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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.

CA SUPREMES: LIFERS GET ZERO CREDITS FOR WRONGFUL, UNLAWFUL OVERINCARCERATION BY GOVERNOR

In re Johnny Lira
Cal. Supreme Ct; ---Cal.4th---, Case No. S204582
February 3, 2014

In a unanimous decision, the California Supreme Court held that when a court reverses a Governor's reversal of a Board grant of parole, and reinstates that earlier grant retroactively, the extra time you spent in prison litigating that result has no value whatsoever as credit against your parole tail. Stated another way, the CA Supreme Court announced that no matter how abusive a Governor's reversal may be found to be, e.g., reversing the Board hypothetically solely because of, say, politics or personal animus, the eventual judicial relief granted challenging that abuse cannot include credits for the years of wrongful incarceration you spend litigating to gain it.

The question came up when Johnny Lira won relief from the Sixth District Court of Appeal, seeking credit against his five-year parole tail for those years spent litigating his excess incarceration following the reversal by the Governor of his grant of parole, after the courts retrospectively reversed the Governor. The Supreme Court framed the question thusly:

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A life inmate is found suitable for parole and given a parole date by the Board of Parole Hearings (the Board). The Governor reverses the grant of parole, the inmate challenges the reversal by petition for writ of habeas corpus, and while the petition is pending the Board again finds the inmate suitable and sets another parole date. The Governor does not review the second decision, and the inmate is released from prison, subject to a maximum five-year parole term under the applicable statute. If the court subsequently grants relief on the inmate's habeas corpus petition and overturns the Governor's earlier reversal for want of supporting evidence, is the inmate entitled to credit against his parole term for the time he spent in prison between the erroneous reversal and his eventual release? We conclude he is not.

For normal mortals, i.e., those convicted of *non*-life crimes, the law has long been that if you are found by a court to have been excessively incarcerated (for *any* reason), the excess incarceration will first be credited against any time you yet owe on another sentence, with any remnant to be used to offset your parole tail. (See, generally, PC § 2900.5.)

For the above class of non-life persons, PC § 3001 announces their periods of parole (depends on the type of crime). But § 3001 states that this is for successfully completing *continuous periods of parole* – i.e., no violations.

Enter another class of prisoners: lifers convicted of *murder* committed after 1982. These souls are exposed not to PC 3001, but to another statute, PC § 3000.1. That statute announces that while these individuals are *subject* to a lifetime parole, they "shall" be discharged after 5 years (2d degree murder) or 7 years (1st degree murder) of *continuous* parole since release.

Yet a third class of prisoners is identified: lifers convicted of *murder* committed *before* 1983. They fall under PC § 3001 et seq., and cannot be held on parole longer than five years, period.

For the second group above (life parole top), the Sixth District Court of Appeal held in *In re Chaudhary* (2009) 172 Cal.App.4th 32, that the phraseology "continuous years on parole" in PC § 3000.1 foreclosed Mr. Chaudhary from gaining any credits against his parole tail, after that court held that his earlier Governor reversal was unlawful, following which the court reinstated his original parole date.

The California Supreme Court looked to *Chaudhary* as precedent for deciding *Lira's* case, even though *Lira* did not fall under the ambit of PC § 3000.1. Finding that *Chaudhary* had nothing coming, they accorded the same absence of benefit to *Lira.*

Lira's effort to shorten his parole term based on the asserted unlawfulness of the portion of his term of imprisonment that followed the Governor's 2009 reversal also runs afoul of the rule that a parole term begins only after release from prison. In *In re Chaudhary* (2009) 172 Cal.App.4th 32, a life prisoner sentenced after 1983 was subject under section 3000.1 to a lifetime parole term, with eligibility for discharge " 'when [he] has been released on parole from the state prison, and has been on pa-

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.

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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.

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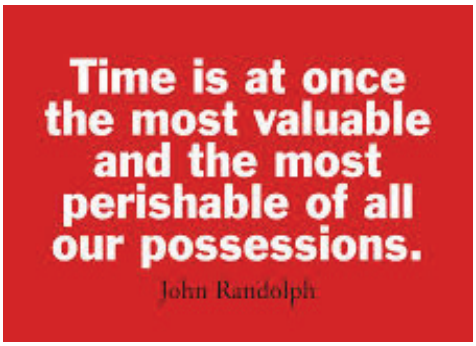
role continuously for . . . five years . . . since release from confinement . . . .' " (*In re Chaudhary, supra*, at p. 37, quoting § 3000.1, subd. (b).) As in this case, the prisoner's release was delayed while the Governor's reversal of the parole grant was being litigated; the reversal was eventually set aside on appeal, leading to the prisoner's release on parole. The prisoner claimed credit against his parole term for the period between when his parole grant would have taken effect and his actual release date. The Court of Appeal rejected the claim, noting that "[s]ection 3000.1's five-year parole discharge eligibility requirement is expressly limited to the period of time after the parolee 'has been released on parole' and requires that the parolee serve five continuous years on parole 'since [the parolee's] release from confinement.' " (*In re Chaudhary, supra*, at p. 37.) The court added: "By placing these explicit limitations on the parole discharge eligibility requirement, the Legislature made unmistakably clear that a parolee must first have 'been released on parole' and must then complete five continuous years on parole after the parolee's 'release from confinement.' This intent explicitly precludes the application of any time spent in custody prior to release to satisfy any part of section 3000.1's five-year parole discharge eligibility requirement." (*Ibid.*; see also *In re Gomez* (2010) 190 Cal.App.4th 1291, 1310.)

Although this case does not involve section 3000.1's five-year minimum parole discharge eligibility requirement in the context of a potential lifetime parole period, the language of the portion of former section 3001, subdivision (b) pertinent to this case is similar, and the *Chaudhary* court's analysis is therefore relevant and persuasive. In our view, Lira's argument (that a court's subsequent decision that the Governor's reversal was unsupported by some evidence rendered unlawful his custody during the intervening period, retroactively necessitating a credit against his parole term) would undermine the Legislature's intent in requiring the service of three continuous years of parole after release from confinement and therefore must be rejected. (Former § 3001, subd. (b).)



Yet, inconsistently, the underlying language "continuous years on parole" that the Court focused on also appears in the language of PC § 3001, which *does* permit retroactive parole credits for excess incarceration to *non*-lifers pursuant to PC § 2900.5. Indeed, the Court relied upon a truly incredible statement found in *In re Chaudhary*, *supra*, 172 Cal.App.4th at p. 38: "There is no way to apply 'credits' to a lifetime parole period." Apparently, the court turned a blind eye to the daily process of the Board which has no difficulty crediting one's good time to calculate an MEPD on a life sentence, or to the trial court's abstract of judgment, which declares the pre-prison credits applicable to the then-pronounced life sentence.

While we have to accept the highest court in the State's interpretation of existing statutes, their conclusion does little here to inspire confidence in the Court's oath to render justice. The *Lira* decision amounts to an *absolute bar* to gaining any kind of credits for any manner of wrongful incarceration, solely because you are (or, more precisely, *were*) a lifer.

While *Lira's* wrongful reversal by the Governor was not egregious in nature, the question leaves one with a pit in their stomach as to how bad things could get for lifers' gubernatorial reviews of parole grants. What if, hypothetically, a Governor reversed a grant of parole unlawfully based upon political sway during an election, or based upon personal animus, or upon personal favoritism (the recent pardon of the son of the head of the CA Legislature comes to mind), or something totally off the hook, such as ethnicity or creed? It is settled that you cannot sue the Governor for money damages (absolute immunity applies), but now, neither can you recover in any way for the excess time you were thus unlawfully held behind bars.

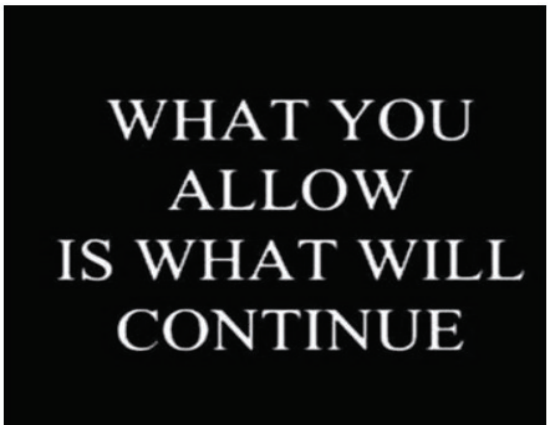
In short, the *Lira* decision elevates the office of Governor to Emperor. The Governor may unilaterally commit you to prison unlawfully, for any reason or for no reason at all, from which no temporal relief lies upon a successful court attack of that commitment.

Moreover, the Court had the temer-

LIRA cont. pg. 7

POPULATION CAP— FINAL DECISION

Is the glass half-full or half- empty? Depends on whether you're looking from the top down or bottom up.



February 11, 2014

True to their word the three federal judges adjudicating the population cap in California prisons rendered their latest and final decision on how long the state can take to reach that court-ordered level. The court has allowed the state until Feb. 28, 2016 to reach a total prison level in state prisons of 112, 547 inmates. The judges, Steven Reinhardt, Circuit Judge of the Ninth Circuit Court of Appeals; Lawrence Karlton, Senior District Judge of the Eastern District of California; and Thelton Henderson, Senior District Judge, Northern District of California, issued both an order and accompanying opinion, spelling out in significant detail why they agreed to the two year plan.

This date is in line with the Brown administration's latest request for a two year extension, following the denial of his earlier request for a three year time frame. The decision and accompanying order list a series of three bench-mark dates the state must reach on the way to the final population number, and assesses non-negotiable actions if the state fails at any of those benchmarks.

Of most interest to CLN readers are those court-ordered actions that will impact lifers. There are basically three: promotion of an elder parole hearing schedule, expanded perimeters for medical parole and an ersatz-early release, advanced release for those already found suitable but with a date calculated in the future.

As this is being written, only a few hours after the order and decision was announced, there are as yet no details on how these programs would be implemented, nor how soon or how many prisoners may be affected by them. We have reached out to BPH officials for clarification and details, as they become available.

As part of the agreement, and one of the reasons the judges agreed to the two year plan, the state has agreed not to continue litigating against the court population cap order and will immediately begin to implement many of the changes listed. "[B]elated though it may be," the judges noted the state now shows signs of being willing and able to achieve what the court and prisoner attorneys have long sought, a durable solution to the overcrowding. Reluctant though the judges stated themselves to be to grant an additional delay, they weighed the worth of immediately implemented reforms against the harm continued delay could cause. By grating the 2 year window and accepting the state's promise not to continue to challenge the population cap the court effectively does away with the continued legal battle and can monitor the implementation of tangible reforms, set into place right away.

Although the court agreed to a two year plan, it did not let the state, or even the court itself, off without trenchant comment. "We recognize that these measures should have been adopted much earlier, that the plaintiff's lawyers have made unceasing effort to obtain immediate relief on be half of their clients, and that California prisoners deserve far better treatment than they have received from defendants over the past 41/2 years," the court noted. The judges also commented on the cost to California taxpayers of the "unyielding resistance" of the state to compliance with the court order.

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And the judges conceded to a bit of a mea culpa, admitting "Finally we recognize that this court must accept part of the blame for not acting more forcefully with regard to the defendants' obduracy in the face of its continuing constitutional violations." In other words, the judges regret they did not take Jerry to the woodshed sooner.

Regarding the Governor's threat to send thousands more state prisoners to out-state prisons the federal judges noted such action would be "neither durable or desirable" as a solution to overcrowding. And, importantly, they noted the adverse impact of such out state housing on both inmates and families, specifically mentioning that such housing deprives inmates of contact and support from their families, as well as costing the state unnecessary amounts of funds that could be better spent on reentry and rehabilitation programs.

And the court, noted , part of the durable reforms proposed may include the study and reform of California's penal code and sentencing laws, although late in the day of the decision Brown's spokesman cautioned that while such reform had been discussed, it had not been ordered by the judges or agreed to by the administration. The proposed sentencing reform commission is the favored idea of Senate President Pro-Tem Darrell Steinberg, who proposed the action last summer.

Also ordered and agreed to are new procedures to bring non-violent second strikers to parole hearings after they have served 50% of their sentence, increase good-time credits for non-violent second strikers, and adding more women to those participating in alternative custody program for females. However, other proposals would simply increase the number of beds available for state prisoners, through expansion of the new Stockton medical facility, continue to allow up to 8,900 state prisoners to be housed in out of state prisons, reopen the defunct Northern California Re-entry Facility in Stockton and continuing to rent space from county and city jails.

The agreement would also allow CDCR to construct about 2,400 new beds at two existing prisons (RJD and MCSP), continue to ship inmates off to a formerly private prison near California City, now run by the state, and continuing the operation of Norco State Prison, once slated for closure due to its decrepit condition. Although not sanctioning the construction of new prisons, the court ruling does allow the Brown administration wiggle room in creating more in-state beds.

The state must meet three benchmark dates and population goals in order to comply with the agreement and order. The dates and numbers are:

1. 143% of design capacity by June 20, 2014
2. 141.5% of design capacity by Feb. 28, 2015
3. 137.5% of design capacity by Feb. 20, 2016.

At present the state has 34 prison facilities, not counting newly opened or soon-to-open facilities and private prisons housing state inmates. Those facilities' design capacity has been calculated at 81,574 prisoners. By setting a cap at 137.5% of capacity the judges would allow the state to house 112,164 inmates in state-run facilities. At present the 34 state prisons have a total population of about 117,500.

Perhaps the biggest stick yet hanging over Brown's head, to make sure he complies with the agreement, is the looming appointment of a Compliance Officer, who will have the power and authority to release the necessary number of inmates to meet those levels if the state falls 30 days behind meeting any of the benchmarks. No word as yet on just who this person may be, but the judges urged opposing sides to agree on a nominee, noting if there is no agreement both sides may submit two names each and the court will select the officer. All this will be accomplished within the next 60 days, thus assuring the Compliance Officer is in place prior to the first looming benchmark, less than 4 months away.

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The judges also reserved for themselves (as "the court") the authority to oversee the population reduction efforts long enough to be sure the benchmarks are met and the results appear to be "durable." Clearly, these judges do not want to find themselves or colleagues in a similar position in coming years.

Predictably, both sides of the debate found something to hate. Attorney Michael Bien, who has and still represents prisoners suing the state regarding medical and mental treatment, called the two year extension "dangerous and unjustified." Prison Law Office director Don Spector said "We're disappointed that the court didn't order the state to comply with the Supreme Court's order more quickly." He added no decision had yet been made by prisoner attorneys on whether or not to appeal the decision, an appeal that would go immediately to the United States Supreme Court.

On the other side, state Sen. Jim Nielsen, once chair of the then-Board of Prison Terms and constant opponent of any inmate releases (even on parole), characterized the order as "tragic; it turns our justice system upside down. Once released, these dangerous felons will threaten our local communities, where residents are already suffering from increased crime and where police agencies are overburdened," he continued. Apparently the Senator has not yet read any of the several reports recently released by CDCR and other reporting agencies and venues, who find the situation rather different.

As more details of the proposed changes are rolled out CLN will keep our readers apprised of how these will affect lifers. We have already reached out to sources in the BPH to learn how and when the new proposed elder parole hearings will be held, what the new criteria for expanded medical parole will look like and how many already suitable inmates may see an advance in their release dates.

LIRA from pg 3

ity to refer to such unlawful excess incarceration as "a temporary infringement." This writer suffered a *three year* "temporary infringement" from excess, unlawful incarceration, as adjudicated in *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256-257, but was denied parole credit relief thereafter.

> Lira fails to show he has a fundamental right to credit against a legislatively prescribed period of parole supervision as a judicial remedy for a temporary infringement of his right to a factually supported suitability decision by the executive branch.

The U.S. Supreme Court has held, "Habeas corpus is, at its core, an equitable remedy." (*Schlup v. Delo* (1995) 513 U.S. 298, 319.) But there is nothing "equitable" about such an irremediable "temporary infringement" of one's liberty.

At the very least, if *Lira* is now the settled judicial interpretation of existing law, the Legislature needs to revisit those laws and properly accord lifers unlawfully incarcerated from errant gubernatorial reviews of their grants of parole the same credit consideration it accords non-lifers under PC § 2900.5 et seq.

The only people you should try to get even with are those who have helped you.

PLATA COURT GRANTS TWO-YEAR EXTENSION TO POPULATION REDUCTION SCHEDULE

Plata v. Brown
USDC (N.D. Cal.)
Case No. C01-1351 TEH
February 10, 2014

CDC won a great victory in the ongoing battle against cutting the prison population. The following Order and Opinion were issued on January 14, 2014, which extend until for two more years the time to achieve a 137.5%-of-capacity population cap. By this approved plan, CDC may either build its way out of excess population, release more prisoners earlier, or a combination of these techniques.

Of greatest concern to CLN readers is the effect, if any, on lifer paroles. Since the order makes no change to the procedure by which lifers are found suitable by the Board, the short answer, in this writer's opinion, is that there is no real change for lifers. In a more selective reading, a few lifers will gain substantive relief. (1) The terminally ill will gain a more expedient procedure to having their compassionate release applications processed. (2) Lifers over age 60, with at least 25 years in, will gain an earlier initial parole hearing if they have not already had one. (3) Lifers with prospective dates (i.e., were found suitable and were blessed by the Governor, but await completion of their terms) will gain immediate release.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' REQUEST FOR EXTENSION OF DECEMBER 31, 2013 DEADLINE

WHEREAS the Court has read and considered the parties' filings in response to this Court's January 13, 2014 Order;

WHEREAS defendants have represented that, in conformance with the terms of this order, they will develop comprehensive and sustainable prison population-reduction reforms and will consider the establishment of a commission to recommend reforms of state penal and sentencing laws;

WHEREAS defendants have represented that they will not appeal or support an appeal of this order, any subsequent order necessary to implement this order, or any order issued by the Compliance Officer to be appointed in conformance herewith that is consistent with the duties of the Compliance Officer as specified in this order, and will not move or support a motion to terminate the relief contained in this order until at least two years after the date of this order and such time as it is firmly established that compliance with the137.5% design capacity benchmark is durable;

WHEREAS this order is issued in reliance on defendants' representations; and

WHEREAS the Court finds that the order below is narrowly tailored to the constitutional violations identified by the Plata and Coleman courts, extends no further than necessary to remedy those violations, and is the least intrusive possible remedy.

