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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 May 11, 2016, the Ninth Circuit panel denied Gilman's motion for rehearing. This leaves only a motion for rehearing en banc as a possible procedure for Gilman, followed by a certiorari petition to the U.S. Supreme Court.

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STATUS OF IN RE ROY BUTLER

In re Roy Thinnes Butler
___Cal.App.4th___; CA1(2); A139411
May 15, 2015

On May 31, 2016, the First District Court of Appeal held oral argument on questions relating to performance on the stipulation entered earlier in this case. On June 7, 2016, the State filed

Respondent's response to Court's request at OA [oral argument] for steps the Board of Parole Hearings has taken to comply with the stipulation signed by the parties on December 16, 2013, and became operative on April 3, 2014 (see full text of response).

CLN has not seen this response, but will report on the Court's ruling in the case when it comes down.

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GOVERNOR'S REVERSAL OF PAROLE GRANT SUSTAINED ON APPEAL

In re Timothy Busch

--- Cal.App.4th ---; CA4(1); D068791

April 21, 2016

Timothy Busch was convicted of second degree murder in 1989. He was granted parole by the Board in 2014 based on his exemplary record while incarcerated. Governor Brown reversed the Board on grounds that the Governor found Busch's explanation for the death of the victim implausible, when compared with the evidentiary record from the

See Busch pg. 2

Table of Contents

CALIFORNIA LIFER NEWSLETTER

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COURT CASES (in order)

Reviewed in this Issue:

***Busch* from pg 1**

trial and on Busch's statements to the FAD psychologist and to the Board, and determined that Busch remained a danger to society.

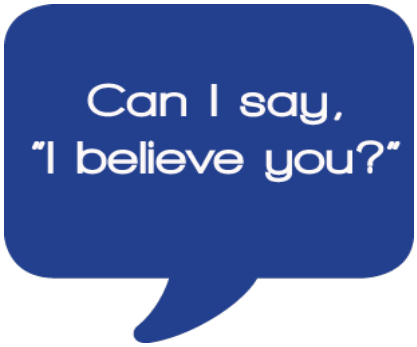
Busch, who has always claimed the death was accidental and not of his actions, claimed that PC § 5011 insulated him from being forced to admit to the crime, and that rejecting parole for his denial was unlawful. In this published appellate ruling, the Court found that the Governor properly based his decision on "some evidence" in the record, and that there was no violation of PC § 5011.

The appellate court noted that when granting parole, the Board expressed mixed feelings.

> "As far as your understanding, and past and present mental state, and past and present attitude about the crime, I have to tell you that at this point I do think … that there is a lack of insight and understanding, and a lack of credibility there. I don't necessarily believe what you're telling us today about what happened. I think the evidence suggests otherwise in the paperwork."
>
> Nevertheless, the Board found Busch's exemplary performance in prison weighed in favor of suitability for parole because he had no rules violations, no violence, no drugs, no gang affiliation, and no mental health issues. They noted he had no juvenile history and no arrests or convictions before he came to prison. He also programmed well in many different areas. One of the commissioners described Busch as "the poster child for … the model inmate."

The Governor reversed based on the facts and lack of Busch's credibility.

> The Governor noted the crime was horrific. ... The Governor also found Busch's claim of innocence based on his story ... "entirely implausible" and "impossible to believe." The Governor noted more than one doctor concluded the injuries resulting in ... death could not have been caused by a fall out of bed. The Governor referred to evidence [in the record of appeal of the conviction]. The Governor also noted a troubling pattern of abuse ...



> The Governor concluded ... that Mr. Busch's claim of innocence is unbelievable. Mr. Busch is not required to admit guilt to be granted parole, but, under these circumstances, his claim that [the victim] died because she fell out of bed is implausible. His story, to me, indicates he is not yet honestly addressing the underlying issues that led to the death ...." Based on the evidence in the record, the Governor found Busch currently poses an unreasonable danger to society if released from prison.

The Court recited its review authority under *In re Shaputis II.* That case reaffirms that only a "modicum" of evidence in the record used to support the Governor's decision is required. The Court found much more than this "modicum."

First, there was support under the "egregiousness" factor analysis.

> The circumstances of the commitment offense are an appropriate consideration in determining parole suitability. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).) The circumstances of the crime provide some evidence of current dangerousness to the public if "the record also establishes

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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***Busch* from pg 2**

that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*Lawrence, supra*, 44 Cal.4th at p. 1214.) Among the signs of an especially heinous commitment offense are: "[t]he victim was abused, defiled or mutilated during or after the offense"; "[t]he offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering"; and "[t]he motive for the crime is inexplicable or very trivial in relation to the offense." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(C)-(E).)

