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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.

GILMAN V. BROWN NINTH CIRCUIT STATUS REPORT

Gilman v. Brown

USDC (N.D. Cal.) Case No. 05- 00830-LKK-CKD
[Ninth Circuit Court of Appeal Case Nos. 14-15613, 14-15680]
July 22, 2014
September 22, 2014

On June 2, 2016, the Ninth Circuit issued mandate in this case. Unless a petition for certiorari is made to the U.S. Supreme Court, no further reporting on this case will be made in CLN.

STATUS OF *IN RE ROY BUTLER*

In re Roy Thinnes Butler

___Cal.App.4th___;
CA1(2); A139411
May 15, 2015

On July 27, 2016, the First District Court of Appeal denied the Board's motion to modify the previous stipulated settlement order. It also issued the following order:

ORDER REGARDING ENFORCEMENT OF THE DECEMBER 16, 2013 STIPULATED ORDER IMPLEMENTING SETTLEMENT

In light of the court's order filed on July 27, 2016, denying respondent's motion to modify the stipulated settlement order filed on December 16, 2013 (the stipulated order), the court believes it would be useful for members of the assigned panel to meet with counsel for the parties, including the Executive Officer of the Board of Parole Hearings and/or the Board's General Counsel (both of whom attended the last status conference held in this matter), should they wish to attend, to discuss future enforcement of the terms of the stipulated order. The court has the following directives and comment. 1. The court will conduct a status conference with the parties at 10:30 a.m. on August 17, 2016. Counsel should appear at

See Butler pg. 2

In Order to Keep *You* in the KNOW...

CLN SUBSCRIPTION RATES

ARE CHANGING!

see page 47

Table of Contents

CALIFORNIA LIFER NEWSLETTER

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COURT CASES (in order)

Reviewed in this Issue:

Gilman v. Brown
In re Roy Butler
In re John Laponte
In re Jesus Santana
P. v. Tyris Franklin
In re William Richards
In re Ezekiel Johnson
People v. Travis Brown

Prop. 36 Cases,
People v. Paul Martinez
People v. Daniel Ragan
People v. Sergio Acevedo

***Butler* from pg 1**

the Office of the Clerk of the First District Court of Appeal at 10:15 that day. The conference will be informal and will not be recorded. If appropriate, a formal order will be issued after the conference. 2. The issues the court wishes to discuss at the conference arise from the disclosure by the Attorney General, in her letter to the court dated June 7, 2016, that the Board of Parole Hearings has not been calculating base and adjusted base terms for life prisoners "who qualified for youth-offender or elderly-parole hearings" because "the youth offender law and the federal court order in the Three Judge Panel proceedings mandate the immediate release of these inmates once their parole grants become effective." As explained in the order denying the Board's motion to modify the stipulated order, that order applies by its own terms to "all life prisoners" and the Board's exception of youth offenders and certain elderly life prisoners is unjustified by the reasons given by the Board. The court's present concerns are whether (a) counsel for Butler was provided advance notice of those exceptions, (b) it is necessary for the court to order that any future proposed exceptions to the requirements of the stipulated order, or other matter related to the stipulated order, be disclosed in advance to the court and counsel for Butler, and (c) it would be useful for the parties and counsel or, if they are unable to agree, the court, to prescribe the manner in which the court and counsel for Butler will be kept informed of the Board's acts in furtherance of the "implementation of new policies and procedures that will result in the setting of base terms and adjusted base terms for life term inmates at their initial parole consideration hearing, " that is required by the stipulated order. 3. Counsel may raise additional issues and should be prepared to respond to additional questions pertaining to the rulemaking proceedings that are presumably now underway regarding implementation of the new policies and procedures called for by the parties' settlement and the stipulated order.

Then, on August 15, 2016, Butler moved for contempt against the Board for non-compliance with the stipulated settlement agreement. Also on 8/15/16, the Court canceled the August 17 scheduled (non-recorded) conference. On August 17, the Court scheduled a (recorded) conference for September 21, 2016.

The court believes it would be useful for members of the assigned panel to meet with counsel for the parties to discuss the stipulated order. The Executive Officer of the Board of Parole Hearings and/or the Board's General Counsel (both of whom attended the last status conference held in this matter) are invited, should they wish to attend. The status conference will be held at 3:00 p.m. on Wednesday, September 21, 2016. The status conference will be held in the courtroom and will be recorded.

Any orders resulting from this status conference will be reported in future issues of CLN.

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See Butler **pg. 3**

PUBLISHER'S NOTE

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

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

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

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

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***Butler* from pg 2**

MORE ON BUTLER: EVERYONE MUST HAVE TERM CALCULATED

> **...the base term is important because it "indicates the point at which a prison term becomes constitutionally excessive."**
>
> **Justice Anthony Kline, 1st Appelate**

In late 2013 the BPH came to an agreement to settle *In re Butler,* and begin, at a lifer's initial parole hearing, to set their term. For those lifers whose initial hearing had already been held, often long ago, the board agreed to provide that term calculation at their next hearing. Prior to the settlement the board's long-standing practice had been to set the term only if and when an inmate were found suitable for parole.

The Butler decision was heralded by inmates and attorneys as a way to make sure there was proportionality in sentences effectively served by differing inmates for largely the same sort of crime. But with regard to two specific groups, inmates who come under YOPH consideration and those who qualify for elderly parole, the board has not been setting base terms at the initial or next subsequent parole hearing, holding instead that by virtue of the inmate qualifying for either of those specialized proceedings he/she had, in fact, met the base term. Since the settlement agreement the board has reportedly held over 1,000 such hearings for YOPH or elderly parole candidates and have not set terms.

Inmate attorneys, filing a contempt complaint against the BPH in the First District Court of Appeal in San Francisco, said the Board had "willfully disobeyed the settlement order" and asked the court to hold the Board in contempt and hand down a fine of $1000 for each such occurrence. In addition, the inmate lawyers allege that in over 500 cases parole panels have not pronounced a base term, with no explanation as to why they did not do so.

Attorney General Kamala Harris' office, in a June 7, 2016, letter to the court, maintained the BPH was not calculating base and adjusted base terms for "who qualified for youth-offender or elderly-parole hearings" because "the youth offender law and the federal court order in the Three Judge Panel proceedings mandate the immediate release of these inmates once their parole grants become effective." In other words, once qualified for YOPH hearings and found suitable, these inmates would be 'immediately' released, subject nonetheless to all review periods.

According to court filings, the parole board decided last year that, because of new state laws, it lacked authority to give the notice required by the settlement to two groups of life prisoners: those 60 years or older who had served 25 years in prison, and those who committed their crimes as minors, were sentenced as adults, and had served at least 15 years. Because of YOPH and elderly parole procedures some prisoners might be found suitable and released before completing their standard base term, leading state lawyers to contend that the base was no longer meaningful to either group and thus panels were not required to provide base and adjusted base term calculation.

But the appeals court, in the person of Judge Anthony Kline, felt otherwise. In late July Kline refused to change the settlement terms, saying that for all life inmates, YOPH and elderly notwithstanding, the base term is important because it "indicates the point at which a prison term becomes constitutionally excessive." He also suggested the requirement for the board to notify inmates of their base term (calculate their term) might increase the likelihood of an appropriate sentence.

Andrea Nill Sanchez, an attorney representing the inmates, said that in the period from the settlement being reached until the Aug. 15 filing, the board held 466 elderly parole hearings, and 676 YOPH hearings without calculating and setting base terms for those inmates. And while no inmate has yet challenged a parole denial on the basis of having served past their base term it is a hot topic of discussion, especially among older inmates with early alphabet designations. Another inmate attorney speculated that once base terms are provided to all inmates, including those at elderly or YOPH hearings, such calculations could be "a starting point for a constitutional challenge."

EDITORIAL

LIFE SUPPORT ALLIANCE

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WHY ASK WHY?

An open letter to Governor Brown on parole reversal

Governor Brown,

As one of the primary and most persistent advocates for life term prisoners in California's prisons, we acknowledge, with appreciation, the changes you have helped bring about over the last six years to the outlook and situation for lifers. The hope these changes have engendered in those 35,000+/- men and women serving life terms is palpable on prison yards. And, it cannot have escaped your attention as, indeed, it has not escaped ours that this new outlook has resulted in increased programming, fewer incidents and lockdowns in the prison system.

The parole grant rate continues to inch up, slowly, as your personally selected parole commissioners take their responsibilities to follow the law and protect the public very seriously. As they should. And, again, credit where due, the number of parole reversals via your office has decreased. But, as of 2015, you, Governor Brown, were still reversing about 10% of those grants. And the courts have upheld your right to do so. To a point.

As apparently the only group to do an in-depth analysis of your reasons for reversing grants, we also note that you frequently criticize inmates for failing to explain why they became involved in criminal activities. So, Governor, we have a question for you for:

Why ask why?

We've asked your staff, what, for you, would constitute an acceptable explanation of why? Because they were young, unable to make good decisions, as we know is typical of adolescent behavior from SB 260 and 261, which you signed? Apparently that isn't enough, as you reversed several grants given under YOPH.

Because they were under the influence of various and sundry substances, but now have found their way to sobriety? Apparently not, as several reversals mention your distrust of that sobriety.

Because they thought they found a family in gangs but have now learned the difference between caring family and manipulative exploiters? Again, several times you expressed your suspicion of their growth.

Because they receive what you often term 'an elevated risk' evaluation on the CRA? But, Dr. Kusaj, head of the fabled FAD, has opined that a moderate risk for a lifer is equivalent to a low risk for any other group, and 'moderate,' by definition, does not mean elevated.

Lack of sufficient remorse? We've long thought, Governor that you operate at a disadvantage, only being able to read words in two-dimensional transcripts, not see the actual remorse and regret exhibited by the

Editorial **cont. pg 41**

PAROLE DENIAL AFFIRMED, BUT BOARD ORDERED TO SET BASE TERM PRIOR TO NEXT SCHEDULED PAROLE HEARING IN ORDER TO PERMIT POSSIBLE PROPORTIONALITY CHALLENGE

In re John Laponte
CA2(1); B267768
July 29, 2016

This (unpublished) case touches on a "hot button" issue for many lifers, namely, whether their time served to date is unconstitutionally disproportionate to their sentence. Laponte, with a 7-life kidnap sentence in 1990, received a 10-year denial in 2009, but was denied having an advanced hearing set. Post-*Butler*, this left him with no chance to have his base term set prior to his next scheduled hearing (in 2019). The Court of Appeal granted his habeas petition to the extent that they ordered the BPH to presently fix his base term, either by memorandum review, or in a new hearing, so that he would be in a theoretical legal position to challenge the disproportionality of his punishment, prior to his 2019 hearing.

> John Rafael Laponte petitions for a writ of habeas corpus relating to a 2009 decision of the Board of Parole Hearing denying him parole. Because "some evidence" supported the Board of Parole Hearing's determination to deny Laponte parole, Laponte's petition is denied to the extent it seeks review of that decision. We also decline to address at this point Laponte's contention that his sentence is unconstitutionally disproportionate to his culpability. Upon review of the petition, the return, the traverse, and related exhibits, and solely with respect to the issue of setting his base term and adjusted base term, we agree with Laponte, however, that under the particular circumstances of his case, and in light of *In re Butler* (2015) 236 Cal.App.4th 1222, he is entitled to have his base and adjusted base term set rather than waiting until his next scheduled parole hearing in November 2019. Accordingly, we grant the petition and order the Board of Parole Hearings to provide Laponte with the calculation of his base and adjusted base term or to conduct a new parole hearing at which Laponte's base term and adjusted base term shall be calculated.

Laponte's "life term" was explained to him by the sentencing court.

Laponte **cont. pg 6**

Laponte **from pg 5**

On April 13, 1990, Laponte pleaded guilty to kidnapping to commit robbery (§ 209, subd. (b)), for which he was sentenced to life with the possibility of parole. The trial court struck the firearm allegation with respect to count one. With respect to that count, Laponte was informed that he would be eligible for parole at the end of seven years, which would be the minimum sentence, but that the specific sentence would be set by the BPH and that it would vary depending on the facts and how he conducted himself in prison.

Laponte has been repeatedly denied parole, and his first petition, in the superior court, was denied.

> Laponte's Minimum Eligible Parole Date (MEPD) was September 15, 1996. Laponte appeared before the BPH for his initial parole consideration hearing on December 6, 1995, and was denied parole. His most recent hearing, his eighth, took place on November 23, 2009, and resulted in a ten-year denial. His next scheduled hearing date is no later than November 23, 2019.
>
> At the 2009 hearing, the BPH concluded that Laponte was unsuitable for parole based on factors including the commitment offense; Laponte's unstable social history and relationships; disciplinary violations that included a previous attempt to escape from prison; Laponte's past and present mental state, including demonstrating anger and defiance; an unfavorable psychological report; and Laponte's attitude towards the crime and lack of insight. Laponte made a brief appearance at the hearing and made a statement, but then elected to leave and did not remain for the remainder of the hearing.

In 2012 and 2014, Laponte requested that the 2019 hearing date be advanced, which request the Board denied. A letter from BPH dated November 24, 2014 informed Laponte that the Board would not consider another request to advance his 2019 hearing any earlier than September 26, 2017.

Laponte argues in his petition that he should be released on parole, that his sentence is so disproportionate to his individual culpability that it violates the constitutional prohibition of cruel and unusual punishment, and that the BPH should be required to set his base and adjusted base term. The superior court denied Laponte's petition on September 22, 2015. We issued an order to show cause on March 9, 2016.

The Court first found that there was "some evidence" (citing *In re Swanigan* (2015) 240 Cal.App.4th 1, 14) to support the Board's denial of parole.

> Laponte's most recent parole hearing took place on November 23, 2009. Laponte elected to proceed without counsel at the hearing, disputed the panel's jurisdiction over him, unilaterally declared the he was concluding the hearing, and left the room. BPH, after reviewing the evidence supporting and opposing Laponte's suitability for parole, determined that releasing Laponte would pose an unreasonable risk to public safety. The panel heard evidence that from Laponte's first hearing in 1995 and throughout subsequent hearings he was belligerent and argumentative, failed to conduct himself appropriately in prison, and did not accept responsibility for the life crime or demonstrate insight, believing that he was justified in kidnapping Noriega. ...
>
> Laponte has had 27 serious disciplinary violations, with five occurring after his parole hearing in 2007. Further, a 2009 report of BPH Forensic Assessment Division Forensic Psychologist James McNairn concluded that Laponte presented a "Moderate" risk of violence. In 1990, he had a 128B disciplinary incident for attempting to escape. Laponte admitted to McNairn that he committed Noriega's kidnapping, saying, "I did it." Laponte has "problems with impulsivity and anger based on his actions in the commitment offense and the many disciplinary infractions he has received while incarcerated." On the instrument used to measure levels of risk to recidivate, Laponte received a score in the "medium" category. McNairn concluded that "[a]fter weighing all data from the available records, the clinical interview and risk assessment data, it is believed that Mr. [Laponte] presents a relatively MODERATE RISK for violence in the free community." (Boldface and underline omitted.) This evidence before the BPH supports the panel's finding that Laponte presents an unreasonable risk of danger and the resulting decision denying parole.

But the Court did agree with Laponte that the length of his denial (10 years) should not, post-*Butler*, act as a bar to his having his term fixed before his next hearing. The Court theorized that given Laponte's incarceration long past his 7 year base sentence, this might give rise to a legal challenge that his resulting punishment was constitutionally disproportionately long. However, he could not raise such a claim unless his base term had first been fixed. The Court's explanation on this point, although not published, is reported in full here with its detailed analysis to aid other lifers facing this question.

> Section 3041, subdivision (b) provides that "[t]he panel or the board, sitting en banc, shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration

of the public safety requires a more lengthy period of incarceration for this individual. (§ 3041, subd. (b).) Our Supreme Court has held that this consideration of public safety takes precedence over uniformity in sentencing. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1096.) In *Dannenberg*, the Court concluded that the requirement that inmates were "normally" to receive "uniform" parole dates did not "impose upon the Board a general obligation to fix actual maximum terms, tailored to individual culpability, for indeterminate life inmates. Our prior ruling that the parole authority had such a general duty was influenced by the nature and provisions of the more comprehensive indeterminate sentencing system then in effect." (*Dannenberg, supra*, 34 Cal.4th at 1096.)

This conclusion, however, addressed uniformity rather than the issue of proportionality with respect to any requirement for calculating an inmate's base term and adjusted base term. The *Dannenberg* Court also held that "even if sentenced to a life-maximum term, no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense. Such excessive confinement, we have held, violates the cruel or unusual punishment clause (art. I, § 17) of the California Constitution. [Citations] Thus, we acknowledge, section 3041, subdivision (b) cannot authorize such an inmate's retention, even for reasons of public safety, beyond this constitutional maximum period of confinement." (*Dannenberg, supra*, 34 Cal.4th at p. 1096.) Laponte contends that his confinement exceeds that limit.

The issue of calculating a base and adjusted base term in the context of an argument that a sentence was constitutionally disproportionate to the individual's culpability was raised in Butler, which resulted in a settlement agreement pursuant to which the BPH changed the way it calculates base and adjusted base terms for every life inmate. (*In re Butler, supra*, 236 Cal.App.4th at p. 1229).

Prior to the settlement, a life inmate's term was not calculated until the inmate was found suitable for parole. As a result of the settlement in *Butler*, however, BPH agreed to begin setting base terms and adjusted base terms at an inmate's initial parole hearing rather than waiting until the date on which an inmate receives a determination that he is suitable for parole. The People argue that as a result of the *Butler* settlement, Laponte's petition is moot because his base and adjusted base term will be calculated at his next scheduled parole hearing after the effective date of *Butler*. Under most circumstances, we agree that the relief provided in *Butler* renders moot challenges to the BPH policy. In this case, however, by the time Laponte receives his next hearing

Laponte **cont. pg. 8**

Laponte **from pg 7**

he will have been incarcerated for almost 30 years without having had his base and adjusted base term set. We are concerned by this delay in light of the potential that the base term and adjusted base term applicable to Laponte may be less the 25 years he has already served. Without this information, Laponte is unable to utilize that information in order to challenge the proportionality of his confinement. "That the base term and adjusted base term relate to proportionality, and can serve as useful indicators of whether denial of parole will result in constitutionally excessive punishment, is evident in the fact that the matters considered by the Board when it sets the base term relate almost entirely to a prisoner's individual culpability for the base offense. It is also clear from the genesis of these concepts and the guidelines that define them, which were adopted by a former parole board precisely in order to measure constitutional proportionality during the parole granting process. (*Butler, supra*, 236 Cal.App.4th at p. 1237.)