PLATA-POP CAP from pg.7

IT IS HEREBY ORDERED that:

1. The Court GRANTS defendants' request for an extension of time, but only to February 28, 2016, to comply with this Court's June 30, 2011 Order to reduce California's prison population to 137.5% design capacity.
2. The deadline to achieve the ordered reduction in the in-state adult institution population to 137.5% design capacity is extended to February 28, 2016. Defendants will meet the following interim and final population reduction benchmarks:
(a) 143% of design bed capacity by June 30, 2014;
(b) 141.5% of design bed capacity by February 28, 2015; and
(c) 137.5% of design bed capacity by February 28, 2016.
3. During the extension period, and as long as this Court maintains jurisdiction, defendants shall not increase the current population level of approximately 8,900 inmates housed in out-of-state facilities. Defendants shall also explore ways to attempt to reduce the number of inmates housed in out-of-state facilities to the extent feasible.
4. The Court acknowledges that defendants intend to comply with this order in part through a combination of contracting for additional in-state capacity in county jails, community correctional facilities, and a private prison, and through newly enacted programs including the development of additional measures regarding reforms to state penal and sentencing laws designed to reduce the prison population. Defendants shall also immediately implement the following measures:

(a) Increase credits prospectively for non-violent second-strike offenders and minimum custody inmates. Non-violent second-strikers will be eligible to earn good time credits at 33.3% and will be eligible to earn milestone credits for completing rehabilitative programs. Minimum custody inmates will be eligible to earn 2-for-1 good time credits to the extent such credits do not deplete participation in fire camps where inmates also earn 2-for-1 good time credits;
(b) Create and implement a new parole determination process through which non-violent second-strikers will be eligible for parole consideration by the Board of Parole Hearings once they have served 50% of their sentence;
(c) Parole certain inmates serving indeterminate sentences who have already been granted parole by the Board of Parole Hearings but have future parole dates;
(d) In consultation with the Receiver's office, finalize and implement an expanded parole process for medically incapacitated inmates;
(e) Finalize and implement a new parole process whereby inmates who are 60 years of age or older and have served a minimum of twenty-five years of their sentence will be referred to the Board of Parole Hearings to determine suitability for parole;
(f) Activate new reentry hubs at a total of 13 designated prisons to be operational within one year from the date of this order;
(g) Pursue expansion of pilot reentry programs with additional counties and local communities; and
(h) Implement an expanded alternative custody program for female inmates.
5. Defendants will report to this Court monthly on the status of measures being taken to reduce the prison population, and on the current in-state and out-of-state adult prison populations. The first report shall be submitted on the 15th of the month following the date of this order and shall continue until further order of the Court.
6. The Court will appoint a Compliance Officer for the purpose of bringing defendants into compliance with any missed benchmark by ordering inmate releases. If compliance with any benchmark is not achieved within a 30-day period following the expiration of any missed benchmark, the Compliance Officer shall, within seven days, direct the release of the number of inmates necessary to achieve compliance with the missed benchmark and the measures to be followed in selecting the prisoners to be released. The authority of the Compliance Officer shall extend no further than ordering defendants to release inmates necessary to ensure defendants' compliance with any missed benchmark.
(a) In selecting inmates for release, the Compliance Officer shall consider public safety by minimizing any risk of violent re-offense. The Compliance Officer shall not be authorized to order the release of condemned inmates or inmates serving a term of life without the possibility of parole.

PLATA-POP CAP from pg. 8

(b) The Compliance Officer shall have access to all necessary CDCR data and personnel regarding the California prison population, including population projections, risk assessments, recidivism data, statistical data, and prisoner files, and shall receive administrative support from CDCR to the extent needed to carry out the Compliance Officer's duties. In addition, the Compliance Officer may engage the services of a part-time assistant and/or a part-time secretary upon a showing of good cause within the discretion of this Court at a rate of pay to be approved by this Court should the parties disagree. If the Compliance Officer finds good cause to question the accuracy of any data presented to him or her, the Compliance Officer shall have the authority to verify the accuracy of such data.

(c) The Compliance Officer shall be compensated for all work or services necessary to ensure compliance with a benchmark, should a benchmark be missed, and all work or services necessary to verify the accuracy of any data presented to him or her by the CDCR, should the Compliance Officer find good cause to question the accuracy of such data. Defendants shall reasonably compensate the Compliance Officer on an hourly basis and for reasonable expenses, and the provisions of 18 U.S.C. § 3626(f) shall not apply.

7. The Compliance Officer shall retain all powers, access to information, and compensation granted under this order after the final 137.5% benchmark is reached and until it is firmly established that defendants' compliance with the 137.5% benchmark is durable. During this period after compliance with the final benchmark and before such compliance is durable, if two of defendants' monthly reports, consecutive, report a prison population above 137.5% design capacity, the Compliance Officer shall, within seven days, direct the release of the number of inmates necessary to bring the prison population to 137.5% design capacity.

8. The parties shall meet and confer to attempt to make a joint recommendation to the Court regarding the selection of the Compliance Officer and an appropriate hourly rate of compensation, which may be subject to increase annually. If the parties are not able to agree, they may each recommend up to two candidates for the Court's consideration and a proposed hourly rate. The parties shall file their recommendations, including a description of any recommended candidate's qualifications and an explanation of any proposed hourly rate, within 30 days of the date of this order. The selection of the Compliance Officer and compensation rate rests solely within the Court's discretion, and the Court will not be limited to the parties' recommendations, whether separate or joint.

9. To the extent that any state statutory, constitutional, or regulatory provisions, except the California Public Resources Code, impede the implementation of this order or defendants' ability to achieve the population reduction benchmarks, all such laws and regulations are waived. Although the Court does not issue a general waiver of the Public Resources Code, defendants may request waivers, as the need arises, of these statutory provisions that are tailored to specific projects.

10. This Court shall maintain jurisdiction over this matter for as long as is necessary to ensure that defendants' compliance with the 137.5% final benchmark is durable, and such durability is firmly established.

11. Defendants shall, within 60 days of the date of this order, file with the Compliance Officer under seal, the categories of prisoners who are least likely to reoffend or who might otherwise be candidates for early release (the "Low Risk List") that this Court previously ordered them to create. The Low Risk List shall not be viewed by the Compliance Officer unless and until he or she is ordered

PLATA-POP CAP from pg. 9

to do so by this Court. Similarly, this Court will not inspect the list unless circumstances so warrant. Defendants shall file an amended list every 60 days, should changes to the list become appropriate.
IT IS SO ORDERED.

OPINION RE: ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' REQUEST FOR EXTENSION OF DECEMBER 31, 2013 DEADLINE

In August 2009, this Court ordered defendants to reduce the California prison population to 137.5% design capacity in order to remedy the unconstitutional condition of mental and medical health care in California prisons. Today, the prison population remains above 144% design capacity. Yet, it is at least as important now as it was then for the prison population to be reduced to the limit ordered by this Court. In fact, it is even more important now for defendants to take effective action that will provide a long-term solution to prison overcrowding, as, without further action, the prison population is projected to continue to increase and health conditions are likely to continue to worsen. Since 2009, more and more states have come to recognize that, properly handled, the release of prisoners held past the time necessary to serve the purposes of their incarceration will not result in danger to the community, but rather may actually benefit both the prisoners and their communities. Despite this fact, defendants have consistently refused to take measures to reduce the California prison population. In the four and a half years between our 2009 order and the date of this opinion, defendants have instituted only one significant measure to relieve overcrowding in California prisons: "Realignment," a program that shifted responsibility for criminals who commit non-serious, non-violent, and non-registerable sex crimes from the state prison system to county jails. Apart from Realignment, defendants have taken no significant steps toward reducing the prison population and relieving overcrowding despite repeated orders by this Court requiring them to do so. Instead, defendants have continually failed to implement any of the measures approved by this Court and the Supreme Court that would have safely reduced the California prison population and alleviated the unconstitutional conditions of medical and mental health care in the prisons.

Defendants now request an extension of time within which to comply fully with the population reduction order. We are presented with two options. Plaintiffs have proposed that we deny defendants' request for an extension and order defendants to comply immediately. Pursuant, however, to a recently enacted statute, Senate Bill 105 ("SB 105"), defendants have informed this Court that, if instructed to comply immediately, they will doso by sending thousands of California prisoners to out-of-state facilities. This solution is neither durable nor desirable. It would result in thousands of prisoners being incarcerated hundreds or thousands of miles from the support of their families, and in hundreds of millions of dollars that could be spent on long-lasting prison reform being spent instead on temporarily housing prisoners in out-of-state facilities. Moreover, we have consistently demanded a "durable" solution to California prison overcrowding, and plaintiffs' proposal does not help to achieve that solution. See Apr. 11, 2013 Opinion & Order at 69 ("It is [the] long-term obligation that defendants must bear in mind in achieving a 'durable remedy' to the problem of prison crowding."); June 20, 2013 Opinion & Order at 45 ("What is necessary is a 'durable' solution to the problem of overcrowding if the underlying problem of the deprivation of prisoners' constitutional rights is to be resolved."); Sept. 24, 2013 Order to Meet and Confer (ordering the parties to explore "how this Court can ensure a durable solution to the prison crowding problem").

In contrast, belated as it may be, defendants appear to be prepared to take the necessary steps toward achieving a durable solution, without additional costly and wasteful litigation and delay. They have proposed an order whereby they will be granted a two-year extension in which they will comply fully with the population reduction order of June 30, 2011, and the population will be reduced in three stages, or "benchmarks" – first in June of this year, second in February 2015, and third and finally in February 2016. For the first time under this order, there will be an effective mechanism which will ensure that these benchmarks are met: a "Compliance Officer" who will have the authority to release prisoners should defendants fail to

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reach one of the benchmarks, with the number of prisoners released being the number necessary to bring defendants into compliance with the missed benchmark.

Further, during these two years, defendants have agreed to develop comprehensive and sustainable prison population-reduction reforms, including considering the establishment of a commission to recommend reforms of state penal and sentencing laws. They have also agreed to immediately implement various population reduction measures, such as increasing good time credits prospectively for non-violent second-strike offenders and minimum custody inmates, implementing a new parole determination process by which second-striker offenders will be eligible for parole after serving only 50% of their sentence, and expanding parole for the elderly and medically infirm. In addition, as provided by SB 105, the two-year extension will allow for hundreds of millions of dollars to be allocated to a "Recidivism Reduction Fund" for activities designed to reduce the state's prison population, including but not limited to, reducing recidivism. Finally, defendants have represented to this Court that, if a two year extension is granted, they will not appeal or support an appeal of the order granting the extension, or of any of its provisions; nor will they appeal or support the appeal of any subsequent order necessary to implement the extension order or any of its provisions, nor any order issued by the Compliance Officer pursuant to the authority vested in him by the extension order; nor will they move or support a motion to terminate any relief provided for or extended by the extension order or any of its provisions until at least two years after the date of the extension order and such time as it is firmly established that compliance with the 137.5% design capacity benchmark is durable. This should bring to an end defendants' continual appeals and requests for modification of this Court's orders.

Thus, while we are reluctant to extend the deadline for two more years, we also acknowledge that defendants have agreed that, with such an extension, they will implement measures that should result in a durable solution to

BPH RECONSIDERS AND DODGES BULLET IN PETITION CHALLENGING DENIAL OF 1045(A) ADVANCEMENT

In re John Field
CA 4(1); Case No. D063227
December 18, 2013

John Field had petitioned the court for relief from a BPH denial of his application to advance his next parole hearing (BPH form 1045(a)). After the court had issued an Order to Show Cause, the Board gave in and granted an advancement, thereby mooting Field's petition.

Field was convicted of first degree murder in 1992 and sentenced to 27-life. At his 2009 parole hearing, he was denied five years. In 2012, he filed a 1045(a) advancement petition, which the Board denied. He took a writ petition to the superior court, which denied relief. On his subsequent petition to the Court of Appeal, the Court issued and OSC and appointed counsel.

Field had challenged his denial as *ex post facto*. However, in the intervening period, *In re Vicks* came out, trashing lifer *ex post facto* complaints. However;

> Field's habeas corpus petition also asserted he adequately demonstrated new information or changed circumstances, and therefore the BPH's summary denial of his petition to advance his next parole suitability hearing to an earlier date was a manifest abuse of discretion (§ 3041.5, subd. (d)(2) [BPH decision on request made pursuant to subdivision (d)(1) "shall be subject to review by a court or magistrate only for a manifest abuse of discretion by the board"]), denying him due process, and he therefore continued to pursue this writ seeking an order requiring the BPH to set an advanced hearing date.

But in the interim, the matter became moot when the BPH capitulated ("reconsidered").

> However, we are informed by the parties that the BPH reconsidered its summary denial of his petition to advance his next parole suitability hearing to an earlier date and, on August 1, 2013, the BPH approved Field's application for an advanced parole suitability hearing date. Accordingly, even were we to rule that Field's petition for an advanced hearing date should have been granted by the BPH, that ruling would have no impact because the relief he sought--an order requiring the BPH to advance his next suitability hearing for a date earlier than the due course suitability hearing--has al-

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ready been provided by the BPH. We therefore agree with the People that the proper disposition is to discharge the order to show cause and dismiss the petition as moot.

DISPOSITION

The order to show cause is discharged and the petition is dismissed.

To the BPH's great credit, they have been granting many advancements, both *sua sponte* and in response to compelling 1045(a) applications.

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THE DISPARITY IN LIFE SENTENCES BETWEEN "OLD" LIFERS AND "NEW" LIFERS IS WIDENING

The term "old" lifers has commonly been used to refer to those whose crimes were committed under the old (pre-1977) ISL (Indeterminate Sentence Law). Today, a new meaning is becoming apparent, due to radical changes in "enhancements" to convictions resulting in "new" life sentences. This change will affect the business of the Board in future parole hearing planning.

The change is that a great number of men and women are entering (or re-entering) prison with monstrously long life-top sentences – often many *times* longer than those imposed for "old" lifers, or even later lifers sentenced prior to enactment of Three Strikes and gun/gang enhancement laws.

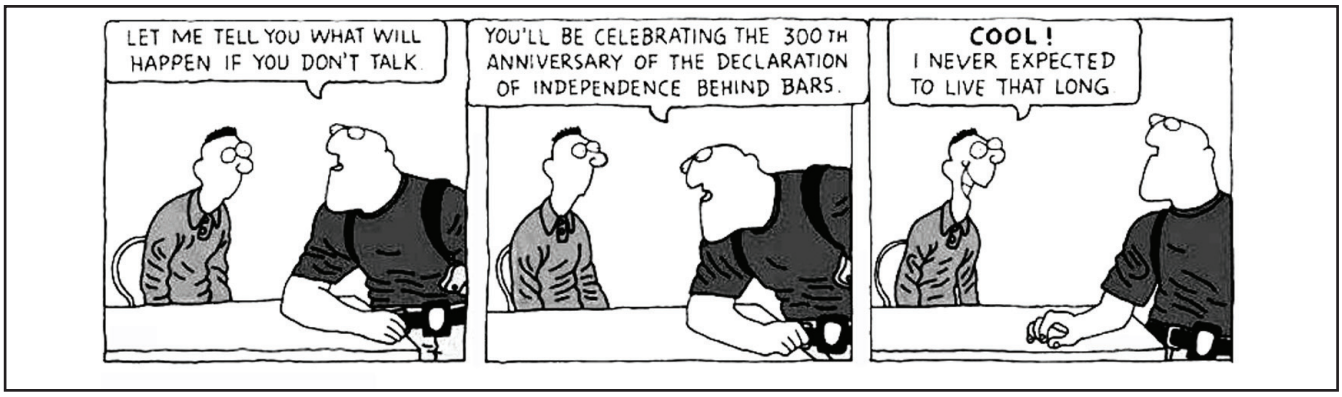
This writer reviews the daily summaries of appellate decisions, and notes the large number of cases wherein the prisoner, often guilty of a murder or attempted murder, is sentenced to at least 50 years to life, and often 75-150 years to life. Yet, these crimes are not so different from the ones that "old" lifers are gaining release on parole from today.

A "typical" "old" lifer has a single murder with a gun enhancement. The base sentence is either 7-life, 15-life, or 25-life. But the *enhancement* for the use of a gun adds a *consecutive 25 years to life* – mandatory by law – rather than the old 2-year determinate enhancement. Thus, for example, a second degree murder with use of a gun that was 15-life, plus 2 for the gun, and which had a 1/3 credit grant to reach one's MEPD in 10 years (plus 1 year for the gun), today calculates at 15 + 25, or 40 years to life, with 100% of 40 years to be served before reaching one's MEPD. This difference, from 10 years to 40 years, leaves the Board with a growing hole in its lifer hearing schedule for the next three decades.

And that's if you don't have mandatory consecutive Three-Strikes time. Even "just" a two-strikes doubling of your sentence can take the new "norm" of 40-life for a second degree gun murder to a non-survivable 80-life.

Things only get worse if you have other enhancements, such as for the purpose of abetting gang activities. And that's assuming you don't qualify for "special circumstances," from which you will get LWOP *plus* all of the enhancements, bowlegged.

The message here is simply a word to the wise. For those who are currently serving survivable "old" life sentences, count your blessings and work diligently to make the changes the Board wants to see in you to grant your parole. For those now on the streets, or paroling to the streets, the chances of *ever* getting out of prison alive upon suffering a new violent crime conviction are rapidly diminishing.



