences for use of a gun. This bill is not retroactive and will not automatically apply to those currently incarcerated. For more information on this bill and possible impact please see additional article elsewhere in this issue.

SCR 48 This measure is not a bill, but a legislative resolution of agreement that recognizes the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime. This is not a law, and currently has no impact on sentencing or prisons, but is the first step toward a possible bill in future legislative sessions addressing the felony murder rule.

Brief recap: this legislative session the lawmakers voted to extend the age for YOPH hearings to those under 26 years of age at the time of their crime, made parole consideration automatic after 25 years for those sentenced to LWOP before the age of 18, made elderly parole a permanent process, and provided a more realistic monitoring system for sex offenders based on actual risk, not fear. Legislators also began the revamp draconian sentencing laws relative to firearms and announced their intent to consider changes to the felony murder law in future sessions.

All the above bills, having been passed and signed into law by the Governor, will become part of the California system of laws, staring January 1, 2018. Until then, current laws in these areas will remain operational and in force.

CLARIFICATION ON ELDELRY PAROLE

Much confusion and dismay over the recently passed bill, AB 1448, codifying, but modifying, the elderly parole process has been soothed by recent remarks from BPH Executive Director Jennifer Shaffer. Speaking at a recent BPH monthly business meeting (and confirmed later to LSA) Shaffer noted changes in the elderly parole process via AB 1448 would be put on hold so long as the agreement between the 3 Judge Panel and the BPH remains in force.

Under the provisions of the bill, recently passed and signed by the Governor, elderly parole, now operating under the agreement with the 3 federal judges, would become law, not simply an agreement that could, once the supervision of the federal court is lifted, be eliminated. However, in the process of being passed, late amendments to the bill removed third strikers from qualifying for elderly parole consideration. Many third strikers had already been notified that their up-coming hearings would be under the guidelines of elderly parole and there was considerable confusion among the inmate population as to whether these notifications would hold.

It appears they will, at least for the foreseeable future. As Shaffer explained, the board's agreement with the federal judges supersedes the new state law. While AB 1448 officially goes into effect January 1, 2018, and would disqualify third strikers from elderly parole, the force of the federal agreement will allow third strikers to be included, until the agreement is lifted, Shaffer and BPH Chief Legal Counsel Jennifer Neill both agreed that action is not on the horizon.

At such time as the federal agreement is ended, Shaffer indicated the board will reassess the situation and issue new guidelines. Until then, third strikers will be considered for elderly parole as they have been since the implementation of the process.

GUN ENHANCEMENT BILL IS NOT RETROACTIVE

With the good news, there is usually some not-so-good news, and so it is with the passage of SB 620, which would allow judges to strike gun enhancement sentences; but only for those facing sentencing or resentencing. The provisions of the bill are not retroactive and therefore will not automatically apply to the sentence of those currently in prison or jail.

The bill allows courts to waive firearm enhancement sentences 'at the time of sentencing or resentencing,' but there is no stated provision for retroactive application to apply to current prisoners. Conversations with the office of the bill's author confirmed, SB 620 was not meant to be retroactive and will not apply to current inmates.

CDCR cannot automatically change a judicially imposed sentence simply because the bill passed. If a current prisoner is, for some reason, back in court for resentencing in a case where he/she is currently serving time on a gun enhancement, it is possible the judge could apply the new law (after it goes into effect on January 1, 2018), but there is no requirement to do so. Application of the law is at the discretion of the court.

And, passage of this bill does not, in itself, constitute sufficient reason for courts to approve a prisoner's request for resentencing. We've asked some attorneys to study the issue and provide us with their thoughts about how, if at all, current prisoners might be able to initiate court action that would enable them to be considered under this law, and we're awaiting their thoughts.

If, and until, that work-around is discovered, those serving sentences with long gun enhancements must look elsewhere for relief.

NO WHOLESALE SOCIAL MEDIA BAN FOR SEX OFFENDERS

In a unanimous decision (8-0, one judicial seat vacant) the US Supreme Court struck down a North Carolina law that banned convicted sex offenders from participating in such popular social media sites as Facebook, Twitter and other sites that could lead to social interaction between individuals. The North Carolina law, like similar laws in other states, banned those with a sex offense from engaging in social media sites in an effort to protect minors.

