



## *Public Safety and Fiscal Responsibility*

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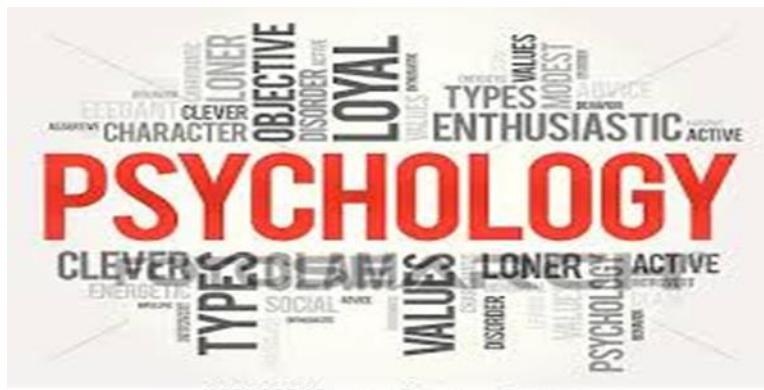
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## **FAD UPDATE FOR 2017**

At the October training session for BPH Commissioners the usual 2-day monthly Board Executive Meeting turns into a week-long conference, with all commissioners and most deputy commissioners present to hear a variety of speakers and topics, all relating to making good parole decisions and evaluating the board's action in previous hearings. As part of that training Forensic Assessment Division Chief Psychologist Dr. Cliff Kusaj presented the board, and whatever public is interested (that would be us, the DAs, a few victim group representatives and a smattering of attorneys) an overview of the preceding year's CRA action. Fair warning here; the following report is replete with figures. If you aren't a numbers person, caution is indicated.

This year's presentation built on the theme from previous years, indeed a theme Dr. Kusaj had expressed even before he began giving public run-downs on the FAD's work: lifers recidivate at the lowest level of any prisoner cohort, and even a lifer receiving a high-risk rating is really an average risk, relative to other, non-lifer, non-long term incarcerated individuals. And even those scary High-Risk lifers are, in the professional opinion of the FAD, no more likely to engage in crime or violence than the average DSL inmate, released after fewer years, much less programming and often zero self-change.

Also, of note is that only 25% of the more than 3,000 individuals evaluated by FAD clinicians in 2017 received a High-Risk rating. Dr. Kusaj reported that most (49%) of those evaluated received a moderate risk rating, and 26% were in the low risk range.

Those are overall percentages, for all inmates given CRAs during 2017. The numbers are only slightly different when the total prisoner population is considered in various groups. YOPH inmates (58% of those evaluated in 2017) were in line with the percentage breakdown of the overall group, 23% low, 48% moderate and 28% high, as did elderly parole candidates, average age of 65 years, came in at 24% low risk, 50% moderate risk and 26% high.

There was, however, a gender difference. Women inmates received low risk assessments in 40% of the evaluations, moderate at 46% and high risk only 15% of the time. And Indeterminately sentenced third strikers also presented differently, with only 19% assessed as low risk, 47% as moderate risk and over a third, 35% as high risk. Overall, Kusaj reported long term inmates evaluated by the FAD in 2017 were at an average of 52 years old and had spent more than 20 years in prison.

The report also found differences between indeterminate (ISL) and determinate sentenced (DSL) prisoners who were evaluated by the FAD. Not only were the ISL inmates, on average, slightly older than the DSLs, (51 years for ISL, 40 for DSL), but the percentage of DSL inmates receiving low risk ratings from the FAD was remarkably smaller. Only 5% of DSL inmates received a low risk rating, compared to 27% of ISL prisoners rated as low risk. Similarly, the high-risk category saw more DSL inmates, at 54%, than ISLs, rated as high risk 24% of the time. The moderate risk category was closer, with 40% of DSLs rated moderate and 49% of ISLs getting that tag.

Kusaj also made the point that a past history of problems whether couched in terms of ('anti-social personality disorder,' for example) were of less predictive value regarding risk than recent problems any factors. And even when those issue are present, they are not always deemed relevant to risk, in the professional judgment of the clinicians. It's a combination of risk factors and relevance that make up the risk rating, with relevancy of the issue to criminal behavior appearing more probative of both risk rating and hearing outcome than simply the presence of the risk factor.