THREE-STRIKER WINS APPEAL CHALLENGING DOMESTIC BATTERY AS A THIRD STRIKE

People v. Martin Contreras
CA 4(3), ---Cal.App.4th ---; Case No. G047603
November 18, 2013

Martin Contreras won his direct appeal of his 25-life sentence for a third strike of violation of PC 273.5(a), felony domestic battery resulting in a traumatic condition, which was imposed before Prop. 36 was passed. Because his appeal was still pending, he was able to claim retroactive application of Prop. 36 and gain resentencing.

A jury found defendant guilty of domestic battery resulting in a traumatic condition, a felony (Pen. Code, § 273.5, subd. (a)), and misdemeanor assault (§ 240). In a bifurcated proceeding, the court found true that defendant was previously convicted of two prior strikes (§§ 667, subds. (d), (e)(2)(A), 1170.12, subd. (b)(C)(2)(A)), both of which were robberies (§ 211), and three prison priors (§ 667.5, subd. (b)). The court struck the prison priors and sentenced defendant to an indeterminate prison term of 25 years to life pursuant to the "Three Strikes" law then in effect.

This appeal concerns only defendant's sentencing. Less than one month after defendant was sentenced, and thus before the judgment was final, the California electorate approved Proposition 36, the Three Strikes Reform Act of 2012 (Reform Act), which provides that, with certain exceptions, a three strike term of 25 years to life may be imposed only if defendant's current offense is a serious or violent felony. Domestic battery resulting in a traumatic condition is not deemed a serious or violent felony. (see §§ 667.5, subd. (c), 1192.7, subd. (c).) Defendant contends that under the analysis set forth in *In re Estrada* (1965) 63 Cal.2d 740 (Estrada), the more lenient sentencing change applies retroactively to defendant and he is entitled to be resentenced. We agree and remand for resentencing. ...

After extensive discussion, the Court of Appeal concluded:

In sum, we find no indication in the [Prop. 36] Reform Act that the electorate intended it solely to operate prospectively. Accordingly, under *Estrada* the Reform Act applies retroactively to all non final judgments, and defendant is entitled to be resentenced.

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APPELLATE COURTS CONTINUE TO DECLINE PROP. 36 RELIEF TO NON-QUALIFYING APPLICANTS

Prisoners sentenced to life-terms under the Three Strikes law continue to pepper the appellate courts with requests for relief under Prop. 36, even though it is plain that they are barred because of prior serious/violent convictions. CLN is summarizing some of these cases below in hopes of educating potential applicants of the futility of trying to gain relief when they simply do not qualify. The following excerpts are from recent court rulings, without identifying the names of the applicants.

Case No. 1

In 1997, appellant was convicted of first degree burglary (§ 459), forgery (§ 470), intimidation or dissuading a witness (§ 136.1, subd. (c)(1)), and grand theft of a firearm (§ 487, subd. (d)). Two prior serious or violent felonies and a prior prison term were found to be true. Appellant was sentenced to a total of 81 years to life, consisting of three consecutive terms of 25 years to life on the burglary, forgery, and dissuading a witness counts. On the burglary count, the court also imposed one year for the prior prison term enhancement (§ 667.5) and five years for the serious felony enhancement (§ 667, subd. (a)). A 25-years-to-life sentence for grand theft of a firearm was stayed. We affirmed. (*Citation*.)

On February 28, 2013, appellant filed a motion for resentencing under sections 1170.126, 667, subdivision (f)(2), 1385, and *People v. Superior Court* (Romero) (1996) 13 Cal.4th 497. The trial court denied the motion with prejudice because appellant was convicted of burglary, a violent felony under section 667.5, subdivision (c)(21), and therefore was ineligible for resentencing under section 1170.126. Section 1170.126 applies to a person serving an indeterminate life sentence imposed upon conviction of a felony or felonies not defined as serious or violent for purposes of the Three Strikes law; such a person may petition for a recall of sentence and request resentencing. (See § 1170.126, subd. (a) & (b).) Resentencing de-

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pends on meeting additional eligibility criteria and on the court's discretionary determination that it "would not pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (e) & (f).) ...

Appellant is not eligible for resentencing under 1170.126, subdivision (e) (1) because his current indeterminate life sentence is based on his conviction of two serious or violent felonies: first degree burglary, both a serious and a violent felony for purposes of the Three Strikes law (§§ 1192.7, subd. (c) (18) & 667.5, subd. (c)(21)), and intimidation of a witness, a serious felony (§ 1192.7, subd. (c)(37)).

Case No. 2

[Petitioner] was convicted in 1998 of multiple felonies, including carjacking (§ 215, subd. (a)), second degree robbery (§ 212.5, subd. (c)), vehicle theft (Veh. Code, § 10851, subd. (a)), felony evading a peace officer (Veh. Code, § 2800.2), and three counts of felony assault with a deadly weapon (automobile) on a peace officer (§ 245, subd. (c)). Among the multiple special allegations found true were three prior strike convictions (§ 1170.12) and four prior serious felony convictions (§ 667, subd. (a)). In January 1999, [he] was sentenced, inter alia, to two consecutive 25-years-to-life terms for carjacking and one count of felony assault with a deadly weapon (automobile) on a peace officer plus a consecutive 20-year term for the four 5-year serious felony enhancements. Judgment was affirmed by this court. ...

We find no arguable issue. Section 1170.126, subdivision (b), provides that "Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the [Reform Act]." (Italics added.) An inmate is "eligible for resentencing if: . . . The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are *not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7*." (§ 1170.126, subd. (e) (1), italics added.) [Petitioner]'s commitment offenses include two "violent felonies" under section 667.5, subdivision (c) and two "serious felonies" as defined under section 1192.7, subdivision (c), and he was not eligible for resentencing.

Case No. 3

Defendant ... appeals from a April 9, 2013 order denying his petition to be resentenced under Penal Code section 1170.126. We appointed counsel to represent defendant on appeal. After examination of the record, appointed appellate counsel filed an "Opening Brief" in which no issues were raised. Instead, appointed appellate counsel requested we independently review the entire record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. (See *Smith v. Robbins* (2000) 528 U.S. 259, 277-284.) On October 11, 2013, defendant filed a supplemental brief raising issues concerning the validity of his conviction and submitted documents indicating he had completed programs while in the state penitentiary.

His appeal is frivolous. The time to challenge the validity of his conviction expired 60 days after he was sentenced on April 3, 2001. No notice of appeal was filed and his conviction has been final for the last 12 and one-half years. (*In re Ronald E.* (1977) 19 Cal.3d 315, 322; *People v. Clark* (1938) 24 Cal. App.2d 302, 307.) And, he may not challenge the sufficiency of the evidence because he pled guilty, no contest or nolo contendre. (*People v. McCullough* (2013) 56 Cal.4th 589, 596; *In re Troy Z.* (1992) 3 Cal.4th 1170, 1180-1181.) Further, defendant cannot seek resentencing because he was previously convicted of attempted murder. Penal Code sections 1170.126, (e)(3), 667, subdivision (e)(A)(iv)(IV) and 1170.12 subdivision (subdivision (c)(A)(iv)(IV) bar resentencing. (*People v. Thomas* (2013) 214 Cal.App.4th 636, 639.)

Case No. 4

Appellant's position presents a unique situation that section 1170.126, subdivision (e) does not clearly address. Appellant's two prior strikes do not exclude him from consideration under section 1170.126, subdivision (e)(3) because robbery is not a disqualifying offense. However, Appellant's conviction for spousal rape would have rendered him ineligible for resentencing per section 1170.126, subdivision (e)(3) if it had been either his first or second strike. In other words, Appellant would have qualified as one of the "truly dangerous criminals" who would "receive no benefits whatsoever" under the Act. (Voter Information Guide, Gen. Elec., supra, argument in favor of Prop. 36, p. 52; see §§ 1170.126, subd. (e)(3).) Nevertheless, because Appellant's

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offense of spousal rape was one of his offenses leading to his current sentence, he argues that offense should play no role in determining his eligibility for resentencing. Appellant essentially argues he should not be considered a truly dangerous criminal because he committed rape as part of the offenses leading to his current sentence. We see no logic in this argument.

Because he was convicted of spousal rape, Appellant proved himself to be one of the truly dangerous criminals the Act was intended to keep in prison. Thus, it would be inconsistent with the Act's intent for the superior court to simply ignore Appellant's conviction for spousal rape in determining his eligibility for resentencing under section 1170.126. For this reason alone, we see no error in the court's denial of Appellant's petition for resentencing.

In addition, the text of section 1170.126 provides further support that the court correctly considered all felonies under which Appellant received an indeterminate life sentence. As the People point out, in submitting a petition for recall of sentence, a petitioner must disclose the offenses that led to his prior strikes and all of the currently charged felonies that resulted in an indeterminate life sentence under section 667, subdivision (e)(2) or section 1170.12, subdivision (c)(2). (§ 1170.126, subd. (d).) Thus, for Appellant's petition, he was required to list count 1 and count 5 because the court sentenced him to consecutive indeterminate life sentences for each of those counts. If the court was not to consider all the felonies that led to his sentence, there would little need to require all of them to be listed.

In addition, count 5 (spousal rape) is one of the enumerated felonies that section 1170.126, subdivision (e)(2) deems to render a petitioner ineligible for resentencing if it is one of the offenses leading to the current sentence. Spousal rape falls under both section 677, subdivision (e)(2)(C)(ii) and section 1170.12, subdivision (c)(2)(C)(ii). Accordingly, Appellant's current conviction for spousal rape made him ineligible for resentencing. (See §1170.126, subd. (e)(2).) It also is a serious and violent felony, making Appellant ineligible for resentencing under section 1170.126, subdivision (e)(1).

Case No. 5

Defendant was charged by information with possession for sale of a controlled substance. (Health & Saf. Code, § 11378, count 1.) It was further alleged that, in the commission of count 1, defendant was personally armed with a firearm. (Pen. Code, former § 12022, subd. (c).) In addition, it was alleged as to count 1 that defendant was previously convicted of a violation of Health and Safety Code section 11378, within the meaning of Health and Safety Code section 11370.2, subdivision (a). The information also charged defendant with possession of a firearm by a felon (Pen. Code, former § 12021, subd. (a)(1), count 2), and possession of methamphetamine while being armed with a loaded, operable firearm (Health & Saf. Code, § 11370.1, subd. (a), count 3). The information further alleged that defendant suffered two prior strike convictions (Pen. Code, §§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)), and that he had served four prior prison terms (Pen. Code, § 667.5, subd. (b)). A jury found defendant guilty of all counts.

The court sentenced defendant to a total term of 57 years to life in state prison. The sentence consisted of the indeterminate term of 25 years to life on count 1, plus three years pursuant to Health and Safety Code section 11370.2, subdivision (c), and one year on each of the four prison priors. The court sentenced him to four years on the armed allegation (Pen. Code, former § 12022, subd. (c)), but stayed that term under Penal Code section 654. On count 2, the court imposed a consecutive term of 25 years to life. On count 3, the court also imposed 25 years to life, but stayed that sentence pursuant to Penal Code section 654. The court subsequently struck the armed allegation under Penal Code former section 12022, subdivision (c).

On March 15, 2013, defendant filed an in pro. per. petition for resentencing under Penal Code section 1170.126. The court denied the petition on the ground that defendant's current conviction for possession of methamphetamine while being armed with a loaded, operable firearm (Health & Saf. Code, § 11370.1, subd. (a)) made him ineligible for resentencing under Penal Code section 1170.126, subdivision (e)(2). ...

[W]e have conducted an independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

PROP. 36 RESENTENCING REQUESTS DENIED FOR UNIQUE CASE-SPECIFIC REASONS

In the following cases, Prop. 36 resentencing requests were denied for various unique reasons, which may serve as illustrative examples to potential applicants

People v. Mark White

CA 4(1), ---Cal.App.4th ---;
Case No. D063369
January 28, 2014

This case takes on the question of whether "possessing a firearm" is the same as being "armed" with a firearm, as regards former and current laws relating to the Three-Strikes Act. The Court defined the question before it

> The principal issue we must decide is whether the armed-with-a-firearm exclusion applies to White so as to render him ineligible for resentencing relief under the Reform Act.

and announced its conclusion:

> We conclude the exclusion applies and, thus, the court properly denied White's petition.

The Court explained:

> In this case, Mark Anthony White is an inmate serving a 25-year-to-life sentence as a third strike offender under the pre-Proposition 36 version of the Three Strikes law following his current conviction of possession of a firearm by a felon (§ 12021, subdivision (a), hereafter section 12021(a)). For purposes of the Three Strikes law as amended by the Reform Act, this felony offense is not a violent felony within the meaning of section 667.5, subdivision (c), or a serious felony within the meaning of section 1192.7, subdivision (c).

White appeals an order denying a petition he filed under the Reform Act, in which he asked the trial court to recall his life sentence and resentence him as a second strike offender. In denying White's petition, the court found he was ineligible for resentencing relief because he was armed with a firearm during the commission of his current offense —possession of a firearm by a felon —within the meaning of the "armed with a firearm" exclusion set forth in sections 667, subdivision (e)(2)(C)(iii) (hereafter section 667(e)(2)(C)(iii)) and 1170.12, subdivision (c)(2)(C)(iii) (hereafter section 1170.12(c)(2)(C)(iii)), both of which are referenced in section 1170.126, subdivision (e)(2) (hereafter section 1170.126(e)(2)).

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White contends the court erred in denying his petition because (1) no sentence was ever imposed on him for being armed with a firearm; (2) the Reform Act "does not exclude the stand-alone offense of firearm possession because one is not 'armed' with a firearm during the commission of possession of that firearm"; (3) rules of statutory construction "dictate" that possession of a firearm is not a disqualifying offense because the plain language and syntactic structure of the armed-with-a-firearm exclusion set forth in section 667(e)(2)(C)(iii) "does not include 'possession' and it requires that the arming be anchored or tethered to an offense which does not include possession"; (4) the court's "literal and expansive interpretation" of the armed-with-a-firearm exclusion is "contrary to the intent and purpose underlying [the Act]"; and (5) "[a]nother significant reason to interpret the statute in favor of [White] is that the trial court still has discretion to deny relief if it determines that resentencing [him] would 'pose an unreasonable risk of danger to public safety' under section 1170.126[(f)]."

The Stanford Law School Three Strikes Project filed an amicus curiae brief in support of White, asserting that (1) "'[p]ossession' of a firearm is a separate distinct offense from being 'armed" with a firearm and from 'using' a firearm, and a conviction for 'possession' of a firearm does not disqualify a petitioner from relief under Prop[osition] 36"; (2) "[a]ny offense or conduct that disqualifies a petitioner from relief under Prop[osition] 36 must be 'pled and proven' by the prosecution"; and (3) Proposition 36 "only excludes offenses where the petitioner's firearm was connected to a separate underlying offe[nse]."

Following a lengthy analysis, the court held:

We hold that, where the record establishes that a defendant convicted under the pre-Proposition 36 version of the Three Strikes law as a third strike offender of possession of a firearm by a felon was armed with the firearm during the commission of that offense, the armed-with-a-firearm exclusion applies and, thus, the defendant is not entitled to resentencing relief under the Reform Act. We also hold that, in such a case, a trial court may deny section 1170.126 resentencing relief under the armed-with-a-firearm exclusion even if the accusatory pleading, under which the defendant was charged and convicted of possession of a firearm by a felon, did not allege he or she was armed with a firearm during the commission of that possession offense. Accordingly, we affirm the order denying White's petition for a recall of his life sentence and for resentencing as a second strike offender under the Reform Act.

People v. McCloud

CA 4(1); Case No. D063459
January 17, 2014

The basic issue presented in this case is whether the record discloses that McCloud was armed with a firearm during the commission of the offenses for which he is serving a third strike sentence. McCloud contends he is not ineligible for resentencing because the offense for which he was convicted, possession of a firearm by a felon, does not include the element of being armed with or using a firearm.

Thus, the primary inquiry was the distinction between being "armed" and having "possession" of a weapon in the underlying qualifying offense. The court went on to explain.

McCloud contends that conviction of possession of a firearm by a felon does not disqualify him from resentencing. The parties agree the offense does not qualify as a serious or violent felony. McCloud argues that the offense can be committed without being "armed." We agree that physical possession of a firearm is not required to prove possession. Such offense can be proved by showing constructive possession of the weapon, either directly or through another person. (People v. Sifuentes (2011) 195 Cal.App.4th 1410, 1417.) On the other hand being armed means that the defendant had the weapon physically available for offensive or defensive use. (*People v. Bland* (1995) 10 Cal.4th 991, 1003; *People v. Wandick* (1991) 227 Cal.App.3d 918, 921; *People v. Fierro* (1991) 1 Cal.4th 173, 225.)

Thus we agree with McCloud that mere proof of conviction for possession does not show the defendant was armed during the commission of the offense. Something more is required. McCloud contends we must examine the question of arming as if it was alleged as an enhancement, or as if the prosecution was attempting to prove a recidivist allegation. (*People v. Guerrero, supra*, 44 Cal.3d 343.) We disagree.

The controlling section in this case is section 1170.126, subdivision (e)(2). It makes a defendant ineligible for resentencing if "[d]uring the commission of the current offense [he] . . . was armed with a firearm." (§ 667, subd. (e)(2)(C)(iii).) As we will discuss below, the section does not require pleading and proof of arming when a retrospective examination of the sentence occurs nor does it refer to any requirement to establish elements of any of the statutory arming enhancements.

A central contention in McCloud's challenge to the trial court's decision is that in order to establish he

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is ineligible for resentencing, the disqualifying criterion must have been pled and proved prior to his 2000 conviction. This is required, he argues, because the ineligibility "increases punishment" and pleading and proof are required after Apprendi, supra, 530 U.S. 466. We disagree. ...

