Filed 12/10/19 In re McDowell CA4/2
Opinion following rehearing
See Concurring Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re JONATHAN DEWITT MCDOWELL on Habeas Corpus.	E072191 (Super.Ct.Nos. RIC1709427 SWF1500382, RIF141332) OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Ronald L. Johnson (retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Janice M. McIntyre (retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), Edward D. Webster (retired judge of the Riverside Super. Ct. assigned by the Chief

Justice pursuant to art. VI, § 6 of the Cal. Const.), and Chad W. Firetag, Judges.* Petition denied.

Steven L. Harmon, Public Defender, and William A. Meronek, Deputy Public Defender, for Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Seth M. Friedman and Michael P. Pulos, Deputy Attorneys General, for Respondent.

In 2012, in *People v. Rodriguez* (2012) 55 Cal.4th 1125, the Supreme Court held that the crime of active gang participation (Pen. Code, § 186.22, subd. (a)) is not committed by a gang member who commits a felony alone. In 2015, in *People v. Velasco* (2015) 235 Cal.App.4th 66, one of our sister courts of appeal held that this crime is not committed by a gang member who commits a felony with a member of another gang.

In this habeas proceeding, petitioner Jonathan Dewitt McDowell seeks to annul his conviction of active gang participation in 2008, on the ground that there was no evidence that he committed a felony with a member of his own gang. By doing so, he also seeks to annul true findings in 2015 on various enhancements based on the 2008 conviction.

---

* In 2008, in case No. RIF141332 (2008 case), Judge Johnson presided over petitioner's trial, and either Judge Johnson or Judge McIntyre (the clerk's transcript and the reporter's transcript conflict on this point) sentenced him. In 2015, in case No. SWF1500382 (2015 case), Judge Webster presided over petitioner's trial and sentenced him. In 2018, in case No. RIC1709427 (2018 case), Judge Firetag denied petitioner's habeas petition in the trial court.

We will hold that the habeas petition is untimely. Even assuming that petitioner could not have filed any earlier than 2015, when *Velasco* was decided, he has failed to explain his delay of over two years after *Velasco*. Separately and alternatively, we will also hold that the factual premise of petitioner's claim is mistaken. The 2015 enhancements were not based on his 2008 conviction for active gang participation, but rather on his 2008 conviction for sale of a controlled substance, with a gang enhancement (Pen. Code, § 186.22, subd. (b)). *Rodriguez* and *Velasco* do not apply to a gang enhancement.

I

FACTUAL BACKGROUND[1]

The evidence in the 2008 case showed the following.

Petitioner and two women were sitting in the carport area of an apartment complex in Moreno Valley. A confidential informant approached petitioner and said, "Can I get a dub?" A "dub" is a rock of cocaine.

Petitioner said, "Go get it from [my] sister," motioning toward the women. The informant walked over to one of the women and asked for drugs. She then gave him 0.35 grams of cocaine. A drug expert testified that it is common for a drug dealer to have a woman or a juvenile hold the drugs.

---

[1] At the People's request — which petitioner did not oppose — we have taken judicial notice of the records in petitioner's previous appeals, *People v. McDowell* (case No. E046920) and *People v. McDowell* (case No. E064587).

Petitioner was a member of the Unknown Mafia Gang, a clique of the "higher-ups" in a larger gang called Sex Cash Money. The drug sale took place on Sex Cash Money turf. A gang expert testified, in hypothetical form, that petitioner's drug sale benefited his gang.

Chris Thomas, a member of the South Side Compton Crips, helped petitioner make the sale by acting as a lookout.

II

PROCEDURAL BACKGROUND

In the 2008 case, petitioner was found guilty on two counts:

Count 1: Sale or transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)), with a gang enhancement (Pen. Code, § 186.22, subd. (b)).

Count 2: Active gang participation (Pen. Code, § 186.22, subd. (a)).

He was sentenced to a total of six years eight months in prison.

Petitioner appealed to this court. He did not argue insufficiency of the evidence. We modified the sentence, based on Penal Code section 654, but otherwise we affirmed.