In the ruling the justices held the federal right to freedom of speech superseded a state's interest in protecting citizens from potential danger, specifically, exploitation or abuse of minors. Opponents of the law raised the fear that such a ban could prevent those with past sex convictions from using various sites that today have become virtually indispensable, including various interactive news sites.

How the federal ruling will affect local laws in individual states has yet to be discerned. The justices appeared to leave open the possibility that it would be up to the administrators of each site to regulate what is acceptable behavior on each site. For instance, Facebook currently bans convicted sex offenders from establishing accounts, but the new ruling seems to suggest that it's up to Facebook and other such sites, not the courts or government, to decide.

Justice Anthony Kennedy, calling such cyberspace

sites as Linkedin and Twitter some of today's most important communication venues, noting, "[T]hese websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." They are, he said, akin to a "modern public square."

ACLU attorney Esha Bhandari said "I do think this precedent would be applicable if a state engaged in other attempts to prophylactically bar people from using social media." Over all, the ruling means there cannot be a wholesale denial of access to social media for any particular group.

BRINGING LSA TO YOU

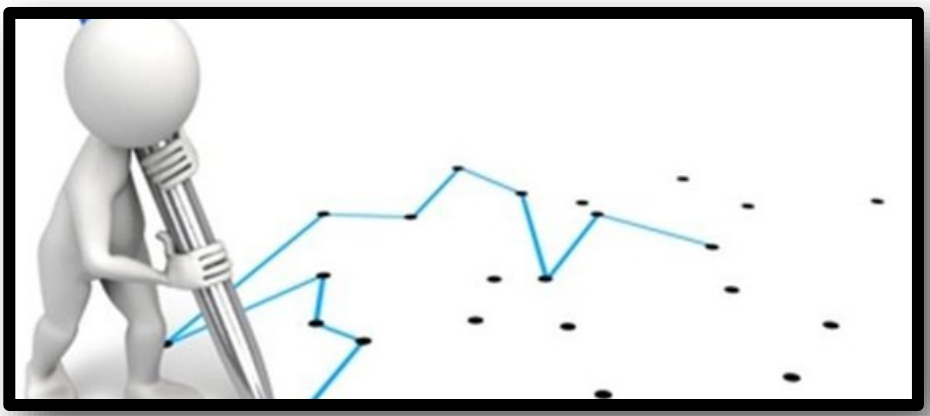
Currently Life Support Alliance offers two workshop programs for lifers and other long-serving inmates, both aimed at helping our constituents understand and achieve the goals to be found suitable for parole. Although we'd like to say we'll go anywhere, the reality is, we must be invited, usually by an ILTAG or self-help groups, as guest speakers.

In the last month, we've rolled out Connecting the Dots, a 2-part workshop designed to help prisoners identify the causative factors in their life (their 'dots') that helped lead to their criminal behavior and how to understand and overcome those tendencies (the connecting part). And we are nearly 2 years into The Amends Project, assisting inmates in understanding how to write an appropriate, meaningful and healing apology letter to their victims and/or victims' family.

As part of both workshops LSA staff comes to you (yeah, it would be nice if you could come to us, but it is what it is), bringing tips, insight and resource materials to help you surmount the obstacles of insight and understand making amends. And while we'll go to any institution, the key is getting an ILTAG or self-help group to sponsor our clearance.

If you are currently participating in a group that you feel would benefit from the information and insight LSA can bring, let us know. Better yet, ask the group sponsor to contact us. We'll be happy to provide them with information about either or both workshops and set a date when we can present. Alternately, you can send us the name and contact information of your sponsor, and we'll start the ball rolling. But it's important that you send the contact information as well as the name, so we can reach out right away.

Two more workshops, on mock board hearings, and relationship issues after release, are in the works, and as those become available, we'll let you know.



COMMISSIONER TRAINING MONTH AND OTHER REPORTS

Twice a year BPH commissioners come off the parole hearing circuit to receive additional training in a variety of subjects. October is fall training month, and the commissioners were treated to two full days of training on subjects from the Prison Industry Authority (PIA) to gender-responsive strategies, with a heavy emphasis on various aspects of psychological evaluations, most presented by heretofore invisible member of the Forensic Assessment Davison. Interestingly, all reports were presented with the caveat that there is little research into lifers, as a group.