Laponte attempted to obtain his base term from BPH prior to filing the instant petition. On May 13, 2014, Laponte wrote the BPH and requested a term calculation based on the *Butler* decision. On June 11, 2014 the BPH responded, in relevant part: "The *Butler* decision requires the Board to set base terms and adjusted base terms for all life-term inmates at their initial parole consideration hearing, or at their next scheduled parole consideration hearing that results in a grant of parole, a denial of parole, a tie vote, or a stipulated denial of parole. [¶] The base term will be established pursuant to the matrices and directives found in Title 15 of the California Code of Regulations. The adjusted base term refers to the base term after it has been adjusted for enhancement purposes pursuant to Title 15 of the California Code of Regulations. [¶] . . . [¶] Your next hearing is scheduled no later than November 23, 2019, at which time you will receive a term calculation as described above."

In determining that the *Butler* settlement provided a "substantial benefit" to life prisoners justifying an award of attorneys fees, the Butler court concluded that "[t] he settlement and stipulated order will *rectify or at least diminish* this and other problems attributable to the Board's former policy and practice." (*Butler, supra*, 236 Cal.App.4th at p. 1242, italics added.) Because BPH will not calculate Laponte's base term and adjusted base term until 2019, this potential constitutional violation cannot be said to be rectified or sufficiently diminished. Given that "the base term and adjusted base term relate to proportionality, and can serve as useful indicators of whether denial of parole will result in constitutionally excessive punishment," (*Butler, supra,* 236 Cal.App.4th at p. 1237), facilitating judicial review, Laponte is entitled to have his term set. "A reviewing court can most usefully analyze a life prisoner's claim that the denial of parole results in a cruel and/or unusual punishment after the parole authority has established a term that can be subjected to judicial review. . . . Once the primary term is fixed by the [parole authority], however, all of the relevant data regarding the particular inmate, the circumstances of his offense, and the criteria upon which the term is based will have been marshaled by the [parole authority], thus enabling petitioner to set out the basis or bases for his complaint, while at the same time providing the court with a record adequate to permit meaningful review." (*Id*. at p. 1243.)

Because Laponte's situation results in such a lengthy delay in calculating his base and adjusted base term, it does not sufficiently resolve, under these circumstances, the constitutional concerns identified in *Butler.* Accordingly, we grant the petition solely to the extent that it requests the BPH to calculate Laponte's base term and adjusted base term.

Accordingly, the Court ordered either a paper review or a new hearing, to fix Laponte's term.

Within 90 days, the Board is directed to provide Laponte with either a written calculation of Laponte's base and adjusted base term or a date for a new hearing at which time the Board shall provide Laponte with his base term and adjusted base term. In all other respects, the petition is denied.

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BOARD ORDERED TO CONDUCT NEW HEARING WHERE AN INTERPRETER ASSISTS LIFER AT ALL ATTORNEY VISITS AND AT PAROLE HEARING

In re Jesus Santana
CA4(2); E064063
June 9, 2016

Incredibly, the BPH conducted a lifer hearing (in English) where the inmate did not understand or speak English, and was totally unable to communicate even with his attorney. Why the Panel persisted on conducting this hearing is not explained, but the due process violation is reprehensible. The Court's decision is brief because there was no disagreement between the parties that writ relief was required. As an aside, this writer believes that the attorney who (mis) represented Santana by *pressuring him into signing a waiver to attend the hearing due to the language barrier*, should be stricken from the Board's list of approved hearing attorneys.

On July 24, 2015, petitioner filed a petition for writ of habeas corpus alleging, among other things: that

he cannot communicate in English but can do so in Spanish; that he appeared for a hearing before the Board of Parole Hearings (BPH); that no interpreter was present; that the attorney appointed to represent petitioner at the BPH proceeding did not speak Spanish and was frustrated with petitioner's inability to communicate in English; and that this attorney pressured petitioner to sign a form that he did not understand but which waived his right to attend the BPH hearing. We requested a response, which respondent provided. We then issued an order to show cause and elicited a return and traverse. On May 2, 2016, the parties filed a "joint stipulation for the issuance of an order granting petition for writ of habeas corpus," which we deem a waiver of the right to attend the hearing we set when we issued the order to show cause. (See *People v. Romero* (1994) 8 Cal.4th 728, 739-740 & fn. 7.) The petition is therefore granted in accordance with the terms of the parties' stipulation.

DISPOSITION

The petition for writ of habeas corpus is granted. The BPH decision dated April 9, 2015, is vacated, as is the order deferring petitioner's next hearing for five years. BPH is to schedule a new parole consideration hearing within 120 days of the date of filing of this opinion. BPH shall provide a Spanish-speaking interpreter at this hearing, including any prehearing meetings between petitioner and his appointed counsel. In addition, BPH will provide any attorney appointed to represent petitioner at this proceeding, at the time of the appointment, with the following statement: "The inmate has requested that all communications with counsel be made through a Spanish-speaking interpreter, who will be provided at the expense of the Board."

******

JUVENILE HOMICIDE OFFENDERS MAY NOT BE SENTENCED TO THE FUNCTIONAL EQUIVALENT OF LWOP WITHOUT THE PROTECTIONS OUTLINED IN *MILLER V. ALABAMA* – BUT, NEW PC § 3051 CURES THE DEFECT IF MITIGATING FACTS ARE PROPERLY SET OUT DURING SENTENCING

P. v. Tyris Franklin
---Cal.4th---; Cal. Supreme;
S217699
May 26, 2016

Tyris Franklin was 16 when he shot and killed a rival. The trial court sentenced him to a mandatory term of 50 years to life. On appeal, he argued that his sentence violated the Eighth Amendment, citing *Miller v. Alabama* (2012) 567 U.S.__ and *People v. Caballero* (2012) 55 Cal.4th 262. The Court of Appeal affirmed, reasoning that the subsequent enactment of PC § 3051 cured any potential constitutional infirmity.

On review, the California Supreme Court affirmed and remanded. As a threshold matter, the Supreme Court considered whether *Miller's* prohibition on LWOP sentences for juvenile *homicide* offenders also prohibits sentences that are the functional equivalent to LWOP. The court answered that question in the affirmative. A similar question arose in the context of sentencing for juvenile *nonhomicide* offenders. In *Graham v. Florida* (2010) 560 U.S. 48, the Court held that no juvenile who commits a nonhomicide offense could be sentenced to LWOP. In *People v. Caballero* (2012) 55 Cal.4th 262, the California Supreme Court held that *Graham* also prohibited sentencing a juvenile nonhomicide offender to the functional equivalent to LWOP. "[J]ust as *Graham* applies to sentences that are the "functional equivalent of a [LWOP] sentence so too does *Miller* apply to such functionally equivalent sentences" for juvenile homicide offenders.

The Cal. Supreme Court further held that Senate Bill No. 260, which added PC § 3051, moots *Miller* claims, but that remand is required in this case to provide the parties with an opportunity to make an accurate record. The Legislature explicitly passed Senate Bill No. 260 to bring juvenile sentencing into conformity with *Graham, Miller,* and *Caballero*. At the heart of the bill is section 3051, which requires the Parole Board to conduct a "youth offender parole hearing" during the 15th, 20th, or 25th year of a juvenile offender's incarceration. Section 3051 thus reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile may serve before becoming eligible for parole. Franklin did not argue that a life sentence with parole eligibility during his 25th year of incarceration (when he would be 41 years old) is the functional equivalent of LWOP. Because section 3051 transformed Franklin's sentence into one that includes a meaningful opportunity for release during his 25th year of incarceration, it is neither LWOP nor its functional equivalent and thus has rendered Franklin's *Miller* challenge moot.

However, Franklin did argue that section 3051 did not satisfy *Miller* because it permits a trial court to abdicate its responsibility to ensure that a juvenile offender's sentence comports with the Eighth Amendment at the outset. Although disagreeing, the Supreme Court determined that remand was appropriate "to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is

***Franklin* cont. pg. 10**

***Franklin* from pg. 9**

'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.'" (Quoting *Graham v. Florida* (2010) 560 U.S. 48, 79.)

The Cal. Supreme court noted that its "mootness holding is limited to circumstances where, as here, § 3051 entitles an inmate to a youth offender parole hearing against the backdrop of an otherwise lengthy mandatory sentence. We express no view on *Miller* claims by juvenile offenders who are ineligible for such a hearing under § 3051, subdivision (h), or who are serving lengthy sentences imposed under discretionary rather than mandatory sentencing statutes."

The Court first delineated the questions that it would answer, and those that it need not answer.

> We granted review to answer two questions: Does Penal Code section 3051 moot Franklin's constitutional challenge to his sentence by requiring that he receive a parole hearing during his 25th year of incarceration? If not, then does the state's sentencing scheme, which required the trial court to sentence Franklin to 50 years to life in prison for his crimes, violate *Miller's* prohibition against mandatory LWOP sentences for juveniles?
>
> We answer the first question in the affirmative: Penal Code sections 3051 and 4801 — recently enacted by the Legislature to bring juvenile sentencing in conformity with *Miller, Graham,* and *Caballero* — moot Franklin's constitutional claim. Consistent with constitutional dictates, those statutes provide Franklin with the possibility of release after 25 years of imprisonment (Pen. Code, § 3051, subd. (b)(3)) and require the Board of Parole Hearings (Board) to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity" (id., § 4801, subd. (c)). In light of this holding, we need not decide whether a life sentence with parole eligibility after 50 years of incarceration is the functional equivalent of an LWOP sentence and, if so, whether it is unconstitutional in Franklin's case.

The Court was clear to make one direct command, however, namely that Franklin's case be remanded for the sole purpose of permitting mitigating evidence, if any, to be placed on the sentencing record, so that future parole panels would have that information on hand to consider at his eventual parole hearing under PC § 3051.

> Although Franklin's constitutional claim has been mooted by the passage of Senate Bill No. 260 (2013–2014 Reg. Sess.) (Senate Bill No. 260), he raises colorable concerns as to whether he was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth. The criteria for parole suitability set forth in Penal Code sections 3051 and 4801 contemplate that the Board's decision making at Franklin's eventual parole hearing will be informed by youth-related factors, such as his cognitive ability, character, and social and family background at the time of the offense. Because Franklin was sentenced before the high court decided Miller and before our Legislature enacted Senate Bill No. 260, the trial court understandably saw no relevance to mitigation evidence at sentencing. In light of the changed legal landscape, we remand this case so that the trial court may determine whether Franklin was afforded sufficient opportunity to make such a record at sentencing. This remand is necessarily limited; as section 3051 contemplates, Franklin's two consecutive 25-years-to-life sentences remain valid, even though the statute has made him eligible for parole during his 25th year of incarceration.

On direct appeal of his conviction, Franklin challenged the constitutionality of his sentence. However, the Court of Appeal held that recently enacted PC § 3051 mooted any such claim because he now would get a first parole hearing much sooner (at 25 years, not 50 years).

> The Court of Appeal affirmed Franklin's conviction and sentence. The court assumed without deciding that "the sentence, when imposed, violated the Eighth Amendment and that had there been no intervening developments, remand for resentencing would have been required." But the court held that "any potential constitutional infirmity in [defendant's] sentence has been cured by the subsequently enacted Penal Code section 3051, which affords youth offenders a parole hearing sooner than had they been an adult." Thus, "defendant's sentence is no longer the functional equivalent of an LWOP sentence and no further exercise of discretion at this time is necessary."

Franklin complained that 50-life would put his MEPD at age 66, which he argued was the functional equivalent of LWOP.

Franklin claims that this sentence violates the Eighth Amendment because it is effectively a term of life without parole imposed by statute, without judicial consideration of his youth and its relevance for sentencing. This claim is grounded in a series of United States Supreme Court cases assigning constitutional significance to characteristics of youth long known to common sense and increasingly substantiated through science.

The Court summarized the recent legal history of juvenile and LWOP sentencing as held by the highest courts in the land.

The Eighth Amendment prohibition on cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." (*Roper v. Simmons* (2005) 543 U.S. 551, 560 (*Roper*); see *Robinson v. California* (1962) 370 U.S. 660, 667 [Eighth Amend. is binding on the states through the 14th Amend.].) This prohibition encompasses the "foundational principle" that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2466].) From this principle, the high court has derived a number of limitations on juvenile sentencing: (1) no individual may be executed for an offense committed when he or she was a juvenile (*Roper,* at p. 578); (2) no juvenile who commits a nonhomicide offense may be sentenced to LWOP (*Graham, supra,* 560 U.S. at p. 74); and (3) no juvenile who commits a homicide offense may be automatically sentenced to LWOP (*Miller,* at p. __ [132 S.Ct. at p. 2460]).

Miller addressed two cases, each of which involved a 14-year-old offender tried as an adult, convicted of murder, and sentenced to LWOP under a state law that did not allow the sentencing authority to impose a less severe punishment. In prohibiting such mandatory LWOP sentences, the high court in *Miller* affirmed and amplified its observations in Graham and Roper that children are "constitutionally different . . . for purposes of sentencing" for several reasons based "not only on common sense — on what 'any parent knows' — but on science and social science as well." (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2464]; see id. at p. __ [132 S.Ct. at p. 2464, fn. 5] ["the science and social science supporting *Roper's* and *Graham's* conclusions have become even stronger"].) "First, children have a ' "lack of maturity and an underdeveloped sense of responsibility," ' leading to recklessness, impulsivity, and heedless risk-taking. . . . Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. . . . And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' " (*Ibid*., citations omitted.)

These "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because ' "[t]he heart of the retribution rationale" ' relates to an offender's blameworthiness, ' "the case for retribution is not as strong with a minor as with an adult." ' . . . Nor can deterrence do the work in this context, because ' "the same characteristics that render juveniles less culpable than adults" ' — their immaturity, recklessness, and impetuosity — make them less likely to consider potential punishment. . . . Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible' — but ' "incorrigibility is inconsistent with youth." ' . . . And for the same reason, rehabilitation could not justify that sentence. Life without parole 'forswears altogether the

Franklin **cont. pg. 12**

Franklin **from pg. 11**

rehabilitative ideal.' . . . It reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." (*Miller, supra,* 567 U.S. at p. __ [132 S.Ct. at p. 2465], citations omitted.)

Miller also relied on cases that have "elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." (*Miller, supra,* 567 U.S. at p. __ [132 S.Ct. at p. 2467], citing *Woodson v. North Carolina* (1976) 428 U.S. 280 and related cases.) These cases were relevant, the high court explained, because *Graham* had "likened life without parole for juveniles to the death penalty itself." (*Miller,* at p. __ [132 S.Ct. at p. 2463]; see id. at p. __ [132 S.Ct. at p. 2466] ["Imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.' [*Graham, supra,* 560 U.S. at p. 69.]"].)

Based on the "confluence" of the considerations above, the high court concluded that "in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." (*Miller, supra,* 567 U.S. at pp. __, __ [132 S.Ct. at pp. 2464, 2468].) *Miller* thus held that a state may not require a sentencing authority to impose LWOP on juvenile homicide offenders; the sentencing authority must have individualized discretion to impose a less severe sentence and, in exercising that discretion, must take into account a wide array of youth-related mitigating factors. (*Id*. at pp. __–__ [132 S.Ct. at pp. 2468–2469].) While declining to decide whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger" *(id*. at p. __ [132 S.Ct. at p. 2469]), the high court concluded by saying: "[G]iven all we have said in *Roper, Graham,* and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper and Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.] Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Ibid*.)

The Calif. Supreme Court reflected and relied upon other courts' holdings on this question, after *Miller* and its progeny came down.

Since *Graham* and *Miller,* courts throughout the country have examined whether the high court's restrictions on LWOP sentences apply to lengthy sentences with a release date near or beyond a juvenile's life expectancy. In *Caballero,* we held that the defendant's 110-year sentence was the "functional equivalent" of life without parole and thus violated *Graham*'s prohibition against LWOP sentences for juvenile offenders convicted of nonhomicide crimes. (*Caballero, supra*, 55 Cal.4th at p. 268; see *Sumner v. Shuman* (1987) 483 U.S. 66, 83 ["there is no basis for distinguishing . . . between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy."].) But we did not further elaborate what it means for a sentence to be the "functional equivalent" of LWOP, and we left open how our holding should be applied in the case of a juvenile homicide offender. (*Caballero*, at p. 268, fn. 4.)

We now hold that just as *Graham* applies to sentences that are the "functional equivalent of a life without parole sentence" (*Caballero, supra*, 55 Cal.4th at p. 268), so too does *Miller* apply to such functionally equivalent sentences. As we noted in *Caballero, Miller* "extended *Graham's* reasoning" to homicide offenses, observing that " 'none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.' " (*Caballero*, at p. 267, quoting *Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2465].) Because sentences that are the functional equivalent of LWOP implicate *Graham's* reasoning (*Caballero*, at p. 268), and because " '*Graham's* reasoning implicates any life-without-parole sentence imposed on a juvenile' " whether for a homicide or nonhomicide offense (*id*. at p. 267, quoting *Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2465]), a sentence that is the functional equivalent of LWOP under *Caballero* is subject to the strictures of *Miller* just as it is subject to the rule of *Graham.* In short, a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller.*

The Court went on to analyze how SB260, and PC § 3051, operated to effect Legislative intent to moot *Miller* claims. The Court also noted that Franklin did not suggest that his resultant first parole hearing at age 41 would still amount to an LWOP sentence.

At the heart of Senate Bill No. 260 was the addition of section 3051, which requires the Board to conduct a "youth offender parole hearing" during the 15th, 20th, or 25th year of a juvenile offender's

incarceration. (§ 3051, subd. (b).) The date of the hearing depends on the offender's "controlling offense," which is defined as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (*Id*., subd. (a)(2)(B).) A juvenile offender whose controlling offense carries a term of 25 years to life or greater is "eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (*Id.*, subd. (b)(3).) The statute excludes several categories of juvenile offenders from eligibility for a youth offender parole hearing: those who are sentenced under the Three Strikes Law (§§ 667, subds. (b)–(i), 1170.12) or Jessica's Law (§ 667.61), those who are sentenced to life without parole, and those who commit another crime "subsequent to attaining 23 years of age . . . for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison." (§ 3051, subd. (h); see Stats. 2015, ch. 471, § 1 [changing the age after which malice aforethought crimes are disqualifying from 18 to 23].) Section 3051 thus reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole. Apart from the categories of offenders expressly excluded by the statute, section 3051 provides all juvenile offenders with a parole hearing during or before their 25th year of incarceration. The statute establishes what is, in the Legislature's view, the appropriate time to determine whether a juvenile offender has "rehabilitated and gained maturity" (Stats. 2013, ch. 312, § 1) so that he or she may have "a meaningful opportunity to obtain release" (§ 3051, subd. (e)).