While his report detailed that about 80% of those inmates evaluated were opined to have some recent problems with insight, those 'problems' were considered highly relevant in only 7% of those with low risk rating, less than half (41%) of moderate ratings and only highly relevant in those individuals with a high risk (77%). In discussing the three test instruments used by the FAD, the HCL-20, the PCL-R and the Static 99-R, Kusaj explained that the HCL-20 is composed of 20 risk factors, mainly of historical incidence and therefore those issues identified by this test have somewhat less relevance in determining current risk than dynamic, or current, factors.

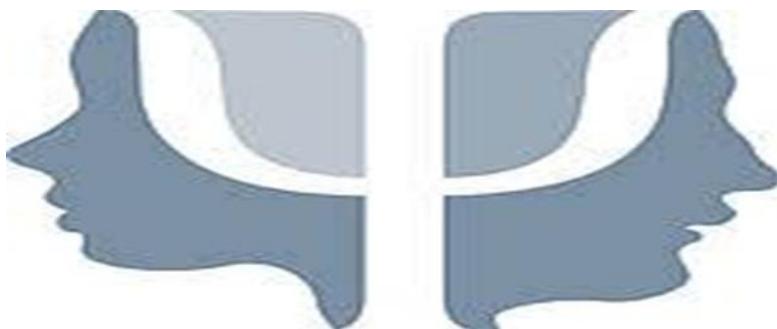
The PCL-R was described not as a risk assessment, but a personality assessment tool, where in the higher the 'score', the more expected problems. Any score over 30 is consider predicable of problems. Among California lifers, women scored largely between 16-22, and the men, 19-25. Regarding risk ratings, those receiving a low risk rating had an average of 13.9 factors, moderate, 18.7 and those with a high-risk rating averaged 23 factors on the PCL-R.

The Static 99-R, created for use with adult sex offenders primarily to create treatment programs, provided diagrams showing most sex offenders (60%) were estimated by the Static-99 to be in categories of very low risk, below average risk or average risk to recidivate. Kusaj also noted that if the FAD clinician feels the Static 99-based risk assessment is overly predictive of recidivism, given other factors in the individual's case or situation, the clinician should so note in the CRA.

Third strikers are beginning to be a presence in the parole cycle, and the FAD data reflect some differences in 3 Strikes ISL inmates and 'regular' ISL, or lifer, inmates. Overall ISL prisoners checked in at a 28% low risk rating; 3 strikers, however, received a low rating only 19% of the time. Three strikers also presented with a lower percentage of moderate risk ratings (47% to 49%) than other ISL inmates, but a higher level of high-risk rating, 35% of 3 strikers were evaluated as a high risk, with 23% of other ISL inmates reaching that level.

And issues contributing to risk levels were both more prevalent in third strikers and deemed, by FAD clinicians, to be more relevant to their risk assessment than other lifer cohorts. Other factors, including recent treatment/supervision issues, future problems with stress and coping, were also higher in the three strikes population than other ISL groups and deemed more relevant to their risk. In gender issues, Kusaj reported that women present fewer risks than men, are less likely to have a history of problems with other anti-social behaviors (other than the life crime) but more likely to have a history of major mental disorder and traumatic experiences. Women may also be better prepared for the stress of parole, as they are usually less likely to have problems in the community finding and utilizing professional services to assist in their living situation as well as treatment.

Also, as expected, the report indicated more inmates are assessed as low risk as they age, especially in those in the low risk category. The reduction in risk level tied to increased age is also evident, though to a lesser degree, in moderate and high-risk categories. Kusaj noted the difference in risk level shows the greatest change between ages 18 and 35, with risk changes less notable in age groups after 35.



Length of incarceration correlation to risk level presented an interesting puzzle, figures did not present in a predictable pattern relative to time served and assessed risk level. The figures did little to answer the question of longer in, less risk? Perhaps the difference lies more in the use of incarceration time, rather than the simple length of term.

In the all-important area of correlation of risk assessment to parole grants, the data is far from clear. Kusaj's figures show 55% of inmates with a low risk rating received a grant, 42% were denied and another 3% stipulated to unsuitability. Moderate risk rating showed a 17% grant rate, 71% denials and 12% stipulation; and high-risk inmates were granted parole in less than 1% of cases, denied 61% of the time and stipulated to unsuitability in 39% of hearings.