Each of these signs is present in this case. [The victim] was struck or pushed with such force against a hard surface that she suffered massive skull fractures .... The evidence showed these injuries could only have been incurred by horrific abuse carried out with callous disregard for [the victim's] suffering. The record suggests Busch may have been frustrated due to the disruptive behavior of the [victim] while he was studying, which is certainly trivial in relation to the nature of abuse inflicted .... There is more than a modicum of evidence supporting the Governor's characterization of the crime as horrific.

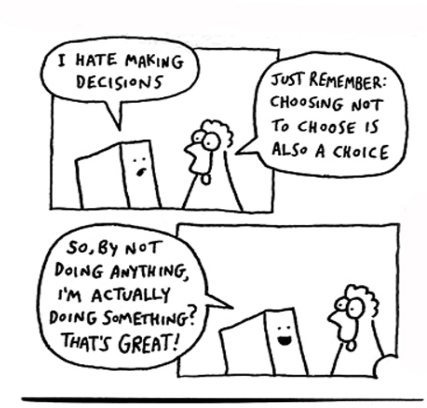
The Court also upheld the Governor's determination that Busch's failing to deal with the crime rendered him unsuitable today.

In addition to the horrific nature of the crime, the Governor determined Busch's implausible explanation that ... injuries resulted from a fall out of bed "indicates that he is not yet honestly addressing the underlying issues that led to the death of this child." An inmate's acceptance of responsibility and development of insight are also appropriate considerations in determining parole suitability. (Cal. Code Regs., tit. 15, § 2402, subd. (d)(3); *Shaputis I, supra*, 44 Cal.4th at p. 1246.) "[T]he presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (*Shaputis II, supra*, 53 Cal.4th at p. 218.)

Busch has asserted [the victim's] injuries could have resulted from an injury [as suggested by a defense expert at trial]. ... [Prosecution experts] ... testified the extensive injuries ... could not have occurred as a result of a fall from a bed. .....

The fact Busch continues to cling to the entirely implausible theory the injury was caused by a fall from a bed either the night before or earlier in the day supports the Governor's conclusion Busch lacks insight into the crime and has not honestly addressed the underlying issues leading to [the] death. The Governor also pointed to the troubling pattern of abuse [the victim] suffered in the months leading up to her death.... The psychologist who evaluated Busch noted his contention he did not cause [the] death leaves open the possibility he is a pathological liar and he is not remorseful. He told the evaluator even if he had committed the crime, he has already done enough time. The evaluator expressed concern regarding a risk of future violence if he were [in a similar environment]. The evaluator also indicated he would benefit from additional exploration of himself and the crime.

The record as a whole establishes more than a modicum of evidence to support the Governor's conclusion Busch is currently dangerous because he lacks insight into the crime. There is a rational nexus between the evidence and the Governor's determination of



current dangerousness. (*Shaputis II, supra*, 53 Cal.4th at p. 221; *In re Criscione* (2009) 180 Cal.App.4th 1446, 1461 [pro forma recitation of nexus by parole authority is not necessary, merely an articulation of reasoning].)

The Court also rejected Busch's claim that PC § 5011 prevented his being denied parole because he would not admit to the offense.

"The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed." (§ 5011, subd. (b).) However, when, as here, an inmate goes beyond a simple denial of guilt and chooses to provide a version of events, neither section 5011, subdivision (b), nor title 15, section 2236 of the California Code of Regulations preclude the Governor from considering the plausibility of the inmate's version of events to the extent it bears on the inmate's parole suitability. To the contrary, the parole authority is required to consider "[a]ll relevant, reliable information available" when determining an inmate's parole suitability. (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

An inmate with a plausible account, who has accepted responsibility for his or her professed actions, expressed remorse, effectively participated in rehabilitative programs, and been found by a psychologist to present a low recidivism risk may be suitable for parole notwithstanding

***Busch* cont. pg 5**

EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility
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WELL IT'S ABOUT TIME
AND YOU HEARD IT HERE FIRST

Well, it IS about time.

More and more voices in CDCR are finally beginning to say what we've known, and preached, for years: lifers are a special group, with special needs, special talents, and great expectations.

Our attendance at a recent CROB (California Rehabilitation Oversight Board) meeting was an experience in 'déjà vu all over again,' as speaker after speaker from CDCR divisions, organizations and agencies joined in the chorus of 'what can we do for lifers, they're special with different needs.' This is old news to us. We've been beating on departmental and legislative doors for years, preaching this cause; we've been a pebble in the shoe of CDCR for a long time.

Nearly 7 years ago, when we started LSA, we were the first and at that time the only group even talking about lifers, let alone trying to provide programming and assistance to them. So we're a bit bemused by the sudden burst of interest by various groups, organizations, individuals and agencies who have so recently and amazingly discovered lifers.