By July 28, 2013, petitioner had served his time and was no longer in custody or on parole.

In the 2015 case, petitioner was charged with making a criminal threat. (Pen. Code, § 422.) His prior conviction on count 1 in the 2008 case[2] was alleged as a strike prior (Pen. Code, §§ 667, subd. (b)-(i), 1170.12) and a prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)).[3] A jury found petitioner guilty of the charged offense. In a bifurcated proceeding, it also found the prior conviction allegations to be true.

Petitioner was sentenced to prison for a total of 12 years. This included the doubling of the principal term based on the strike prior and an additional five year term based on the prior serious felony conviction enhancement.

Once again, petitioner appealed to this court. He did not challenge the enhancements. We affirmed.

In 2017, petitioner filed a habeas petition in the trial court, alleging that, in hindsight, under *Rodriguez*, there had been insufficient evidence to support the gang findings in the 2008 case.

In 2018, the trial court denied the petition. Petitioner sought review by filing a habeas petition in this court, but we denied it summarily.

---

[2] As we discuss in part V, *post*, the parties mistakenly believe these enhancements were based on the prior conviction on *count 2*.

[3] The same prior was also alleged as a prior prison term enhancement (Pen. Code, § 667.5, subd. (b)), but the trial court struck this enhancement at sentencing.

Petitioner then sought review by filing a habeas petition in the Supreme Court. The Supreme Court issued an order to show cause, returnable before this court.

III

THE EFFECT OF THE SUPREME COURT'S ORDER TO SHOW CAUSE

"In issuing an order to show cause in . . . a [habeas] proceeding, a court makes 'an implicit preliminary determination' as to claims *within the order* that the petitioner has carried his burden of allegation, that is, that he 'has made a sufficient prima facie statement of specific facts which, if established, entitle him to . . . relief . . . .' [Citation.] That determination, it must be emphasized, is truly 'preliminary': it is only initial and tentative, and not final and binding." (*In re Sassounian* (1995) 9 Cal.4th 535, 547.)

"[The Supreme Court's] direction to an appellate court to issue an order to show cause why the relief sought in the petition should not be granted does not . . . *establish* a prima facie determination that petitioner is entitled to the relief requested. Rather, it signifies [its] '*preliminary determination* that the petitioner has made a prima facie statement of specific facts which, if established, entitle [petitioner] to habeas corpus relief under existing law.' [Citations.]" (*In re Serrano* (1995) 10 Cal.4th 447, 454-455.) More specifically, the issuance of an order to show cause represents "a preliminary determination that [the petitioner] has proceeded in a timely manner. [Citation.]" (*In re Morrall* (2002) 102 Cal.App.4th 280, 286, fn. 1.)

"[W]hen the Supreme Court, in response to a habeas corpus petition, issues an order to show cause returnable before a lower court, the lower court must decide the

issues before it on their merits. . . . It is not, however, the equivalent of a final appellate decision on questions of law, nor does it constitute law of the case. [Citation.]" (*In re Orosco* (1978) 82 Cal.App.3d 924, 927; accord, *Hudson v. Superior Court* (2017) 7 Cal.App.5th 1165, 1170, fn. 4.)

For completeness' sake, we note that, at least in mandate cases, the issuance of an order to show cause "necessarily" determines that appeal is not an adequate remedy. (See *Langford v. Superior Court* (1987) 43 Cal.3d 21, 27 [issuance of alternative writ].) Accordingly, again in mandate cases, this court and other courts have said that "issuance of the order to show cause operates as a conclusive finding that the remedy by way of appeal would not be adequate. [Citation.]" (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 99, fn. 5; accord, *People v. Superior Court* (*Sanchez*) (2014) 223 Cal.App.4th 567, 572; *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 488.) Assuming such cases apply in a habeas proceeding at all, the Supreme Court's issuance of an order to show cause conclusively determines only the inadequacy of other remedies, not the timeliness of the petition nor the existence of any other procedural bar. (*Krueger v. Superior Court* (1979) 89 Cal.App.3d 934, 939.)