Amid a report from FAD clinician Dr. Lisa Hazelwood on dynamic risk factors, those factors labeled as bearing a strong relationship to violent recidivism were anti-social and offense supportive attitudes (criminal thinking), anti-social peer groups (continued gang/criminal affiliation), inadequate living conditions (lack of housing and finances) and treatment noncompliance (going off your meds). Noted as having a weaker relationship to violent recidivism were denial or rationalization of the crime (excuses), deficits in insight, lack of remorse and empathy, and low motivation to continue treatment.

The board also received two training reports on dealing with inmates with developmental disabilities, and how to assess rules violation reports racked up by this prisoner cohort, and how those afflictions can affect recidivism and possible violence, the latter report presented by FAD's Dr. Donna Robinson. Neurodevelopmental disorders are defined as those ailments, usually diagnosed before the age of 18, that impair the growth and development of the brain or central nervous system.

Neurocognitive disorders, by contrast, cause a decline in mental ability to the point of interference in daily life, often caused by age or injury. Dr. Robinson's final thoughts on her subject: both neurodevelopmental and neurocognitive disorders can be safely managed in the community and violence risk assessments are (supposed) to be individualized and based on variables relevant to each individual (prisoner) and in a specific context (likelihood of repeat criminal behavior).

Bringing the board up to date on the PIA, agency director Charles Patillo noted inmates can now be employed by PIA half time, with the remainder of their work day devoted to GED classes. It is not a requirement for prisoners to have a GED degree to get a PIA job, and while the agency tries to be sure all workers attain a GED within 2 years of PIA employment, exceptions are made on a case by case basis. Patillo emphasized no prisoner should consider him or herself ineligible for a PIA job due to lack of a GED or high school diploma. Patillo noted there are PIA slots available at many prisons, with PIA programs showing an average of 33% vacancy rate, while more PIA programs are being offered at more prisons.

Other reports, including a follow up by FAD head Dr. Cliff Kusaj to his report of last December, an overview of 2016/17 by Executive Director Jennifer Shaffer and two reports on issue specific to women prisoners are presented in future issues of CLN.

Third Annual Northern California Lifer Picnic in Sacramento. Sponsored by LSA and Freedom Through

Left: Keith Chandler former lifer and recent law school grad

Right: Bill Lane, Director of Freedom Through Education and co-sponsor of the picnic with LSA

Former lifer and CLN contributor John Dannenberg chats with friends

REGS WATCH

The waiting, not always patiently, continues for release of the much anticipated and eagerly awaited new regulations implementing both Prop. 57 and family visits. As we go to press, neither set of regs has been released to the public, but both are reportedly getting closer.

The final public hearing on changes to regulations enactment of Prop. 57 was held September 1, with more than 90 individuals and groups speaking, most decrying the exclusion of third strikers from Prop. 57 impact. This is a topic we have reported repeatedly on and won't detail here again. Suffice to say, early indications from sources report some changes will be made, most likely in allowing some credits retrospectively, but the chances for inclusion of third strikers look, at present, dim.

On the family visiting front, sources say those regs have been approved by CDCR and are presently under review by CDCR legal, to assure all legal minutia have been covered. Those regs are expected to be submitted to the Office of Administrative Law probably by the end of October. However, CDCR is not asking that the new regs be implemented immediately under the emergency process, which means it will take about 3 more months, after submission, for the regs to go into effect.

Those new regs will reportedly allow 'a lot' more lifers and LWOPs to be included in family visiting. Our sources tell us that the prohibitions on family visits for those with a minor victim, old domestic violence charges and similar will see some relief. Each case reportedly will be handled on an individual basis, so if the regs continue to screen you out, your prisoner will have to file a 602 appeal. Sounds also as though those with old trafficking convictions may also have a chance at family visits, after a certain period of 'clean time.'