Suddenly everyone is espousing what we've been preaching for 7 years—that lifers are different, the safest cohort of prisoners to release, the most rehabilitated men and women in the prison system, with different needs both for in-prison programming and reentry. They are the best performing prisoner group on release, and they are their own best and most willing mentors.

We listen in amazement as staff from CDCR headquarters talk about the low recidivism rate of lifers, what great mentors they make and how CDC is planning great and expanded programs for lifers, both inside and when they are released. And some of those ideas, those programs, sound awfully familiar.

But we're happy to see lifer programs expanded and improved (even LTOP is changing), and delighted to see more resources available for those coming home, including new dedication of beds just for lifers in transitional houses. It seems everyone now has some sort of program just for lifers.

And so while the fact that so many lifers are ready for release, that they are an asset to the community where they settle and a study in the success of the human spirit is old news to us, we're delighted to see so many others now coming to this realization and jumping on the lifer band wagon. Our hope is that all these agencies and organizations will be inclusive, and not simply hear the lifer message from those who can work in reentry facilities or counseling centers.

Theirs is not the typical experience of lifers returning home. Study committees, brainstorming sessions should include those lifers who have returned to the everyday workforce and are still giving back to their communities,

***Editorial* cont. pg 42**

Busch **from pg 3**

the inmate's claim of innocence or reduced culpability. (See, e.g., *In re Pugh* (2012) 205 Cal.App.4th 260, 269; *In re Jackson* (2011) 193 Cal.App.4th 1376, 1389-1391; *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110-1112, disapproved on another ground in *In re Prather* (2010) 50 Cal.4th 238, 252–253.) Conversely, an inmate with an implausible account, but an otherwise exemplary prison record, may be unsuitable for parole if the implausibility of the inmate's account indicates the inmate does not appreciate the magnitude of the commitment offense or its contributing causes and there is psychological evidence the inmate's character has not appreciably changed since the commitment offense. (See, e.g., *Shaputis I, supra*, 44 Cal.4th at p. 1260; *In re McClendon* (2003) 113 Cal.App.4th 315, 321-322.)

As one appellate court explained, "where the inmate's version of events is contrary to the facts established at trial and is inherently improbable, this reflects on the inmate's credibility, and indicates a refusal to admit the truth to himself and to others. This establishes a nexus to current dangerousness because it indicates the inmate is hiding the truth and has not been rehabilitated sufficiently to be safe in society." (*In re Pugh, supra*, 205 Cal.App.4th at p. 273.) The Supreme Court explained "an implausible denial of guilt may support a finding of current dangerousness, without in any sense requiring the inmate to admit guilt as a condition of parole. In such a case it is not the failure to admit guilt that reflects a lack of insight, but the fact that the denial is factually unsupported or otherwise lacking in credibility." (*Shaputis II*, supra, 53 Cal.4th at p. 216.)

Some courts have suggested the Board or the Governor must accept an account "that is ' "not physically impossible and [does] not strain credulity." ' [Citations.] [¶] … [H]owever, … this view 'has been called into question' by the Supreme Court's decision in *Shaputis II*. [Citation.] In *Shaputis II*, the high court held not only that 'an implausible denial of guilt may support a finding of current dangerousness …' [citation], but that credibility and therefore plausibility is for the Board [or the Governor] to determine. Thus, when 'the parole authority declines to give credence to certain evidence, a reviewing court may not interfere unless that determination lacks any rational basis and is merely arbitrary.' " (*In re Sanchez* (2012) 209 Cal.App.4th 962, 974 quoting *Shaputis II, supra*, 53 Cal.4th at p. 216.)

Busch **cont. pg 6**

***Busch* from pg 5**

In this case, Busch did not simply deny guilt. He provided a version of events and a theory of injury that, as discussed above, is entirely implausible based upon the evidence. The facts of this case are not similar to *In re Swanigan* (2015) 240 Cal.App.4th 1, 19 in which the inmate's denial of guilt was not inconsistent with the evidence at trial because the assailant's face was covered and the eyewitness accounts were unreliable. Both the Board and the Governor found Busch's version of events incredible and entirely inconsistent with the evidence. These determinations were not arbitrary and did not violate section 5011, subdivision (b).

Accordingly, the Court denied Busch's petition, thereby affirming the Governor's reversal of the Board's grant of parole.

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BOARD'S DENIAL OF PAROLE SUSTAINED ON APPEAL

In re Jimmy Rodriguez
CA4(1); D068466
May 6, 2016

Jimmy Rodriguez was convicted of second degree murder, with use of a firearm, in 1992, and sentenced to 20-life. He was denied parole by the Board in 2015. The Board determined that Rodriguez remained dangerous in light of his inconsistent testimony at the parole hearing concerning the circumstances of the murder and his failure to demonstrate sufficient progress in therapeutic programming designed to address certain mental health deficiencies that contributed to his commission of murder.