IV

THE TIMELINESS OF THE PETITION

The People assert the following procedural bars: (1) petitioner is not in custody on the 2008 conviction; (2) petitioner could have raised his claim on direct appeal; (3) a

sufficiency of the evidence claim is not cognizable on habeas; and (4) the petition is untimely.[4]

In part V, *post*, we consider (in a limited way) the assertion that petitioner is not in custody on the 2008 conviction. Otherwise, while we have not considered these procedural bars in depth and we express no holding with respect to them, they strike us as weak — with the exception of untimeliness.

"A criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner. [Citation.] Thus, a petitioner is required to explain and justify any significant delay in seeking habeas corpus relief. [Citation.] An unjustified delay in presenting a claim bars consideration of the merits. [Citations.]" (*In re Sims* (2018) 27 Cal.App.5th 195, 204-205.)

"[T]he *petitioner* has the burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness. [¶] Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. A petitioner must allege, *with specificity*, facts

---

4 The People have never withdrawn their assertion that the petition is untimely. In their supplemental brief, they state: "Respondent *has nothing further to add* to its position on this issue as set forth in its return. However, because the California Supreme Court issued an order to show cause, respondent agrees with petitioner that this court should *also* resolve petitioner's claim on its merits. [Citation.]" (Italics added.)

showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time." (*In re Robbins* (1998) 18 Cal.4th 770, 780.)

Here, the petition contains no such allegations. Petitioner may be forgiven for not bringing his claim before March 13, 2015, when *Velasco* was published.[5] However, the record shows that he was actually aware of his claim by April 14, 2015, when he argued to the trial court before trial that, under *Rodriguez*, there was insufficient evidence to support the strike prior because he had committed the drug offense alone. (See part V,

---

[5] When, as here, a habeas petition is based on a case that announced new law, some courts measure delay from the time when either a petition for certiorari in the United States Supreme Court is denied, or the time to file such a petition expired. (*In re Taylor* (2019) 34 Cal.App.5th 543, 555-556; *In re Lucero* (2011) 200 Cal.App.4th 38, 44.)

We see no justification for this approach. It is purportedly derived from cases dealing with whether a conviction is final for statutory retroactivity purposes. (*In re Lucero*, *supra*, at p. 44, citing *Linkletter v. Walker* (1965) 381 U.S. 618, 622, fn. 5, and *People v. Vieira* (2005) 35 Cal.4th 264, 306.) At issue here, however, is the finality of an *opinion*, not the finality of a *conviction*. Indeed, as soon as an opinion is published — i.e., even before it becomes final — it can be cited (Cal. Rules of Court, rule 8.1115(d)), and thus it serves as notice of the need to file a prompt habeas petition.

Finally, even assuming the certiorari process is relevant, the California Supreme Court denied review in *Velasco* on July 15, 2015. (*People v. Velasco* (July 15, 2015, S225933) 2015 Cal. LEXIS 4959.) No petition for certiorari was filed. Thus, the time to file a petition for certiorari expired on October 13, 2015. (U.S. Sup. Ct. R. 13(1), (3).) This would still leave a delay of over a year and a half to be explained.

post.) Nevertheless, he did not file his first habeas petition, in the superior court, until May 17, 2017 — more than two years later. His petition does not explain this delay.[6]

Petitioner nevertheless argues that his petition was timely, for three reasons.

First, he argues: "A two year delay is not substantial, especially considering that Mr. McDowell was pro per." A habeas petition, however, "should be filed as promptly as the circumstances allow, and the petitioner 'must point to particular circumstances sufficient to justify substantial delay . . . .' [Citation.]" (*In re Clark* (1993) 5 Cal.4th 750, 765, fn. 5.) In *People v. Miller* (1992) 6 Cal.App.4th 873, we held that a delay of approximately two years (from "late 1988" to October 1990) was substantial, in part because the petitioner could have filed in pro per instead of waiting to obtain counsel. (*Id*. at pp. 882-883.) Here, petitioner was in pro per when he filed his first petition in the superior court. He has not alleged when or how he became aware of his legal claim. Thus, he has not specifically alleged that his pro per status prevented him from filing sooner.