Hopefully this will mean changes to the current prohibitions on those with minor victims and old domestic violence accusations being included; however, those prisoners currently not allowed family visits due to a distribution or trafficking charge may have a harder time finding inclusion.

When the new regs on either topic are released we will make them available to inmates and family members. Both sets of regulations have been in the works so long our grievance with CDCR still stands; it didn't take this long to write the Ten Commandments.

UPDATE ON KUSAJ REPORT

Following a report to the BPH last December, the result of an agreement to settle the Johnson v Shaffer litigation, Forensic Assessment Division Chief Dr. Cliff Kusaj updated the FAD situation to the commissioners during their semi-annual training session in October. The report offered no new insights into the FAD or the success/applicability of CRAs, but did present a few new and interesting details.

According to figures gleaned from the CRAs performed in 2016, 49% of inmates received a moderate risk rating, 28% were assessed as a low risk and 23% were considered high risk. Kusaj also reaffirmed the FAD's assessment articulated last year, that Low Risk inmates are expected to commit violence less frequently than all other parolees, High Risk inmates are expected to commit violence more often than low or moderate risk inmates (and on a scale about equal to all other non-long serving parolees) and Moderate Risk Inmates fall somewhere in the middle. No news there.

However, figure reveal that long term inmates 'granted parole and discretionarily released in California (lifers and other long-term inmates who are granted parole after a hearing) actually recidivate less than anticipated. According to figures provided during the presentation, 3-15% of inmates released after parole were expected to be arrested and convicted again within 3 years for violent crimes; in fact that number turned out to be less than 1%, thus upholding a long-standing lifer tradition of being safest prisoner cohort to release.

Arrests and conviction for non-violent crimes with 3 years post-release were estimated at 10-25%, and in actuality, only 1-5% did so. And 20-40% were expected to return to jail or prison from arrests stemming from new crimes and/or parole violations. Results, however, report that only 5-10% have been returned to custody. All these results are consistent with figures dating back many years, which, to us, begs the question of why the estimates, from the FAD, were so high in the first place. Yes, it is a rhetorical question.

As expected, risk assessments also reflected age, as younger inmates tended to receive higher risk evaluations. The average age of a high risk prisoner was just over 48 years, while low risk inmates averaged just over 51 years of age. Placement scores also correlated with risk ratings, high risk inmates averaging a score of 114 points, low about 23 points and moderate risk, 37 points. Again, no news there.

A category labeled Recent Problems with Instability, sub defined as 'recent problems with instability,' which Kusaj reported was found (though relative undefined) in 37% of those evaluated, also reportedly related to risk ratings, with 79% of those experiencing this 'recent instability' receiving a high risk rating. Kusaj did offer that such issues as helplessness, anger, hyperactivity and impulsiveness all contributed to instability.

That old nemesis, insight, also reared it's hoary head, with Kusaj reporting to the board that while 79% of inmates evaluated were 'assessed to have recent problems with insight,' how much those problems impacted the risk rating varied, depending on 'relevant' that insight problem was judged to be by the clinician. According to figure presented, 99% of High Risk inmates had problems with insight, and those problems were judged to be relevant to their risk 79% of the time.

The PCL-R, the favored 'instrument' of the FAD, was finally presented in terms of numbers, to interesting effect. The 'average' PCL-R score of 'North American offenders,' (which we take to be the overall score racked up by all former prisoners in the nation who are so evaluated) was 22.1 points for men and 19.0 points for women. The average scores for California inmates were 18.5 for men and 13.6 for women, well below the national average. Just what does that mean? No real explanation was given, but it appears to show California in-