The Court of Appeal denied Rodriguez's petition for habeas relief from the Board's denial.

Applying the extremely deferential standard of review applicable to the review of parole hearing decisions reaffirmed in *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis)*, we conclude that there is a "modicum of evidence" (*id*. at p. 219) to support the Board's determination that Rodriguez is unsuitable for parole because he would pose a danger to the public if released. Accordingly, we deny the petition.

At issue in the habeas petition was the inconsistency between the facts of the crime, as reported in Rodriguez' 1994 court record on appeal of his conviction, and his defense at trial – repeated at Board – that he acted in self-defense.

"At approximately 8 a.m. on September 19, 1992, Rodriguez visited his former girlfriend Christen Kreider at her parents' Vista home. Rodriguez had gone with Kreider for several years but had broken up with her several months before his September 19 visit. They remained friends. During the several months before the visit, Kreider had been going out with Johnny Ochoa.

"On September 19, Rodriguez told Kreider about an incident outside her home the night before. He had been mistakenly identified as Ochoa by two men. They held guns to his head until Rodriguez identified himself. The men said they were going to kill Ochoa. Kreider talked to Ochoa later that morning and told him to stay away because he was putting her family in danger. Around 11 a.m., Rodriguez and Kreider were in the bedroom when the doorbell rang. Kreider went to the door. Ochoa was there. Kreider put her head on his shoulder and cried as he handed her a key to her garage. Rodriguez came out of the bedroom. Ochoa stepped back and said, 'Put it away, fool.' Running toward Ochoa, Rodriguez repeatedly fired a handgun at him. Ochoa died of three gunshot wounds. Rodriguez fled, had his truck repainted and cut his hair and mustache."

Our opinion further states that Rodriguez defended against the murder charge by presenting evidence that he acted in self-defense. In support of this defense, Rodriguez presented evidence that Ochoa always carried a firearm, frequently committed robberies, and had threatened to kill Rodriguez several weeks before the killing. This court's opinion also stated:

"Rodriguez and Kreider testified Ochoa had a black pouch when he came to the home on September 19. He repeatedly tried to open it as Rodriguez shot. Rodriguez thought he was trying to obtain a gun. Rodriguez testified he removed a gun from the pouch before fleeing but someone later stole it."

In his 2015 Board hearing, Rodriguez was questioned extensively about his past statements regarding the offense. The Board challenged him on inconsistencies it observed between what he had told the FAD psych, what he told the Board, what a crime partner had stated, and what was found in the record of the appellate decision in the appeal of his conviction.

The Board denied parole on two grounds: past and present mental state and past and present attitude about the crime; and failure to have engaged in institutional activities that indicate an enhanced ability to function in society."

With respect to Rodriguez's mental state and his attitude toward the crime, the Board noted that Rodriguez had been "very insincere" by providing inconsistent accounts of how the crime occurred and that he also continued to minimize his culpability for the crime in an implausible manner by contending that his actions were, at least in part, attributable to self-defense.

The Board also stated that Rodriguez had not sufficiently demonstrated that he understood that jealously had been a major contributing factor to his commission of the crime and that he had not conducted rehabilitative programming related to "jealousy issues that [he] had with women." For example, the Board noted that Rodriguez had not taken a class on domestic violence so that he could understand "the whole cycle of control," that led him to murder Ochoa.

The Board also noted that while Rodriguez had attempted to address his substance abuse issues, he had not done so "completely." In support of this determination, the Board stated that Rodriguez's testimony concerning his substance abuse issues revealed that he did not fully understand the "internal triggers" that led him to begin using drugs. The Board also noted that while Rodriguez had "gone through" some substance abuse programs in prison, he had not attended Alcoholics Anonymous or Narcotics Anonymous classes, which concerned the Board given that Rodriguez's substance abuse was a critical causative factor leading him to commit the murder.

Rodriquez grounded his petition in complaints that there was not "some evidence" of his current dangerousness, and that there was no "nexus" to his current dangerousness. The Court offered the following analysis refuting his complaint.

During his January 2015 testimony before the Board concerning the circumstances of the murder, Rodriguez initially stated that Ochoa was unarmed and that Ochoa did nothing to precipitate the killing. Later, during the same hearing, the presiding commissioner noted that, just a few months prior to the parole hearing, Rodriguez told a psychologist who was performing a forensic evaluation for the Board that Ochoa had been armed, had angrily approached him just before the shooting, and had reached for a gun while Rodriguez shot him. Rodriguez then admitted that this latter version was in fact how he remembered the killing.