Second, petitioner argues that there was good cause for the delay, in that his trial and appellate counsel in the 2015 case were ineffective because they failed to challenge the enhancements that were based on the 2008 conviction. This might arguably explain his counsel's failure to file a habeas petition, but it does not explain petitioner's own delay in filing a habeas petition in pro per (as he eventually did).

---

[6] The same is true of his petition in the superior court and his previous petition in this court.

Third, petitioner argues that he is within one of several exceptions to the timeliness requirement.

He cites the exception "that the petitioner is actually innocent of the crime or crimes of which he or she was convicted." (*In re Sims*, *supra*, 27 Cal.App.5th at p. 205.) However, there is a recognized distinction between actual innocence and mere insufficiency of the evidence to prove guilt. (See *House v. Bell* (2006) 547 U.S. 518, 538.) Here, petitioner merely claims that the prosecution failed to prove the crime of active gang participation; he does not offer to prove that he was actually innocent of this crime.

He also cites the exception "that the petitioner was convicted or sentenced under an invalid statute." (*In re Sims*, *supra*, 27 Cal.App.5th at p. 205.) He concedes that that is not what happened here; he argues, however, that "he was convicted under an invalid interpretation of a statute, which as a practical matter amounted to the same thing." It is not the same thing at all. A petitioner claiming to have been convicted under an invalid statute is essentially claiming actual innocence — i.e., he or she did not commit any crime. Moreover, such a claim implicates the principle that a judgment that is void on the face of the record may be set aside at any time. (*People v. Amaya* (2015) 239 Cal.App.4th 379, 386.) These two points explain why a claim of conviction under an

invalid statute might be exempt from the timeliness requirement.[7] But they do not apply to a claim that the evidence at trial was insufficient to satisfy a statute.

Finally, petitioner argues that "[i]t would . . . be a 'fundamental miscarriage of justice'" to require him to serve time on enhancements that are based on an "invalid" conviction. Our Supreme Court has emphasized, however, that a *mere* miscarriage of justice — in the sense of a prejudicial error — is insufficient to excuse the timeliness requirement. (*In re Clark*, *supra*, 5 Cal.4th at p. 795.) Rather, a petitioner must show a *fundamental* miscarriage of justice, which the court defined in terms of certain specific exceptions. (*Id*. at pp. 759, 797-798.) Petitioner has not made out any of these exceptions.

We therefore conclude that the petition is untimely.

V

THE 2008 CONVICTION FOR ACTIVE GANG PARTICIPATION

Petitioner's claim is that there was insufficient evidence to support his conviction in the 2008 case for active gang participation, because there was no evidence that he acted with a member of his gang.

"Any person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and

---

[7] We have traced the invalid statute exception back to *In re Clark*, *supra*, 5 Cal.4th at pages 759, 798. *Clark*, however, cited no authority for it and did not actually apply it; indeed, our research has not revealed any other case that applied it.

who *willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang*" is guilty of active gang participation. (Pen. Code, § 186.22, subd. (a), italics added.)

Petitioner was convicted of this crime in 2008. Later, in 2012, in *Rodriguez*, our Supreme Court held that this crime "require[es] that a person commit an underlying felony with at least one other gang member" (*People v. Rodriguez, supra*, 55 Cal.4th at p. 1134); a person who commits the underlying felony alone is not guilty. (*Id*. at pp. 1128, 1135, 1139.)

Still later, in 2015, *Velasco* added a gloss to *Rodriguez*. It held that the crime of active gang participation requires the commission of an underlying felony with at least one other member *of one's own gang*; the commission of a felony with a member of another gang will not support a conviction. (*People v. Velasco*, *supra*, 235 Cal.App.4th at pp. 68, 75-78.)

Accordingly, petitioner argues that, in the 2008 case, there was no evidence that he committed a felony with a member of his own gang. He was assisted by an unidentified woman, but there was no evidence that she was a member of his gang. And he was assisted by Chris Thomas, but Thomas was a member of a different gang.