In the portion of the Act dealing with prospective application of the three strikes law to new cases, the statute requires the prosecution to plead and prove any factor which would qualify the defendant for a life term sentence, including, where appropriate, that the defendant was armed during the commission of the offense. (§ 667, subd. (e)(2)(C).)

The differences in approach make sense. Prospectively, the prosecution is seeking, in the case of nonserious or nonviolent third strikes, to impose a life term, which would not be possible without the added factors. On the other hand, in a retrospective analysis of sentences, the increased punishment has already been lawfully imposed. We agree with the court in *People v. Superior Court* (Kaulick) (2013) 215 Cal.App.4th 1279, 1303, in finding no requirement of pleading and proof for factors of ineligibility in retrospective examination of third strike sentences.

Finally, McCloud claimed that the record did not establish the fact that he was "armed," but only that he "had possession" of a gun. The Court of Appeal reviewed the following facts from the Probation Report and disagreed.

"On [January 25, 1999], at about 6:15 a.m., a San Diego police officer watched a vehicle drive though a red light. The officer stopped the vehicle in the 4200 block of Hamilton Street, but before the officer could contact the driver, the vehicle sped off. The driver ignored two stop signs as he continued to evade the police officer. The driver, Charles McCloud, subsequently tried to turn a corner and collided with a pole. The defendant exited the vehicle and ran away from the officer. Prior to apprehending the defendant, the officer saw the defendant throw an unknown object away. McCloud was handcuffed and a semiautomatic handgun was recovered. The gun had one live round in the chamber and two live rounds in the magazine."

Accordingly, the Court of Appeal affirmed the Superior Court's denial of Prop. 36 relief.

People v. Turner

CA 4(2); Case No. E059373

January 17, 2014

Robert Turner appealed from a denial in the Superior Court for Prop. 36 relief, claiming he was wrongfully denied because of a gang allegation in his priors.

Robert Turner is serving a life sentence under the Three Strikes law after a 2006 conviction for possessing cocaine base for sale (Health & Saf. Code, § 11351.5) with a criminal street gang enhancement (Pen. Code, § 186.22, subd. (b)(1)). Defendant appeals from the superior court's denial of his petition to recall his sentence under Penal Code, section 1170.126. The court ruled the gang enhancement makes defendant statutorily ineligible for resentencing.

Turner asked the Court to consider his gang-enhancement a non-serious felony, for purposes of Prop. 36. The Court declined.

[Turner] cites to *People v. Briceno* (2004) 34 Cal.4th 451, for the proposition that the gang enhancement makes the possession for sale conviction a serious felony for sentencing purposes only if the defendant re-offends, but does not make the possession for sale conviction a serious felony for purposes of the 2006 proceedings or the petition for recall of sentence based on those proceedings. We disagree with defendant's interpretation of *People v. Briceno* and find no published opinions supporting his interpretation. The language to which defendant points, at pages 463 to 466 of that opinion, does not allow a court considering a petition under section 1170.126 to ignore the criminal street gang enhancement and treat the underlying offense as a non-serious felony.

The Court affirmed the superior court's denial of Prop. 36 relief.

People v. Wilson
CA 4(2); Case No. E058849
January 17, 2014

In its third ruling against Prop. 36 petitioners on January 17, 2014, the Court of Appeal held that Wilson's petition amounted to nothing more than a veiled attempt to gain an unavailable "second appeal" of his conviction.

Wilson received a substantial sentence for his multiple convictions.

> On July 7, 1999, a jury found defendant guilty of one count of commercial burglary (§ 459; count 1); three counts of robbery (§ 211; counts 2, 4 & 6); five counts of assault with a semiautomatic weapon (§ 245, subd. (b); counts 3, 5, 7-9); and one count of felon in possession of a firearm (former § 12021, subd. (a)(1); count 10). The jury also found true that in the commission of counts 1 through 9, defendant personally used a firearm (former § 12022.5, subd. (a)). In a bifurcated bench trial, the trial court found true that defendant had suffered two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) for two robberies committed in 1992 and two prior serious felony convictions (§ 667, subd. (a)(1)) for the same robberies committed in 1992. On November 18, 1999, the trial court sentenced defendant to a total determinate term of 55 years plus an indeterminate term of 125 years to life in state prison with credit for time served.

The Court proceeded to review its reasons for affirming the finding below that Wilson was ineligible for Prop. 36 resentencing.

> Here, the jury found true that in the commission of the burglary, as well as the other offenses with the exception of felon in possession of a firearm, defendant personally used a firearm (former § 12022.5, subd. (a)). As such, defendant was ineligible for resentencing under section 1170.126 as to his burglary offense.

The Court then made a specific finding that all of Wilson's other claims amounted to a second appeal, which is not available.

> Furthermore, defendant's remaining claims are waived since he failed to raise them in his first appeal. "[W]here a criminal defendant could have raised an issue in

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a prior appeal, the appellate court need not entertain the issue in a subsequent appeal absent a showing of justification for the delay." (*People v. Senior* (1995) 33 Cal. App.4th 531, 538.) California law prohibits a direct attack upon a conviction in a second appeal after post-trial procedures. (*Id.* at p. 535.) Here, defendant cannot show any justification for the delay in raising the issues he now does in this appeal following a denial of his petition to recall his indeterminate sentence. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894.)

Wilson's denial of Prop. 36 relief below was affirmed.

***

People v. Liborio Ochoa

CA 2(4); Case No. B249170
December 14, 2013

In yet another example, the trial court denied Prop. 36 resentencing relief because a firearm enhancement made appellant ineligible for resentencing.

In 1995, [Ochoa] was convicted of possession and transportation of cocaine for sale (Health & Saf. Code, §§ 11351, 11352, subd. (a)), conspiracy to possess and transport cocaine for sale (Pen. Code, § 182, subd. (a)(1)), and false compartment activity (Health & Saf. Code, § 11366.8, subd. (a)). Enhancement allegations that appellant was personally armed with a firearm, and that a principal was armed with a firearm, were found to be true, and so were allegations that more than one kilogram of cocaine was involved. (Pen. Code, § 12022, subd. (a)(1) & (c); Health & Saf. Code, § 11370.4, subd. (a)(1).) Two alleged prior serious felony convictions also were found to be true. (Pen. Code, § 667, subds. (b)-(i).)

[Ochoa] was sentenced under the Three Strikes law to an indeterminate term of 25 years to life, plus seven years for the firearm and drug weight enhancements. Additional sentence terms were stayed. [Hi]s sentence was reviewed in a prior appeal. (*People v. Ochoa* (1996) 49 Cal.App.4th 697, review granted Jan. 15, 1997, S056787, review dism. Oct. 1, 1997.)

On April 9, 2013, [Ochoa] filed a petition for a recall of sentence under Penal Code section 1170.126. The trial court denied it because the firearm enhancement made [him] ineligible for resentencing.

The Court of Appeal was very succinct in denying relief from the superior court's denial below.

Penal Code section 1170.126 allows inmates serving an indeterminate life sentence imposed upon conviction of a felony or felonies not defined as serious or violent for purposes of the Three Strikes law to file a petition for a recall of sentence and request resentencing. (See § 1170.126, subd. (b).) One of the eligibility conditions for resentencing is that the inmate's current sentence was not imposed for any of the offenses listed in Penal Code section 667, subdivision (e)(2)(C)(i)-(iii). (Pen.Code, § 1170.126, subd. (e)(2).) Appellant's current sentence was imposed for a controlled substance offense enhanced under Health & Safety Code section 11370.4, which makes him ineligible for resentencing under Penal Code section 667, subdivision (e)(2)(C)(i). He also is ineligible under Penal Code section 667, subdivision (e)(2)(C)(iii), due to the firearm enhancement.

TWO LIFE SENTENCES IMPOSED ON A JUVENILE OFFENDER IS NOT "CRUEL AND UNUSUAL" PUNISHMENT BECAUSE SB260 PROVIDES FOR THE POSSIBILITY OF PAROLE

People v. Marlin Martin

CA 2(6) --- Cal.App 4th ---; Case No. B242447
December 16, 2013

Underlying this ruling is the appellate court's reliance upon a ruling by the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262.

A juvenile defendant is convicted of numerous crimes, including attempted murder. He receives a sentence of two consecutive life terms. Newly enacted Penal Code section 3051 affords youth offenders a parole hearing at an earlier age than had they been an adult. We therefore conclude defendant's sentence is constitutional because it is not the "functional equivalent" of life without parole. (*Graham v. Florida* (2010) 560 U.S. 48; *People v. Caballero* (2012) 55 Cal.4th 262.)

Marlin V. Martin appeals a judgment following conviction of two counts of attempted murder, first degree residential robbery, escape, and first degree burglary, with findings of personal firearm use causing great bodily injury. (Pen. Code, §§ 664, 187, subd. (a), 211, 4532, subd. (b)(1), 459, 12022.53, subds. (b)-(d).) We affirm. ...

The trial court sentenced Martin to a life term with the possibility of parole, plus 25 years to life for the firearm enhancement for count 1, and a consecutive life term with the possibility of parole, plus 20 years to life for the firearm enhancement for count 2. Pursuant to section 654, the court imposed

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and stayed sentence for the remaining counts and an applicable firearm enhancement. The court also imposed a $5,000 restitution fine, a $5,000 parole revocation restitution fine (stayed), a $200 court security assessment, and a $150 criminal conviction assessment, and awarded Martin 315 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a)(1); Gov. Code, § 70373.)

The trial court did consider Martin's youth in sentencing.

On appeal, Martin argued that Caballero required a lesser sentence. The appellate court disagreed.

Martin relies upon *People v. Caballero, supra*, 55 Cal.4th 262, 268-269, to argue that his sentence of 45 years plus two consecutive life terms is unconstitutional within the Eighth Amendment because it does not provide him an opportunity for parole. He asserts that his sentence is the "functional equivalent of a life without parole sentence" because he will be 76 years old at the time of his minimum eligibility parole date. (*Id*. at p. 268.) Martin points out that the National Center for Health Statistics estimates his life expectancy to be 64.6 years. (*Id*. at p. 267, fn. 3 ["'life expectancy' means the normal life expectancy of a healthy person of defendant's age and gender living in the United States"].) He contends that Caballero compels reversal and remand for resentencing, particularly concerning the trial court's imposition of consecutive sentencing for the two counts of attempted murder. (*Id*. at pp. 268-269; id. at p. 269 [sentencing court must consider all mitigating circumstances of juvenile's crime and life, including his age, whether he was a direct perpetrator or an aider and abettor, and his physical and mental development as bearing upon "when the juvenile offender will be able to seek parole from the parole board"].)

The court recounted the newly enacted SB 260, and how that would salve Martin's concerns about an excessive sentence for a youth offender.

On September 16, 2013, the Governor signed Senate Bill No. 260 (2013 Reg. Sess.), amending sections 3041, 3046, and 4801, and adding section 3051. The amended and new legislation requires the Board of Parole Hearings to conduct "youth offender parole hearings" to consider the release of offenders who committed specified crimes as juveniles and who were sentenced to prison.

Section 1 of Senate Bill No. 260 refers to *Miller v. Alabama*, supra, 567 U.S. - [183 L.Ed.2d 407] and People v. Caballero, supra, 55 Cal.4th 262 and declares: "The purpose of this act is 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 . . . . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established."

Section 3051 provides for a youth offender parole hearing during the 15th year of incarceration for a prisoner serving a determinate sentence (subd. (b)(1)), a hearing during the 20th year of incarceration for a prisoner serving a life term less than 25 years to life (subd. (b)(2)), and a hearing during the 25th year of incarceration for a prisoner serving a life term of 25 years to life (subd. (b)(3)). Section 3051, subdivision (d) requires the Board of Parole Hearings to "conduct a youth offender parole hearing to consider release." Section 3051, subdivision (f)(1) requires that any psychological evaluations and risk assessment instruments be administered by licensed psychologists employed by the board and that the evaluations and instruments "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."

Newly created section 3051 thus provides Martin "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham v. Florida, supra*, 560 U.S. 48, 75.) Martin was 19 years old at his June 29, 2012, sentencing, and pursuant to section 3051, will receive a youth offender parole hearing at age 44. His present sentence therefore is not "the functional equivalent of a life without parole sentence." (*People v. Caballero*, supra, 55 Cal.4th 262, 268.)

Senate Bill No. 260 insures that Martin will be afforded a meaningful opportunity for release on parole after a set number of years based upon fixed criteria.

The court affirmed Martin's conviction and sentence, but noted that his fears of an excessive sentence for a juvenile offender were remediated by SB 260.

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THREE OTHER APPELLATE COURTS ORDER JUVENILE OFFENDERS RESENTENCED, NOTWITHSTANDING SB260

People v. Marcellous Lewis
CA 1(5) --- Cal.App 4th ---;
Case No. A134480
December 16, 2013

In another juvenile lifer case decided on December 16, 2013, the First District Court of Appeal remanded for resentencing, rather than depend on SB 260.

Marcellous Lewis was convicted of a litany of offenses. On appeal, he claimed, inter alia, that his sentence of 115-years-to-life (75-life for nonhomicide offenses, and 40-life for homicide) violates his constitutional right against cruel and unusual punishment.

In the published portion of this opinion, we conclude that Lewis' sentence is unconstitutional and the matter must be remanded for the trial court to determine a parole eligibility date within Lewis' expected lifetime, unless it concludes that his offenses reflected such irreparable corruption that it is appropriate to preclude him from the possibility of parole during his lifetime.

Lewis proceeded to attack both the non-homicide term and the aggregate term as unconstitutional.

Lewis contends the 75-year-to-life sentence for nonhomicide offenses is unconstitutional under Caballero. He also contends his 115-years-to-life aggregate sentence is unconstitutional, because 115-years-to-life is the functional equivalent of an LWOP sentence, the sentence was mandatory under the sentencing scheme (once the court decided that the one strike law offenses occurred on separate occasions), and the sentencing court did not consider Lewis' youth, background, and other circumstances as Miller requires. Respondent urges that, even if Lewis received the functional equivalent of an LWOP sentence, the court did consider Lewis' youth and background, concluding that those factors actually pointed towards greater punishment.

After reviewing options it had based on considering Lewis' "mixed" case of both homicide and non-homicide offenses, the court ordered a new sentencing hearing comporting with Caballero and *Miller v. Alabama*.

In our view, the constitutionality of a parole eligibility date must be determined by looking at the sentence as a whole, since a defendant obtains a single parole eligibility date based on the entirety of his or her sentence. In this case, Lewis was convicted not just of nonhomicide offenses, but of a homicide offense as well. Our Supreme Court was careful to point out that Caballero did not address a situation where the juvenile offender, like Lewis, had committed a homicide. (Caballero, supra, 55 Cal.4th at p. 268, fn. 4.) Since the United States Supreme Court recognizes there are circumstances in which a juvenile who commits a single homicide as his only offense might be found to be of such irreparable corruption as to warrant an actual LWOP without offending the Eighth Amendment, certainly there could be circumstances in which a juvenile who commits a homicide and three separate one strike offenses could be of such irreparable corruption as to warrant a de facto LWOP without offend-

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ing the Eighth Amendment. Because the trial court in this case did not have the opportunity to make this determination under Miller, we will remand for the trial court to have that opportunity. (Miller, supra, 132 S.Ct. at pp. 2468-2469; *Ramirez, supra*, 219 Cal.App.4th at pp. 689-690 (Aronson, J., concurring & dissenting). See *Caballero, supra,* 55 Cal.App.4th at p. 268, fn. 4 [under Miller, the sentencing court must " 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison"].) If the court does not find that Lewis' offenses reflect irreparable corruption within the meaning of Miller, the court shall set a parole eligibility date within Lewis' expected lifetime as set forth in Caballero. (Caballero, supra, 55 Cal.4th at pp. 268-269 ["the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board"].)

III. DISPOSITION

The matter is remanded for the trial court to determine a parole eligibility date within Lewis' expected lifetime, unless it finds that Lewis' offenses reflect his irreparable corruption within the meaning of Miller v. Alabama (2012) 132 S.Ct. 2455. In all other respects, the judgment is affirmed.

Curiously absent from this decision is any mention of SB 260, which was the controlling consideration in the Martin case decided the very same day. A petition for review of the Lewis decision is pending in the California Supreme Court presently.

In re Christopher Murray

CA 2(8); Case No. B253237
December 23, 2013

Christopher Murray, when a juvenile, committed two murders. Upon his second resentencing, he received

> life without parole on the first murder count, with a consecutive 25 years for the gun use enhancement; a consecutive term of 25 years to life on the second murder count, plus another consecutive 25 years for the gun use enhancement; and the consecutive high term of 9 years for the attempted murder count, plus another consecutive 20 years for the other gun use enhancement.

Following *Miller v Alabama* and Caballero, Murray petitioned for a recall of remittitur or a writ of habeas corpus. The court chose the latter option, and issued an Order to Show Cause. The Court then proceeded to examine the state of the case law.

> In *Graham v. Florida* (2010) 560 U.S. 48, 63-64, 81-82 (Graham), the United States Supreme Court announced a categorical rule prohibiting no-parole life sentences for minors who were convicted of non-homicide offenses. Graham's holding was based on the following: (1) scientific studies showing fundamental differences between the brains of juveniles and adults; (2) a juvenile's capacity for change as he matures, which shows that his crimes are less likely the result of an inalterably depraved character; (3) the notion that it is morally misguided to equate a minor's failings with those of an adult; and (4) the fact that even though non-homicide crimes may have devastating effects, they are cannot be compared to murder in terms of severity and irrevocability. (Id. at pp. 67-70.)