In light of Rodriguez's inconsistent testimony at the parole hearing concerning the circumstances of the murder, the Board could reasonably find that Rodriguez "lack[ed] credibility." (*Juarez, supra*, 182 Cal.App.4th at p. 1341.) That Rodriguez would provide such dramatically differing accounts of the killing at the same hearing also provides a reasonable basis for the Board's finding that Rodriguez had "a material deficiency in [his] understanding and acceptance of responsibility for the crime." (*In re Rodriguez* (2011) 193 Cal. App.4th 85, 99.) The Board could reasonably consider such a lack of insight to be a significant factor in determining whether there was a " 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (*Shaputis, supra*, 53 Cal.4th at p. 218.)

In arguing that any inconsistencies in Rodriguez's account of the crime do not constitute some evidence of current dangerousness, Rodriguez cites a line of cases decided before *Shaputis* that rely on *In re Palermo* (2009) 171 Cal.App.4th 1096, 1112 (*Palermo*) for the proposition that a remorseful inmate's plausible claim that his conduct related to the life crime was less culpable than that which could be inferred from the evidence in the record does not constitute some evidence of current dangerousness. We assume for purposes of this decision that Rodriguez's contention that he shot Ochoa in self-defense and then took a gun from Ochoa before fleeing was plausible and that *Palermo* and its progeny remain good law in the wake of *Shaputis*. (But see *In re Butler* (2014) 231 Cal.App.4th 1521, 1533 ["*Palermo* and its progeny seem inconsistent" with *Shaputis*]; *In re Tapia* (2012) 207 Cal.App.4th 1104, 1113 ["*Palermo* has been called into question by [*Shaputis*]".) However, neither *Palermo*, nor any of the other cases cited by Rodriguez involved, as does this case, an inmate who provided materially differing accounts of the commitment offense at the same parole hearing. Thus, *Palermo* and its progeny are distinguishable because the Board could have reasonably found that Rodriguez's insincerity and apparent willingness to tell the Board "what they wanted to hear," concerning the circumstances of the life offense reflected a deficiency in his present mental state concerning the circumstances of the life crime.

There was also evidence in the record to support the Board's findings that Rodriguez lacked insight into his jealousy as a motive for the killing. During his October 2014 psychological evaluation, Rodriguez denied that feelings of jealousy had caused him to murder Ochoa, while at the parole hearing, Rodriguez agreed with a commissioner's suggestion that jealousy had been a major contributing factor to his commission of the murder. In addition, there is evidence to support the Board's finding that Rodriguez had not taken a domestic violence course that would help him understand the "cycle of control and not wanting people to be with other people."

There is also evidentiary support for the Board's finding that Rodriguez

***Rodriguez* cont. pg 8**

***Rodriguez* from pg. 7**

had failed to completely address his substance abuse problem. Despite admitting that his addiction to methamphetamine was a primary cause of the murder, and admitting that he was on methamphetamine at the time of the murder, Rodriguez had not attended Narcotics Anonymous, and was not on a wait list to attend such program. Further, after reviewing Rodriguez's testimony concerning his substance abuse and his relapse prevention plan, we conclude that there is evidence to support the Board's finding that his understanding of his addiction was "[v]ery vague, very general, not really going to [his] internal triggers."

The Court was not insensitive to Rodriquez's successful work toward gaining suitability. But it concluded that it was not the lawful province of the Court to reweigh this record against the evidence cited by the Board in its decision.

We acknowledge that there is much evidence in the record that would support a determination that Rodriguez is suitable for parole. Among other factors, he has developed realistic parole plans, obtained numerous vocational certificates, and has completed numerous self-help programs. He has a remote and minor disciplinary history while in prison, as well as an exemplary work history. Notwithstanding this, and other evidence, that would support a grant, we also have identified evidence in the record that supports the Board's determination that Rodriguez is unsuitable for parole because he would pose a danger to the public if released. Under these circumstances, we may not second guess the Board's suitability determination. (See *Shaputis, supra*, 53 Cal.4th at p. 210 [" 'It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole' "].)

******

WARDEN CANNOT IGNORE A 602 THAT WAS FILED IN THE INSTITUTIONAL MAIL RATHER THAN IN A 602 APPEALS BOX

In re Kevin Andres
--- Cal.App.4th ---; CA4(1); D067039
February 23, 2016

This case involves a problem that lifers may well encounter during their lengthy incarceration: a 602 Inmate Appeal Form is deliberately ignored by prison officials solely because the inmate deposited his otherwise timely appeal into an institutional mail box, rather than an appeals collection box. In this published decision, the appellate court upheld the superior court's decision to grant habeas relief that ordered the warden to process the ignored 602.