We need not decide this issue, however, because petitioner is no longer in custody on his 2008 conviction for active gang participation. "Our courts have no power to provide habeas corpus relief to a person who is not in actual or constructive custody.

[Citations.]" (*L.A. v. Superior Court* (2012) 209 Cal.App.4th 976, 980; accord, *People v. Villa* (2009) 45 Cal.4th 1063, 1068-1069.)

Petitioner argues that he is, in fact, in custody — he is serving time on enhancements in the 2015 case that were based on the prior conviction for active gang participation in the 2008 case, and therefore he can use habeas to challenge that prior conviction. Alternatively, he also argues that in the 2015 case, both his trial and appellate counsel rendered ineffective assistance of counsel by failing to challenge the prior conviction enhancements based on *Rodriguez* and *Velasco*.

The hole in this argument is that the enhancements were based on count 1, not count 2, in the 2008 case.

Both count 1 — because of the gang enhancement — and count 2 qualified as serious felonies for enhancement purposes. (Pen. Code, §§ 667, subds. (a)(1), (a)(4), (d)(1), 1192.7, subd. (c)(28); *People v. Briceno* (2004) 34 Cal.4th 451, 459-465.)

The information in the 2015 case alleged a prior conviction for "[t]ransportation/sale of a controlled substance for criminal street gang activity, a felony, in violation of Health and Safety Code section 11352, subdivision (a), with 186.22, subdivision (a), of the Penal Code . . . ." (Capitalization altered.) Admittedly, this was somewhat ambiguous. If forced to choose, we would conclude that it referred to count 1, because if it referred to count 2, there would be no need to mention the transportation or sale of a controlled substance, nor to cite Health and Safety Code section 11352; on that

view, the citation of subdivision (a), instead of subdivision (b), of Penal Code section 186.22 was just a typo.

Rather than rely solely on our own judgment, however, we turn to our records in petitioner's appeal from his 2015 conviction. The reporter's transcript confirms that the prior conviction allegations were actually based on count 1.

In pretrial plea negotiations, defendant tried to raise the very same issue he is raising now — that he had committed the drug crime alone, and therefore, under *Rodriguez*, there was insufficient evidence to support his strike prior. In response, the trial court advised him that the strike was based on the gang enhancement, not the active gang participation conviction:

"[PETITIONER]: . . . I've been trying to bring up the issue about the whole strike prior that I have —

"THE COURT: Yes.

"[PETITIONER]: — which I committed the offense, I was by myself. I had no codefendants or nothing like that. It was a motion that was said that was going to be filed for me, that never had got filed.

"THE COURT: . . . [M]y understanding . . . is that [defense counsel] looked at whether you had any remedy because, yes, under the new case *Rodriguez* if you were by yourself, and it was the 186.22(a), which is that you're a gang member by yourself doing something, that that would be taken away. But that wasn't the facts, as I understand it, in your case —

"[PETITIONER]: Well —

"THE COURT: — and that yours was an enhancement, and the appellate court affirmed it. So —

"[PETITIONER]: No —

"THE COURT: — my understanding is you don't have the ability to strike that strike.

"[PETITIONER]: Well, that's what they're saying. *They're talking about the 186.22*(*b*).

"THE COURT: Correct.

"[PETITIONER]: They never brought up the 186.22(a).

"THE COURT: Because that one doesn't matter. *The* (*b*) *is what makes the drug charge a strike.* The (a) could go away. It could be dismissed. *You'd still have the enhancement that made it a strike*." (Italics added.)[8]

---

[8] Defendant nevertheless continued to argue that he had committed the drug crime alone. The trial court responded that the plea bargain was favorable to him because it would prevent him from being convicted of a new strike: "[J]ust realize if you go to trial and lose, that 422 is going to be a strike on your record. *So if you're wrong about your enhancement*, you'll have two strikes. *Even if you are right about your enhancement*, you'll still have another strike, the 422." Defendant characterizes this as leaving the basis for the strike prior unclear. Not so. It was plainly a concession solely for the sake of argument. Defendant may not have accepted what the trial court told him, but that does not take away from the fact that he was told.