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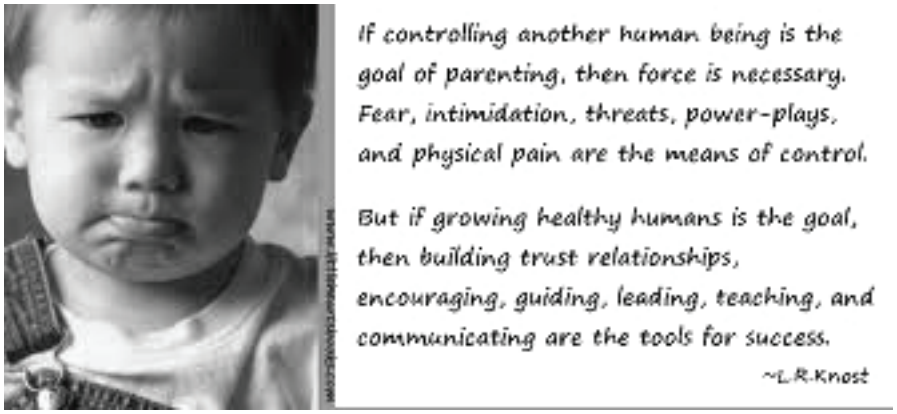

In *Miller, supra*, 132 S.Ct. 2455, the Supreme Court held that sentencing schemes that made LWOP sentences mandatory for juveniles who commit homicide offenses violated the Eighth Amendment's ban on cruel and unusual punishment. Under Miller, LWOP sentences are still permissible, but may be imposed on only the "rare juvenile offender whose crime reflects irreparable corruption." (Id. at p. 2469, citations omitted.) This determination must be made as part of a sentencing scheme that requires trial courts to take into account the "distinctive (and transitory) mental traits and environmental vulnerabilities" of children. (Id. at p. 2465.)

Mandatory LWOP sentences for juveniles "preclude[] consideration of [their] chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds [them] – and from which [they] cannot usually extricate [themselves] – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of [their] participation in the conduct and the way familial and peer pressures may have affected [them]. Indeed, it ignores that [they] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, [their] inability to deal with police officers or prosecutors (including on a plea agreement) or [their] incapacity to assist [their] own attorneys." (*Miller, supra*, 132 S.Ct. at p. 2468.) Accordingly, trial court sentencing of juvenile homicide offenders must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at p. 2469.)

In *People v. Caballero* (2012) 55 Cal.4th 262 (Caballero), the California Supreme Court applied Graham to non-homicide juvenile offenders who receive a sentence which, although subject to the possibility of parole, is so long that it amounts to a de facto LWOP sentence.

Taking a liberal stance, the Court decided that it would give Murray yet another sentencing hearing. Although the trial court did give consideration to his youth, it did not do so after Miller had been decided.

Our Courts of Appeal have split on the viability of section 190.5 in light of Miller, with three such cases currently before the California Supreme Court. Because this issue remains unsettled we decline to resolve the issue here. Instead, we deem it appropriate to remand the matter to the trial court once more to resentence Murray in the first instance in light of Miller. As we held in Murray II, supra, the trial court here was aware of its discretion under section 190.5, but that hearing took place before Miller and through the presumptive choice lens of *People v. Ybarra*, *supra*, 166 Cal.App.4th at page 1089. We cannot say how the Miller factors might have affected the trial court's sentencing analysis, and express no opinion as to whether Miller compels a particular sentence in this case.

DISPOSITION

The petition is granted. The judgment is reversed as to sentencing only and the matter is remanded for a new sentencing hearing that considers the factors set forth in *Miller, supra*, 132 S.Ct. 2455.

In re Frank Heard

CA 4(1), ---Cal.App.4th ---;
Case No. D063181
January 22, 2014

Frank Heard was 15 years old when he committed the two counts of attempted murder and 16 years old when he committed the voluntary manslaughter. The superior court sentenced to a determinate term of 23 years for the manslaughter count and a consecutive indeterminate term of 80 years to life for the two counts of attempted murder.

On habeas corpus, Heard complained that his sentence ran afoul of the recent *Miller v. Alabama* and *Caballero* decisions. The state argued that this was irrelevant, since Heard was eligible for SB 260 early parole hearings.

Unlike the cases reported above, the court took the cautious approach and

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ordered resentencing, consistent with *Miller* and *Caballero*, so that Heard would have both the benefit of full consideration of his youth at sentencing, AND, again, at his SB 260 parole hearing eligibility.

> Heard brings this petition for writ of habeas corpus, contending that his sentence is equivalent to a sentence of life without the possibility of parole, and thus, violates the holding of *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*). In *Caballero*, our high court "conclude[d] that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Id*. at p. 268.)

The Attorney General does not dispute that Heard's sentence is the equivalent to life without the possibility of parole, but counters that *Caballero, supra*, 55 Cal.4th 262 only applies to nonhomicide crimes and because Heard pled guilty to voluntary manslaughter, *Caballero* is distinguishable from the instant matter. As such, the Attorney General asserts Heard's sentence does not violate the Eighth Amendment, citing the United States Supreme Court's recent case *Miller v. Alabama* (2012) 567 U.S. ___, 132 S.Ct. 2455, 2464, 2469 (*Miller*) (concluding "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment[,]" but noting a life-without-parole sentence is permissible for homicide offenses (although "uncommon") in the sentencing court's discretion).

The Attorney General is correct that Heard was sentenced, in part, for committing a homicide. Our high court in *Caballero, supra*, 55 Cal.4th 262 did not address such a situation. Instead, it left *Miller, supra*, 132 S.Ct. 2455 to be applied in the homicide context. (*Caballero, supra*, at p. 268, fn. 4.) Yet, this case does not present the same issue as the one addressed in *Miller, supra*, 132 S.Ct. 2455, namely the unconstitutionality of a mandatory life without the possibility of parole sentence for a homicide offense. Here, Heard did not receive such a sentence, and the portion of his sentence attributable to his homicide crime is 23 years, hardly the "harshest possible penalty" that concerned the Supreme Court in *Miller*. (See *id*. at p. 2469.)

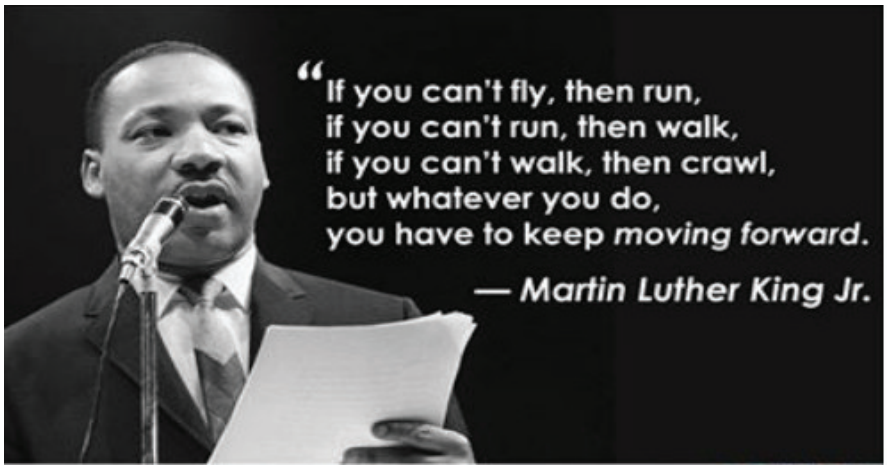
Despite this matter not falling directly under the ambit of either *Miller, supra*, 132 S.Ct. 2455 or *Caballero, supra*, 55 Cal.4th 262, we remain concerned by Heard's sentence. Ironically, it is not the homicide that leads to the troubling nature of Heard's sentence, but the

nonhomicide offenses, which account for the majority of Heard's prison term. When added to the determinate sentence Heard received for voluntary manslaughter, the 80-year-to-life indeterminate sentence for the nonhomicide offenses results in a de facto life without the possibility of parole sentence. Also, the homicide offense occurred six months after Heard's two attempted murder offenses. Additionally, Heard's homicide offense was for voluntary manslaughter, a crime the Legislature has not seen fit to punish with a life sentence. Under these unique circumstances, we follow *Caballero, supra*, 55 Cal.4th 262 and conclude Heard's sentence violates the Eighth Amendment.

However, recently the Legislature enacted Senate Bill No. 260 (SB 260), which amends the California Penal Code to address the sentencing concerns expressed in *Miller, supra*, 132 S.Ct. 2455, *Caballero, supra*, 55 Cal.4th 262, and *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*). SB 260, which took effect January 1, 2014, provides almost every juvenile offender an "opportunity parole hearing" whereby the juvenile would be given a "meaningful opportunity" for release during his or her lifetime. The Attorney General maintains that this new law essentially moots Heard's petition because he will have the opportunity to be released during his lifetime. Despite SB 260 offering the possibility of release during Heard's lifetime, we nevertheless conclude a sentencing court must comply with *Graham, Miller, and Caballero* in sentencing juvenile offenders. Accordingly, we grant the requested relief. ...

DISPOSITION

We grant the requested relief. Heard's sentence of 23 years and 80 years to life is reversed and the matter remanded for resentencing consistent with this opinion.



18-YEAR OLD TRIES TO SLIDE UNDER JUVENILE PROTECTION LAW AGAINST CRUEL AND UNUSUAL PUNISHMENT; LOSES

People v. Abundio

CA 4(1) --- Cal.App 4th ---; Case No. B245774

December 4, 2013

A bright line demarcates the availability of *Miller v. Alabama* and *Caballero* relief: if the defendant was 18 at the time of the offense, these new cases cannot be applied to help him.

Abundio sought relief on two grounds. In the first, he alleged that his LWOP sentence was cruel or unusual under *Graham v. Florida* (2010) 560 U.S. 48 and *Miller v. Alabama* (2012) 132 S.Ct. 2455. Although he was 18 at the time of the offense, he tried to rely on *Graham* and *Miller* (which address the constitutionality of LWOP sentences for minors) to support his claim that his sentence was cruel or unusual.

Citing *People v. Argeta* (2012) 210 Cal.App.4th 1478, the appellate court rejected this argument, noting that a minor reaches adulthood at the age of 18. If the court opened Pandora's box by permitting a person who has only been an adult for a few months to attack his LWOP sentence based on *Graham* and *Miller*, there would be no end to other young adults making such claims. The court respected the bright line 18-years-equals-adulthood that society has drawn and that the U.S. Supreme Court has relied on for sentencing purposes.

Abundio's other claim was that his LWOP sentence was cruel and unusual punishment based on *People v. Dillon*(1983) 34 Cal.3d 441. The appellate court rejected this claim.

In *Dillion*, the California Supreme Court found a life sentence imposed for *felony* murder on an "unusually immature" 17-year-old high school student who killed in the belief he was acting in self-defense constituted cruel and unusual punishment.

The Court was quick to distinguish Abundio's case from *Dillion*, observing that Abundio was an adult at the time of his crime and there was no evidence that he was unusually immature. Unlike *Dillion* who had no prior record, Abundio had a juvenile conviction for assault with a stun gun. The sentencing court observed that Abundio's case reflected a significant escalation in violent criminality over time. His plan did not reflect his immaturity, but was instead simple, straightforward, and executed in a vicious manner. He did not act rashly in response to a suddenly developing situation that he found life threatening, he intentionally attacked and killed his dealer by planned subterfuge.

Accordingly, Abundio's conviction and sentence were sustained.

IN-PRISON ASSAULT ON STAFF CAN GET YOU STRUCK OUT

In several recent court cases, inmates – usually already in a SHU – have been prosecuted and convicted of assault on staff for relatively minor tiffs with staff. Recently, an argument over the taking of medicine resulted in a charge of assault; the inmate ultimately went to trial and was sentenced to 25-life. Although he had a violent past, he was not serving a life sentence before.

It is all to easy to "lose one's cool" in the 24/7 immersion in debilitating SHU life and its inherent tensions. The harsh reality is that having a "bad day," even just a bad *moment*, can turn into a lifetime nightmare.

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State Appointed Attorney Process- BPH

Under a new process instituted this year by the Board of Parole Hearings prisoners attending parole hearings with state appointed attorneys may see a veritable sea of new faces. Whether this new development will be beneficial or not remains to be seen. The new process was initiated by the Board to bring 'new blood' in the form of new attorneys into the attorney cohort for parole hearings.

In mid-January the BPH selected teams of attorneys to handle parole hearings in each of 13 newly created regions, configured on the basis of the number of prisons in proximity to one another. The number of attorneys available to represent Lifers at the prisons in those regions was determined by the total number of hearings held in those institutions. These range from a low of two attorneys (serving Pelican Bay, which constitutes a region in itself due to remote location) to a high of a panel of 10 for the region containing PVSP, SATF, COR, NKSP, WSP, KVSP AND ASP. Half of those assigned to the panels were chosen on the basis of seniority, having already done hearings in past years, with the remainder selected through random draw from a pool of attorneys who indicated their interest in representing clients in that region.

Of the 87 attorneys who expressed an interest in representing lifers and fulfilled the BPH's basic requirements (more on that later) some 27, or nearly one-third, reportedly have never participated in a BPH hearing before--newbies! The rest covered the gamut of experience, from high 400s to a single hearing.

But experience may not be a wholly good thing. Three of the most 'experienced' attorneys are also among those considered the worst by prisoners, as we reported to the board last year following a survey from lifers. The fourth on that list appears to no longer by practicing law in California.

The criteria to be included in the BPH's list was pretty basic: licensed through the California Bar Association, proof of malpractice insurance, completion of the BPH's one day training session, recent TB test and attendance as an observer at no less than 6 parole hearings. Whatever the number of attorneys selected for the Active Panel, there is an additional stable of attorneys listed on the Inactive Panel, who are prepared to move up onto the Active List, should any of those attorneys drop off for any reason.

According to the board's new policies, attorneys on the Active Panel may refuse an assignment twice and/or fail to meet with their client or appear at a hearing twice before they will be removed from the Active Panel and a new attorney from the inactive list moved up. This is a first step in the Board's efforts to make state attorneys more accountable for their performance. Additionally, those prisoners who feel their state appointed attorney failed to adequately represent them may voice those concerns in two ways: they may file a complaint with the California Bar Association or make their concerns known to the BPH legal staff via letter.

Inmates would do well to understand that simply being denied a date by the board does not in itself constitute failure of their attorney. However, if you feel your state appointed attorney did not adequately represent you, did not meet with you, take time to understand your case, consider your input or wishes, or was fully involved and mentally present at your hearing, LSA urges you to avail yourself of the opportunity to bring this to the attention of the Board. We anticipate that later this year we will again issue a survey, aimed at gaining feedback from prisoners on the state appointed attorneys, both returning and new. The new attorney staffing list is expected to be activated in March.

For those contemplating alerting either the State Bar Association or the BPH legal staff to problems the addresses are below.

State Bar Association of California
845 S, Figueroa
Los Angeles, Ca. 90017
Attn: Office of Chief Counsel

Board of Parole Hearings
PO Box 4036
Sacramento, Ca. 95812
Attn: Legal Staff

Many may find the panels they were selected or signed up for are not tenable for them due to distance, workload or other reasons and those attorneys may choose to leave the active list. This will result in attorneys assigned to the inactive list being

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moved up, in accordance with their position on the inactive list, LSA/CLN will monitor any changes and update our lists and information on needed.

The following chart outlines the number and individual attorneys initially placed on the Active List for each region. The new attorney lists are expected to go into effect in March and during the initial months it is expected that there may be significant change in the Active Lists, especially for those who may be new to the hearing process.

Those who are interested in additional information on the various regions, such as numbers of parole hearings held in each region and at each prison, who may be on the Inactive Attorney List for a specific region and how many parole hearings specific attorneys have held as of the selection date may write for more details.

We urge our readers to provide us with feedback once the new system begins, on the availability, preparedness and engagement of the state appointed attorneys on forms following this article.

PANEL 1-PBSP	Richard Rutledge (363), Tarek Shawky (0)
PANEL 2-HDSP, CCC	Alexandra Morgan (0), Michele Garfinkel (320)
PANEL 3- CMF, SOL, SQ	Gertrude Akpenyi (254), Lawrence Strauss (122), Jeffrey Hall (0), Douglas
	Manor (0), Kate Brosgart (301), Candice Christensen (465), Katey Gilbert (407)
	Laurie Sanders (323), Geoffrey Taft (323)
PANEL 4- FOL, SAC, MSCP,	Kate Brosgart (301), Candice Christensen (465), Sabina Crocette (208),
SACCO	Sam Judd (294), Erin Morgan (50), Uzoma Ogan (0)
PANEL 5- CHCF, SCC, DVI	Daniel Iyayi (0), Geoffrey Taft (323)
PANEL 6- VSP, CCWF	Katey Gilbert (407), Daniel Iyayi (0), Douglas Manor (0), Christopher
	Harris (395)
PANEL 7- CTF, SVSP	Candice Christensen (465), Peter Ferguson (429), Katey Gilbert (407), Marcia
	Hurst (222), John Ibrahin (179)
PANEL 8- PVSP, SATF, COR,	Elizabeth Comeau (0), Peter Ferguson (429), Carl Fraley (0), Leon Harris III
NKSP, WSP, KVSP, AVE	(480), Jeffrey Hall (0), Jpseph Haytas (137), Crhistopher O'Hara (395), Philip
	Osula (58), richard Rutlede (363) Patrick Sparks (390)
PANEL 9- CMC	Leon Harris III (480), Peter Ferguson (429), Geoffrey Ojo (26) James
	Willison (82
PANEL 10- CCI, LAC	Leon Harris III (480), Alexandra Morgan (0), David Ramirez (344)
PANEL 11- CIM, CIW	Jared Eisenstadt (251) Jesse Hoffs (0), John Ibrahim (179)
PANEL 12- ISP, CVSP	Carly Fraley (0), Marc Gardner (0), Michael Kern (0), David Ramirez (344)
PANEL 13- CAL, CEN, RJD	Gertrude Akpenyi (254), Sam Judd (294), Philip Osula (58), Will Ramey (0),
	David Ramirez (344)

SALAZAR from pg.26

YOPH HEARINGS AT FIRST BLUSH

Now that the Youth Opportunity Parole Hearings (YOPH) have been in force for a full month, first indications are that the effects of SB 260, the legislation that created the new hearings, may indeed be having an impact. A total of 16 hearings for prisoners who come under the guidelines of SB 260 were scheduled for January; of the 14 actually held to completion (1 stipulation, 1 continuance), 7 prisoners received suitability findings. That's a grant rate of 50%.

