

“A POST-HARDIN SUGGESTION”

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On 4 March 2024, the California Supreme Court dashed the hopes of thousands of men and women who were sentenced to Life With Out Parole (LWOP) eligibility as young adult offenders (18 to 25 years of age) by reversing a lower court decision in the case of Tony Hardin,¹ who sought equal treatment under California's Youth Offender statutes.

"The Supreme Court relied upon a legal theory called the 'rational basis' test – deciding the case as a purely legal question rather than a subjective evaluation of fundamental fairness. Observing that this strict legal decision might seem harsh, the court passed the baton back to the Legislature to enact a different law – if the Legislature didn't like the Court's ruling. By this ruling, the Court properly performed its technical job of interpreting the law by applying legal precedent yet inviting the Legislature to enact laws properly."²

Hardin contended that the youth offender's statute, excluding him, was a denial of equal protection in violation of the U.S. Constitution's Fourteenth Amendment and that the exclusions of youth offenders sentenced to LWOP due to a capital crime conviction were irrational discrimination.

This ruling illustrates the power of the County District Attorney's office. It is this elected official who uses 'his charging power to determine whether to go for the ultimate

¹ See: People V. Hardin, Cal.5, CA Supreme Court Number S277487, 4 March 2024

² Quoting John E. Dannenberg commentary Vol 21 No. 1, California Lifer Newsletter 2024 First Quarter edition, page 1

punishment of death in a ritualized execution or a slower expiration by a lifetime of imprisonment without parole eligibility (LWOP) in a capital crime prosecution. This mid-level politician could also file first-degree murder charges against the youth, which today would result in a twenty-five-year to life sentence with parole eligibility.

This exposes the youth offender to the whim and caprice of a mid-level politician who may have an agenda of their own coupled with personal prejudices and desire for future advancement in political office (s).

Capital crime prosecutions are wrought with racist overtones reflected in the number of minority populations currently on condemned rows across the United States of America, including the 500+ sentenced to die in California executions. However, a recent voter initiative³ has changed the housing of the condemned. California no longer has a death row, and the current governor has dismantled the two execution chambers at San Quentin State Prison. The State still has many condemned spread throughout the prison system in those institutions surrounded by a lethal electric fence.

Additionally, despite the lack of a state-sanctioned homicide since 2006, local District Attorneys continue to pursue death sentences, as if those convicted were to be killed post haste.

As in the racial makeup of the condemned, the majority of those in California who

³ Proposition 66 (2016)

are sentenced to LWOP are black and brown; whites, Asians, and others make up a minority in each category and when they are considered in congregate.

At the suggestion of the California Supreme Court and to avoid the entanglement of the voter initiatives. I suggest that the legislature could reinject science back into the controversy by a bill that would recognize the youth of capital crime offenders sentenced to death or LWOP by taking parole off the table and insert a recommendation to the executive to strongly consider granting clemency to a youth offender (18 – 25 years old at the time of the crime).⁴ Because of his/her age at the time of the crime and subsequent maturity and rehabilitation in the years of incarceration following conviction, such a grant could be to a sentence with parole eligibility.

The Board of Parole Hearings (BPH) would be charged with a review of the records of all condemned and LWOPs who have served at least 25 years awaiting execution and/or of their LWOP sentences to determine who among them is programming,⁵ and may benefit from a BPH hearing at the 30-year mark in their wait or term.

The legislature should ensure that the BPH review and hearing are meaningful and genuinely seek prisoners working diligently to reform themselves despite the bleakness of their situation.

⁴ Ca. Penal Code Section 3051, subd. (b)(h) ; Sec. 4801

⁵ Programming = participating in Education Self-help groups, Good Behavior, Vocational and Employment

The 25-year review should result in a notification to the prisoner that because of their good behavior and ability to improve themselves, they will be scheduled for a BPH hearing that may result in a positive recommendation to the Governor to commute their sentence to one of parole eligibility. Or, in the case of a non-programming individual, the review notification will be that no recommendation for a BPH hearing will be issued at this time and that you will be reviewed again within five calendar years. The BPH shall also recommend to the prisoner the path he should take if he wishes to be recommended for a hearing in the future. This process is similar to the consultation and hearing process or parole eligible persons.

The legislature could detail this new version of the former BPH regulation Section 2817 with other provisions if needed.

Since Executive Clemency existed before and after all the pertinent voter initiatives, there should be no challenges to this new route to the Governor's desk. Like a parole hearing, a clemency application and/or grant does not guarantee release.