Sections 3051 and 3046 have thus superseded the statutorily mandated sentences of inmates who, like Franklin, committed their controlling offense before the age of 18. The statutory text makes clear that the Legislature intended youth offender parole hearings to apply retrospectively, that is, to all eligible youth offenders regardless of the date of conviction. Section 3051, subdivision (b) makes eligible all persons "convicted of a controlling offense that was committed before the person had attained 23 years of age." In addition, section 3051, subdivision (i) says: "The board shall complete all youth offender parole hearings for individuals who become entitled to have their parole suitability considered at a youth offender parole hearing on the effective date of this section by July 1, 2015." This provision would be meaningless if the statute did not apply to juvenile offenders already sentenced at the time of enactment.

The Legislature did not envision that the original sentences of eligible youth offenders would be vacated and that new sentences would be imposed to reflect parole eligibility during the 15th, 20th, or 25th year of incarceration. The continued operation of the original sentence is evident from the fact that an inmate remains bound by that sentence, with no eligibility for a youth offender parole hearing, if "subsequent to attaining 23 years of age" the inmate "commits an additional crime for which malice aforethought is a necessary element . . . or for which the individual is sentenced to life in prison." (§ 3051, subd. (h); Stats. 2015, ch. 471.) But section 3051 has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required. (Cf. *State v. Mares* (Wyo. 2014) 335 P.3d 487, 498 [holding that a similar statute had "converted" juvenile offenders' sentences "by the operation of the amended statutes" regardless of when those juveniles were originally sentenced, and that no judicial intervention was required to effectuate their new parole eligibility].)

In this case, the trial court sentenced Franklin to a mandatory term of 25 years to life under section 190 for first degree murder and to a consecutive mandatory term of 25 years to life under section 12022.53 on the firearm enhancement. Either the homicide offense or the firearm enhancement could be considered the "controlling offense" under section 3051, subdivision (a)(2)(B). Regardless of which is considered controlling, Franklin is a "person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life." (§ 3051, subd. (b)(3).) As such,

Franklin **cont. pg. 14**

Franklin **from pg. 13**

Franklin "shall be eligible for release on parole by the board during his . . . 25th year of incarceration at a youth offender parole hearing." (*Ibid*.)

Franklin does not argue that a life sentence with parole eligibility during his 25th year of incarceration, when he will be 41 years old, is the functional equivalent of LWOP. We conclude that such a sentence is not the functional equivalent of LWOP, and we are not aware of any court that has so held. Instead, Franklin urges us to conclude that his 50-year-to-life sentence is the functional equivalent of LWOP and, in light of that conclusion, to "construe [section 12022.53, subdivision (h)'s] prohibition on striking section 12022.53 enhancements as inapplicable to cases involving juvenile offenders, in which imposition of the enhancement would result in a functional life without parole sentence." He seeks relief in the form of resentencing whereby the trial court would strike the firearm enhancement and impose only a single term of 25 years to life for the first degree murder. But we see no basis for rewriting section 12022.53, subdivision (h)'s prohibition on striking firearm allegations in light of the Legislature's determination that inmates such as Franklin, despite the mandatory character of their original sentences, are now entitled to a youth offender parole hearing during their 25th year of incarceration. Even if section 12022.53, subdivision (h) could be construed to authorize the trial court to strike the firearm enhancement, it is not clear how the imposition of a single term of 25 years to life for first degree murder would put Franklin in a better or different position, from the standpoint of *Miller's* concerns, than section 3051's requirement of a youth offender parole hearing during his 25th year of incarceration.

In sum, the combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that Franklin is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because Franklin is not serving an LWOP sentence or its functional equivalent, no Miller claim arises here. The Legislature's enactment of Senate Bill No. 260 has rendered moot Franklin's challenge to his original sentence under *Miller*.

Our mootness holding is limited to circumstances where, as here, section 3051 entitles an inmate to a youth offender parole hearing against the backdrop of an otherwise lengthy mandatory sentence. We express no view on *Miller* claims by juvenile offenders who are ineligible for such a hearing under section 3051, subdivision (h), or who are serving lengthy sentences imposed under discretionary rather than mandatory sentencing statutes.

***Franklin* from. pg. 14**

Two more issues were raised. One was that he was not provided a "meaningful opportunity for release" by SB 260, so that even his earlier initial parole hearing amounted to the functional equivalent of LWOP. The Court disagreed.

> The Legislature has declared that "[t]he youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release" (§ 3051, subd. (e)) and that in order to provide such a meaningful opportunity, the Board "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity" (§ 4801, subd. (c)). These statutory provisions echo language in constitutional decisions of the high court and this court. (See *Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2468] ["chronological age and its hallmark features"]; *Graham, supra*, 560 U.S. at p. 75 ["meaningful opportunity to obtain release"]; *Roper, supra*, 543 U.S. at p. 571 ["diminished culpability of juveniles"]; accord, *Caballero, supra*, 55 Cal.4th at p. 268, fn. 4.) The core recognition underlying this body of case law is that children are, as a class, "constitutionally different from adults" due to "distinctive attributes of youth" that "diminish the penological justifications for imposing the harshest sentences on juvenile offenders." (*Mille*r, at p. __ [132 S.Ct. at p. 2458].) Among these "hallmark features" of youth are "immaturity, impetuosity, and failure to appreciate risks and consequences," as well as the capacity for growth and change. (*Id*. at pp. __, __ [132 S.Ct. at pp. 2465, 2468].) It is because of these "marked and well understood" differences between children and adults (*Roper,* at p. 572) that the law categorically prohibits the imposition of certain penalties, including mandatory LWOP, on juvenile offenders. (*Montgomery v. Louisiana* (2016) 577 U.S.__, __–__ [136 S.Ct. 718, 732–737].)
>
> In directing the Board to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner" (§ 4801, subd. (c)), the statutes also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. For example, section 3051, subdivision (f)(2) provides that "[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the board." Assembling such statements "about the individual before the crime" is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. In addition, section 3051, subdivision (f)(1) provides that any "psychological evaluations and risk assessment instruments" used by the Board in assessing growth and maturity "shall take into consideration . . . any subsequent growth and increased maturity of the individual." Consideration of "subsequent growth and increased maturity" implies the availability of information about the offender when he was a juvenile.
>
> It is not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing. Thus, although Franklin need not be resentenced — as explained (*ante*, at pp. 14–20), Franklin's two consecutive 25-year-to-life sentences remain valid, even though section 3051, subdivision (b)(3) has altered his parole eligibility date by operation of law — we remand the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.
>
> If the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to "give great weight to" youth-related factors (§ 4801, subd. (c)) in determining whether the offender is "fit to rejoin society" despite having committed a serious crime "while he was a child in the eyes of the law" (*Graham, supra*, 560 U.S. at p. 79).

Finally, the Court dealt with the suggestion that evidence of maturity and rehabilitation will not properly enter into Franklin's earlier parole consideration hearing. Because the BPH has not yet promulgated regulations to deal with these parole candidates, it is premature to rule on such concerns.

Finally, amicus curiae PCJP

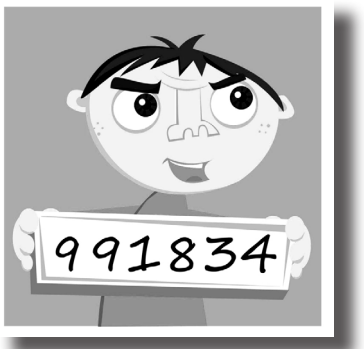
***Franklin* cont. pg. 16**

Franklin **from pg. 15**

contends that despite the announced purpose of Senate Bill No. 260, youth offender parole hearings will not, in practice, "afford the juvenile offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' " (*Caballero, supra*, 55 Cal.4th at p. 266, quoting *Graham, supra*, 560 U.S. at p. 73) and therefore cannot render moot a *Miller* challenge to a lengthy mandatory sentence that is functionally equivalent to LWOP. PCJP's argument subsumes several concerns distinct from those we have considered above.

First, although the Governor, like the Board, is required to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law" (§ 4801, subd. (c); see Cal. Const., art. V, § 8; Pen. Code, § 3041.2; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 664), PCJP notes that the Governor, in reviewing Board decisions that find persons serving an indeterminate term for murder suitable for parole, has historically reversed such decisions at a very high rate. Second, PCJP observes that judicial review of parole denials is "highly deferential" and limited to determining "whether a modicum of evidence supports the parole suitability decision." (*In re Shaputis* (2011) 53 Cal.4th 192, 221.) Third, PCJP contends that some of the suitability criteria used by the Board run counter to the high court's observations concerning the mitigating attributes of youth. For example, a finding that "[t]he motive for the crime is inexplicable or very trivial in relation to the offense" is a factor tending to show unsuitability (Cal. Code Regs., tit. 15, § 2281, subd. (c)(1)(E)), even though "such a motive correlates with hallmark features of youth like 'impetuosity, and failure to appreciate risks and consequences.' " An unstable social history also counts against suitability (id., subd. (c)(3)), even though youth " 'are more vulnerable . . . to negative influences and outside pressures . . . [,] have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.' (*Miller, supra*, at p. __ [132 S.Ct. at p. 2464].)" Fourth, PCJP argues that developing a record of mitigation focused on youth-related attributes for the purpose of a youth offender parole hearing is "unachievable in practice" given resource constraints. And fifth, PCJP contends that juvenile offenders serving lengthy sentences have little access to education and rehabilitative programs that may serve to forestall "the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." (*Graham, supra*, 560 U.S. at p. 79.)

We have no occasion in this case to express any view on the concerns raised by PCJP. As noted, the Legislature enacted Senate Bill No. 260 with "the intent . . . to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established." (Stats. 2013, ch. 312, § 1.) Section 4801, subdivision (c) directs that the Board, in conducting a youth offender parole hearing, "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." And section 3051, subdivision (e) says: "The youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent



with relevant case law, in order to provide that meaningful opportunity for release."

As of this writing, the Board has yet to revise existing regulations or adopt new regulations applicable to youth offender parole hearings. In advance of regulatory action by the Board, and in the absence of any concrete controversy in this case concerning suitability criteria or their application by the Board or the Governor, it would be premature for this court to opine on whether and, if so, how existing suitability criteria, parole hearing procedures, or other practices must be revised to conform to the dictates of applicable statutory and constitutional law. So long as juvenile offenders have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination, we cannot say at this point that the broad directives set forth by Senate Bill No. 260 are inadequate to ensure that juvenile offenders have a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

Accordingly, the Court affirmed Franklin's sentence but remanded the matter to the Court of Appeal with instructions to remand to the trial court for the limited purpose of determining whether Franklin was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801.

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BITING BACK: NEW STATUTE LIMITING USE OF DENTAL BITE EVIDENCE REQUIRES REVERSAL OF OLD MURDER CONVICTION

In re William Richards
--- Cal.4th ---; CA Supreme Ct.; S223651
May 26, 2016

This case involves a second bite at the apple. In 1997, William Richards was convicted (after two hung juries) of the first degree murder of his wife, based on expert dental bite testimony, and sentenced to 25-life. He challenged the bite evidence in the CA Supreme Court in 2012, but lost in a 4-3 decision ("Richards I"). Based on this ruling, the Legislature later changed the law to stiffen the burden of proof using such unproven evidence. On a renewed habeas petition, Richards claimed he was entitled to this newer standard. The Court agreed, and reversed his conviction 9 years after his conviction ("Richards II"). Since there may be other lifers in California whose convictions were based on dental bite evidence, this case is presented to CLN readers.

In 1997, petitioner William Richards was convicted of the 1993 murder of his wife, Pamela. In 2012, by a 4 to 3 decision, this court rejected his claim on habeas corpus that his conviction should be overturned because the prosecution's dental expert had recanted his expert opinion testimony at trial that a lesion on Pamela's hand was a human bite mark matching petitioner's unusual teeth. (*In re Richards* (2012) 55 Cal.4th 948 (*Richards I*).) The majority concluded that the expert's recantation did not constitute "false evidence" within the meaning of Penal Code section 1473 as the statute then read because, in the absence of "a generally accepted and relevant advance in the witness's field of expertise" or "a widely accepted new technology" that would allow "experts to reach an objectively more accurate conclusion," petitioner had failed to show, by a preponderance of the evidence, that the expert's opinion at trial was "objectively untrue." (*Richards I, supra*, 55 Cal.4th at pp. 963, 966.) In 2014, however, the Legislature responded to our decision in Richards I by amending section 1473 to state that " 'false evidence' shall include opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances." (§ 1473, subd. (e)(1), as added by Stats. 2014, ch. 623, § 1.)

Petitioner has filed a new petition for writ of habeas corpus before this court in which he contends that, under the 2014 legislative revision of section 1473, he is now entitled to relief and that his conviction should be overturned. For the reasons discussed hereafter, we agree.

Richards had one foot out the door after an earlier habeas petition, but the CA Supreme Court slammed the door back shut.

In 2007, petitioner filed a petition for writ of habeas corpus in the San Bernardino County Superior Court, asserting that his 1997 murder conviction was based on false evidence and that new evidence unerringly established his innocence. The superior court issued an order to show cause and subsequently held an evidentiary hearing in 2009. At the conclusion of that hearing, the superior court granted the petition and vacated petitioner's judgment of conviction.

The prosecution appealed, and the Court of Appeal reversed in November 2010. We granted review, and, as noted above, affirmed the Court of Appeal judgment by a 4 to 3 vote on December 3, 2012. (Richards I, supra, 55 Cal.4th 948.)

Following the Legislature's 2014 amendment to section 1473, petitioner filed the present petition for writ of habeas corpus. Importantly, the California Supreme Court held that because of the intervening change in the applicable law concerning the definition of false evidence, the petition was not subject to the procedural bar of successiveness.

Section 1473, subdivision (b) provides in relevant part: "A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons: [¶] (1) False evidence that is substantially material or probative on the issue of guilt or

***Richards* cont. pg. 18**

***Richards* from pg. 17**

> punishment was introduced against a person at any hearing or trial relating to his or her incarceration." If a petitioner fails to show that false evidence affected the outcome of petitioner's trial, a petitioner may present new evidence to challenge the conviction, but in order to prevail, " 'such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.' [Citation.]" (*In re Clark, supra*, 5 Cal.4th 750, 766.)

The Court reviewed the change to PC § 1473, regarding "false evidence" used to gain a conviction.

> After this court's decision in *Richards I*, the Legislature enacted Senate Bill No. 1058 (2013-2014 reg sess.), which added subdivision (e)(1) to section 1473. That provision now states in full: "For purposes of this section, 'false evidence' shall include opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances." (Pen. Code, § 1473, subd. (e)(1).)
>
> The plain meaning of the amendment to section 1473 makes clear that an expert opinion given at trial can later be deemed "false evidence" under two circumstances: (1) if the expert repudiates his or own opinion given at trial; or (2) if the opinion given at trial is undermined by subsequent "scientific research or technological advances." (§ 1473, subd. (e)(1).) We conclude that, under this amendment to section 1473, petitioner has met his burden to show that Dr. Sperber's trial testimony constituted false evidence under either circumstance.

The Court reviewed the newly presented evidence and found that Richards won on both prongs of § 1473 (revised).

> First, Dr. Sperber clearly repudiated his trial testimony. In the habeas corpus proceedings, Dr. Sperber testified that he no longer was certain that the autopsy photograph depicted a human bite mark, stating, "I don't know for sure that . . . that photograph depicts a bite mark." He also repudiated his trial testimony concerning whether petitioner's teeth were consistent with the lesion depicted on the autopsy photograph, stating, "My opinion today is that [petitioner's] teeth . . . are not consistent with the lesion on the hand." Because section 1473 as amended in 2014 states false evidence is established when an expert's trial testimony has "been repudiated by the expert who originally provided

the opinion," petitioner has shown through Dr. Sperber's subsequent testimony during the 2009 proceedings on habeas corpus that Dr. Sperber's testimony was false. (§ 1473, subd. (e)(1).)

Second, the evidence petitioner presented in the prior habeas corpus proceedings also established that new technological advances undermined Dr. Sperber's trial testimony. Technology that was not available at the time of petitioner's 1997 jury trial was used to correct the angular distortion of the lesion depicted in the autopsy photograph. That corrected photograph informed the opinions of the experts at the habeas corpus proceedings.
In light of the corrected photograph, Dr. Sperber and Dr. Golden testified that they would exclude petitioner's teeth as the source of the lesion. Dr. Bowers noted that the length of the lesion in the corrected autopsy photograph was inconsistent with the size of petitioner's lower teeth and that three of petitioner's teeth did not match the lesion, and he expressed doubt whether the lesion was a bite mark at all. After examining the corrected photograph and photographs of other lesions on Pamela's body, Dr. Johansen testified that, because of the poor quality of the autopsy photograph, he could not include or exclude petitioner's teeth as the source of the mark and that it was just as likely that the lesion was created by the fencing material and not a bite.

As a result, petitioner has shown that Dr. Sperber's trial testimony constituted false evidence because that opinion has "been undermined by later scientific research or technological advances." (§ 1473, subd. (e)(1).) The legislative history of the 2014 amendment of section 1473 bolsters our interpretation of that section. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120.) ...

> Accordingly, we conclude that petitioner has shown that Dr. Sperber's trial testimony that the lesion on Pamela's hand was consistent with the assertedly unusual dentition of petitioner's lower teeth constituted "false evidence" within the meaning of section 1473 as amended in 2014.

After the District Attorney argued, the Court rejected his claim that "false evidence" as found here amounted to no more than "insufficient evidence" - a degree of proof not permitted on habeas review.