Although the process is still very new and still in the initial phase, the first results are hopeful. Life Support Alliance has been in attendance at some of the first YOP hearings and so far we find the process runs smoothly, with commissioners acknowledging the YOPH considerations and issues in their findings. We are scheduled to attend additional YOP hearings in coming months and will evaluate the process and results for our readers.

As a reminder, YOP hearings are not a guarantee of parole, nor an easy way out. The same conditions apply: the individual must be judged to no longer be a danger to society. Inmates would be well served to be sure their parole plans are in order, that they have reviewed the standards for SB 260 and have discussed any relevant factors in their case with their attorney.

(Reprinted from CLN# 54, Nov./Dec.) YOUTH OPPORTUNITY PAROLE HEARINGS-

One of the most anticipated laws to go into effect on Jan.1, 2014 is SB 260, the **Youth Opportunity Parole Hearing** measure passed by the legislature and signed into law by Gov. Brown last September. SB 260 will mean new parole chances for thousands of California prisoners, convicted as juveniles and sentenced to long determinant terms or life terms in California prisons. The Youth Opportunity Parole legislation will bring these prisoners to newly constituted parole hearings, sometimes before they might otherwise be considered and, in the case of determinate sentenced, when they would not otherwise be considered.

Attorneys, prisoners, advocates, families and prisoners are scrambling to figure out just what these new hearings will mean for specific individuals and lifers as a whole. Also scrambling is the Board of Parole Hearings, charged with identifying those entitled to the new hearings, updating psychological evaluations (also to be done with new considerations) and scheduling hearings for all those entitled to a 260 hearing, all in an 18 month window. Reportedly, FAD psychs and the parole commissioners have received specialized training in how to consider the "hallmarks of youth" called for in the new law. The youth review hearings will begin in January, and 21 prisoners whose hearings are scheduled in January and have been identified by the BPH as falling under SB 260 will the first to receive YOPH consideration. As many as 3,000 prisoners are expected to eventually come under the umbrella of SB 260, some already in the BPH hearing schedule, some not yet having served minimum times relative to the new requirements.

The new law has been codified in the California Penal Code as Sections 3041, 3046, 3051, and 4801. Although The YOP hearings will become effective January 1, the BPH has until July 1, 2015,

TIREY from pg.27

to bring all those entitled to a YOP hearing to their first appearance before the board for a YOPH.

LSA/CLN, following a conference held at the BPH in early December on implementation of SB 260, has been able to construct the following framework for how the hearings will be held, who will be entitled to 260 hearings and when various prisoner cohorts might expect to have those hearings scheduled. We have also included a flow chart, provided by the BPH that details how the determination of qualification for SB 260 is made.
The following is a brief and general summary of how and when the hearings are expected. For more detailed information please contact LSA for a free, multi-page hand out on the whys and wherefores of SB 260, including more detailed information on training for the board and FAD psychs. This is one time we hope those writing to us will include an email or SASE, as we anticipate a substantial number of requests. As new or additional information is available we will publish that information in *Lifer-Line* and *California Lifer Newsletter*.

- **WHO:** Any prisoner convicted of a crime committed before the age of 18, given either a long determinant sentence or a life with the possibility of parole sentence is eligible for a Youth Offender Hearing. The longest term of sentence, whether that is the sentence for the felony conviction or enhancement related to that crime will be the 'controlling offense.' This applies to both determinate sentenced prisoners and lifers. If the individual was convicted/sentenced after the age of 18 he/she may still be covered under the YOP hearings, as the determining factor is when the crime was committed.

- **WHO ISN'T:** Those whose life sentence was the result of a third strike, a first strike rape (under Jessica's Law) and those sentenced to life without parole. LWOP prisoners may be able to pursue relief from the LWOP sentence under SB 9, passed last year, which could modify their sentence to a life with parole term. They would then be eligible to have their parole hearings considered under the umbrella of YOPH. Also ineligible are those who committed a new crime after the age of 18 that resulted in a long or life sentence (likely to have been committed while incarcerated).

- **HOW LONG:** Those with determinant sentences (DSL) longer than 15 years are eligible for a YOP hearing in the 15th year of custody; for those serving a term of less than 25 to life (ISL, example: 15 to life) eligibility will begin in the 20th year of incarceration; and those sentenced to a term of 25 years or more to life (ISL) will be eligible in the 25th year in prison. For those who have had an LWOP sentence modified to life with parole the same time lines apply. All incarceration time applies toward the minimum threshold, whether in state prison, county jail or CYA/DJJ facilities.

- **WHEN:** YOP hearings will begin in January, 2014. Any lifer already slated for a parole hearing in 2014 or the first 6 months of 2015 and who qualifies under the terms of SB 260 will receive his scheduled hearing under the umbrella of SB 260. For those who fall under SB 260 and who do not have a hearing scheduled in those 18 months, including determinant sentenced prisoners, who heretofore were not seen by the parole board, hearings will be scheduled within that time frame. Those lifers who fall under SB 260 but were not scheduled in the 18 months between January 1, 2014 and July 1, 2015, will be placed into the parole hearing schedule as they are identified. Determinant sentenced prisoners will be the last group to be scheduled hearings in the 18 month roll out period.

- **WHERE:** YOP hearings will be conducted at every prison where affected individuals are held.

- **HOW:** The hearings will be held in much the same manner as current parole hearings, with the exception that psych evals and deliberations by the parole commissioners must give "great weight" to what are termed the 'hallmarks of youth;' diminished culpability, lack of clear understanding of impact of their actions, lack of impulse control and susceptibility to peer pressure, among other factors. The YOPH sessions will be conducted by the present Parole Board commissioners and Deputy Commissioners, who will have received additional training on how to consider the "hallmarks of youth" variables in their deliberations.

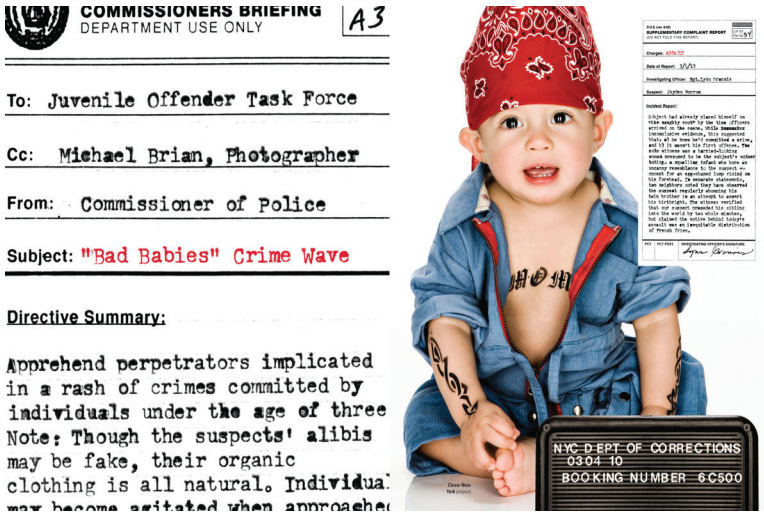
- **WHAT IS DIFFERENT ABOUT YOPH? :** Parole board commissioners and Forensic Assessment psychologists will be instructed to consider the youthful nature and development of those convicted of crimes before the age of 18 in a different light than someone who were adults at the time of the crime. The Board should consider the youthful factors as mitigating circumstances and thus supportive a finding of suitability. This will hope-

fully increase their chances of being paroled. The new YOPH will also allow family, friends, school personnel, faith leaders, and representatives from community-based organizations who knew the person prior to the crime, or who can attest to growth and maturity since the time of the crime can submit letters in support of parole. While this was always allowed in regular parole hearings, the fact that the law now specifically mentions such letters will hopefully cause commissioners to view such letters with greater attention.

- **WHAT DO I NEED TO DO?** Nothing. If you are eligible for parole consideration under the YOPH guidelines, even if you are a determinant sentenced prisoner, the BPH will identify your case and schedule a hearing for you as well as provide an attorney (if you cannot or choose not to hire a private attorney) and notify you of your hearing date. Understand, that determinate sentenced prisoners will be in the later group of inmates scheduled for hearings. At present there is no mechanism available to determinate sentenced individuals to request their hearing be held sooner, as there is for lifers via a Form 1045 A Petition to Advance. Lifers who fall under SB 260 and were previously denied parole may ask to have their next hearing date advanced by filing a Form 1045A, Petition to Advance, as the passage of this new law constitutes the "new information" required to advance a hearing. There will be no automatic advancement of hearings by the BPH for SB 260 purposes.

- Although those who qualify for a YOP hearing need do nothing, it has been suggested that letters from friends, family and others who knew the inmate as a youth and can provide information and context to their situation at the time of the crime should be sought and submitted as soon as possible. It appears likely that the FAD psychs, who are charged with updating psych evals for SB 260 clients, might rely on some of the information contained in such letters in creating the psych evals as required under SB 260. It would appear a best practice to have such letters available sooner rather than later, for consideration by both the psychs and the board panel. Since many hearings that will be held under the guidelines of SB 260 are already scheduled and many of the updated psych evals already underway, time may be of the essence in securing such letters—so start now!

- **THEN WHAT?** If found suitable at a YOP hearing prisoners will be paroled, either in accordance with statute for their offense (in the case of lifers) or released right away, in the case of determinant sentenced inmates. Lifers must still undergo the Governor's review, but the clear intent is that the Governor also will give 'great weight' to the young age at the time of the crime. If found unsuitable the requirements of Marsy's Law still remain in play, but once again, the considerations of the hallmarks of youth are supposed to be considered by the commissioners in deciding on denial length. For those with determinate sentences, they will receive another hearing either at a date set by the board (length of denial) or be released at the end of their sentence, whichever comes first. Prisoners may also appeal denials via writs. For those who are denied parole at their first YOP hearing, every hearing after January, 2014 will be held under the considerations of YOPH until they are either found suitable or reach the end of their sentence term, for determinant sentenced prisoners.



COMMISSIONERS BRIEFING
DEPARTMENT USE ONLY A3

To: Juvenile Offender Task Force

Cc: Michael Brian, Photographer

From: Commissioner of Police

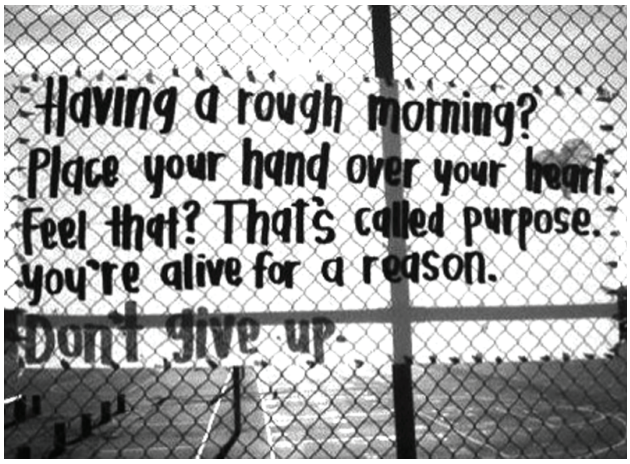
Subject: "Bad Babies" Crime Wave

Directive Summary:

Apprehend perpetrators implicated in a rash of crimes committed by individuals under the age of three Note: Though the suspects' alibis may be fake, their organic clothing is all natural. Individual may become agitated when approache

- **DOES THE MATRIX APPLY?** No. Under normal lifer parole guidelines if a prisoner is found suitable before a specified number of years served for various crimes that prisoner, though suitable for parole, must remain in prison until the prescribed number of years have been accomplished. Those lifers found suitable for parole under YOPH will not have the matrix applied and could therefore be released following the 120-150 day review period. Lifers who would normally be scheduled for a parole hearing prior to the time guidelines of SB 260 will receive that hearing on the regular schedule and it will be held in accordance with guidelines of YOPH.

INNOCENCE from pg. 29



- **WILL ATTORNEYS BE NEEDED FOR YOP HEARINGS?** Yes, the same rules apply as for regular parole hearings; prisoners may hire a private attorney or have a state-appointed attorney assigned to them. Many lifer attorneys are now gearing up for the new YOPH procedures.

- **WHAT WILL IT TAKE TO BE FOUND SUITABLE?**: From all appearances the qualities the BPH commissioners will be looking for in deciding suitability for parole remain largely the same; first and foremost, a determination that the prisoner is no longer a danger to society. Other factors, such as insight, remorse, parole plans (for lifers), and behavior in prison remain the same, but with the caveat of the hallmarks of youth consideration.

- **WHAT ABOUT MULTIPLE TERMS/CONVICTIONS?** For those prisoners serving concurrent/consecutive terms the determining factor will be the longest sentence, whether a sentence for the crime or an enhancement. Once found suitable for parole under the YOPH guidelines the prisoner will be eligible for release on parole (lifers) or simply released from custody (determinate sentenced prisoners). Those found suitable under YOP hearings do not have to serve a minimum amount of sentence for any consecutive sentences.

- **WHAT IS IMMEDIATE RELEASE?:** Although the new law states some individuals found suitable for parole under SB 260 are subject to 'immediate release,' immediate is a relative term. For any suitability finding the normal review periods, up to 120 days for the BPH legal review and then another 20 days for the governor (in cases of murder convictions) still apply. So someone found suitable under YOPH guidelines will not be released the following day.

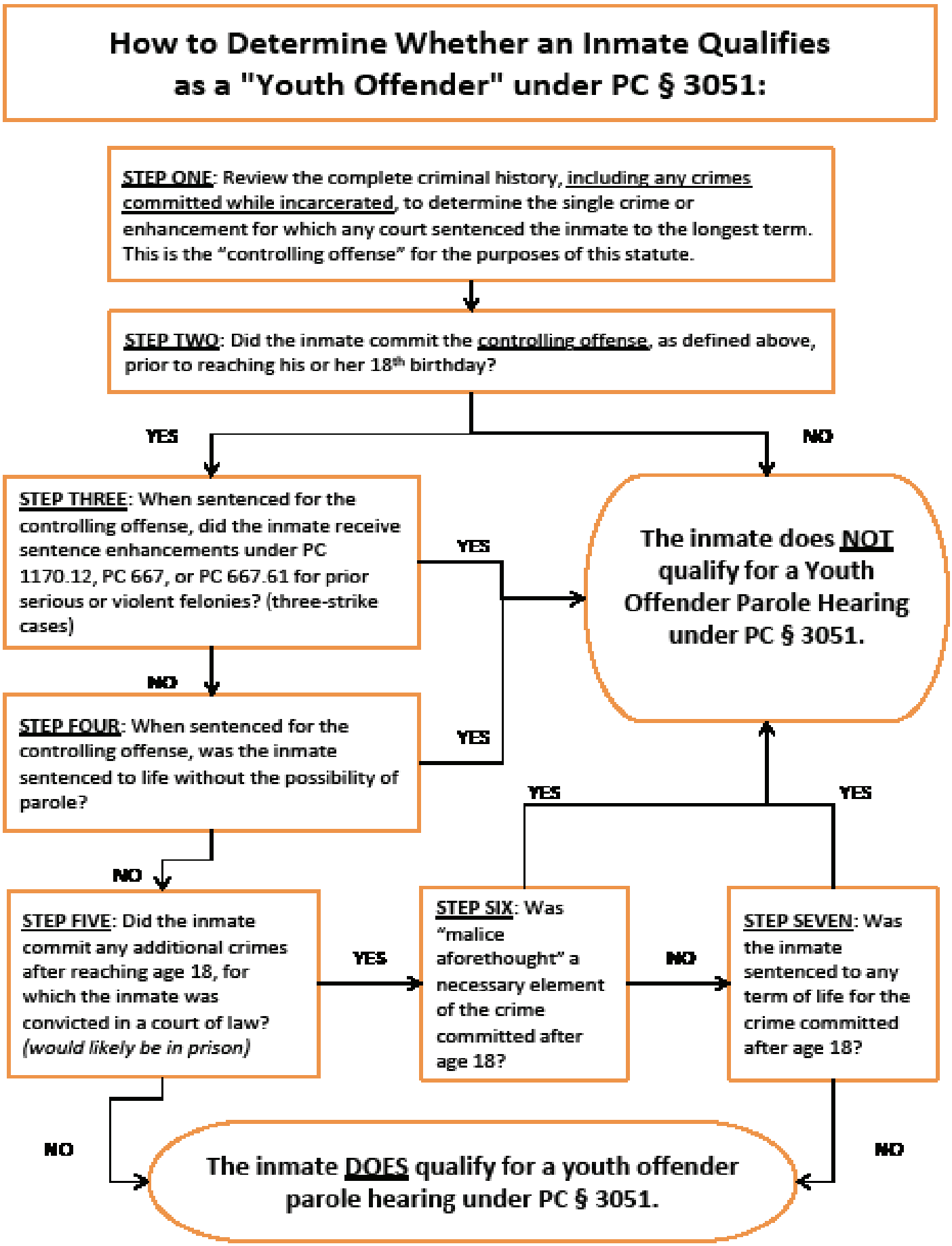
As previously stated, there are many, many details to SB 260. Some already known, some still to be worked out. For complete information please write LSA/CLN asking for details of SB 260. One more request. Lifers, please share this information with determinant sentenced prisoners. In many ways, parole hearings will be even more harrowing for this cohort, who, until now, never knew they would have face the parole board and may be woefully uninformed about what it takes to be found suitable.

Those determinate sentenced prisoners still have time to prepare for the new experience of a parole board hearing, by attending (if they haven't already) self-help programs, garnering support from family, friends and community and learning to articulate their life change to the board. For more information on how to make a positive presentation to the board, please request LSA's free hand-out, "Working Toward Parole".