In closing his report to the board Kusaj reported that for CRA interviews conducted between March and July of 2018, FAD clinicians reported spending an average of 135 minutes, just over 2 hours, with each interviewee. In only 6% of cases, he noted, were the interviews less than 90 minutes long, in those cases due to "offenders' unwillingness or inability to participate." And while LSA has anecdotal reports, including several reports from prison staff, of substantially shorter, or abbreviated interviews, until CRA interviews are recorded, in much the same manner as parole hearings, we have no way of knowing for sure and are left with dueling contentions.

As we are able to parse out additional information from Kusaj's report, or are supplied answers to follow up questions, we'll update our readers.

## THE COMMUTATION FLOOD

The BPH, in recent months, has faced a veritable avalanche of commutation petitions submitted to the Governor, who refers those with 2 or more felony convictions to the BPH for their appraisal and recommendation. In the past three months the board had no less than 39 such requests, 6 in August, escalating to 16 in September and 17 at the October BPH business meeting. The good news: commutations have all been positively viewed by the board, with recommendations to the governor to grant the requests.

In August, **Deryl Armstrong, Willie Erwin, Howard Ford, John Manning, Tin Nguyen, Curtis Roberts and James White** all requesting commutation of their sentences were saw positive recommendations from the BPH to the Governor. Armstrong, Erwin, Ford, Manning, Nguyen and White are all LWOP inmates. Another request, from **Travis Westley**, was withdrawn prior to BPH consideration.

Most, but not all, inmates requesting commutation had speakers supporting their request, and in nearly all cases the DA office in the respective counties opposed the commutation, most usually with a recitation of the facts of the crime. Chief opposers among the DAs, to no surprise, were the DAs from Los Angeles and Santa Clara Counties.

In September, of the 16 commutation applications, half were from LWOP inmates. The board recommended the Governor grant commutations to **Richard Barnfield, Jessie Biggs, Jose Esquero, Huey Ferguson, Michael Fischer, Gustavo Flores, Robert Glass, Jesus Hernandez, Johanna Hudnall, Tyrone Jackson, Dean Jacobs, John Johnson, Crystal Jones, James King, Thomas Marston and Richard Richardson**. All but Barnfield, Esquero, Fischer, Flores, Hernandez, Hudnall, King and Richardson are LWOP inmates.

In addition to a parade of supporters for some requests, the DAs, primarily from LA county, opposed 10 of the requests. The LA County DA office was joined in opposition by representatives from San Diego and, in something of a uncommon occurrence, a representatives from Yuba and San Mateo counties joined the party, to oppose commutation.

The October meeting was a marathon, with a total of 91 speakers voicing their opinions on a total of 21 en banc considerations, 17 of which were for commutations. In fact, so many speakers showed up, BPH was forced to triage speakers, allowing groups into the hearing room as other groups provided their input and exited. Anticipating the interest and numbers, the board started the meeting at 9 am, not recessing until nearly 3 pm.

Commutations were recommended for **Jameel Coles, Richard Flowers, Anthony Guzman, James Harris, Joe Hernandez, Gerald Holton, Fateem Jackson, Howard James, Kenny Lee, Huan Nguyen, Walter Oatis, Rick Rivera, Bryant Rodezno, Ramon Rodriguez, Richard Snyder, Rahsaan Thomas and Luis Velez**. Among this posse of potential parolees, only Guzman, Jackson, Oatis, Rivera, Rodezno, Snyder and Thomas are not currently LWOP inmates.

The October en banc process turned into something of a marathon performance by Donna Lebowitz from the LA County DA's office, who rose repeatedly to oppose a full dozen commutation seekers, all from LA County. She was joined by her not-infrequent fellow traveler, Aaron West, from Santa Clara County, and as a DA from Tulare County. Lebowitz commented to the board that she didn't want to sound like a broken record in always opposing change in sentences.

Unfortunately, her comment came too late, as not only opposition from the DAs, but the reasons cited for that opposition are predictably the same; heinousness of the crime, lack of remorse, potential danger to victims. It appears, both from comments and performance, that inmates from Los Angeles

County can count on their requests for commutation, and any other form of relief, being opposed by the county DA. Recently however, both Lebowitz and West have added a new objection; that those sentenced to LWOP have already received compassion and grace from the justice system, in that they received an LWOP sentence, rather than the death penalty.

Several victims, and members of victims' rights groups, representing victims also spoke in opposition to several commutation requests, a trend that will probably increase as the number of commutation requests continues to grow. It also appears many victims could benefit from some basic information regarding life sentences, parole and circumstances under which inmates operate.