> The San Bernardino County District Attorney does not extensively discuss whether Dr. Sperber's trial testimony constitutes false evidence for purposes of section 1473. Rather, the district attorney primarily argues that petitioner's claim of false evidence concerning Dr. Sperber's trial testimony is an attempt to present a sufficiency of the evidence claim, which is a type of claim not cognizable on a petition for writ of habeas corpus. (See *In re Lindley* (1947) 29 Cal.2d 709, 723 ["Upon habeas corpus, . . . the sufficiency of the evidence to warrant the conviction of the petitioner is not a proper issue for consideration"].) The district attorney contends that petitioner's claim is not cognizable because if Dr. Sperber's trial testimony is eliminated from consideration, the remainder of the evidence admitted against petitioner must be considered in evaluating his guilt and such reweighing of the evidence would amount to nothing more than a sufficiency of the evidence claim.
> This contention is based on a misunderstanding of the standard that section 1473 establishes for determining when relief on habeas corpus is available upon a showing that false evidence was admitted at trial. The statute and the prior decisions applying section 1473 make clear that once a defendant shows that false evidence was admitted at trial, relief is available under 1473 as long as the false evidence was "material." Our case law further explains that false evidence is material " 'if there is a 'reasonable probability' that, had it not been introduced, the result would have been different.' " (*In re Roberts* (2003) 29 Cal.4th 726, 742.) The remedial purpose of the statute is to afford the petitioner relief if the "false evidence [was] of such significance that it may have affected the outcome of the trial . . . ." (*In re Wright* (1978) 78 Cal.App.3d 788, 808-809.) Thus, the crucial question is whether the false evidence was material — not whether, without the false evidence, there was still substantial evidence to support the verdict.
>
> Our courts have held that " '[f]alse evidence is "substantially material or probative" if it is "of such significance that it may have affected the outcome," in the sense that "*with reasonable probability* it *could* have affected the outcome . . . ." [Citation.] In other words, false evidence passes the indicated threshold if there is a "reasonable probability" that, had it not been introduced, the result would have been different. [Citation.] The requisite "reasonable probability," we believe, is such as undermines the reviewing court's confidence in the outcome.' " (*Malone, supra,* 12 Cal.4th at p. 965 (*Malone*), quoting *In re Wright, supra*, 78 Cal.App.3d 788, 814, italics

***Richards* cont.pg. 20**

***Richards* from pg. 19**

added by *Malone*.) This required showing of prejudice is the same as the reasonably probable test for state law error established under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Wright, supra,* 78 Cal. App.3d at p. 812.) We make such a determination based on the totality of the relevant circumstances. (*Malone, supra*, 12 Cal.4th at p. 965.)

Accordingly, we will apply this standard to determine whether the false evidence was substantially material and probative on the issue of petitioner's guilt.

The Court found that it could not ignore the materiality of the use of the now-determined "false evidence."

Although in *Richards I, supra*, 55 Cal.4th 948, we characterized the evidence against petitioner as strong, we did so in the context of whether the evidence was strong enough to overcome any suggestion that evidence discrediting Dr. Sperber's conclusion pointed "unerringly" to petitioner's innocence. Now, however, we must decide whether the evidence is strong enough to rule out a reasonable probability that the admission of Dr. Sperber's trial testimony affected the outcome of the case. In that context, the case against petitioner was entirely based on circumstantial evidence, and much of that evidence was heavily contested. Upon examination of this circumstantial evidence admitted against petitioner, it appears that Dr. Sperber's testimony was "material" for purposes of section 1473. ...

Accordingly, with the exception of the bite mark evidence, the defense had a substantial response to much of the prosecution's evidence against petitioner. Under these unique circumstances, it is reasonably probable that the false evidence presented by Dr. Sperber at petitioner's 1997 jury trial affected the outcome of that proceeding. ...

The petition for writ of habeas corpus is granted. The judgment of the San Bernardino County Superior Court in *People v. William Richards*, No. SWHSS700444, is vacated.

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***Cases* from pg. 20**

P. V. CHIU RULED TO HAVE RETROACTIVE EFFECT: AN AIDER AND ABETTOR MAY NOT BE CONVICTED OF FIRST DEGREE PREMEDITATED MURDER UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE.

In re Ezekiel Johnson
___Cal.App.4th___; CA1(4);
A145625
April 19, 2016

In an important published case for any lifer convicted of first-degree premeditated murder under the "natural and probable consequences" doctrine, the error of such a conviction – as held recently by the CA Supreme Court in People v. Chiu – has now been ruled retroactive to others similarly convicted in the past.

This case presents petitioner Ezekiel Johnson's second appellate challenge to his conviction for first degree murder. Petitioner contends his conviction is no longer valid after the Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), which held that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. The primary question before us is whether petitioner is entitled to have his conviction reversed where he has not shown as a matter of law that the jury based its verdict on the natural and probable consequences theory of aiding and abetting now invalidated by our Supreme Court. We answer this question in the affirmative, and therefore grant the petition for writ of habeas corpus.

The Court first ruled that it had original jurisdiction in a habeas petition not first brought to the superior court.

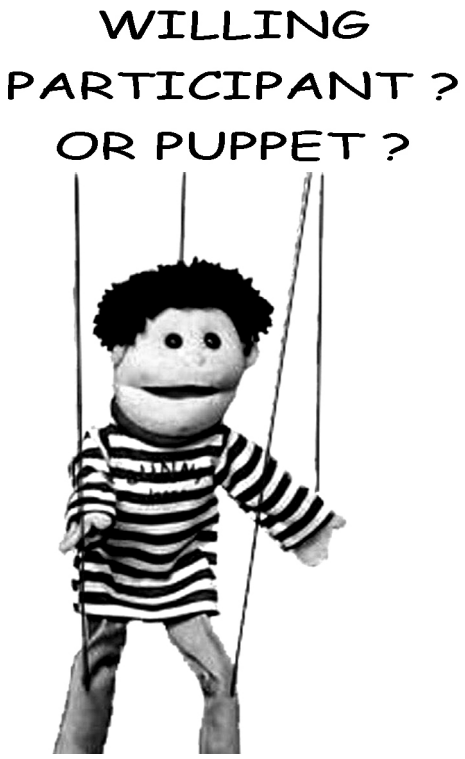
(*In re Kler* (2010) 188 Cal.App.4th 1399, 1403.) " 'Generally speaking, habeas corpus proceedings involving a factual situation should be tried in superior court rather than in an appellate court, except where only questions of law are involved.'. . ." (I*n re of Hillery* (1962) 202 Cal.App.2d 293, 294, quoting 24 Cal.Jur.2d, Habeas Corpus, § 68, pp. 524 525; *In re Davis* (1979) 25 Cal.3d 384, 389 [exercising original jurisdiction where the petitions raised issues of law and there were no material factual issues].)

The habeas petition raises a legal issue that does not require any further factual development. The legal argument is largely dependent upon our appellate opinion in *Johnson I*. Further, petitioner argues this court is more experienced in determining prejudice than the superior court and the primary issue here is the proper harmless error analysis. We, therefore, elect to exercise our jurisdiction to resolve the writ petition.

Next, the Court summarized the *Chiu* ruling.

In *Chiu*, the Supreme Court announced: "We now hold that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine." (*Chiu, supra*, 59 Cal.4th at pp. 158 159, original italics.) A conviction of premeditated murder must be based on direct aiding and abetting principles. (*Id*. at p. 159.)

Chiu was involved in a fight with a group of teenagers outside a pizzeria. The evidence showed *Chiu* went to the pizzeria specifically to witness



or to participate in the fight, and he asked a friend if he wanted to "see someone get shot." (*Chiu, supra,* 59 Cal.4th at p. 159.) During the fight, one witness testified that *Chiu* told his friend, Che, to grab the gun. (*Id.* at p. 160.) Che pointed the gun at the victim and when he hesitated, *Chiu* yelled "shoot him." (*Ibid.*)

Chiu was charged with murder pursuant to section 187, subdivision (a), a gang enhancement and firearm allegations. (*Chiu, supra*, 59 Cal.4th at p. 160.) At trial, the prosecution set forth two theories of liability: (1) *Chiu* was guilty of murder because he directly aided and abetted Che in the shooting of the victim; or (2) *Chiu* was guilty of murder because he aided and abetted Che in the target offense of assault or of disturbing the peace, the natural and probable consequence of which was murder. (*Ibid*.) The jury found *Chiu* guilty of first degree murder and found both the gang enhancement and firearm allegations to be true. (*Id*. at p. 161.)

***Johnson* cont. pg. 22**

Johnson from **pg. 21**

The Supreme Court stated: "We have not previously considered how to instruct the jury on aider and abettor liability for first degree premeditated murder under the natural and probable consequences doctrine." (*Chiu, supra,* 59 Cal.4th at p. 162.) It then concluded:

"[W]e hold that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine. We further hold that where the direct perpetrator is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing a defendant to be convicted of that greater offense under the natural and probable consequences doctrine." (*Chiu, supra,* 59 Cal.4th at p. 166.) Aiders and abettors may still be convicted of first degree premeditated murder based on a direct theory of aiding and abetting. (*Ibid*.) "A primary rationale for punishing such aiders and abettors—to deter them from aiding or encouraging the commission of offenses—is served by holding them culpable for the perpetrator's commission of the nontarget offense of second degree murder. [Citation.]" (*Id*. at p. 165.)

After concluding the giving of the instruction on natural and probable consequences was error, the court went on to determine if the error was harmless. "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. [Citations.)" (*Chiu, supra*, 59 Cal.4th at p. 167, quoting *People v. Guiton* (1993) 4 Cal.4th 1116, 1128–1129 (*Guiton*).) "Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder. [Citation.]" (*Chiu*, at p. 167.)

The court held that the error was not harmless because the record showed the jury may have based its verdict on either theory presented by the prosecution. Based on the jury's notes during deliberations, the court found the jury may have been focused on the natural and probable consequences theory of aiding and abetting, and therefore it could not conclude beyond a reasonable doubt the jury based its verdict on the alternate valid legal theory. (*Chiu, supra,* 59 Cal.4th at p. 168.) The court held the appropriate remedy was to allow the People to accept a reduction in the conviction to second degree murder, or to retry the first degree murder conviction under a direct aiding and abetting theory. (*Ibid.*)

The Court then reviewed the facts of Johnson's conviction, and found that the prosecutor argued no less than three theories of first degree murder, one of which was the now-disallowed "natural and probable consequences" doctrine. Using its newly fashioned retroactivity standard that was fashioned from *Chiu*, the Court of Appeal granted Johnson habeas relief ("*Johnson II*").

Rather, the Supreme Court's *Chiu* opinion effected a significant change in the law of aiding and abetting, eliminating the natural and probable consequences doctrine as a basis for a conviction of first degree murder. There is no question that the arguments and jury instructions allowed the jury to base its murder finding on the now-discredited theory of natural and probable consequences; accordingly, as instructed by our Supreme Court, we now turn to the question of prejudice.

In determining whether the error was harmless beyond a reasonable doubt we begin with a consideration of the basis for the jury decision. "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. [Citations.]" (*Chiu*, supra, 59 Cal.4th at p. 167, quoting *Guiton, supra,* 4 Cal.4th at pp. 1128–1129.) "Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder. [Citation.]" (*Chiu*, at p. 167.)

The court instructed the jury on all three theories and the prosecutor argued each theory. Here, the record shows the jury may have based its verdict on any of the three theories presented to them. In *Johnson I*, we noted the jury verdict form did not indicate which theory of guilt the jurors relied on. We stated: "Because jurors were instructed on the natural and probable consequences doctrine, and because the prosecutor highlighted this theory during his closing argument, we cannot say that jurors did not rely on the doctrine in finding defendant guilty of first degree murder." (J*ohnson I, supra*, at *49 51, fn. 19.)

Additionally, petitioner was charged with enhancements for personal use of a deadly weapon for using a knife and milk crate in connection with the murder. The jury did not find these allegations true. (*Johnson I, supra*, at *8.) The jury's rejection of the deadly weapon enhancement supports petitioner's argument that the jury did not find him guilty of premeditated murder as the actual

perpetrator of the crime but rather found him guilty under the invalid natural and probable consequences theory.

Respondent argues the jury could have rejected the enhancement not because they believed petitioner did not use the milk crate in the attack, but because they believed a milk crate was not a dangerous or deadly weapon. While this is possible, the fact that the record does not demonstrate which theory the jury relied upon, means they may have focused on the invalid theory.

We, therefore, cannot conclude beyond a reasonable doubt that the jury based its verdict on the alternative valid legal theory.

IV.
DISPOSITION

The petition for writ of habeas corpus is granted. The judgment of conviction is vacated and the matter is remanded to the superior court. The People may elect to retry petitioner on the first degree murder conviction under a direct aiding and abetting theory. If the People do not elect to bring petitioner to trial, the trial court shall enter judgment reflecting a conviction of second degree murder and shall sentence petitioner accordingly.

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AID and ABET
To assist another in the commission of a crime by words or conduct.
The person who aids and abets participates in the commission of a crime by performing some Overt Act or by giving advice or encouragement. He or she must share the criminal intent of the person who actually commits the crime, but it is not necessary for the aider and abettor to be physically present at the scene of the crime.

P. V. CHIU RULED TO HAVE RETROACTIVE EFFECT: AN AIDER AND ABETTOR MAY NOT BE CONVICTED OF FIRST DEGREE PREMEDITATED MURDER UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE.

People v. Travis Brown
___Cal.App.4th___; CA4(3);
G049867
May 4, 2016

In another case like that of Ezekiel Johnson, the Fourth District Court of Appeal also reversed the first degree premeditated murder conviction of a lifer whose jury had been instructed on the lately-forbidden "natural and probable consequences" theory of guilt.

The amended information in this matter charged defendant Travis Jordan Brown with one count each of murder (Pen. Code, § 187, subd. (a); count one) and active participation in a criminal street gang (§ 186.22, subd. (a); count two). It alleged the murder was for the benefit of and in association with a criminal street gang (§ 186.22, subd. (b)), and further alleged a special circumstance allegation that the victim was "intentionally killed" while defendant was an active gang member and that the murder was carried out to further the activities of the criminal street gang (§ 190.2, subd. (a)(22)). Lastly, it alleged a number of firearm allegations in connection with the charged murder: that defendant personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)); personally used a firearm in the commission of the murder (§ 12022.5, subd. (a)); and vicariously discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)). The charged incident was alleged to have occurred on July 11, 2008. The trial took place in December 2013.

The defense was that defendant was not the shooter. The person defendant contends was the shooter, Kevin Martinez, was the only witness to say defendant was the shooter. Martinez, who was interrogated by the police about the shooting, pled guilty to a lesser crime in exchange for a six-year sentence and his agreement to testify against defendant, after following a police officer's lead to say he was not the shooter and did not know there was going to be a shooting. There was evidence the shooter was left-handed, Martinez is left-handed, defendant is right-handed, and Martinez matched the general description of the shooter.

Defendant was prosecuted for first degree murder under three different theories: he was the actual killer (shooter); he aided and abetted the murder with the intent to kill; and he was liable under the natural and probable consequence theory of aider and abetter liability. The latter theory is legally impermissible. (*People v. Chiu* (2014) 59 Cal.4th 155, 158-159.) This error requires reversal unless we conclude beyond a reasonable doubt the jury rejected the natural and probable consequences theory of aiding and abetting. (*Id.* at p. 167.) ...

The court sentenced the defendant to life in prison without the possibility of parole (LWOP) on the murder count, imposed a consecutive 25 years to life on the personal discharge (§ 12022.53, subd. (d)) allegation, struck the section 186.22, subdivision (b) gang enhancement for sentencing

***Brown* cont. pg. 24**

purposes, found the vicarious discharge finding "moot," struck the firearm use enhancement (§ 12022.5, subd. (a)), and stayed the sentence on count two pursuant to section 654.

The Court reviewed the jury's dependence (or not) on the "natural and probable consequences" theory of guilt that they were instructed on.

Defendant was prosecuted for first degree murder on three different theories and the court instructed the jury on each of the theories: 1. That he was the shooter and deliberated and premeditated the killing of Sarmiento; 2. That he was not the killer, but he aided and abetted the killer and shared the killer's intent; and 3. He aided and abetted the killer without sharing the killer's intent, but a first degree murder was a natural and probable consequence of the lesser crime defendant aided and abetted. In connection with the natural and probable consequences theory, the trial court instructed the jury that to convict defendant of murder, the prosecution must prove defendant violated section 415, subdivision (1) (fighting in public or challenging to fight in public); during the violation of section 415, a co-participant committed a murder; and a reasonable person would have known murder was a natural and probable consequence of fighting or challenging someone to fight. (CALCRIM No. 403.)

After the trial, our Supreme Court held the natural and probable consequences theory of aider and abettor liability cannot serve as a basis of a conviction for first degree murder. (*People v. Chiu, supra,* 59 Cal.4th at p. 167.) Consequently, instructing the jury on the natural and probable consequences theory in this matter was error. The issue now is whether such error requires reversal in this matter.

"When a trial court instructs a jury on two theories of guilt, one

of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on the valid ground. [Citations.]" (*People v. Chiu, supra*, 59 Cal.4th at p. 167.) Because the defendant in *Chiu* was prosecuted on a direct aiding and abetting theory—the permissible theory—and as an aider and abettor under the natural and probable consequences theory—the legally impermissible theory—(*Id*. at p. 158), and the court could not "conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory," reversal was required. (*Id.* at p. 167.) An instruction that relieves the prosecution of the obligation to establish a necessary element violates a defendant's right to due process under the state and federal Constitutions, and is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 (reversible unless harmless beyond a reasonable doubt). (*People v. Cox* (2000) 23 Cal.4th 665, 676-677.)

Whether such instructional error requires reversal or was harmless requires an appellate court to closely examine the record to determine whether it may conclude beyond a reasonable doubt that the error did not contribute to the jury's verdict. The Attorney General argues the error was harmless because the jury convicted defendant of first degree murder "based on a different, valid theory of liability." According to the Attorney General, because the jury also found the special circumstance allegation true and the instruction on the special circumstance required the jury to find the defendant "intentionally killed" Sarmiento, defendant was not prejudiced by the erroneous instruction. We note, however, that the special circumstance's requirement that the defendant intentionally killed the victim while a member of a criminal street gang does not require the defendant to have been the actual killer. (§ 190.2, subd. (c).)

It is possible in a given case to conclude the giving of an erroneous natural and probable consequences instruction was harmless beyond a reasonable doubt when the jury finds the defendant guilty of first degree murder and finds the gang special circumstance true, because the special circumstance required finding the defendant intentionally killed. In such a situation, it might be concluded the jury necessarily rejected the natural and probable consequences theory of aider and abettor liability and instead found defendant was either the actual killer or aided and abetted the actual killer while sharing the killer's intent to kill. We are, however, unable to do so in this matter.

III
DISPOSITION
The conviction on count one (first degree murder) and its attendant special allegations are reversed and the matter is remanded. The judgment on count two is affirmed.

ANY LIFER CONVICTED OF PREMEDITATED FIRST DEGREE MURDER WHOSE JURY WAS INSTRUCTED ON THE "NATURAL AND PROBABLE CONSEQUENCES" THEORY OF GUILT SHOULD SEEK COUNSEL TO EVALUATE REOPENING THEIR CASES, BASED ON CHIU, AND NOW, JOHNSON II AND BROWN.