Kevin Andres alleged that he was the victim of excessive force when prison guards shot him with a bean bag gun and struck him with a baton while he was lying prone on the floor. He claimed that he completed a 602 to redress his grievance and sent it to the prison appeals coordinator via institutional mail. When he did not receive a response, he filed a habeas petition. The court granted relief, ordering the warden to process his administrative appeal.

Dissatisfied with this initial ruling, the warden sought reconsideration in the superior court on the ground that Andres sent his appeal by institutional mail rather than placing it in the secured 602 appeal collection box, asserting that the collection box was the exclusive means for inmates to submit 602 administrative appeals. The superior court denied the reconsideration motion because the warden's collection box evidence was not newly discovered. In addition, the court rejected the argument on the merits, finding that the controlling regulation (Title 15, § 3084) authorizes inmates to submit an administrative appeal via institutional mail.

The warden appealed. The Court of Appeal upheld the superior court. Inmates may appeal any policy, decision, action, condition, or omission by the department or its staff that the inmate . . . can demonstrate as having a material adverse effect upon his or her health, safety, or welfare." (Cal. Code Regs., tit. 15, § 3084.1.) Although an appeal must be submitted within 30 days of the action or event being appealed, there is no requirement in the applicable regulations that an appeal be submitted through a particular mail delivery system. Accordingly, the superior court properly ordered the warden to process Andres's appeal.

The convoluted history of this spat is spread out in the appellate decision. It is reported in full below, because it demonstrates a familiar frustration experienced by prisoners over the years when their attempts to redress staff grievances via the 602 process are obfuscated by the "it was lost in the mail" defense, or, upon later resubmission, by the "you failed to file it within 30 days" defense or the "you filed more than one 602 within 14 days" defense. New, and now the subject of this published case, is the lame "you put it in the wrong mailbox" defense.

Andres alleged on January 20, 2013 he was the victim of excessive force by one or more correctional officers

at RJDCF when he was shot with a bean bag and struck multiple times with a baton while prone on the floor (January 20 incident). Andres further alleged that he timely submitted an administrative appeal on January 25 and again on February 19, 2013 to redress his grievance. He filed his petition in early April 2013, when he received no response from RJDCF to either administrative appeal. Finally, in early June 2013, the RJDCF appeals coordinator notified Andres that his February 19 appeal was canceled as untimely. The appeals coordinator later claimed never to have received Andres's January 25 appeal.

The court in its May 13, 2013 order found that Andres made a prima facie showing that he was the victim of excessive force and that the administrative appeals process was futile. The court thus ordered RJDCF to file an informal response to address the "status" of Andres's appeals.

After reviewing the informal response of RJDCF and the reply to that response of Andres, the court in its August 27, 2013 order found a material issue of fact existed regarding whether Andres "filed his administrative appeal(s) in a timely fashion." The court in its August 23 order thus issued an order to show cause directing RJDCF to "specifically address why Petitioner [Andres] is not entitled to have his grievance investigated . . . in accordance with the Department Operations Manual §§ 54100.10 and 54100.25, and Cal. Code Regs. tit. 15 §§ 3268-3268.2." The August 23 order also directed RJDCF to submit a "[r]eturn" and Andres to submit a "[d]enial."

The court in its July 30, 2014 order found there was a "reasonable likelihood" that Andres may be entitled to relief under his petition. The court further found that whether Andres was entitled to relief "depend[ed] on the resolution of facts surrounding Petitioner's claim that he submitted an administrative appeal in a timely fashion and whether the misconduct alleged by Petitioner should have been investigated as a Staff Complaint." The court thus ordered an evidentiary hearing to be held to address the factual issues raised by Andres's petition.

The record shows an evidentiary hearing was held on August 22, 2014. Andres testified on his own behalf, and Ronald Olson, an appeals coordinator, testified on behalf of RJDCF.

Andres testified that he used the required form 602 in preparing his administrative appeal stemming from the January 20 incident; that after he completed his administrative appeal, he made a copy of that form; that he put the original appeal in a "U-Save, EM" envelope; that he addressed the envelope to the appeals coordinator; and that he mailed it via institutional mail between 4:30 and 8:30 p.m. on January 25. Andres never received a response to his January 25 appeal.

When Andres did not receive (what he considered to be) a timely response to his January 25 appeal, he testified he spoke to his cellmate, who told Andres that he had experienced similar problems when submitting an administrative appeal to RJDCF. Concerned his January 25 appeal would be mishandled, Andres, with the help of his cellmate, submitted another appeal dated February 17, 2013 concerning the January 20 incident. This time, however, Andres mailed his administrative appeal to the warden, using legal mail. Andres testified he deposited his February 17 appeal in the inmate mailbox after dinner on February 19. Andres was then unaware of the "602 lock box" that was located adjacent to the inmate mailbox. At the hearing, he described the 602 lock box as a "small little box."