Victims and representatives often bemoan the fact that lifers are considered for parole, apart from commutation, often remarking their expectations, from a life sentence, is that the inmate will simply die in prison, never to be thought of by society again. And again this month victims' representatives deplored the fact that inmates had not reached out to them to apologize, apparently unaware of the fact that prisoners are precluded from doing so.

Other en banc considerations, for pardons, were also largely successful. August pardon applications from Jose Padilla and Larry Thompson were favorably forwarded to the Governor, as were similar requests in September from Michael Crawford, Deborah Seal and Roderick Wright. Wright, a former state Senator, was convicted and ousted from the Senate in 2014 over alleged election law violations. Wright appeared before the board to speak on his own behalf.

At the marathon October BPH meeting a pardon request by recently released and still on parole former lifer Borey Ai elicited the greatest interest and participation, with dozens of speakers supporting Ai's request. Ai, a stellar programmer and inmate leader in San Quentin, faces deportation to Cambodia, a nation where he has never lived, without a pardon.

Ai's request was supported by numerous staff from programs at San Quentin, a parade of former lifers who had benefited from his mentorship and support and several attorneys. The pardon request, which would allow him to stay in the United States, was opposed by the DA from Santa Clara County and several relatives of the victim. Ai's request received a positive recommendation from the BPH.

## PREPARING FOR THE NEW LAWS

With changes in many laws resulting from legislative actions and new bills this session, LSA, along other groups and attorneys, is being inundated with requests on how to seek relief under these changes, especially SB 1437, along with some key questions, most especially, will LWOP inmates be able to seek recall of sentence under this bill. To which the answer is, yes, no and maybe, depending on who you ask. Some attorneys (and advocates) think the felony murder law change should apply to LWOPs while others say since that cohort is not named, either explicitly or inferred, the new law is not applicable to them. This will likely require court action to reconcile.

No matter what, none of the new laws go into effect until January 1, 2019, so to submit anything, to any agency, anywhere prior to that date is an exercise in futility, and will probably result in all documentation being returned to sender. Right now, the best advice most attorneys, who are seriously pouring over the new laws, again, especially SB 1437, is to begin gathering documents from the original criminal case. This could include abstract of judgement, charging documents, appellate decision and briefing if available, jury instructions, and trial transcripts. Start with these and any other documents that might be relevant; at this point having a glut of information is preferable to not having enough and starting now may enable some to obtain copies of such esoteric documents as jury instructions, as well as those cumbersome transcripts.

## ATTORNEY SURVEY

Life Support Alliance is seeking information on the performance and reliability of state appointed attorneys in the lifer parole hearing process. Please fill out the form below in as much detail as possible, use extra sheets if needed. Please include your name, CDC number and date of hearing, as this will allow us to request and review actual transcripts; your name will be kept confidential if you desire. Details and facts are vital; simple yes or no answers are not particularly helpful. Mail to PO Box 277, Rancho Cordova, CA. 95741. We appreciate your help in addressing these issues.

NAME\* \_\_\_\_\_ CDC #\* \_\_\_\_\_ HEARING DATE\* \_\_\_\_\_

COMMISSIONER\_\_\_\_\_ GRANTED/DENIED(YRS)\_\_\_\_\_

INITIAL/SUBSEQUENT (how many)\_\_\_\_\_ EVER FOUND SUITABLE/WHEN\_\_\_\_\_

ATTORNEY NAME:private/state\* \_\_\_\_\_ PRISON  
\_\_\_\_\_  
PET

MEET BEFORE HRG? (# of times, length)\_\_\_\_\_ HOW FAR IN ADVANCE OF HRG? \_\_\_\_\_

TIME SPENT CONSULTING\_\_\_\_\_ OBJECT TO PSYCH EVAL?\_\_\_\_\_

LANGUAGE PROBLEMS?\_\_\_\_\_ WAS ATTORNEY PREPARED?\_\_\_\_\_

DID S/HE BRING ANY DOCS NEEDED?\_\_\_\_\_ SUGGEST STIP/WAIVE?\_\_\_\_\_

### COMMENTS:

(Please provide details regarding attorney's performance, or lack of, including interaction with parole panel and/or any DAs and VNOs present. Was attorney attentive during pre-hearing meeting and hearing, did s/he provide support/advice to you? Was s/he knowledgeable re: your case and/or parole process? Had s/he read your C-file before meeting with you? )