PROP. 36 CASES

GUN POSSESSION CONTINUES TO BAR PROP. 36 CLAIMS

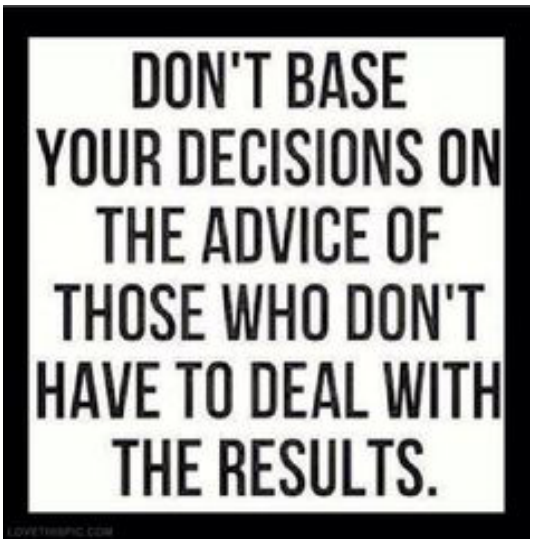
GUN TUCKED IN WAISTBAND IS "POSSESSION"

People v. Paul Martinez
CA1(5); A145500
May 20, 2016

In 1997, appellant Paul Joseph Martinez (appellant or Martinez) was convicted of being a felon in possession of a firearm (Pen. Code, § 12021.1) and the trial court sentenced him to 25 years to life in state prison. In 2014, Martinez filed a petition to recall his sentence pursuant to Proposition 36 (§ 1170.12). The trial court denied the petition, concluding Martinez was ineligible for resentencing pursuant to Proposition 36 because he was "armed with a firearm during the commission of the current commitment offense[.]"
Martinez appeals from the denial of his Proposition 36 petition. We affirm.

The facts tell the story. Martinez' claim that he was not 'armed' failed.

Martinez claims the court erred in finding him ineligible for resentencing pursuant to Proposition 36 on the ground that he was "armed" while committing the crime of being a felon in possession of a firearm. We review his claim — which concerns statutory construction — de novo, and reject it. (*Brimmer, supra*, 230 Cal.App.4th at p. 790.) Under Proposition 36, a person is "'armed with a firearm'" when he "ha[s] a firearm available for use, either offensively or defensively." (*Osuna, supra*, 225 Cal. App.4th at p. 1029; *People v. White* (2014) 223 Cal.App.4th 512, 525 (*White*) [defendant had firearm under his custody or control and was "personally armed with the firearm . . . because he was carrying—and, thus, had "'ready access'" . . . to—that firearm"].)



Here, Martinez was "armed with a firearm" under Proposition 36 because he had "a loaded .357 revolver tucked into his pants underneath his shirt." In other words, the gun was available to Martinez for offensive or defensive use when he possessed the firearm as a felon. Numerous cases have reached the same conclusion under nearly identical circumstances and we adopt their reasoning. (See e.g., *Brimmer, supra*, 230 Cal.App.4th at p. 796 [defendant was "personally armed" with a shotgun "because he was carrying it"]; *Osuna, supra*, 225 Cal.App.4th at p. 1030 [defendant was "holding a handgun" and was therefore "'armed with a firearm'"]; *Hicks, supra*, 231 Cal.App.4th at p. 285 [defendant had backpack containing a gun]; *White, supra*, 223 Cal.App.4th at p. 524 [defendant "was in physical possession of a firearm when the police officers approached him"].) Martinez has not demonstrated these cases were wrongly decided.

Martinez claims his conduct in being "armed" with the firearm must be "tethered" to another crime, and that this other offense cannot be the crime of being a felon in possession. To support this argument, Martinez relies on case law interpreting the sentencing enhancement applicable when a person "is armed with a firearm" in the commission of a felony, (§ 12022, subd. (a)(1)) which applies only "if the gun has a facilitative nexus with the underlying offense (i.e., it serves some purpose in connection with it)[.]" (*Brimmer*, *supra*, 230 Cal.App.4th at pp. 794-795.) Because "[h]aving a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon" courts cannot impose the "armed" enhancement in section 12022 to a felon-in-possession crime unless there is some further crime to which the arming can be "tethered." (*Hicks, supra*, 231 Cal.App.4th at p. 283.)

Martinez's reliance on cases interpreting the enhancement in section 12022 is misplaced. Proposition 36 considers whether the defendant was armed "during" the crime rather than "'in the commission'" of it; as a result, Proposition 36 requires "a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Osuna, supra*, 225 Cal. App.4th at pp. 1030-1032; *Hicks, supra,* 231 Cal.App.4th at p. 284.) For this reason, numerous courts have rejected the argument Martinez makes here. (*Osuna*, at p. 1032; *Hicks*, at p. 284; *People v. Elder* (2014) 227 Cal. App.4th 1308, 1312-1313 [noting "illogic" of conflating section 12022 enhancement provision with Proposition 36's ineligibility provision].)

Finally — and like numerous other courts — we reject Martinez's claim

that his "non-serious, non-violent" felony was not the type of offense the electorate intended to exclude from Proposition 36 relief. (See *People v. Blakely* (2014) 225 Cal. App.4th 1042, 1055-1056; *White, supra,* 223 Cal.App.4th at p. 526.) We conclude the trial court properly determined Martinez was ineligible for resentencing under Proposition 36 because he was armed during the commission of the offense of possession of a firearm by a felon.

DISPOSITION

The order denying relief under Proposition 36 is affirmed.

GUN IN BEDROOM IS "POSSESSION"

People v. Daniel Ragan
CA3; C080548
July 19, 2016

Daniel Ragan was sentenced to 181 years to life as a third striker, when he was convicted, *inter alia*, of possession of a firearm. The gun, and ammunition, was found in his bedroom where he was selling drugs.

Defendant Daniel Phillip Ragan appeals from the trial court's order denying his Penal Code section 1170.126 petition for resentencing on his convictions for maintaining a place for selling or using controlled substances and felon in possession of ammunition. He contends there is insufficient evidence that he was armed with a deadly weapon during the commission of those offenses to support the trial court's finding that he was ineligible for resentencing. We affirm. ...

Maintaining of a place for using or selling controlled substances is therefore subject to *Bland* as it is a continuing offense. Since felon in possession of ammunition is a possessory offense, it, like the unlawful possession of drugs or a firearm, is a continuing crime, and therefore also subject to *Bland.*

Applying *Bland*, we find substantial evidence supports the trial court's ruling as to both offenses. Defendant's home was the location where he maintained a place for furnishing or using drugs, and a loaded firearm was found in his bedroom in the home. The trial court could reasonably infer that defendant would use his own bedroom and, since the maintaining crime was a continuous offense, defendant had the loaded firearm available for immediate offensive or defensive use while committing that crime. Since police found ammunition both near to and loaded in that same firearm, defendant was also armed while committing the continuous offense of felon in possession of ammunition. The trial court's denial of the petition as to these offenses is therefore supported by substantial evidence.

DISPOSITION

The judgment (order) is affirmed.

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GUN IN TOWEL IN CAR CONSOLE IS "POSSESSION"

People v. Sergio Acevedo
CA4(2); E02712
June 8, 2016

Sergio Acevedo petitioned under Prop. 36 for relief from his 3-strikes sentence for possession of a firearm. He claimed that he was not in possession under the following circumstances.

On November 24, 2009, California Highway Patrol Officer William Strom was on routine patrol on Interstate Highway 10 when he observed a vehicle drifting or weaving between lanes and driving at varying speeds. Officer Strom activated his patrol car's emergency lights when he was about 50 feet behind the vehicle and followed the vehicle for about a mile before the vehicle pulled over to the shoulder. During that time, Officer Strom saw the driver's "right arm coming up off the shoulder, moving up and down," "fidgeting around," "as if something was trying to be concealed." The windows of the vehicle, a blue pickup truck, were not tinted, it was light outside, and the officer was able to see inside the vehicle. Officer Strom believed the driver was trying to conceal something "[b]ecause of the way his arm was moving when [the officer] was attempting to make the stop on him, just the fidgeting, it was like he was trying to conceal something within that area on his right-hand side."

Once the vehicle stopped, Officer Strom made contact with the driver. Defendant was the driver and sole occupant of the vehicle. After Officer Strom administered

field sobriety tests on defendant, defendant was arrested for driving while under the influence of alcohol or drugs. When Officer Strom informed defendant that he would be impounding the truck, defendant yelled, " 'Leave the truck there' " and " 'Take me to fucking jail. Take me now.' " Officer Strom nonetheless conducted an inventory search of the truck prior to towing defendant's vehicle, and found a loaded .38-caliber revolver stuffed between the driver's seat and the truck's center console. In finding the loaded revolver, Officer Strom explained, "I went to the area where I had assumed [defendant] was trying to conceal something, which is the right-hand side, and there was a towel sticking up between the center console and the driver's seat, and when I removed the towel the gun was locate[d] inside that towel."

Acevedo argued many legal theories to try to overcome the obvious. But having a gun next to you in your car is possession – period.

"Where the record establishes that a defendant convicted of possession of a firearm by a felon was armed with the firearm, i.e., he had a firearm capable for ready use, during the commission of that offense, the armed-with-a-firearm exclusion applies and the defendant is not entitled to resentencing relief under the [] Act. We therefore rejected defendant's argument that the plain language of the armed-with-a-firearm exclusion requires that the arming be anchored or tethered to an offense which does not include possession." (*Acevedo II, supra,* E058557, pp. 14-15.) Therefore, contrary to defendant's argument, the trial court's focus on the accessibility of the firearm, i.e., whether it was available for use for an offensive or defensive purpose, and its references to cases addressing the available-for-use requirement was entirely consistent with our unpublished decision in Acevedo II and published opinion in Brimmer.

DISPOSITION

The order denying defendant's petition for a recall of his life sentence is affirmed.

******

Late one night, a burglar broke into a house he thought was empty. He tiptoed through the living room but suddenly he froze in his tracks when he heard a loud voice say,

"Jesus is watching you!"

Silence returned to the house, so the burglar crept forward again.

"Jesus is watching you," the voice boomed again.

The burglar stopped dead again. He was frightened.Frantically, he looked all around. In a dark corner, he spotted a bird cage and in the cage was a parrot. He asked the parrot:

"Was that you who said Jesus is watching me?"

"Yes," said the parrot.

The burglar breathed a sigh of relief and asked the parrot:

"What's your name?"

"Clarence," said the bird.

"That's a dumb name for a parrot," sneered the burglar. "What idiot named you Clarence?"

The parrot said,

"The same idiot who named the Rottweiller Jesus."

Board's Information Technology System

Commissioners Summary
All Institutions
May 01, 2016 to May 31, 2016

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	CHAPPELL	FRITZ	GARNER	LABAHN	MINOR	MONTES	PECK	RICHARDSON	ROBERTS	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**18**	**27**	**30**	**23**	**30**	**20**	**18**	**27**	**29**	**22**	**27**	**34**	**113**	**418**	**0**	**418**
Grants	3	5	6	2	8	6	3	5	7	6	9	5	0	65	0	65
Denials	11	15	21	15	19	10	13	14	13	7	14	20	0	172	0	172
Stipulations	1	5	0	1	2	2	1	2	8	4	2	6	0	34	0	34
Waivers	0	1	1	1	0	0	1	0	0	3	1	3	25	36	0	36
Postponements	3	1	2	2	0	2	0	5	1	1	1	0	71	89	0	89
Continuances	0	0	0	2	1	0	0	1	0	1	0	0	0	5	0	5
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	17	17	0	17

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

Subtotal (Deny+Stip)	**12**	**20**	**21**	**16**	**21**	**12**	**14**	**16**	**21**	**11**	**16**	**26**	**0**	**206**	**0**	**206**
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	5	14	13	10	15	6	5	7	14	4	14	12	0	119	0	119
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	2	5	3	4	4	4	8	7	6	7	2	9	0	61	0	61
7 years	4	1	5	1	1	2	1	1	1	0	0	4	0	21	0	21
10 years	1	0	0	1	1	0	0	1	0	0	0	1	0	5	0	5
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)	**0**	**1**	**1**	**1**	**0**	**0**	**1**	**0**	**0**	**3**	**1**	**3**	**25**	**36**	**0**	**36**
1 year	0	0	1	1	0	0	0	0	0	2	0	1	22	27	0	27
2 years	0	1	0	0	0	0	1	0	0	1	1	0	2	6	0	6
3 years	0	0	0	0	0	0	0	0	0	0	0	2	0	2	0	2
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	**3**	**1**	**2**	**2**	**0**	**2**	**0**	**5**	**1**	**1**	**1**	**0**	**71**	**89**	**0**	**89**
Within State Control	2	0	2	2	0	2	0	4	0	1	1	0	58	72	0	72
Exigent Circumstance	1	0	0	0	0	0	0	1	0	0	0	0	8	10	0	10
Prisoner Postpone	0	1	0	0	0	0	0	0	1	0	0	0	5	7	0	7

Board's Information Technology System

Commissioners Summary
All Institutions
June 01, 2016 to June 30, 2016

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	CHAPPELL	FRITZ	GARNER	LABAHN	MINOR	MONTES	PECK	RICHARDSON	ROBERTS	TURNER	VILLALOBOS	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**34**	**27**	**21**	**36**	**24**	**40**	**30**	**21**	**18**	**38**	**25**	**0**	**27**	**128**	**469**	**0**	**469**
Grants	8	2	4	10	2	8	3	5	6	6	8	0	8	0	70	0	70
Denials	17	21	15	19	18	24	13	14	9	19	12	0	15	0	196	0	196
Stipulations	4	3	1	3	0	3	5	1	2	7	3	0	0	0	32	0	32
Waivers	0	0	0	0	0	0	2	0	0	0	1	0	0	34	37	0	37
Postponements	4	0	0	3	3	4	5	1	1	3	1	0	3	76	104	0	104
Continuances	1	1	1	1	1	1	2	0	0	3	0	0	1	0	12	0	12
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	18	18	0	18

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

Subtotal (Deny+Stip)	**21**	**24**	**16**	**22**	**18**	**27**	**18**	**15**	**11**	**26**	**15**	**0**	**15**	**0**	**228**	**0**	**228**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	8	13	10	13	12	19	10	9	4	10	8	0	11	0	127	0	127
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	7	8	4	8	3	7	7	4	6	11	6	0	3	0	74	0	74
7 years	5	2	1	1	3	1	1	2	1	4	1	0	1	0	23	0	23
10 years	1	1	1	0	0	0	0	0	0	1	0	0	0	0	4	0	4
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

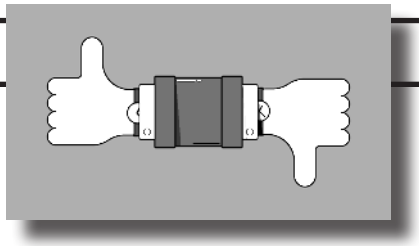
Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**0**	**0**	**0**	**0**	**0**	**2**	**0**	**0**	**0**	**1**	**0**	**0**	**34**	**37**	**0**	**37**
1 year	0	0	0	0	0	0	2	0	0	0	1	0	0	22	25	0	25
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	5	5	0	5
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0	3
4 years	0	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	0	3	3	0	3

Postponement Analysis per Commissioner

Subtotal (Postpone)	**4**	**0**	**0**	**3**	**3**	**4**	**5**	**1**	**1**	**3**	**1**	**0**	**3**	**76**	**104**	**0**	**104**
Within State Control	3	0	0	0	1	3	1	0	0	1	1	0	1	73	84	0	84
Exigent Circumstance	1	0	0	3	2	0	4	1	0	1	0	0	2	1	15	0	15
Prisoner Postpone	0	0	0	0	0	1	0	0	1	1	0	0	0	2	5	0	5

Board of Parole



EN BANC, JUNE AND JULY

The June and July serving of en banc hearings provided a rare result, in that more parole grants, referred by the Governor for reconsideration via en banc, were affirmed rather than reversed. In June two of three grants were affirmed and one application for pardon was forwarded to the Governor's office with a favorable recommendation from the board and in July, six of seven were affirmed.

Grants for **Andrew Silva** and **Darren West** were affirmed. This, in Silva's case, despite predictable opposition from the Santa Clara County DA. Numerous members of Silva's family came to attest to his suitability and changed character and attorney Marc Norton also reminded the commissioners of the suitability factors found by the original panel. The entire board concurred and Silva's grant was affirmed.

In West's case, and again predictably, his parole was opposed by the Alameda DA's office, along with victims and victim's representatives. However, the decision of the granting panel was upheld, with additional conditions relating to the inmate participating in transitional housing and special programs were imposed.

However, the grant originally made for **Steven Caswell** was referred for a rescission hearing. No one appeared in support or opposition to the referral. A pardon request from **Craig Stephenson** was referred to the governor with a favorable recommendation. While there was no specific information on the circumstances of the request, typically such requests are made by those who long ago completed a sentence for a low-level drug or similar conviction and are now seeking to have that old conviction eliminated.

The July calendar of en bancs created considerably more conversation, as well as continuing the track record of about 50% grant rate for those seeking compassionate release due to terminal illness**. Gary Lopez** and **Benjamin Turner** were both seeking compassionate release, though only Lopez's petition was successful.

Lopez' release was opposed by the Fresno County DA's office and via a letter from the victim read by a victim advocate. There were no speakers regarding Turner.

Both **Lyle Crook** and **George Rodriquez** saw their parole grants sent for rescission hearings following allegations of misconduct post hearing. Crook has been through this experience before, this time triggered, apparently by a photo taken in the visiting room. Attorney Charles Carbone succeeded in making the resulting 128 RVR appear frivolous, but the commissioners, perhaps remembering Crook's previous excursion into rescission territory, voted to take another look. Rodriquez, whose release was opposed by the LA County DA, was referred, reportedly due to adverse results from a random UA.

The Governor referred 6 inmates for reconsideration, with grants for 5 of that group affirmed. Referred for rescission hearing was **Raphael Calix**, despite support from several individuals working with him while in prison and his attorney Sabina Crocette.

Going home will be J**onathan Chaidez, Lannie Hampton, Vincent Hatcher, Dale Kincheloe** and **Walter McCottrell**. Chaidez's release was supported by statements from his attorney Carbone and family members. Opposition came from the Fresno County DA and via a letter from the victim's family read by a victim advocate.

Hampton faced opposition from the LA County DA, who, though having nothing new to add to the discussion other than disagreement with the grant, nonetheless opposed release. His grant, however, was upheld.

BPH en banc

Hatcher, again opposed by LA County, found enthusiastic support from friends, including one former prisoner, now 8 years out, who could attest to Hatcher's reformed character and thinking. Kincheloe had support from family read into the record by attorneys.

McCottrell's parole grant was supported by a troupe of family and friends, and his attorney, with opposition coming from the Santa Clara DA in the form of a rehash of the crime and yet another dramatic reading of a letter from the victim.