Predictably, victims' rights groups are opposed to the new law. And just as predictably, they are distorting the process. Victims' groups, along with county DAs were among the most vociferous opponents of the law as it made its way through the legislature and were responsible for a series of amendments that significantly weakened the original bill. Not satisfied with compromise, some have already announced plans to begin a referendum to overturn SB 260.

Christine Ward, head of Crime Victims United proselytized "The Parole Board has to take into account the age that the individual was, not the crime they committed, not their behavior in prison. Weight must be granted, must given to how old they were. So really, people are going to be getting out left and right who are not ready to come back to our society."

Clearly, she had not read the new law or fails to understand the significant aspects of the requirements. As with SB 9, which allowed juvenile LWOP prisoners to petition for modification of sentence to life with parole, this new law is not a get-out-of-jail-free or even quick card. While the special characteristics of youth will be considered, the over-riding concern of the parole board remains public safety and their evaluation of anyone appearing before them, under YOPH or not, remains couched in those considerations.


How to Determine Whether an Inmate Qualifies as a "Youth Offender" under PC § 3051:
STEP ONE: Review the complete criminal history, including any crimes committed while incarcerated, to determine the single crime or enhancement for which any court sentenced the inmate to the longest term. This is the "controlling offense" for the purposes of this statute.
STEP TWO: Did the inmate commit the controlling offense, as defined above, prior to reaching his or her 18th birthday?
YES
NO
STEP THREE: When sentenced for the controlling offense, did the inmate receive sentence enhancements under PC 1170.12, PC 667, or PC 667.61 for prior serious or violent felonies? (three-strike cases)
YES
NO
STEP FOUR: When sentenced for the controlling offense, was the inmate sentenced to life without the possibility of parole?
YES
NO
The inmate does NOT qualify for a Youth Offender Parole Hearing under PC § 3051.
STEP FIVE: Did the inmate commit any additional crimes after reaching age 18, for which the inmate was convicted in a court of law? (would likely be in prison)
YES
NO
STEP SIX: Was "malice aforethought" a necessary element of the crime committed after age 18?
YES
NO
STEP SEVEN: Was the inmate sentenced to any term of life for the crime committed after age 18?
YES
NO
The inmate DOES qualify for a youth offender parole hearing under PC § 3051.

DEATH BY PEPPER SPRAY?

The story of CDCR's use of pepper spray, particularly on mentally ill inmates, just keeps getting more bizarre. The death last fall of an inmate at Mule Creek State Prison, originally deemed a suicide by the Amador County Coroner, was recently brought into question.

Joseph Duran, 35, died in September while in the psych unit at MCSP. Originally reported as a suicide by asphyxiation, Duran died about 8 hours after being pepper sprayed by guards because he refused to remove his hands from the food port of his cell door. At the time Duran was on suicide watch. Additionally troubling is that Duran breathed through a permanent stoma, or tube in his throat

Judge Lawrence Karlton, on hearing the details of Duran's death gave attorneys representing prisoners in a suit revolving around use of pepper spray on mentally ill inmates 30 days to investigate the death and report back to him. Attorneys charge the CDCR hid the details of the Duran case from them during prior discover efforts as part of the on-going court action. Duran's relatives did not learn of his death until December, when a news organization contacted them for comments about the circumstances of his death.

Video tape of the incident and subsequent actions by Duran indicated that after he was pepper sprayed he removed and tried to clean the tube in this throat. He was found dead 8 hours later, with the throat tube still not in place. He had been on suicide watch since his arrival at MCSP about a week prior.

Once the case was revealed the state took the position that any "connection between exposure to pepper spray and his (Duran's) death is speculative." What is not speculative is that Duran was not just "exposed" to pepper spray; it was intentionally applied to his face and person.

During a recent court appearance state attorneys offered to discuss the details of the Duran case with Judge Karlton, producing several state officials prepared to speak with the judge in private. Karlton summarily declined, instead directing prisoner attorneys to produce a report for him within the month.

EN BANC RESULTS

December En Banc cases at the Board of Parole Hearings monthly Executive Board Meeting were routine, short and largely without comment.

Governor Brown referred three parole grants to the board for review by the whole panel. The twelve commissioners dutifully reviewed the cases, with no public comment provided, and just as dutifully affirmed the parole grants of **John Lynch, T61378; Viet Tran, H 93494 and Terrance Tucker, K 52595**, also without comment.

Five year denials given to **Garcia Carlos, K 89409** and **Frederick Fischer, B 55652** were vacated and those inmates scheduled for rehearing, apparently due to problems in creating a transcript of the hearings. The commissioners also vacated the denial of parole for **Elaine McNutt, W 34278**, and will rehear the case to ensure compliance with *In Re Lawrence* in regard to parole plans.

January En Banc hearings at the Board of Parole Hearings evidenced an interesting development: reconsideration of hearing results instigated by the Board's legal team "to ensure compete, accurate, consistent and uniform decisions and the furtherance of public safety." What made these referrals comment-able is that the decisions were being reconsidered on the basis of the deteriorating mental state of the prisoners.

The inmates, **Weldon Hathcock, B 18483** and **Raymond Kelsch, D 63773** were both represented by attorney Dennis Cussick. Both Hancock and Kelsch are elderly and reportedly suffering from various stages and ramifications of dementia, which Cussick explained to the board renders both men incapable of forming plans of any sort and in need of constant supervision. Both men were recently denied parole, partly on the basis of lack of parole plans, which Cussick also noted are difficult for prisoners in these medical circumstances to create, as they cannot grasp the concept of plans and cannot easily communicate with outside agencies.

Until now, the criteria for medical parole required that the prisoners under consideration for this program be unable to meet their basic daily needs, such as dressing or feeding themselves. However in the above cases, while both inmates are apparently able to perform those basic functions, they remain confused and mentally unable to cope. Discussion of the situation revealed that re-hearings for reconsideration of medical parole would include parole plans for those individuals that included placement in supervised nursing facilities specializing in dementia cases. Both cases were passed by the board and new hearings, including the new parole plans, will be scheduled for both inmates.

Under the perimeters of medical parole, if either of the inmates experiences a dramatic positive reversal of their dementia issues their parole could be revoked and they would be returned to prison.

In other En Banc actions the commissioners recommended referring the case of **Ronald Christian, H 83985**, to the courts for consideration of recall of sentence under the compassionate release standards.

Voted to refer the grant of parole for **Salvador Aceves, H 73423**, for revocation consideration occurring after the grant of parole.

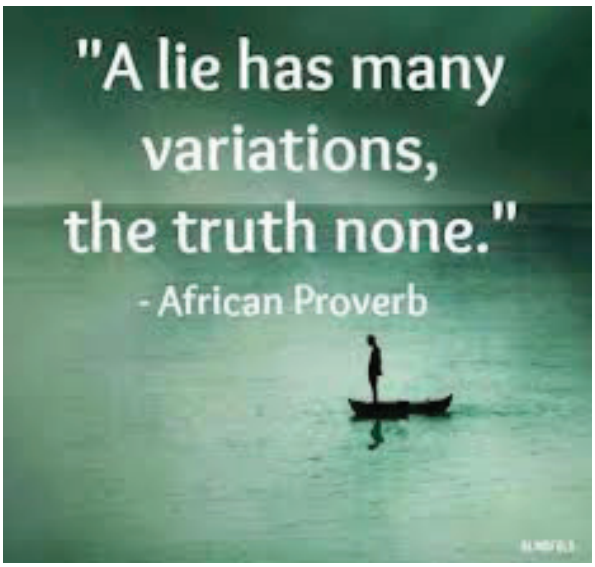
The board also affirmed two parole grants referred by the Governor for En Banc consideration. In doing so the board recorded detailed affirmations, outline for the record that they had considered the points raised by the Governor and still found the inmates suitable for parole.

The parole grant for **Lakendall Smith, H 64209**, was confirmed, "based on the totality of the record before the panel that granted parole to Inmate Smith on September 4, 2013, as well as the content of the confidential file in his central file and the Board's recent investigative report regarding the reliability and validity of that information." In short, the Governor apparently expressed concern about information in Smith's confidential file, but the Board, following review and its own investigation, found the 'evidence' unreliable.

The board also affirmed the parole grant to **Richard Poma, C33048**, also referred by the Governor for consideration by the entire board. Although the Governor's reasons for referral were not delineated, the presence of relatives and friends of the victim and virulence of their presentation and comments it could well be that the governor received letters from victims and family opposing Poma's parole. Since his crime was not a 187 PC conviction the Governor could not reverse, or 'take' Poma' s parole grant, but could and did refer the decision for consideration of the entire 12 member board.

While the victims and their surrogates repeated the details of the crime and offered photos from the crime scene and even claimed statistics said Poma would not do well on parole (we wonder what statistics they were referring to, as stats for lifers' success on parole, whether in California, nation or worldwide, reflect just the opposite fact) and claimed the commissioners were "mostly disconnected" from the reality of lifers on parole. Whew.

In contrast, a veritable parade of supporters for Poma's release, including some well-known names and faces in the rehabilitation and reentry field and no less than two correctional officers either spoke or presented letters to the board attesting to Poma's reformation and long-standing efforts to assist others and facilitate self-help groups. All spoke to Poma's remorse, insight and ability to help others attain those goals. Apparently, the board agreed and confirmed Poma's grant.



In the final En Banc case of the month 11 commissioners voted to affirm the position of their fellow commissioner and grant parole to **Larry Wilson, C 37556**. Wilson's hearing had resulted in a tie vote, with the commissioner (LaBahn) voting in favor of a grant of parole and the Deputy Commissioner opposing. While LaBahn himself was not present for the En Banc deliberations, nor did he participate in the vote, the entire panel supported his determination and granted Wilson parole.

Lifer Scheduling and Tracking System

Commissioners Summary
All Institutions
December 01, 2013 to December 31, 2013

	ANDERSON, JR	FRITZ	GARNER	GUERRERO	LABAHN	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Hearing Totals*	24	27	22	26	29	19	18	27	23	21	29	16	249	530	57**	473
Summary of Suitability Hearing Results per Commissioner																
Suitability Hrg Total	23	27	21	25	29	19	18	27	21	21	27	16	129	403	56	347
Grants	11	5	4	8	10	8	2	8	5	7	9	3	0	80	15	65
Denials	10	17	9	9	16	9	8	11	9	8	15	7	0	128	30	98
Stipulations	0	3	3	4	1	1	1	4	7	3	1	2	5	35	5	30
Waivers	1	0	2	0	0	0	4	0	0	1	1	1	43	53	1	52
Postponements	1	2	2	4	1	0	2	3	0	1	1	3	60	80	3	77
Continuances	0	0	1	0	0	1	1	1	0	1	0	0	0	5	2	3
Split	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	1
Cancelations	0	0	0	0	0	0	0	0	0	0	0	0	21	21	0	21
Denial Length Analysis per Commissioner (Summary of Denials and Stipulations)																
Subtotal (Deny+Stip)	10	20	12	13	17	10	9	15	16	11	16	9	5	163	35	128
1 year	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
3 years	8	14	8	5	11	7	4	8	10	5	13	3	5	101	19	82
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	4	3	6	4	1	3	5	5	3	3	5	0	42	12	30
7 years	1	2	1	1	2	1	2	1	1	3	0	1	0	16	2	14
10 years	1	0	0	1	0	1	0	1	0	0	0	0	0	4	2	2
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Waiver Length Analysis per Commissioner																
Subtotal (Waiver)	1	0	2	0	0	0	4	0	0	1	1	1	43	53	1	52
1 year	1	0	2	0	0	0	1	0	0	1	1	1	27	34	1	33
2 years	0	0	0	0	0	0	1	0	0	0	0	0	9	10	0	10
3 years	0	0	0	0	0	0	2	0	0	0	0	0	5	7	0	7
4 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
5 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
Postponement Analysis per Commissioner																
Subtotal (Postpone)	1	2	2	4	1	0	2	3	0	1	1	3	60	80	3	77
Within State Control	1	0	1	1	0	0	1	0	0	0	0	0	49	53	0	53
Exigent Circumstance	0	1	0	0	0	0	0	0	0	0	0	0	2	3	0	3
Prisoner Postpone	0	1	1	3	1	0	1	3	0	1	1	3	9	24	3	21

*Hearing Totals include other actions such as Rescission, Progress, PC 3000.1, Documentation, 3 year Reviews for 5 year Denials, EnBanc Reviews, PC 1170, Term Calcs, and Inmate Petition (PR/FR).
** Hearings Conducted with more than one "Commissioner" column count on the Hearing Total* line does not include En Banc Reviews.

01/24/2014 10:27 AM Page 1 of 1

Lifer Scheduling and Tracking System

Commissioners Summary
All Institutions
January 01, 2013 to December 31, 2013

Hearing Totals*	341	253	180	323	378	65	285	332	322	70	305	311	303	329	3099	6896	394**	6502

Summary of Suitability Hearing Results per Commissioner

	ABERNATHY, JR	FERGUSON	FIGUEROA	FRITZ	GARNER	GUERRERO	LABAHN	MORTON	PECK	RICHARDSON	ROBERTS	SMITH	TURNER	ZARINNEJAD	BPH HO	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	289	183	118	275	319	63	227	275	279	66	236	230	328	253	1399	4537	369	4168
Grants	57	31	29	56	80	18	51	43	54	21	51	46	72	56	0	667	77	590
Denials	175	116	64	168	146	29	111	152	145	33	119	118	187	129	0	1664	216	1448
Stipulations	21	12	8	14	19	6	41	29	35	7	30	24	30	32	93	403	33	370
Waivers	6	4	7	4	7	1	0	22	9	0	10	9	29	9	624	741	13	728
Postponements	29	18	19	32	64	7	21	25	31	4	26	29	27	23	536	881	26	855
Continuances	0	0	1	0	13	0	2	4	5	1	0	2	3	1	0	32	4	28
Split	1	0	0	1	0	0	1	0	0	0	0	0	0	0	0	3	0	3
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	148	148	0	148

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

Subtotal (Deny+Stip)	196	128	82	182	165	37	152	181	180	40	149	142	187	161	93	2067	249	1818
1 year	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	1
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	125	84	41	116	108	22	102	119	108	17	82	88	114	88	78	1267	151	1116
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	42	31	16	35	44	13	39	47	48	15	47	45	55	50	17	544	71	473
7 years	23	11	4	26	8	1	10	11	17	6	17	16	19	20	0	191	22	169
10 years	4	4	0	4	5	1	1	4	6	2	2	9	6	3	0	51	4	47
15 years	2	0	1	0	0	0	0	0	0	0	1	4	3	2	0	13	1	12

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	6	4	7	4	7	1	0	22	9	0	10	9	29	9	624	741	13	728
1 year	6	2	6	3	4	1	0	18	5	0	5	7	22	6	364	449	9	439
2 years	0	0	1	1	1	0	0	2	2	0	1	0	3	2	136	149	3	146
3 years	0	0	1	0	2	0	0	2	2	0	2	2	2	1	89	103	1	102
4 years	0	0	0	0	0	0	0	0	0	0	1	0	0	0	3	4	0	4
5 years	0	2	0	0	0	0	0	0	0	0	1	0	2	0	32	37	0	37

Postponement Analysis per Commissioner

Subtotal (Postpone)	29	18	19	32	64	7	21	25	31	4	26	29	27	23	536	881	26	855
Within State Control	13	4	5	10	16	3	2	2	8	0	10	8	6	4	428	519	10	509
Exigent Circumstance	11	6	10	15	25	0	7	15	7	0	1	6	9	5	5	122	6	116
Prisoner Postpone	5	8	4	7	13	4	12	8	16	4	15	15	12	14	103	240	10	230

*Hearing Totals include other actions such as Rescission, Progress, PC 3000.1, Documentation, 3 year Reviews for 5 year Denials, En Banc Reviews, PC 1170, Term Calcs, and Inmate Petition (PR/FR).
** Hearings Conducted with more than one "Commissioner" column count on the Hearing Total" line does not include En Banc Reviews.

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Long Term Offender Program Pilot Program CMC, Solano, CCWF

Please Provide Feedback! (ok to use a larger numbered sheet to answer)

1) Did you attend an orientation on the LTOPP? Why/why not? Names of presentors?

2) Do you have a job you will need to leave to participate in this program?

3) Were you told you would "get your job back".

4) Were you told that BPH would require this program?

5) Were you told past self-help programs will no longer be accepted?

6) Did you take the COMPAS test? What did you feel about the questions asked? Were you given the results?

7) Do you plan on participating and why? or why not?

8) Do you disagree with the subjects or content of the programs?

9) How could Lifers that are soon to go home be better served?

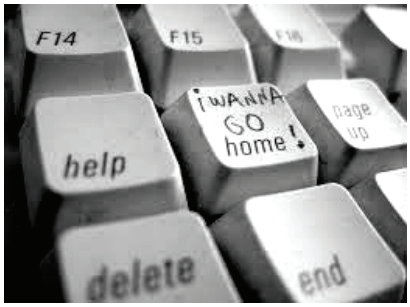
General Comments _____

Please mail to LSA/CLN "Attn. LTOP Form Enclosed"
P.O.Box 277
Rancho Cordova, CA 95741

CDCR

RUMORS, RUMORS, WE GET LOADS AND LOADS OF RUMORS

The prison rumor mill is working overtime these days, as court cases, administrative directives and law changes are changing the face of parole hearings and lifers' situation. Herewith are a few of the rumors that have flown our way, and what facts we can provide to validate or debunk those rumors;



IN RE BUTLER WILL DECREASE LIFERS' SENTENCES. **NOT TRUE.**
Please see elsewhere in CLN for John Dannenberg's crisp and concise explanation of this case. As we reported previously, while it is a good thing that the BPH will now set a lifer's term at his initial or next parole hearing, the setting of that term has *no impact* on whether or not an individual will be found suitable.