Andres testified he waited until February 19 to mail his February 17 appeal because he then believed RJDCF had a policy that if an inmate filed more than one appeal within 30 days they both would be rejected. Andres testified he was then in a "dilemma" because the incident took place on January 20, 2013. As such, he was required to file an appeal within 30 days, which he noted would have been on or before February 19. However, he further noted that, because he filed his first administrative appeal on January 25, RJDCF had 30 days to respond or until February 24, which was after the February 19 deadline. Because he was concerned RJDCF would not respond to his January 25 appeal, he therefore refiled his administrative appeal "before the 30-day deadline was up."

The record includes a log of "legal mail" for Andres through March 15, 2013. Page 2 of the log shows an entry dated "2/20/2013" to "D. Paramo, Warden@RJD." Next to this entry is the handwritten notation, "Legal Mail to Warden Containing 602/Civil Complaint on excessive force."

When asked if he mailed the February 17 appeal on February 20, 2013, as noted in the log, Andres testified, "I know I specifically -- that I filed [this complaint] on the 19th because I made it a point to file within the 30 days from the 20th, strictly because they -- I knew that they were trying to out wait [sic] the deadline on the first 602. And I got some resistance from the C.O. then. They said we don't want to send this mail to the warden, and they argued with me." When asked what date they argued with him, Andres said, "the 19th."

After waiting another 30 days and hearing no response by RJDCF to either the January 25 or February 17 appeals, Andres testified he filed on March 23, 2013 a "rights and responsibility statement" (March 23 statement) in which he noted a lack of response to either of his form 602's. Andres sent the March 23 statement via United States mail to the chief of appeals–inmates appeal branch, in Sacramento.

As noted, Andres filed his petition in early April 2013, after not receiving

Andres **cont. pg. 10**

***Andres* from pg. 9**

any response to his January 25 and February 17 appeals. Finally, more than five months after the January 20 incident, and after filing his petition and after the court in its May 13, 2013 order made a prima facie showing he may be entitled to relief, RJDCF on or about June 5, 2013 informed Andres that his February 17 appeal was canceled as "untimely."

Olson testified as follows at the August 22 evidentiary hearing regarding the process inmates follow to file an administrative appeal:

"Well, the official method is to place it [i.e., the form 602] in the appeal[s] collection box. That ensures the security of the appeal, and it allows us to track and log it in. *But inmates do submit their appeals through the institutional mail at times, and sometimes they even give it to staff to deliver to the appeal[s] office."* (Italics added.)

Olson testified that inmates also were given a pamphlet, aptly titled "How to Submit an Appeal" (appeal pamphlet), to help them with the appeal process. Under the section "how to file an appeal," the appeal pamphlet instructs that after a form 602 is completed, the inmate must "[t]hen *mail* [the] appeal to the local Appeals Coordinator (AC)." (Italics added.)

Olson testified that appeal collection boxes were located in each housing unit among other locations; that the number "602" appears on the boxes; that based on operational policy, which became effective in April 2012, only the sergeant had access to the collection boxes; and that the sergeant was supposed to log the appeals into a logbook and then deliver them to the appeals office. Olson noted if an inmate's appeal was not logged it meant that the inmate did not submit his appeal through a secure collection box.

Olson testified there was another box for institutional mail that was also located in each of the housing units. Like the secured collection boxes, the institutional mailboxes were also locked. Olson noted an inmate could send his appeal via institutional mail by merely "plac[ing] it in that box." He noted some inmates used a certain kind of envelope, known as "U-Save, Em," but other times inmates used a plain-white envelope or sometimes just submitted their appeals "loose[ly]." Olson also noted institutional mail did not require postage, as the mail was processed through the RJDCF mailroom and then routed to its destination. Olson further noted that only "confidential legal mail" was tracked when deposited in the institutional mailbox.

Olson testified that once an appeal was received, it was reviewed for regulatory compliance. If an appeal was accepted, it was then assigned out. If there was a problem with an appeal that could be corrected, Olson stated the appeal would be "rejected" and returned to the inmate with instructions on how to correct the appeal. Finally, if an appeal could not be corrected, it would be "canceled" and returned to the inmate, who then had 30 days from receipt of the notice of cancelation to appeal the cancelation decision.