BOARD BUSINESS

Increasingly the Executive Board Meetings at the BPH are shorter and shorter in duration. Always a feature are reports on the results of various types of parole hearings, changes in the board's electronic technology, reports on various conferences attended by commissioners and/or staff and, a relatively recent addition, a report from FAD director Dr. Cliff Kusaj.

The reports on specialized hearings revolve around results of YOPH, elderly, medical and NVSS hearings, and Dr. Kusaj's monthly appearance, apparently part of the Johnson v Shaffer settlement, usually involved a simple recitation of numbers of emulations assigned to clinicians and when those are expected to be completed. Less than substantive.

And so it was in June and July, with numbers on specialized hearings showing an aggregate increase in the number of hearings, with the grant rate for those hearings remaining pretty static. The only unique event in either month was June's presentation by the Anti-Recidivism Coalition on their projects and work with parolees.

So why does LSA/CLN continue to faithfully attend these increasingly short meetings? Several reasons. From time to time a spirited discussion on various subjects ensues (see next issue of CLN for report on such an event at the August meeting), we appreciate the chance to watch the in-person reactions and hear the comments from commissioners on various subjects, and at each meeting, there is the opportunity to speak on various issues directly to the board. An opportunity we always avail ourselves of because we believe everyone is entitled to our opinion.

And of course other members of the public hold forth as well, including several comments in the June meeting from victims' advocates encouraging the commissioners to refrain from granting paroles. Attorneys also can and do weigh in on subjects not related to specific inmates and cases, Keith Wattley and Marc Norton being the most vociferous.

ANOTHER OPENING ON THE PAROLE BOARD

Although not unexpected, the resignation of one parole board commissioner did come earlier than rumored. It was announced at the August Executive Board meeting that Commissioner Elizabeth Richardson, a commissioner since 2013, would retire at the end of August.

Rumors of Richardson's impending departure had been circulating, usually with an end of the year date. But after receiving thanks from BPH Executive Officer Jennifer Shaffer for her service, Richardson commented that while she had 'enjoyed doing this, I'm now ready to enjoy not doing this.'

Appointed as a commissioner by Gov. Brown, Richardson had previously served as a Deputy Commissioner, special assistant inspector general at the Office of the Inspector General and positions in other governmental agencies and private law firms.

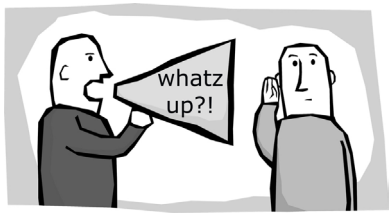
Perhaps most memorable of her past positions was as a captain in the U.S. Marine Corps and in the U.S. Marine Corps Reserve from 1984 to 2010, retiring as a colonel. Lifers appearing before Richardson could count on an aggressive interrogation, a no-nonsense approach and no tolerance of cell phones.

BPH cont. pg. 32

BPH from pg. 31

Those inmates who had served in the military prior to their crime could count on a particularly tough grilling. Yet her grant rate was not especially low and those who were denied were left with no doubt where their issue lay and what they should do the next time around.

Richardson's departure will leave short one commissioner for the remainder of the year, with the rest of the commissioners taking up her share of scheduled hearings. Since the state budget for the coming year includes funds for two new commissioners, in addition to the current 12, Richardson's departure leaves Gov. Brown with three parole commissioner positions to fill.



PAGING DR. KUSAJ...

Last year Dr. Kusaj, chief of the Forensic Assessment Division (FAD) opined that in view of the FAD risk assessments morphing from a 5 tier risk assessment schedule to 3 levels, those prisoners who had previously received a bi-furcated rating risk of low/moderate or high/moderate, would probably break about 50/50 within the 3 tier system; half of those who had received a moderate/high assessment would now, in the 3 level system, be tabbed as moderate, and half as high risk. Has this been the case? Well, we don't know.

Does the FAD track such results and if not why not? And is this noted in the current CRA? It would seem a useful bit of information both for clinicians and commissioners, not to mention our inquiring minds, to know.

Our research, and that of other interested parties, as noted elsewhere in this issue, tends to indicate the commissioners use the CRA more to support their decisions than as a major assist in making that decision. Most inmates receive a 'non-elevated,' or moderate or low risk assessment, according to Dr. Kusaj.

Given this large number of non-elevated or moderate risk assessments, one would expect the grant rate to be significantly higher, if the CRA was a tool of major importance, even if it were only one of the tools of primary importance. But the difference between 80% of parole candidates assessed at a non-elevated risk level and the approximately 17% grant rate announced by the BPH is quite a numerical distance.

Our experience, and that of attorneys, indicates that when denying parole, the commissioners routinely quote the CRA as 'elevated,' even if the risk is rated as moderate; seldom mention that rate if it is low and the decision is to deny, but always mention a low risk assessment if the decision is to grant. And commissioners have been frequently known to simply say they disagree with the conclusion of the clinician and ignore the evaluation entirely.

If the CRA is such a useful and predictive tool, it strikes many, including us, as rather perplexing that commissioners would simply disregard the report, and all the time and expense that went into creating it, if it were truly an integral part of their decisions. And if it can be so comfortably disregarded, why is it a significant tool at all?

Dr. Kusaj has of course championed the accuracy of the FAD's risk assessments by saying his staff monitors hearing results and if the risk rating was assessed as high and the inmate is denied, they conclude that is a validation of the assessment. But of course in instances of denial and high risk rating the commissioners make the same case in reverse. How this mutual dependence validates the legitimacy of CRAs remains puzzling to us and to several researchers with whom we have discussed the FAD and CRAs.

Please understand, we are by no means suggesting the CRAs become the cornerstone of suitability decisions. But it appears there is are some incongruities in how commissioners use CRAs, which makes many question the utility and realism of the conclusions presented therein. As we are seeing more of Dr. Kusaj at the monthly BPH Executive Meetings meetings perhaps more information on these points will be forthcoming.

BPH

YOPH CRA? WE'D LIKE TO SEE IT

Although the Board of Parole Hearings has greatly increased in transparency in the last 5-6 years, and we've learned a great deal attending dozens of parole hearing as observers, some things are still difficult to review. Top of that list is probably the fabled (some would say fumbled) Comprehensive Risk Assessments—you know, the psych evals.

Neither fish nor fowl, not actually a privacy protected medical document, yet not a document of public record either, CRAs are something of a hybrid. Although done for every lifer before a parole hearing and included in his or her C-file, CRAs are not available to the public as are hearing transcripts (yes, those are public record). And although large portions of CRAs are often read into the transcript the entirety of the document is often simply noted as 'included by incorporation" or reference, leaving those of us without access to the C-file with only the portions transcribed.

However, lifers often send us their CRA, sometimes asking for clarification, sometimes aghast at the conclusions of the clinician and sometimes just for 'informational and educational purposes,' to borrow a phrase from the DOM. What we have noticed in several of the YOPH hearings we've attended is that FAD clinicians, required under the guideline of SB 260 and 261, to give 'great weight' to the youthfulness and poor decision-making ability of those inmates when drawing their conclusions and making their risk assessments, frequently try to do an end-run around those hallmarks of youth.

We recall phrases such as 'while the inmate falls under YOPH, the sophistication and planning of the crime bely youthful hallmarks,' or 'in spite of his (usually male) young age, this crime revealed a remarkable level of criminal planning.' Followed, as one might guess, by a less than glowing evaluation and risk assessment.

> YOPH-CRA? Send to our office, PO BOX 277, Rancho Cordova, Ca. 95741 and please mark the envelope "YOPH CRA."

This strikes us as a bit on the shady side, but we've never thought only prisoners were subject to 'criminogenic thinking.' But to pursue this possible side-step maneuver we need to study a body of CRAs done for YOPH-eligible inmates. So we're reaching out to lifers who have one of those nifty documents, asking you to share.

Please send us your YOPH relevant CRA, especially if you've been victim of some of the phraseology sampled above. If you want it back, please so note, we'll make a copy and return it. Our aim here is to build a data base for analysis, not just by ourselves (we aren't after all clinicians, even from the FAD) but by a team of psychologists who we've contacted and have agreed to assist us in this data search and study.

Be assured, we'll protect your privacy, probably better than the CDCR in this instance, and will redact any information that might single you out. What we're looking for is not so much individuals who have experienced this issue, as a pattern, if there is one. And we think there might be. It's a bit like building a class action suit, though we plan no litigation (not being attorneys), but we do hope some changes may come out of this study, if the results show a pattern of side-stepping YOPH intentions.

Send to our office, PO BOX 277, Rancho Cordova, Ca. 95741 and please mark the envelope "YOPH CRA." Yeah, we really do speak CDCR-lish.

Politics

THE NOVEMBER BALLOT

California is one of the few states in the nation where new laws can be proposed, debated, voted on and implemented without the involvement of the state legislature. That process is known as the initiative or proposition process. It's a hard road, as those championing one cause or another must write the initiative/proposition, get it past the Secretary of State and then canvass the voters throughout the state, convincing a certain percentage of them to sign petitions expressing their desire to see the proposal on the ballot for a vote.

It's a disjointed, confusing and inefficient way to govern, but it's California's own. Most ballot initiatives never really make the ballot, many falling short of collecting the number of signatures required, or if they do make the ballot, often go down to defeat because of the costs necessary to promote the cause throughout the large and diverse state.

On the ballot for Nov. 8, 2016 is the usual mish-mash of proposals, but 3 that are of acute interest to lifers and proponents of prison reform. And while no one in prison or still on parole can vote, it would behoove all prisoners to encourage their friends and family to register and vote and, once off parole, register themselves.

Proposition 57

Criminal Sentences, Juvenile Criminal Proceedings and Sentencing Initiative Constitutional Amendment and Statue

Allows parole consideration for persons convicted of nonviolent felonies upon completion of full prison term for primary offense, as defined. Authorizes the Department of Corrections and Rehabilitation to award sentence credits for rehabilitation, good behavior or educational achievements. Requires Department of Corrections and Rehabilitation to adopt regulations to implement new parole and sentence credit provisions and certify they enhance public safety. Provides juvenile court judges shall make determination, upon prosecutor motion, whether juveniles age 14 and older should be prosecuted and sentenced as adults.

This is Governor Brown's initiative. Note the language applies only to nonviolent crimes in allowing parole after serving sentence for the primary offense. Whether other aspects of this initiative would apply to lifers is the source of confusion and disagreement. However, we view it as an important step forward in sentence reform.

Proposition 62

Death Penalty Initiative Statute

Repeals death penalty as maximum punishment for persons found guilty of murder and replaces it with life imprisonment without the possibility of parole. Applies retroactively to persons already sentenced to death. States that persons found guilty of murder and sentenced to life with the possibility of parole must work while in prison as prescribed by the Department of Corrections and Rehabilitation. Increases to 60% the portion of wages earned by persons sentenced to life without the possibility of parole that may be applied to any victim restitution fines or orders against them.

If passed, and a similar measure was narrowly defeated last election, this would abolish the death penalty and those now condemned would be automatically sentenced to LWOP. What would become of those currently under LWOP sentences is not clear, but the possibility of their status being similarly downgraded to life with parole has been discussed. For many reasons, we support this proposition.

Proposition 66

Death Penalty Procedures Initiative Statute

Changes procedures governing state court appeals and petitions challenging death penalty convictions and sentences. Designates superior court for initial petitions and limits successive petitions. Imposes time limits on state court death penalty review. Requires appointed attorneys who take noncapital appeals to accept death penalty appeals. Exempts prison officials from existing regulation process for developing execution methods. Authorizes death row inmate transfers among California state prisons. States death row inmates must work and pay victim restitution. States other voter approved measures related to death penalty are null and void if this measure receives more affirmative votes.

In total opposition to Prop. 62, this initiative would not only entrench the death penalty in California, but also speed up the implementation of any such sentence. It would also require those condemned to work while awaiting their execution. Draconian? Yeah, we think so.

NEW LEGISLATIVE SESSION, OLD BILLS

Although the 2016-17 legislative session is barely underway, lawmakers are still faced with some bills introduced 'last session,' 2015-16 which officially ended in late June. Some of these bills are unlikely to make it through the process this session and will die a semi-natural death, but some may get 'legs,' in the vernacular, meaning they could find enough support to see action and possible passage.
Herewith a summary of the bills affecting prisoners and corrections and their present circumstance. AB indicates a bill originating in the Assembly, SB, in the Senate.

AB 1563 (Rodriguez - D) **Victim's compensation: claims appeal.** Summary: Current law requires the California Victim Compensation and Government Claims Board and requires the board to grant a hearing to an applicant who contests a staff recommendation to deny compensation in whole or part, but provides no deadline for when those decisions must be rendered. Bu February of 2013, the Board had amassed a backlog of 2,000 unanswered appeal applications. This bill would require decisions of the board to be made within 6 months of the date the board received the appeal unless the board determines that there was insufficient information to make a decision. Currently on the Governor's desk awaiting signature.

AB 1843 (Stone, Mark - D) **Applicants for employment: criminal history.** If passed this bill would prohibit employers from asking job applicants to disclose, or employers from using in determining any condition of employment, information about or related to arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the jurisdiction of juvenile court law. The legal effect of sealing and dismissal is that the offense is considered not to have occurred for the purposes of job and college applicants in the future. This bill provides juveniles many of the same protections already given to adults. Awaiting a third reading in Senate.

AB 2005 (Ridley-Thomas - D) **Juveniles: out-of-state placement**. Currently courts can, at their discretion, order a juvenile ward placed on probation without the supervision of the probation officer. In other cases, the court must place the juvenile in the care, custody, and control under the supervision of a probation officer who is required to determine the appropriate placement for the ward. The bill would clarify that these provisions but does not authorize courts to place a minor in a juvenile home, ranch, camp, or forestry camp outside of the state. In 2015, about 235 juveniles under the jurisdiction of county probation departments were living in out-of-state facilities. This bill would recognize the improved outcomes for juveniles in the criminal justice system who are housed near their family, loved ones and support networks whenever possible, to help their transition after release and reduce recidivism. Awaiting a third reading in Senate.

AB 2466 (Weber - D) **Voting: felons**. Current law provides that in order to register to vote an individual must be a United States citizen, a resident

Politics cont. pg. 36

Politics from pg. 35

of California, not imprisoned or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election. This bill would define imprisoned as currently serving a state or federal prison sentence and would define parole as a term of supervision by the Department of Corrections and Rehabilitation. This bill would amend the Elections Code and clarifies that incarceration in county jail does not strip people of the constitutional right to vote. Awaiting third reading in Senate.

AB 2590 (Weber - D) **Sentencing: restorative justice.** Weber's bill would find that the legislature declares that the purpose of sentencing is public safety achieved through accountability, rehabilitation, and restorative justice. It would also amend the specified legislative findings to state that rehabilitative programs should be available to all inmates and encourage the Department of Corrections and Rehabilitation to allow all inmates the opportunity to enroll in programs that promote successful return to the community. This bill follows the goals of restorative justice in offering an alternative to punitive justice and put an emphasis on public safety through rehabilitation. In suspense file.

AB 2765 (Weber - D) **Proposition 47: sentence reduction**. This bill would extend the deadline under provisions of Prop. 47, the Safe Neighborhoods and Schools Act, to allow those currently convicted of a felony or felonies which would have been misdemeanors under the act if the act had been in effect at the time of the conviction to petition or apply to have the sentence reduced in accordance with the act. Currently the deadline for such filings is generally before November 4, 2017. This bill would extend the filing deadline until before November 4, 2022, or at a later date upon a showing of good cause. Because this bill would extend the period of time in which to file, and thus amend the act, it requires a 2/3 vote of the Legislature. Suspense file.

SB 759 (Anderson - R) **Prisoners: segregation housing**. Current law requires CDCR to award credit reductions to prisoners from terms of confinement of 6 months for every 6 months of continuous confinement, as specified. However, current law exempts those placed in a Security Housing Unit, Psychiatric Services Unit, Behavioral Management Unit, or an Administrative Segregation Unit for specified misconduct, or upon validation as a prison gang member or associate, from earning such credits. This bill would repeal those ineligibility provisions and require the department, no later than July 1, 2017, to promulgate regulations to allow specified inmates placed in SHU units to earn credits during that time inmate is in segregated housing. Pending concurrence amendments in Assembly.

SB 1052 (Lara - D) **Custodial interrogation: juveniles**. Currently law enforcement officers are allowed to take a minor into temporary custody when the officer has reasonable cause to believe that the minor has committed a crime or violated an order of the juvenile court. The officer is also required to advise the minor that anything he or she says can be used against him or her, that he or she has the right to remain silent, that he or she has a right to have counsel present during any interrogation, and that he or she has a right to have counsel appointed if he or she is unable to afford counsel. This bill would require that youths under 18 years of age to be allowed to consult with counsel prior to a custodial interrogation and before waiving any of the specified rights. The bill would provide that consultation with legal counsel cannot be waived. Suspense file.

SB 1157 (Mitchell - D) **Incarcerated persons: visitation**. Sen. Mitchell's bill would require local correctional facilities, defined as a juvenile hall for the confinement of minors, and a juvenile ranch, camp, or forestry camp, that uses video or other types of electronic visitation to provide specified numbers and lengths of in-person visits for inmates in local correctional facilities and for incarcerated minors and minors at the juvenile facilities. The bill would also define, among other things, "in-person visit" and "in-person visitation" for these purposes. Passage of this bill would prevent local lockups from providing only video visiting in place of in person, or contact visiting. Awaiting third reading in Senate.

Felony Murder Elimination Project
Needs Your Help

The Felony Murder Rule is a legal theory under which a person is charged with first-degree murder, in the state of California, if any death (even an accidental one) results from the commission of any of 13 enumerated felonies which include arson, robbery, and burglary. All participants in the felony can, and most likely will, be held equally liable – even those who did no harm, had no weapon, and had no intent to hurt anyone. There are only two penalties allowed for a felony murder defendant in California: the death penalty, or life without parole (death by incarceration).

Following the conviction of her only son under this law Joanne Sheer started the Felony Murder Elimination Project with two goals in mind:

1) Eliminate the Felony Murder Rule from California law, and
2) Bring sentencing relief to those already convicted under it.

In April of this year, the first step in the process, introduction of AB 2195 (Bonilla), which called for data collection on the number of people who've been convicted and sentenced under the Felony Murder Rule was accomplished.