Moreover, this colloquy demonstrates that *defense counsel* knew the strike prior was based on count 1 in the 2008 case. We therefore reject defendant's claims (raised

Accordingly, during the trial on the prior conviction allegations, the trial court instructed the jury, "It's . . . alleged that that the defendant was convicted on or about November 21st, 2008, of sales of a controlled substance for a criminal street gang. A violation of Health and Safety Code section 11352, subdivision (a), with a 186.22 gang allegation." Likewise, the prosecutor told the jury, "When you get to the deliberation room, turn to the very first conviction for an 11352(a) of the Health and Safety Code with a gang conviction."[9]

The definition of the gang enhancement is different from the definition of the crime of active gang participation. The enhancement applies to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (Pen. Code, § 186.22, subd. (b).)

Rodriguez construed Penal Code section 186.22, subdivision (a). It relied, in particular, on the language in that subdivision requiring that the defendant "willfully

---

belatedly in his reply brief) that he was not given constitutionally and statutorily adequate notice of the basis for the strike prior allegation.

[9] The jury's verdict form finding the strike prior true tracked the information. Thus, it recited that defendant had been convicted of "transportation/sale of a controlled substance for criminal street gang activity, a felony, in violation of section 11352, subdivision (a), of the Health and Safety Code and section 186.22, subdivision (a), of the Penal Code . . . ." (Capitalization omitted.) Once again, this was a mere typo. In light of the jury instructions, it is clear the jury's verdict was based on count 1 in the 2008 case. The jury had no choice but to use the verdict form it was given — typographical error and all — to express that verdict. (See *People v. Camacho* (2009) 171 Cal.App.4th 1269, 1272-1275 [finding in verdict form that defendant was guilty of carjacking rather than robbery, as charged, was clerical error that could be disregarded].)

promote[], further[], or assist[] in . . . criminal conduct by [gang] members . . . ." (*People v. Rodriguez, supra,* 55 Cal.4th at p. 1132.)

By contrast, Penal Code section 186.22, subdivision (b), merely requires that the defendant "*inten*[*d*] to promote, further, or assist in any criminal conduct by gang members . . . ." (Italics added.) A gang member can commit a felony alone with the specific intent to promote criminal conduct by other gang members. (E.g., *Studebaker v. Uribe* (C.D. Cal. 2009) 658 F.Supp.2d 1102, 1121-1122.) Moreover, a gang member can commit a felony alone to benefit his or her gang. (E.g., *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1376-1377.) Hence, "the holding in *Rodriguez* — that a lone actor cannot violate section 186.22, subdivision (a) — does not apply to the separate enhancement set forth in section 186.22, subdivision (b) . . . ." (*People v. Rios* (2013) 222 Cal.App.4th 542, 546; see also *People v. Perez* (2017) 18 Cal.App.5th 598, 607 ["[A] lone actor is subject to a gang enhancement . . . ."].)

Petitioner does not argue that there was insufficient evidence to support the gang enhancement. Thus, he has forfeited this argument. If he did raise it, he would have an even bigger untimeliness problem (see part IV, *ante*), because he could have raised this particular argument even before the decisions in *Rodriguez* and *Velasco*.

VI

DISPOSITION

The order to show cause is discharged and the habeas petition is denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

I concur:

FIELDS
J.

Slough, J., Concurring.

I write separately because I disagree with the primary holding of the majority opinion. In my view, McDowell's petition is timely.

A habeas corpus petitioner must show they have not "substantial[ly] delay[ed]" in bringing their petition. (*In re Robbins* (1998) 18 Cal.4th 770, 780.) "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of . . . the legal basis for the claim." (*Ibid.*; see *In re Wells* (1967) 67 Cal.2d 873, 875 [delay of 19 years was inexcusable]; *People v. Jackson* (1973) 10 Cal.3d 265, 268 [11-year delay was inexcusable].)