In addition, or as an alternative, the BPH itself could act as a recommender to the County Superior Court that sentenced the young offender to LWOP that said offender should be considered for a recall and resentencing to a parole-eligible term under Ca. Penal Code Section 1170.03, The fact that the offender is currently sentenced for murder does not automatically mean that he/she is an unreasonable risk of committing a violent felony (super strike), and such a finding cannot be based on the offender's prior murder

conviction.

The whole voter-initiated capital crime laws are due for a constitutional challenge once again because of the lack of narrowing and the racist application of the charging prosecution of capital crime. This challenge, if successful, could do away with both the death penalty and the other death sentence LWOP.

Yes, when the statutes were enacted in 1976 and 1978, the five special circumstances met the Furman decision narrowing instruction.⁶ However, subsequent voter initiatives that followed in the 1980s, while touted as narrowing, were expanding the designated special circumstances in which murders rose to capital crime stature and could be punished by a death sentence or a life without parole eligibility (LWOP) sentence.

California Supreme Court Justice Evans observed that after this expanding and narrowing process reached its apex, “at least one special circumstance could be alleged in many if not most first-degree murder cases.”⁷

A survey of all charging instruments in homicide cases throughout California would reveal a pattern of racist practices utilized by prosecutors in such cases and to such a degree as to violate the newly minted Racial Justice Act.

To cure such a gross violation of the Act, a total abolition of capital punishment

⁶ Furman v. Georgia, 408 U.S. 238

⁷ See: People v. Hardin, Cal 5th, Ca. Supreme Court No. S277487, 4 MAR. 2024, Evans, J. Dissenting Opinion, page 1.

would meet the need to rid ourselves of such an oppressive and archaic law. Both the Death penalty and LWOP would be set aside for the good of the people.

Even one of the dissenters in Hardin points out that the exclusion of the 3,100 youth offenders in the majority decision “bears the taint of racial prejudice and perpetuates extreme racial disparities plaguing our juvenile and criminal justice systems.”⁸

[Before I left death row in 2002, I was under the impression that the defense bar was contemplating such a challenge. It has now been 22 years since my retroactive resentencing to LWOP, and to my knowledge, no such writ has been adjudicated.]

How do we untangle ourselves from the web of draconian punishment practices and policies enacted by reactionary legislation and voter outcry in the form of referendums, initiatives, and propositions based on the crime of the day outrage...and political winds that fan the flames of retribution and vengeance to govern by fear?

Obviously, the Legislature has been engaged in incremental changes to the youth offender laws and to whom they apply. Hardin, had it been decided in his favor, would have significantly changed the essential element of coping with one’s imprisonment: hope. If you have not done time, you do not know hope and what it means to a prisoner.

LWOPs, in general, have a slight glimmer of hope in their hearts and minds—hope

⁸ See: People v Hardin, Cal 5th, Ca. Supreme Court No. S277487, 4 MAR. 2024, Evans, J. Dissenting Opinion, Page 1

that someday they may be given a chance at freedom. Hardin held that hope for 3100 youth offenders sentenced to LWOP.

3100 human beings, the majority of the 5,100 sentenced to LWOP in California's prison system. These three thousand will now slip back into the darkness of lifetime imprisonment until death.

Some, just a few, those who survive the carve-out process that eliminates certain offenders from the field of eligibility, will bank the coals of hope to wait for the passage of SB 94 that may impact the lives of 350 some LWOPs whose crimes occurred before 5 June 1990 if it becomes law.

The other factor that has held a slight hope out to LWOPs is an application for executive clemency. The current Governor of California started his terms in office quite well by ordering the dismantlement of the execution chamber at San Quentin and issuing a reprieve on executions during his term (s) in office. Thereby ensuring the 500+ condemned that they would not be subjected to a ritualized killing on his watch.

He also has granted clemency to a few [relative to the whole] LWOPs. To his credit, he has done more than any other Governor of California in my lifetime.

On 29 March 2024, after months of silence on the issue of commutation, the Governor issued a few pardons and commutations, including one to an 86-year-old man who had served 31 years on his LWOP term. However, according to my rough calculation,

his LWOP commutations work out to be about 1.3% of the total number of LWOPs in the system.

A brief review of the Governor's recent action on the clemency front reveals a few youth offenders who evidently recognized their developmental vulnerabilities and had the opportunities to address these issues and change their way of thinking enough to attract the governor's attention with demonstrated maturity and growth.

In conclusion, the legislature must act to repeal all extreme sentences, including death, LWOP, and any sentence that exceeds the life span of a human being.

They need to ensure that every prisoner has the chance at parole by law. Such laws would not guarantee release but would instill hope into the prisoner's desire to seek redemption through rehabilitation and making real amends for their criminal behavior. It will be the prisoner's choice if she/he is to be found suitable for a return to free society.

-The End-