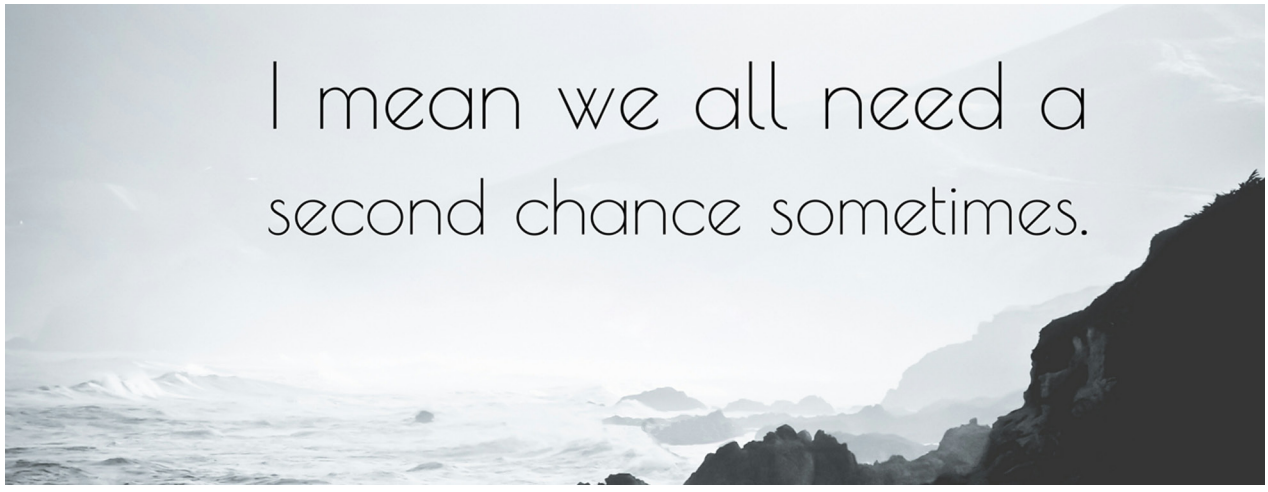
The first question in any researching of new laws is, "How many people are serving time under this law?" And no one really know how many California inmates had been sentenced under the Felony Murder Law.

After being unanimously passed it in Assembly Public Safety Committee, the bill was dropped in Appropriations. So to keep the process in motion and answer that vital question, how many people, Sheer is conducting her own research project, via the survey on next page.

The data gathered from the surveys will be used by the Felony Murder Elimination Project for the sole purpose of calling for change. Personal information will remain confidential and will NOT be shared with any other organization, government entity, or person for any reason. The Felony Murder Elimination Project is not a legal firm and does not give legal advice or supply legal services. Life Support Alliance is not part of the Felony Murder Elimination Project and will have no access to data collected via this survey.

If you choose to participate send the completed survey to:

Felony Murder Elimination Project
P.O. Box 441
Clayton, CA 94517



Have you been convicted and sentenced under the Felony Murder Rule? Are you serving a sentence of life without parole?

If either (or both) of these questions apply to you, please fill out the survey below!

We are the Felony Murder Elimination Project whose goal is to eliminate the Felony Murder Rule from California and bring sentencing relief to those who have been given extreme sentences by its use. We are coordinating our efforts with many other advocacy groups committed to bringing an end to inhumane life without parole sentences, one of whom is Fair Chance Project who was instrumental in amending California's Three Strikes law.

Description: Felony Murder Rule (FMR) is a legal theory under which a person is charged with first-degree murder if any death (even an accidental one) results from the commission of certain felonies such as arson, robbery, burglary, rape, etc. All participants in the felony can, and most likely will, be held equally liable – even those who did no harm, had no weapon, and had no intent to hurt anyone.

1. **Gender: Male ____ Female _____**
2. **Race: _____**
3. **Your age at the time of the charge that resulted in your conviction under the Felony Murder Rule (FMR): _____**
4. **County of conviction: _____**
5. **What were you convicted of (Penal Code if you know it)? _____ _____**
6. **What sentence did you receive from your FMR conviction? _____**
7. **How many years have you served of your sentence? _____**
8. **Are you serving a life without parole sentence that was <u>NOT</u> due to FMR? Yes _____ No _____**

Please complete this survey and mail it as quickly as possible to:
Felony Murder Elimination Project P.O. Box 441 Clayton, CA 94517

Please help us keep in touch with you by including your name, CDC # and address

_____
_____
_____
_____

CDCR

BITS AND BITES

The Joint Legislative Audit Committee (JLAC) in Sacramento recently approved a request by Sen. Connie Leyva (D-Chino) to examine suicide prevention and reduction policies, procedures and practices at state prisons across California, with special focus on CIW. The women's prison, located in Sen. Leyva's district, has recently suffered a significant recent increase in the number and rate of suicides.

In an 18-month period in 2014-15, the suicide rate at CIW was noted at eight times the national average for women prisoners and five times the rate for the entire California prison system, with four suicides and at least 35 suicide attempts. Since the beginning of 2016, there have been two suicides at CIW.

Prior to 2014, there were three suicides total in 14 years. At CIW from October 2014 to March 2015, nine women were sent for emergency care due to suicide risk and there were over 400 referrals for suicidal behavior during the same period.

The audit, conducted by the California State Auditor, is expected to take several months and will be made public on completion.

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Both women's prisons in the CDCR system will be receiving new wardens, following the sudden retirement of wardens at both institutions recently. Both departures come amid controversy and allegations of problems including sexual abuse of inmates at one institution and persistent suicides at the other.

Although CDCR characterized the departures of Deborah Johnson at CCWF and Kimberly Hughes at CIW as "routine retirements," after 30 and 27 years of employment respectively, the departures of both women came virtually overnight and without the fanfare and succession planning usually attendant to a warden's retirement. While the department maintained there was "really no connection" between the retirements and newly-public problems at the prisons, two other senior members of staff at Chowchilla were also 'reassigned' and reportedly walked off grounds

Sources at CDCR headquarters in Sacramento acknowledge issues at both prisons and promised a 'careful' screening of new candidates before making a final selection. In the meantime, a series of retired annuitants are expected to oversee operations at both CCWF and CIW.

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In late August about 4,000 inmates from CDCR fire camps were on fire fighting duty on at least 3 major fires in the state. All inmates in the fire camp system were either actively engaged on the fire lines, in transit to fire locations or in rest-and-recovery mode after their stint of 12 shifts on fire lines.

Inmates were at Silver Range fire in Monterey County, the Mineral fire in San Luis Obispo County and the Pilot blaze in San Bernardino County. All fires were on state lands and control efforts overseen by CalFire. Though no lifers are accepted into fire camp locations, the work of fire camp inmates in yet another instance of rehabilitated prisoners beginning their give-back to the community.

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A new and specialized individual will soon join the ranks of the Ombudsman's office within CDCR. Funded through this year's state budget and set to begin as soon as the hiring search is complete, will be an Ombudsman to specifically address health issues in California prisons.

The individual hired will be based, at least initially, at the California Health Care Facility in Stockton, where many of the state's most chronically ill inmates are housed, but will be responsive to health issues in all prisons. Heretofore health concerns were addressed by various Ombudsmen, depending on where the complaint emanated.

Ombudsmen can be contacted by inmates or friends and family, by mail, phone or email (at least for friends and family). As soon as the new Ombudsman is announced and contact information available we will include that contact in upcoming newsletters.

CDCR cont. pg. 40

CDCR

NEW LOOK AT CELL PHONE PENALTIES

In spite of best efforts of CDCR to eliminate cell phones from inside prisons, that drive hasn't exactly been a rousing success. In 2006 the department reported confiscating 261 cell phones. Four years later, in 2010, that number had jumped to over 11,000.

Efforts at both interdiction and penalizing have been only marginally successful, despite a 2011 bill that increased penalties for an inmate found with a cell phone as well as a crime for anyone to bring one into a prison. And the bill paved the way for what was then considered 'state of the art' blocking and jamming technology, placed around 18 select prisons in 2012 to prevent calls or messages going out or coming in.

However, due to what the department termed "rapid changes in cellphone technology" those jammers have proven to be a "marginally effective system" and there seems little appetite for either expansion or continuation of the contract. And now, due to an inmate-filed law suit, CDCR appears in some cases, to be backing away from imposing the penalties called for under the previous legislation.

Under current penalties an inmate found with a phone can lose to up to 90 days good-time credit and anyone bringing in a phone to an inmate would be guilty of a misdemeanor and face up to six months in prison and a $5,000 fine. However, by the end of the month, prison officials expect to have in place policies that will impose penalties of up to only 30 days loss of good time credit, one-third of the current maximum penalty, for inmates found with many cellphone accessories such as SIM cards or chargers.

Officials are rolling back the penalties after they came to the conclusion that there was some confusion as to whether those maximum penalties laid out in the bill were meant to be imposed on prisoners who actually had cell phones or just any phone-related items. And an inmate suit against the department over the penalty was something of the cherry on top of the confusion.

While acknowledging that there was a 'vulnerable spot' in the legislation-imposed penalties and noting CDCR has no plans to sponsor legislation to clear up the confusion, department spokesperson Vicky Waters maintained the change would have no adverse effect on efforts to prevent prisoners from obtaining cell phones.

RE$TITUTION: WHAT YOU CAN AND CAN'T DO

Many lifers, indeed many prisoners, are faced continually with the problem of restitution; fines imposed on them by the courts that they must pay, either continually or eventually. And often those amounts are staggering, with many inmates saying they'll never be able to pay those amounts, so why try?

Conversations with the Office of Victims and Survivors Rights and Services (OVS for short), the division of CDCR that registers victims, provides information and also oversees restitution, have revealed that there are, in fact some ways to impact both the amount of money assessed and how it is repaid. The most important thing; if the courts have assessed restitution to you, as part of your conviction, you will at some point and in some way have to pay that assessment.

Amounts assessed can actually fall into two categories, Direct Order to the Victims (or family) and fines to the court. While the two categories are often combined to provide a total restitution amount, they are in fact separate and apart and can be impacted differently. While both are imposed by the court, payments to the victims or victims' family are made for expenses directly incurred by those individuals as a result of the crime.

These expenses can include medical, even funeral expenses, lost wages, on-going treatment and similar categories. Those amounts, once set by the court, cannot be reduced or eliminated, no matter how long an inmate has served, how well he programs or how much of the total amount he has repaid.

The other part of restitution, fines and court costs associated with the legal proceedings, can, however, be

Restitution cont.

reduced, though not completely eliminated. Prisoners with these sorts of assessments can petition the sentencing court for a reduction in these fees, if they can show compelling circumstances why such fines should be reduced. A rule of thumb on the amount assessed is usually $300 times the number of years of a sentence.

If your court-ordered fines and fees, absent any money directed to compensating victims, is in excess of this general standard, you may be able to get the amount reduced. But again, it cannot, by law, be totally eliminated.

There are also a couple of ways to make small inroads into the amount you owe while still incarcerated. Most prisoners and family know that any money in an inmate's trust account, whether earned as a result of inmate employment or family contributions, is subject to attachment by the department, if the prisoner owes restitution of any kind. The current rate is 55%, automatically deducted from an inmate's trust account for restitution purposes. Of that amount 10% goes into the coffers of CDCR for 'administrative costs.' In other words, like most banks, CDCR is charging you for the privilege of taking your money.

You can avoid that 10% administrative fee, however, if you voluntarily set aside part of your funds for application to your restitution amount. And family members, if they'd like to help in this process, can notify the trust administrator at the prison that they will be sending in "X" dollars every month specifically for restitution.

And don't for a moment think that when you're paroled, and CDCR no longer has access to your trust account, that you're off the hook. OVS now works with the state Franchise Tax Board (FTB), you know, the state version of the IRS, to find out where you are, how much you're making and extract their share for any remaining restitution balance when you're back in the world.

FTB will reach you when you're on parole, letting you know how much you owe and make arrangements with you for a payment plan. And if you fall off the plan FTB can and will attach any wages or monies you might have coming in.

And here's where some of the confusion lies. The two-part restitution system leads to a bit of confusion, as once an inmate is released, OVS, via the Victims' Compensation Board, is still looking out for the sums owed directly to victims, but restitution for court costs is now the bailiwick of the FTB. And often these agencies don't act in tandem with each other—not a big surprise.

So that once released you may get notification of your restitution amount, and be making payments all along, only to receive a notice up to two years later, that you owe even more, since now both the court costs fees and direct victims payments have been tallied. It isn't that your total restitution amount has gone up, it's just that all parties are now talking to each other and figuring it out.

Bottom line: if you can get the court fees segment of restitution reduced, it may save you and your family some money. But restitution won't completely go away, not even once you're home.

Editorial *cont. from pg. 4*

prisoners in person. These are things your appointed commissioners see, understand and consider.

But perhaps our biggest question is this; Why continue to reverse some individuals two or even three times? Each grant of parole is given by at least one of your commissioners, someone whose judgment you obviously trust, or you would not have appointed, and in many cases, reappointed them to the parole board. When more than one of these hand-picked commissioners gives a grant to the same individual, why then, do you second, third and fourth guess them?

We've asked your staff. And their response has been the same: The Governor considers each grant individually and makes his own decisions. That sounds a great deal like 'Let Jerry Be Jerry.'

And it could be that's the only answer we'll get. But we, like you, will continue to ask: Why?

CDCR

FAMILY VISITS
FOR LIFERS, LWOPS AS OF AUGUST, 2016

On July 1, 2016 LSA met with Director of Adult Institutions Kathleen Allison, followed 6 days later, on July 7, by a second meeting with Allison and Undersecretary for Operations Ralph Diaz. At both meetings a major topic of conversation was the recent decision to restore family visiting privileges to lifer inmates and families.

Both Allison and Diaz emphasized the commitment of CDCR to restore these visits as soon as possible, and both also noted the authority to do so as well as the difficulties in implementing that change of policy. We also received the go-ahead from both to announce this new policy to the interested public of lifers and families. Here is, as of August, 2016, what we know and don't know about the implementation of family visits.

CDCR expects family visits for lifers to begin 'soon,' hopefully as soon as the next few months, and LWOP IS included in family visits. The authority for this comes via the state budget. a few lines on page 42, passed by the state legislature and signed by Governor Brown contains these words:

"Extended Family Visits—the budget includes statutory changes to allow life-term inmates to be eligible for extended family visits."

There are some exclusions--no close custody inmates, no one with a 290 conviction or history of domestic violence. An official memo outlining procedures and policies is expected within a week and we've asked for a copy

Availability will also be an issue, as the budget does not have funds to rehabilitate, reclaim from other uses or build new family visiting units, so family visiting will be prime resource, as many of the former family visiting areas are now used for other purposes. Many former family visiting units are now used for offices, often for the medical receiver's office, some have been converted to other uses including storage and some have been condemned as unfit for habitation. And again, there are no funds in this year's budget to provide more units.

When asked about chances for funds to provide additional units in coming years both Allison and Diaz urged LSA, and our constituents (that would be YOU) to lobby the legislature to provide those funds, either in next year's state budget or perhaps in the May Revise of budget next spring. And so we shall, and we will be asking for your help in that effort.

While some have said these have already been 'enacted' and wanting to know why not at every prison..the answer is that they have been 'enacted' only in that the budget containing money for restoration has been approved and signed, but they have not yet begun to happen.

As to when--after meetings the word is...dunno yet. CDCR legal has not yet concluded whether this can be done via policy/memo (about 3 months) or must be a regulation change (about 6 months), but the prevailing opinion at present is that it will be a regulation change.

And we learned in early August that the draft of those regulations is now on the desk of Sec. of Corrections Scott Kernan, for first review. After that review there will be a public comment period for those supporting and opposing this change.

As for whether or not your inmate will qualify...that will be on case-by-case at times, but basically the requirements for family visiting are set out in Title 15, Section 3177 especially Section 3177 (b) (1). Immediate family members including children, step-children, parents, siblings and grandparents are included in FAMILY visits as well as spouses. And yes, you must be legally married or a registered domestic partner.

This is the preliminary criteria, which will be evaluated in each case and can be modified, as things progress. If you are in doubt about whether or not your inmate will be eligible, submit the form, if the answer is no, begin the 602 appeal process and make your case.

All counselors and wardens are now aware of this change and should be ready shortly with forms for you to fill out. As of now, some counselors, true to their breed, are refusing to acknowledge the change and telling inmates and families it's a rumor. No, this time, it's TRUE.

We can't stress enough that this will be a time consuming process, as there is already a wait of 2-3 months for family visits because of few facilities, and now there are suddenly several hundred/ or thousands of inmates eligible. So you won't be getting your visit next weekend, or the next or the next--but it WILL happen. Everyone at CDC Headquarters is fully and completely behind this new move and it will be system-wide--no prison or warden will be allowed to opt out.

There are more changes coming regarding custody levels and points and as these changes roll out we'll post what they are and when effective. The preliminary word is that the Close Custody designations, brought into place when there were no electric fences around prisons to minimize escape attempts, are now considered somewhat outmoded, since nearly all institutions have electric fences and so these designations will be greatly modified. Similarly, the department has recognized that allowing inmates to rack up unlimited number of points through disciplinary matters but only provide the ability to reduce points by a maximum of 8 per year is counterproductive. We expect to see changes in those policies as well.

Please be aware, there will likely be a backlash regarding the restoration of family visits for lifers, from a variety of sources. We expect the victims' groups to be vocal in their opposition, but we are also hearing comments from curmudgeons in the public arena, from some 'law and order types' (including custody staff) and, perhaps as a surprise to some, from some prison families. Some prisoner families have said those with a murder conviction 'don't deserve' family visits; we disagree. And we caution against comparing prisoners, any prisoners, against one another for who's crime is 'more horrendous.' Just be aware of these possibilities.

When the public comment period begins we will let readers, friends and family know when, where and how to voice their opinion. Bottom line, yes, lifers AND LWOP will see family visits, by the end of the year is the target date, if not sooner. It's real, it's happening and it's coming your way.

TOP 10 QUESTIONS ON FAMILY VISITS FOR LIFERS

1. Yes, family visits for lifers (and LWOP) have been reinstated after 20 years.
2. No, they have not begun yet, prisons waiting the official memo or regulation change that tells them how to proceed, and how to qualify for visits.
3. Yes, you must be legally married or immediate family to qualify, girl friend or fiancé is not immediate family; parents (step parents too), grandparents, children, spouse, siblings, etc. qualify.
4. You must fill out a family visiting form that the prisoner must get from the prison and be approved for family visits; some counselors are handing out the forms but not yet accepting them back (see #2 above) and some are not--try to be patient and keep asking.
5. Yes, there are some crimes or in-prison behaviors that will be screened out, waiting for those guidelines now.
6. Even when visits begin there will be a waiting period, as there are only a limited number of family visiting units, already a waiting list for visits and we've just thrown several thousand more participants into the mix.
7. Yes, we are positive this is happening--this was confirmed by and discussed with the Undersecretary for Operations and the Director of Adult Institutions, at CDCR in Sacramento, face-to-face..we don't make this stuff up.
8. No, we can't tell you why some counselors and prisons are still denying it, but remember, we're dealing with CDCR here; when was the last time they made anything easy.
9. No, we can't tell you if your individual prisoner will qualify due to his past or crime--we can only guess.
10. As we find out more details and solid info we'll publish that information.