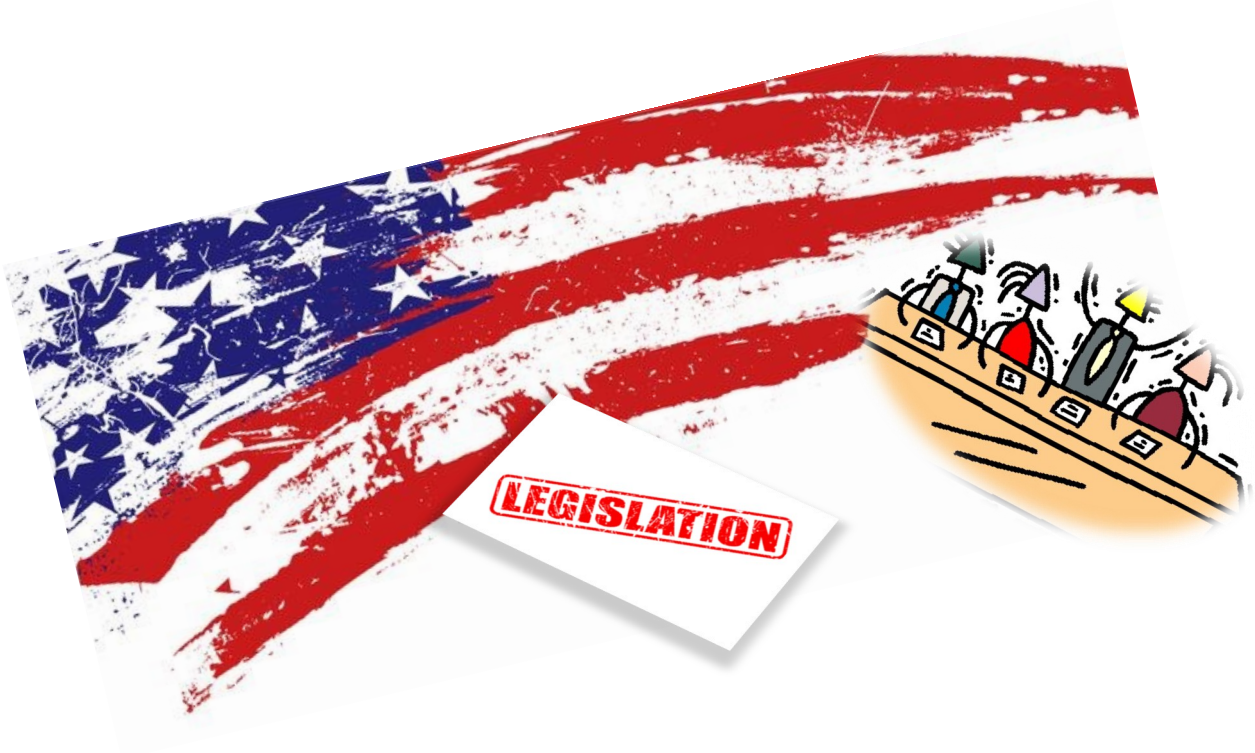
mates evaluated by the FAD tally up lower scores on this 'risk rating instrument' than average parolees. Lower risk? It would appear so.

Other interesting factors noted by Dr. Kusaj was a change over the past 3 years in the percentage of inmates receiving low, moderate and high risk ratings. In 2014, 35% of rating were low, another 45.5% as moderate and the remaining 19.5% were high. By 2016 those percentages had changed, with a reported 28% as low risk, 49% as moderate and 23% as high risk.

What happened, in conversation Kusaj opined the change was likely the result of the influx of determinately sentenced inmates (DSL) into the parole cycle, and thus CRA cycle. DSL inmates tend to have programmed less, have higher placement scores and less insight. This was borne out by figures showing while a relatively sizable percentage (29%) of indeterminately sentenced prisoners (ISL) were rated as low risk, only 8% of DSLs received the same risk assessment. Conversely, 22% of ISLs were rated as high risk, while more than twice as many, 48% of DSLs were considered at high risk to reoffend.

And although the FAD has evaluated relatively few Third Strikers as yet, early indications are they may reflect the results of DSL assessments. Of those evaluated so far, only 14% were considered low risk, 46% moderate and a whopping 40% were tabbed as high risk. Kusaj opined that these results were not the result of historical factors influencing evaluations (numbers of crimes, long criminal history) but how well those evaluated inmates were function within the prison system and who they appeared to be now.

As with the last report, LSA will make the details and particulars of this Kusaj update available to lifers and others. To receive a copy of the report please send 3 stamps to PO Box 277, Rancho Cordova, Ca. 95741, as request the Kusaj Update. For the original Kusaj Report, send 4 stamps the same address and note you are requesting the original report. To receive both reports, send 5 stamps and request both.



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