Yes, we're aware that the LA Times published an article shortly after Butler was released and said lifer terms would be shortened under Butler, but—news flash—they got it wrong. Unfortunately, the same erroneous story was picked up by news wire services and repeated. It was not, however, repeated by LSA or CLN, because we check our sources before publishing. And, straight from the BPH's legal team: *no effect on suitability or time in prison.*

THE BOARD NO LONGER WILL ACCEPT PAROLE PLANS AT HEARINGS. **NOT TRUE.**
This is a misinterpretation of a new administrative directive put into effect by the BPH in January, aimed at streamlining the parole hearing process. The board still wants, accepts and looks for parole packets. What will no longer be allowed is the submission, on the day of the hearing, of massive amounts of documents, submitted either by the prisoner or the inmate attorney. Documents can still be submitted for consideration at the hearing, but are now limited to 20 pages total, either double or single-sided.

This was approved in an effort to allow the panel to give real and meaningful consideration to submissions on the day of the hearing, and not feel rushed or not be able to fully consider all submissions due to the pressure of time. Prisoners can still submit any sort of document to their parole packet, so long as it is done prior to the hearing and can be included in the board's packet. And late-arriving items, up to 20 pages, may still be submitted on the day of the hearing.

Some have suggested if a prisoner is concerned an item of importance has not made it into his packet, he could bring the item in question but not submit it unless it is found to be missing from the official packet.

LIFERS ARE GOING HOME UNDER EARLY RELEASE. **NOT TRUE.**
This one has been around so long it almost has whiskers and we've repeated ourselves so much on it we're almost hoarse. Once again, no lifers are included in any cohort being considered for early release. *In fact, to date, no state prisoner has been 'released early.'*

If lifers do see relief via the population cap suit it will be through enhanced parole hearings; see elsewhere in CLN for more details.

THE BOARD WILL ONLY ACCEPT SELF-HELP PROGRAMS THROUGH THE NEW LTOP PROGRAM. **AGAIN, NOT TRUE.**
The new LTOP program being rolled out on a pilot basis in 3 prisons (Solano, CMC and CCWF) is an attempt by CDCR to provide meaningful programs for lifers. Good idea, bad rollout.

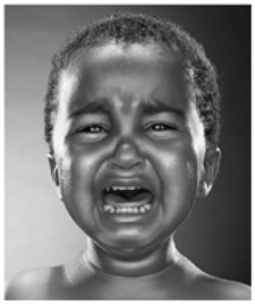
For those that have been introduced to or heard about this program, if you've heard the BPH is endorsing it, behind it, in favor of it or will only recognize it-

CDCR from pg. 50

don't sweat it. That isn't the case. BPH is aware of the concept, and also aware, because we've been repeatedly telling them so, of the problems involved and the board has *not*, nor is it on the verge of, codifying this program and making it mandatory.

LSA sits on the CDCR workgroup for this new program and we are pushing as hard and as fiercely as we can to make sure this good idea doesn't go awry. As presently constituted, it remains a good idea that has yet to reach a good outcome. Stay tuned.

I wanna go HOME!



EVERYONE WITH AN SB 260 HEARING WILL GO HOME. **SADLY, NOT TRUE.** While the implementation of SB 260, Youth Opportunity Parole Hearings, does seem to be making a positive difference for many long-serving lifers, it is not a blanket pass. Parole hearings and the requirements to be found suitable remain largely the same and

GOLD PLATED MEDICAL CARE IS FOOL'S GOLD

Remember a few months ago, when Governor Jerry Brown was touting the success of CDCR in upgrading health care for inmates, including his comment that health services for prisoners was now "gold plated?" Hmm. Perhaps what the Governor was seeing was Fools Gold, given that the federal receiver overseeing prison medical care has just halted admissions to CDCR's much bally-hooed and reportedly state-of-the-art prison medical facility in Stockton.

In early February Federal Receiver Clark Kelso ordered CDCR to halt new admissions to the California Health Care Facility, opened 6 months ago amid much publicity and preening by state officials, including CDCR Secretary Jeffrey Beard, who at the opening ceremony proclaimed CDCR to be "serious" about the health care of prisoners.

Maybe, but first reports from this new jewel-in-the-crown of CDCR health care shows the department is serious, all right, seriously deficient. From the arrival of the first inmates in July LSA/CLN began receiving letters and calls from prisoners and families outlining the deficiencies, which included, insufficient utensils and food trays to service chow hall, no blankets, shortage of beds and linens, not to mention less life-threatening but still problematic issues with lack of visiting space, attorney meeting rooms and other structural problems.

Inspections by representatives of inmates' lawyers last month found severe shortages of such basics as clean linen and soap, which may, according to Kelso's office, have contributed to an outbreak of scabies at CHCF recently. More ominously, lack of clinical personal and confusion may have contributed to the death in early January of one prisoner whose calls to nurses because he was bleeding went unanswered for 30 minutes. Nurses said they were "unclear" as to how soon they should respond to call buttons. An interesting comment and one we suspect we wouldn't hear from nurses in mainline hospitals.

CDCR

Kelso's report noted the facility was experiencing difficulty in acquiring both administrative, custody and clinical staff, with a lack of psychiatrists particularly acute. Reportedly whole wings of the facility have not been opened due to lack of staff to man them.

These problems, coupled with a lack of stable supply chain for medical and logistical supplies (the aforementioned towels and soap, as well as state-issued clothing) led Kelso to halt new admissions at CHCF and work on the yet-to-open 1.333 bed prison facility to be located nearby. An internal memo from the facility's staff noted that due to staffing issues the hospital could offer only "fragmented care."

The report from inspectors sent by prisoner attorneys was more direct: CHCF, it said "was being run like any other prison—where custody issues are typically the highest priority and health care and other programs are secondary—instead of being run as a health care facility for patient-inmates." Indeed staff seems to be so short that ailing inmates are often pressed into service helping inmates in even more dire medical conditions than themselves. We don't think the halt-leading-the-blind, so to speak, was what the Receiver or the federal judges had in mind for improving prisoner health care.

CHCF presently houses nearly 1,300 inmates, but was supposed to be at capacity of 1,722 by last December. That number includes up to 1,622 prisoners designated as high medical risk or in need of long term care

RETURN WITH US NOW TO THOSE DAYS OF YESTERYEAR…

Who says you can't go back again?
Or at least try, according to one mid-Western state…

A legislator in Missouri has introduced legislation that would allow that state to use the old-fashioned (and messy) firing squad to carry out death sentences in Missouri as a way of circumventing problems obtaining drugs for lethal injections.

Gives a whole new meaning to the state's nickname, The Show-Me State.

As reported recently on National Public Radio executions in the United States in the last year were down 75% from previous years, with only 39 state-sanctioned killings recorded. While 32 states have death penalty laws on the books only 9 states carried out those laws in 2013. In many cases the states were stymied by a shortage of one or more of the usual trio of drugs used to carry out the sentence. Many drug companies have refused to provide correctional departments with these drugs to be used in executions.

Some states have been able to obtain them from compounding pharmacies or pharmacists, and have usually kept the source of these acquisitions secret, in fear of those sources also drying up. Several court challenges have been mounted against this practice, not on the basis of the legality or morality of the death sentence itself, but on the hidden nature of the transactions in getting the drugs violates the due process rights of the prisoners and the public's right to know about the actions of their government.

The Death Penalty Information Center, which tracks death penalty issues, reports public support for the death sentence is at a 40 year low. The legislator from Missouri who has proposed the firing squad as a possible alternative to lethal injection seems to have a strange view of the process. He proposes firing squads composed of volunteer law enforcement officers (what this says about those who would volunteer to take a life remains unsaid), 5 strong, with 4 of the members having live rounds and the fifth would be supplied blanks. That way, he

surmises, all squad members could go home at night salving their conscience that perhaps they were the one with the blank and therefore not responsible for the intentional death. This begs the question: if this would weigh so heavily on the conscience, why would anyone volunteer to become a member of a death squad?

The legislative throw back to the rough justice days also claims a firing squad would be no different from an LWOP sentence, as the prisoner would "die in prison anyway." Perhaps. But he apparently fails to grasp, or perhaps doesn't care, that someone serving a life or even LWOP sentence, and later exonerated, can be released and be alive; that can't be said for a those subjected to the death penalty.

Given the low public support for state orchestrated murder, the problems in obtaining the tools of the trade and the lengthy court battles always engendered by capital cases, perhaps a representative from Death Penalty Information Center has asked the penultimate question: "Why are we doing this?"

THE OFFICE IS OPEN NOW….

In early January LSA/CLN realized a long-held goal, opening an official office in the Sacramento area. At last all our efforts and projects can be consolidated in one location and our volunteers will have a home.

Though not in the high-rent district of downtown Sacramento, we are only a short jaunt from the Capitol and an even shorter sprint to CDCR headquarters. And with the help of supportive individuals and businesses we have been ale to equip our new digs with a minimal amount of capital outlay. Which is good, because that's what we have; a minimal amount of capital!

Our mailing and correspondence address remains the same, PO Box 277, Rancho Cordova, 95741 and our is officially (916) 402-3750—that number previously did double duty as Vanessa's personal cell number, but is now for LSA business only.

Gail and Vanessa have now been joined in the office by our super volunteer office manager Robin, with other volunteers dropping in to help, including some say paroled lifers who help with tech issues. Ex-lifer Dave is often on hand to help with any and all tasks and we will be inviting various officials to come meet here with us. A modest, by invitation only open house is planned for early March.

Our thanks to Capital Christian Center church in Sacramento and Judson Enterprises of Gold River for their help in facilitating the office search and location, as well as their continuing support and encouragement. And to all those who answered our call for office equipment and furnishing donations (some of whose names we don't even know), our heartfelt gratitude.

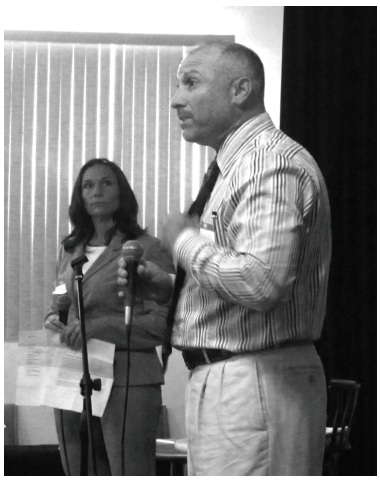
Not so long ago lifers were a forgotten group that no one by family seemed to know or care about. Now lifers and their circumstances are on the minds hearts and yes, even lips, of many outside the wire and we are proud to have been a big part of that change.

LIFER FAMILY SEMINARS GROWING

Life Support Alliance continues to bring information, hope and tools to lifers' families, through our ***Doing Life as a Family*** seminar series. Our latest venture was to the southern part of the state where Canyon Community Church in Chula Vista provided a welcoming atmosphere and great venue for the more than 40 families who came prepared to learn about the parole process and how they can help their prisoners navigate those waters.'

The day-long event (we even work through lunch!) provided latest information on a variety of subjects, from SB 260 (YOPH) to how to write a support letter to a presentation from representatives from the Division of Adult Parole Operations (DAPO) on what to expect from parole when lifers come home. In addition to presentations from LSA Director and Co-Director Vanessa Nelson-Sloane and Gail Brown, participants also heard from recently paroled lifer David Sloane, preeminent lifer attorney Michael Beckman and LSA board members Vic Abrunzo and Bob Driscoll.

Attorney Beckman answered questions from the audience and gave an overview of what it takes to be found suitable. Abrunzo and Driscoll spoke on Inmate Family Councils and the Inmate Welfare Fund and ex-lifer Sloane delivered a personal portrayal of going through a hearing and the areas commissioners are looking for.



For the first time, and indicative of the continuing numbers of lifers now paroling, two supervising parole agents from DAPO spoke on what the agency looks for in home visits, what to expect from parole agents and the changing programs for lifers. Our thanks to those speakers (Angela and John) and to DAPO Director Dan Stone, who continues to work toward assisting lifers reintegrate one released.

Also a first, friends and family of determinant sentenced prisoners joined the participants, now that many of those inmates will be facing a parole hearing, something they never expected to go through before the passage of SB 260. All those attending also took home a substantial handout packet with additional information and contacts.

and assistance. Pastor Lyons has his own prison outreach ministry and provided us with helpful contacts for reentry resources in the San Diego area. And our everlasting gratitude to volunteers Lenona, Jean and Bobette, who did so much to make this seminar, so far from our Sacramento base, so well organized and angst free for us. We couldn't have had such a successful day without you ladies, and on behalf of all lifers and their families, THANK YOU.

Comments from some of the attendees reflect the help and hope families take away from participating in these events:

"I was absolutely blown away at the professionalism of both of you and your abundance of knowledge regarding the CDCR, the Parole Boards and everything that is related to that. Where do you find the time? I applaud you both for caring so much and working so diligently without any compensation." Jean

"I've gained a wealth of information from your organization." Robin

"We attended your seminar yesterday; which was awesome, thank you!" Morgan

Our next seminar is in the planning stages for March in the Chowchilla/Fresno area. If your families are interested in attending have them email us at: lifesupportalliance@gmail.com and sign up.

MAIL... MAIL... MAIL...

An AVALANCHE You Can Help With...
Please Be Part of the Solution, Not Part of Our Problem

The image below is the amount of mail that was in

our LSA/CLN Post Office Box 277 after 2 days this past month.

CLN editors (2 of us) and staff (1) are working on a VOLUNTEER-(read UNPAID) basis and are also;

- attending parole board hearings, planning and putting on Lifer Family Seminars throughout the state, attending monthly BPH Executive Board meetings, making weekly visits to State Capitol on Lifer issues (& SHU terms…and out-of-state-transfers..and a TON of other inmate issues).

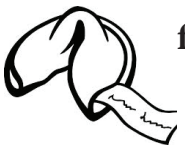
We ask you to keep the following in mind when writing to us;

- We publish California Lifer Newsletter bi-monthly and Lifer-Line monthly. Calif. Lifer Newsletter costs $30 or 6 books of stamps per year. If you want 1 copy of CLN, that is $6 or 1 book of stamps…*one time only.* (& yes, we keep track) Lifer Line is FREE, … HOWEVER…we have outside folks who volunteer to mail a certain number of this publication to inmates, so please be patient when requesting this publication, as we put you on a waiting list. If you have a family member who can print and mail to you, have them contact us directly and we will add their email to our list of Lifer-Line recipients.

- We attempt to keep your address accurate- CDC moves their 'inventory' so often we are all dizzy. If we need to correct your address…no need to write us 2 pages of conversation. **Simply put NEW ADDRESS on 1 sheet of paper.** Put your name, cdc#, housing and address on both letter and envelope! *AND PLEASE LIST YOUR HOUSING!!!*

- Sugar wins every time… **Please .... No one else is working this hard for you…please be kind.**

- OK…we will say it AGAIN. **PLEASE LIST YOUR HOUSING**. Prison mail rooms have returned CLN's to us for lack of housing info and **WE HAVE TO PAY POST OFFICE $.55 FOR EACH ONE RETURNED AND THEN RE-MAIL AT A COST OF $1.90.** To those of you who paid for a CLN subscription then said "you don't need my housing"… this is why you are NOT getting your CLN…as YOU are costing US money!
- **PLEASE WRITE CLEARLY!** We simply CANNOT read some of the names and addresses (& your issues). If your handwriting is poor, please consider having someone else write your letter.
- **WE ASK YOU TO NOT SEND US LEGAL PAGES FOR AN OPINION**. We are NOT lawyers.
- **NO Transcripts**… if we want to read your transcript, we can access it on-line (and save a tree)
- IF YOU SEND US 10 ENVELOPES WITH 10 PAGES EACH OF HANDWRITTEN COMPLAINTS, LEGAL ISSUES, RANTS ABOUT PRISON, BPH, FOOD, ITCHY UNDERWEAR,…WHATEVER…We guarantee you we will NOT only NOT answer (we just can't, we don't have time!)…we will probably throw the numerous letters away. As much as we wish we could help all of you that write, please remember WHAT we actually do. (re-read 1st paragraph)
- If you have written to us "*...this is my 6th letter to you (another 8 pages, double-sided) about this and you never answer me…*", THAT IS your answer.
- **WE ARE NOT 'Cash For Stamps'**… and suppose we will have to say this in almost every issue until the cows actually 'come home'. Please do NOT have your family call and complain to us that we "got your stamps and didn't send you money". If you send us stamps for cash, we mail them to CFS (Don Miller) in Walnut, Ca. Please see his FULL PAGE ad elsewhere in this issue for information.
- **Please keep letters short and to the point**
- We do not have pen-pal service, any products for sale, brochures of what we do AND CANNOT SEND FREE COPIES OF CALIFORNIA LIFER NEWSLETTER.
- And finally… we already have husbands, so thanks to the offers of personal nature, but we barely have time for our own spouses!



fortune cookies

He that gives should not remember, he that receives should never forget

He who is afraid of asking is afraid of learning

He who can take advice is sometimes superior to those who give it

I was sent to prison and I said to my cell mate, "I won't be in here long."

He replied, "Well the judge did give you 6 years."

"Yeah I know, but I think my wife will break me out, she's never let me finish an entire sentence EVER!

CLN SUBSCRIPTION FORM

I am enclosing $_____ or _____ stamps (4 .45cent stamps = $1)

My name, ID, and complete mailing address:

_____

_____

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SUBSCRIPTION RATES (after March 1st, 2013)
Inmates: 1 Year $30; 2 Years $50; 3 Years $75
Other: 1 Year $90; 2 Years $170; 3 Years $250

Back issues: $6.00 (or 20 stamps) each
sent to **CLN, P.O. Box 277, Rancho Cordova, CA 95741**

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California Lifer Newsletter
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After that date, you will not receive further issues of CLN without renewal.