LIFE SUPPORT ALLIANCE

DAVID *(LSA)*

MEETS GOLIATH

(STANFORD U)

Stanford University, in particular the Stanford Criminal Justice Center, has traditionally been a bastion of dependability and source authority on corrections issues, including the 2011 publication "Life in Limbo" which looked at lifer parole hearings. Life Support Alliance is a small, volunteer non-profit advocacy organization, recognized by many state officials as persistent, informed and, often, something of a pain in the neck on lifer issues. So when the data put forth by Goliath as to what is predictive of parole collides with the conclusions of David regarding the same factors, it makes for an interesting conundrum.

"Life in Limbo," which relied on data extracted from a parole transcript trove covering the years 2005-2010, was on the predictive edge of understanding Board of Parole Hearings decisions at the time of publication, in part because it was one of the first attempts at using transcripts as a source of factual and statistical information on the grant process. The bank of transcripts used were, in 2011, fresh and relevant. LSA talked with Stanford researchers early on in their data analysis process prior to publication and when the report was released we found it informative and on-point.

However, with not only the passage of time, but also major changes in political administration and outlook and court decisions impacting both parole decisions and inmate populations, the data from hearings prior to 2011/2012 is becoming increasingly stale and is no longer accurately reflective of either current factors essentially favoring parole grants or primary concerns of the parole commissioners. The latest report relying on this previous data, "Predicting Parole Grants: An Analysis of Suitability Hearings for California's Lifer Inmates," (Federal Sentencing Reporter, April, 2016) reflects, we feel, this disagreement in several areas.

Life Support Alliance, now 6+ years into our full-time exploration of the parole process for California life term inmates, has developed a unique perspective on the parole suitability process, parole commissioners and the factors that tend to make life inmates more likely to receive a grant of parole. This context has been developed over the past 5 years, through attending a myriad of parole hearings in person, reviewing innumerable hearing transcripts, and on-going discussions with both BPH administrators and commissioners.

This in-depth involvement in understanding the parole process has provided LSA principles with a unique perspective and comprehension of what factors must be not only present, but sufficiently exhibited and articulated by an inmate, in order to be successful in obtaining parole from the present Parole Board. And while we have found this objective (obtaining a parole grant) has been something of a moving target, in recent years, most specifically the last three, that bull's eye has become more stationary and able to be analyzed with some confidence.

The 'predictive factors' outlined in Stanford's latest publication, were, we felt, not only currently inaccurate, but could be misleading to the lifer prisoner cohort and should not be accepted as gospel simply on the basis of coming from Stanford. Cheeky little dissidents, aren't we?

But, never being one to shrink from a controversy and firm in the belief that everyone is entitled to our opinion, we marched ourselves over to Stanford (figuratively speaking) to talk with "Predicting's" authors on what we saw as important differences between what we believed to be the case and what the report outlined. Our concerns were twofold:

- With Stanford's reputation as an authoritative source for information on the parole process, some conclusions outlined in the aforementioned "Predicting" report are, from our singular vantage point, possibly misleading to those inmates reading the report in hopes of gaining insight, for lack of a better word, into what parole commissioners look for.

- If "Predicting," or indeed the stale statistical data base from which it was created, continues to be used as a reliable basis for research and current conclusions, rather than an historical perspective, continued erroneous conclusions will be reached and perpetuated, a situation we do not feel is advantageous to the public or inmate population.

We were, as always, met with great courtesy and interest. In fact, one of the first comments from the Stanford group was "you realize, this is old data." Well, yes, we do. As the conversation progressed it became clear that the Stanford authors were simply publishing the last of conclusions mined from that early data and were quite willing to recognize that "Predicting" presents a snapshot of the situation in the period in time and factors in play when hearings transcribed were held, and is, in fact, not reflective in many areas of the current situation.

In fact, the researchers and authors suggested we prepare a summary of those areas we found outdated and outline our conclusions on those specifics. Something of a historical perspective contrasted with the more current picture. Which we are preparing. But in the meantime, should any lifers run across "Predicting," here's a sneak preview of what was then and what is now.

In the introduction portion of "Predicting" the authors state "Despite the large number of lifer inmates, strikingly little is known about the states' decision making process for releasing them and releasing authorities' suitability determinations are largely invisible to the public eye." This may, perhaps, be the case in other states, but in California, particularly since the latter part of 2011, the transparency of the BPH has increased immeasurably, providing public electronic access to transcripts, clearance to attend and observe hearings to interested parties (beginning with LSA in August, 2011) and case law that has impacted both the process of parole as well as the outcome.

The report notes the lifer cohort "differs in composition from the rest of the state's prison population in that it is older, more violent, and slightly more male" than the general prison population. The issue here is whether the allegation of being 'more violent' is meant to apply to the life crime, or to the inmates' behavior while incarcerated. If the former, certainly; however, if the latter is the implication, that is indeed not the case. Lifers are considered the stability of the institutions, not only by advocates, but custody staff and BPH officials as well.

While it was true in the time frame of 2005-2010 as reported by "Predicting," that few individuals not personally involved in the hearing (the inmate, commissioners and associated attorneys) attended hearings, that has changed in the past 5 years, as observers (such as but not limited to LSA) have been allowed to observe hearings and victims' next of kin (VNOK) are increasingly evident at hearings. Indeed, estimates by CDCR officials are that about 30% of parole hearings now see VNOK in attendance. The sheer number of parole hearings held each year and the availability, of both transcripts and entrée to the hearings, affords interested parties ample opportunity to watch, examine and analyze hearings.

While "Life in Limbo" (2011) concluded and "Predicting" repeated that the attendance of VNOK had a significant impact on the outcome of the hearing, our experience and that of other communicants, including conversations with parole commissioners, indicates this is not the case. However, the input of VNOK, both in volume and stridency, appears to have significant impact on the Governor's decisions to affirm or reverse the parole grant.

"Predicting" also found such factors as the inmate's age and prior criminal record (juvenile or adult) did not pose significant impact on the parole decision in 2011. But these factors are very impactful in the current time frame, more so since the implementation of SB 260 (2014) and SB 261 (2016), as well as elderly parole (2014). This constitutes an important difference between the historical considerations and current situation.

LSA cont. pg. 46

LSA from pg. 45

As noted in the report, participation in substance abuse programming (particularly AA and NA) are of prime importance. However, the report continues to the conclusion that "participation in other types of programs…was not significantly correlated with obtaining a grant." Our conclusions are substantially different; while participation in AA/NA is the most universally recognized positive, commissioners currently want to see a 'well-rounded' inmate, one who has marketable skills, a basic education and insight gained through other programs including anger management, victim awareness and life skills.

The report suggests that, while accumulation of 115s was significant in deciding on a grant, a similar history of 128s was not, as "commissioners are willing to overlook recent misdeeds." Not so, in our experience. A history of recent 128s, even for minor infractions, is often cited as part of a decision to deny, indicating to the commissioners that the inmate in question cannot abide by rules, even minor ones.

Regarding the psychological evaluations (CRAs), "Predicting" notes the CRAs are "administered within months of the inmates'..subsequent hearings." This is not presently the case, although recent changes in BPH policy are in a somewhat more positive direction. Prior to January, 2016, the BPH considered the 'shelf-life' of a CRA to be 5 years, not a few months. Starting this year, the 'shelf-life' has been lowered to 3 years, so that an inmate may appear at a hearing with a CRA that is several years, not months, old.

As to the report's conclusion that "the Board takes psychological evaluations into serious consideration in making their releasing decisions and finds psychiatric reports compelling when assessing an inmate's dangerousness to society," our experience tends to indicate the commissioners use the CRA more to support their decisions than assist in making that decision. Dr. Kusaj, chief of the FAD, has stated "Over 80% of long term inmates assessed by FAD psychologists in 2014 were assessed to present a non-elevated or less risk than other state prison inmates or parolees." Given this large number of non-elevated or moderate risk, one would expect the grant rate to be significantly higher, if this factor was of compelling importance.

While "Predicting" concludes "an inmate's expression of remorse or responsibility did not have a significant effect on…chances of obtaining parole," our research and experience, bolstered by conversations with attorneys and parole commissioners is adamantly the opposite. We have not attended a parole hearing in recent memory wherein one of the panel members did not inquire of the inmate if he/she had written a letter of apology to the victims and certainly prisoners are always expected to expressly take responsibility for their actions. Acceptance of responsibility and expression of remorse are crucial to parole suitability.

One conclusion expressed in "Predicting" is that a job offer represents a 3.5 times greater chance of release; but our experience, indeed, any number of transcripts, points to the opposite conclusion. The board is more concerned with and expresses to the inmates that they look for marketable job skills rather than a job offer. This finding is perhaps one of the most overt differences between the conclusions of the report and what our experience and research outlines and is probably the result of the time period researched having few grants given, thus skewing the statistical base on small issues.

However, one area where we resolutely agree with the report is that "it is crucial to understand which factors are reliably associated with parole release," not only for lifer inmates, but for the public, political and correctional officials as well. The public must understand what factors are considered by releasing authorities to feel assured of safety; politicians must understand the stringent process to best assess new proposed laws and the inmates must understand what is expected of them to have a reasonable chance to successfully attain a parole grant.

VNOK should be assured that inmates are being required to express their remorse and apology. Politicians, always attune to winds of public sentiment, should understand that the Parole Board does find the maturation of juveniles probative of suitability.

We strongly agree that further study and reports on the factors required for parole is needed and we hope that when those studies are undertaken new, fresher data will be used and, in the meantime, those reading "Predicting Parole Grants" will be attuned to the age of the data on which the report's conclusions are based.

LIFE SUPPORT ALLIANCE
Doing Life as a Family Seminars

SEPT. 17TH, 2016, Paramount, Ca.
OCT./NOV., FRESNO-CENTRAL

A DAY OF LEARNING AND SUPPORT
Parole Advocates
Updates on Legislation
5 Things the Board Looks For
Suggested Programs
Reading List, Support Letters
Transitional Housing

Speakers

Lifer Attorneys
Paroled Lifers

Have your family or supporters contact LSA to register! (916) 402-3750.
or lifesupportalliance@gmail.com

CALIFORNIA LIFER NEWSLETTER

SUBSCRIPTION RATES
WILL INCREASE
BEGINNING
January 1st, 2017

Inmates: 1 year...$ 35.
2 years ... $60.
5 years ... $80.
110 -STAMPS = 1 YR

PRE-PAY FOR A COST-SAVINGS!
All subscriptions PAID PRIOR TO JANUARY 2017
WILL BE AT PRESENT RATE

HOT DOG!

ANNUAL

LSA

Picnic !!!

Is Scheduled on SEPTEMBER 10, 2016
North Laguna Creek Park
Sacramento
11-3

OK...so maybe you have an EXCUSE THIS TIME...
but we expect you at the next!!!

Gail Brown Departs from LSA/CLN

One of Life Support Alliance's co-founders, Gail Brown has resigned her position as Co-Director with our organization.

She will be taking a much needed hiatus before continuing her advocacy for Lifers.

We appreciate her hard work and dedication !

Other States

WHAT NEW YORK (AND THE FEDS) KNOW, CALIFORNIA IGNORES

"The main source of contraband introduced into the system is through employees," says retired NYPD detective sergeant Chris Cincotta, speaking about the problem of contraband entering prisons. Even the federal prison system was recently taken to task by a report from the Department of Justice about employee-introduced contraband.

During a 9-month investigation into contraband interdiction in federal institutions the DOJ found numerous problems, from poor physical controls to said "no reported random pat searches occurred in 99.5 percent of shifts," making it easy for staff to enter with items ranging from simple tobacco to street drugs and the dreaded cell phones. In response the Bureau of Prisons has promised to "develop and propose changes to the staff search policy" by the end of September.

NYC Corrections Corrections Commissioner Martin Horn noted that even new methods aimed at slowing the flow in contraband into institutions often only makes the price higher and the risk more worthwhile. "The more successful we were, the higher the price," he says. But this profitability growth also breeds corruption, Horn said.

Economist David Skarbek, who has studied shadow economies in correctional facilities, says smuggling behind bars is bigger business than ever. Joe Orlando, public information officer for the California Department of Corrections and Rehabilitation reported, "We're constantly finding five, six, 10 cellphones in a couple hours on sweeps."

And conventional wisdom is that black markets and contraband inside prisons always creates violence. Skarbek has written that such underground economies can also help maintain order. "The violence associated with a Hobbesian jungle ignores the fact that self-interested people often have incentives to develop mechanisms to reduce conflict," he said.

But as more and more items are declared contraband each year (e-cigarettes are the latest addition to many lists) authorities are increasingly faced with developing new methods of interdiction. NYC Horn noted prisons are places of "enforced scarcity. There have always been black markets in prison, but today it's even worse because there are so many more things we prohibit."

New York and federal DOJ recognize the large part staff participation plays in this enterprise and are taking steps to address the issue. California?

Vet's Report

A continuing commentary by Vic Abrunzo, veteran and member of LSA Board of Directors

August 2016

WHY HAS A "PREFERENCE" FOR BLIND VENDORS BECOME AN UNCONTROLLED MONOPOLY IN CALIFORNIA?
[AND WHY NOT A PIECE FOR DISABLED VETERANS?]

A Federally legislated preference for "blind" vendors in Federal buildings has existed since 1936 in legislation that is known as the Randolph-Sheppard Act and, some years later, that law was applied to California city, county & state buildings, including prisons. Most lawyers and their clients have dined at one or more of these vending machine or cafeteria facilities in the courthouses. Many travelers hit the vending machines at the highway rest stops.

This author is more currently familiar with the program as a visitor in the state prison institutions. As implemented in California, the program is called the Business Enterprise Program, as laid out in the and the California Code of Regulations.

The differences between the prison visitors' experience and that of other customers is that generally, we visit for most of the day. There is no stepping out if you don't like the food or the prices. There is no legal method to bring in food of choice for you or the in-custody clientele of the state. Thus my reference to a "monopoly".

Regardless, the price differential between products in the employee canteen and the visiting rooms was, and remains, significant. Not to mention the selection of items available, or, more usually, not available.
And while the regulations provide for some customer satisfaction, it seems that the Department of Rehabilitation (DOR), as the regulatory agency, has little impetus to provide for that customer satisfaction. DOR, in its contracts, provides the vending machines and related equipment, and allegedly the maintenance and repair of said machines, and for that service, DOR claims a percentage of the gross sales.

This arrangement effectively shields the vendor from complaints about machines being out of service, since the vendor-contractor has little influence in the expediting of repairs. DOR's contracts with its vendors are open ended, they continue in perpetuity unless terminated by resignation of the vendor. So if you've ever wondered why vending machines in visiting rooms are often inoperable, it appears a little Catch 22 is in action.

So one may reasonably ask, what's the point? My belief is that some competition is good for all. As a disabled Vietnam era Veteran, my thought is why not open this competition to vets? Why not make sure that there are customer advocacy committees besides the blind vendor committee, and those customers include prisoners and their families? So I offer to you the opportunity to become an advocate yourself!

At several of the institutions, and particularly Valley State Prison, the Inmate Family Council has undertaken efforts to have the vendor and the institutional Business Manager and/or AW for Business sit down to discuss the problems. Such a meeting does seem to have slowed the raising of prices at that institution. Any reason the MAC and WAC committees, in consultation with any vets in the institution, shouldn't be in on this process as well?

If you want to go the full mile, below are some 'outside' contacts with some skin in the game:

Cal Vet
Attn: Dr. Vito Imbasciani, Secretary
Dept. of Veterans Affairs
1227 O Street, Sacramento, CA 95814

Assembly Committee on Veterans' Affairs, Chair J. Irwin
Legislative Office Bldg.
1020 N Street Rm. 389, Sacramento, CA 95814

Dept. of Rehabilitation (DOR), Attn. Z. Mundy, Mgr.
Business Enterprise Program
P.O.Box 944222, Sacramento, CA 94244

Senate Committee on Veterans' Affairs, Chair J. Nielsen
Legislative Office Bldg.
1020 N Street Rm. 251, Sacramento, CA 95814

Transitional Housing 'Possibilities'

At LSA we receive many requests for names and addresses of transitional housing. We understand and sympathize for your need to have resources that are up-to-date, as we struggle also to monitor this bouncing ball.

Please keep in mind this list is only partial and subject to change (constantly!). No promise or endorsement is made by CLN/LSA . We encourage you to write...touch base with TH to explore their programs and availability. Parole Board expects it.

SOUTHERN CALIFORNIA

The Francisco Homes, Sister Teresa Groth,
P.O. Box 7190
Los Angeles, CA 90007

The Martin Home, Sister Mary Sean
2514 Crenshaw
Los Angeles, CA 90016

Bradley's Assisted Living
1575 E. 46th St. Los Angeles, CA 90011
(GPS & 290 availability- have 5 houses)

Crossroads
P.O. Box 15
Claremont, CA 91711
(for women)

East Country Transitional Living Center
1527 East Main St.
El Cajon , California 92021
(faith based, 1 year, no cost)

Timelist Group- Yusef Wiley
3808 Somerset Dr.
Los Angeles, CA 90008

San Diego Parolee Stabilization Center
650 11th Avenue
San Diego , California 92101
(40-bed, adult male parolees, no cost,refer by P.O)

NORTHERN CALIFORNIA

Sacramento-

Restoration House (Christian)
4141 Soledad Ave
Sacramento, CA 95820

Turner House
3600 Turner Dr.
No. Highlands, CA 95660

Redding

Visions of the Cross
3648 El Portal
Redding, CA 96002

Empire
1237 California St
Redding, CA 96001

Bay Area

Homeless Veterans Emergency Housing
795 Will Rd Bldg. 323 B
Menlo Park 94025

Men of Valor Academy
6118 International Blvd
Oakland 94621

DeLancy Street
600 Embarcadero
SF 94107

Swords to Plowshares
1433 Halibut Court
SF 94103

CENTRAL VALLEY

Fresno First
2550 W. Clinton Ave
Fresno 93750

Modesto Gospel Mission
1400 yosemite
Modesto 95354

Isaiah's Recovery Services
1904 Clarendon ST
Bakersfield 93307

CLN
California Lifer Newsletter
P.O. Box 277
Rancho Cordova, CA 95741

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