In this case, McDowell filed his petition in May 2017, about two years after the publication of *People v. Velasco* (2015) 235 Cal.App.4th 66 (*Velasco*), one of the cases on which he bases his claim for relief. Given that he is an indigent, unsophisticated state prisoner who was unrepresented when he filed his petition, and given that his claim is based on a new development in the law (as opposed to newly discovered facts), two years does not constitute a substantial delay. (See, e.g., *In re Saunders* (1970) 2 Cal.3d 1033, 1040-1041 [five-year delay was excusable where the unrepresented petitioner "had only a ninth grade education and was without experience or education in law"].)

The majority do not address this established case law and instead support their conclusion that two years is too long with an earlier opinion from this court, *People v. Miller* (1992) 6 Cal.App.4th 873. (Maj. opn. *ante*, at p. 10.) *Miller* involved unique

circumstances not present here. The petitioner was a medical doctor who had completed two years of law school. (*Miller*, at p. 883.) *After* he learned of the legal basis for habeas relief, he spent an additional two years looking for an attorney to file his petition. (*Ibid.*) In finding the petition untimely, we emphasized the fact he was not the typical prisoner seeking habeas relief, but rather a sophisticated professional with a background in the law. We held that, given his circumstances, he should have filed the petition on his own behalf rather than spend significant time to obtain an attorney. (*Ibid.*) In my view, those facts are a far cry from what we have here, and it strikes me as unfair to treat the two cases in the same way. Unlike the petitioner in *Miller*, McDowell is not a professional and has no legal education. We therefore have no reason to except him from the case law allowing indigent prisoners more time to bring habeas petitions based on new law. (E.g., *In re Bartlett* (1971) 15 Cal.App.3d 176, 185 [in excusing a two-year delay, court refused to "make the somewhat rash assumption that, as a layman imprisoned in a state penitentiary," the petitioner closely followed emerging case law].) In addition, the evidence in *Miller* revealed the petitioner was aware of his legal claim for two years before he sought habeas relief, whereas in this case there is no reason to think McDowell knew about *Velasco* but put off filing his petition.

I find our facts more like *In re Huddleston* (1969) 71 Cal.2d 1031, where our Supreme Court excused a delay of two and a half years because the petitioner's claim, like McDowell's, was based on a change in the case law. (*Id.* at p. 1034.) As the Court reminded the Attorney General who had raised the timing issue, "the basic function of

habeas corpus is to afford relief which cannot otherwise be procured," and, "in any event, [the petitioner's] delay primarily worked to his own disadvantage," not the People's. (*Ibid.*) Given that we have consistently regarded the habeas petition as "'the safe-guard and the palladium of our liberties'" (e.g., *In re Clark* (1993) 5 Cal.4th 750, 764), the majority's conclusion that two years is too long for an unrepresented prisoner to discover a change in the law and file a habeas petition appears overly strict and inconsistent with the bulk of case law.

I also note the majority's holding is based on their conclusion that McDowell's *petition* was insufficient for failing to allege why it took him two years after *Velasco* to file it. (See Maj. opn. *ante*, at p. 8 ["Here, the petition contains no such allegations" to excuse the two-year delay]; see also *id.* at p. 9 [the petition does not "allege[] when or how [McDowell] became aware of his legal claim"].) I doubt that conclusion is appropriate in a case like this, where the California Supreme Court has ordered respondent (the Warden of the Kern Valley State Prison) to show cause, in this court, why McDowell should not obtain the relief he seeks in light of *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*) and *Velasco*. An order to show cause represents a determination that the petition "is sufficient on its face (that is, the petition states a prima facie case on a claim that is *not procedurally barred*)." (*People v. Romero* (1994) 8 Cal.4th 728, 737, italics added.) In other words, in issuing an order to show cause returnable to this court, the California Supreme Court has "signifie[d its] '*preliminary determination* that [McDowell] has made a prima facie statement of specific facts which,

if established, entitle [him] to habeas corpus relief under existing law.'" (*In re Serrano* (1995) 10 Cal.4th 447, 455 (*Serrano*), citing *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4.) Thus, "when the Supreme Court . . . issues an order to show cause returnable before a lower court, the lower court *must* decide the issues before it *on their merits*." (*In re Orosco* (1978) 82 Cal.App.3d 924, 927, italics added.)

McDowell's petition before the California Supreme Court—the same petition before us now—alleged that *Rodriquez* and *Velasco* entitle him to relief and that he filed his original habeas petition on May 17, 2017. In other words, the Court was aware of the approximately two-year lapse between *Velasco* and the petition's filing and, by ordering respondent to show cause, preliminarily determined, among other things, that there had not been a substantial delay in this case. (See, e.g., *In re Morrall* (2002) 102 Cal.App.4th 280, 286, fn. 1 ["In issuing an order to show cause, we made a preliminary determination that [petitioner] has proceeded in a timely manner"], citing *Serrano, supra,* 10 Cal.4th at p. 455.)

I recognize that the Court's order to show cause does not constitute a decision on the *merits* of McDowell's claim for relief nor does it direct us how to resolve whatever factual disputes may arise when the petition, return, and traverse are joined. However, the order *does* constitute a preliminary determination that McDowell's petition has sufficiently alleged facts which, if true, "entitle [him] to habeas corpus relief." (*In re Hochberg, supra,* 2 Cal.3d at p. 875, fn. 4.) Had respondent alleged facts in the return that raised doubt about whether McDowell's timing allegations were true, then the issue

would be in dispute and we would have to resolve it. But here, respondent's return didn't allege any new or different *facts* on the issue of delay, but simply argued we should consider the delay substantial. It seems to me that by accepting that argument and concluding McDowell's petition insufficiently explains the time it took him to file, my colleagues have disregarded the Court's preliminary determination that the petition states a prima facie case for relief.

My colleagues' holding seems especially inappropriate given that, after we granted McDowell's petition for rehearing and vacated our opinion, the People conceded the effect of the Court's order to show cause and withdrew their contention that untimeliness was a procedural bar to considering McDowell's petition. Given the established rules regarding orders to show cause and the People's concession, I simply don't understand why the majority persist in finding a procedural bar to McDowell's petition. Not only does their holding flout Supreme Court precedent, but it does so needlessly, as they end up reaching the merits as an alternative holding anyway.

Turning to the merits of the petition, however, I agree with the majority's alternate holding that McDowell is not entitled to relief because his prior strike was *not* in fact based on his 2008 conviction for active gang participation (Pen. Code, § 186.22, subd. (a)) but was actually based on his 2008 conviction for sale or transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) with a gang enhancement (Pen. Code, § 186.22, subd. (b)). (Maj. opn. *ante*, at pp. 12-18.) I am not persuaded by McDowell's arguments on rehearing that the references to Penal Code section 186.22,

subdivision (a) in the information, jury instructions, and jury findings were not typographical errors.

To the points the majority make, I would add two. First, the information refers to the prior strike as "*the crime* of TRANSPORTATION/SALE OF A CONTROLLED SUBSTANCE FOR CRIMINAL STREET GANG ACTIVITY; a serious and violent felony, in violation of Health and Safety Code section 11352, subdivision (a), *with* 186.22, subdivision (a). (Italics added.) That the information identifies a single offense strongly indicates the reference to Penal Code section 186.22 should be a reference to the gang enhancement, not the stand-alone offense of active gang participation. Otherwise, the information would be internally inconsistent, alleging two separate offenses—the drug offense and the gang offense. The more natural reading is the reference to "subdivision (a)" should be a reference to "subdivision (b)." Lending further support for this reading is the fact the information says "with" instead of "and" before the reference to "subdivision (a)." Had the prosecution alleged two offenses instead of one offense with an enhancement, we would expect "and" to precede the second offense, not "with," which is most commonly used for enhancements.

Second, McDowell's trial counsel appears to have been aware the prior strike was based on the enhancement and not the stand alone felony, because in closing argument he described the prior strike allegation as "[a] violation of Health and Safety Code section 11352, subdivision (a), with a 186.22 gang allegation."

I therefore concur in the judgment and join all but part IV of the majority opinion.

SLOUGH

J.