Olson testified the timeliness of an inmate's appeal was determined when it was received by the appeals office. If an appeal was received more than 30 days after the "action" or "decision" that was the subject of the appeal, it was deemed untimely. Olson explained they used the date it was received because otherwise "inmates [could] backdate their appeals." Before an appeal was canceled, Olson testified they determined whether there were "any circumstances that would indicate that it wasn't the inmate's fault, that it didn't get right to us, you know, that we would take that into consideration. And we can actually have discretion to accept the appeal, even though we actually received it late."

When asked whether such "circumstances" might include institutional mail, Olson testified as follows:

"Well, the institutional mail is not the approved way of sending it, but we do try to, you know, look

at the circumstances. If we knew our mailroom was behind -- there w[ere] any delays. . . . But there are times when the mailroom -- we thought there might be a chance that the mailroom was delayed, then we will take that into consideration to accept the appeal."

When asked whether any such exceptions would apply if an inmate sent an appeal to another person, like a warden, Olson testified, "That's -- that's -- well, I would look at the circumstances, but I would not consider that to be a valid reason why it was received late." When asked what would happen if an appeal was sent to the warden, Olson stated the warden would either return the appeal to the inmate with instructions to submit it directly to the appeals coordinator or would just forward the appeal to the appeals office.

With regard to Andres's appeal(s), Olson testified that the appeals office received only one appeal, dated February 17, 2013; that the February 17 appeal was received in the appeals office on March 1, 2013; that based on the envelope, the warden had forwarded the February 17 appeal to the appeals office; that the appeals office on March 4, 2013 canceled the appeal because it was untimely, inasmuch as it was "mailed" per the log on February 20 or more than 30 days after the January 20 incident; and that although the February 17 appeal was canceled, it nonetheless was sent for an "allegation review" because the appeal alleged excessive force.

As noted, Andres was notified on or about June 5, 2013 that his appeal had been canceled. When asked why it took the appeals office so long to notify Andres, Olson testified the office "had an enormous amount of backlog." Although Andres had 30 days to appeal the cancelation decision, Olson testified that Andres never filed such an appeal. Olson also testified the appeals office never received Andres's January 25 appeal.

At the conclusion of the evidentiary hearing, the court found that Andres had timely submitted his January 25 appeal via institutional mail. In so finding, the court rejected RJDCF's contentions that Andres failed to exhaust his administrative remedies when he failed to file an appeal to the notice of cancelation and that his appeal, in any event, was untimely.

The court stated it was "astonished" that RJDCF would claim Andres failed to exhaust his administrative remedies given that RJDCF did not notify Andres his appeal had been canceled until *after* Andres had filed his petition, and given that RJDCF aggressively argued Andres's February 17 appeal was untimely. Because RJDCF took the position the appeal was untimely, the court found it would have been futile for Andres to have appealed the cancelation notice.

The court also found Andres and his testimony credible with respect to the date he prepared and filed his January 25 appeal. Specifically, the court found that from the "very beginning after this [i.e., the January 20 incident], I [i.e., the court] ha[s] reams of documentation that Mr. Andres was pursuing whatever remedy he could possibly think of because, right or wrong . . . he felt that he was wronged on that date. [¶] And I find -- I don't know when the January 25th appeal was filed. I believe it was filed. I don't find any deliberate wrongdoing by anybody at [RJDCF], but I think the appeal just went missing with the reams of paperwork that are filed in the appeal[s] office and otherwise at [RJDCF]. You know, I imagine things do go missing. They go missing here in this courthouse. So I don't find it unreasonable that after he got no response, that he went okay. Watch this. I'm going to go file it with the warden.

"I understand better from Mr. Olson's testimony why it's a receipt date rather than a filed date for the 30 days; however, I think that if you -- 30 days isn't very long. And I think if you put it in the mailbox within 30 days, to me that's sufficient. But I'm finding – I have to say I'm finding that there was an earlier appeal – an earlier timely appeal that was filed and was somehow misplaced. [¶] . . . [¶]

"That it was not until after [Andres filed his petition and after the May 13, 2013 order for the informal response was sent] that that the cancellation was received . . . by Mr. Andres – that not only received, but issued. To say at that point with able counsel [RJDCF] was vociferously fighting the fact that Mr. Andres can pursue his appeal, I just find it kind of incredible that you would argue that he had to go back and exhaust his appeals at that point. There is no clear indication by [RJDCF] that [it was] going to do anything – as indicated by this hearing here, anything but deny the timely filing of the complaint. [¶] So . . . I'm also finding . . . a waiver because of [RJDCF's] untimely response" to the February 17 appeal.

The record shows that the court next clarified that it was finding the January 25 appeal was timely filed and that, in granting Andres's petition, it was "sending this back to [RJDCF] so that his appeal can be processed." The court thus found it resolved the only issue before it—whether Andres timely filed his administrative appeal—

***Andres* cont. pg. 12**

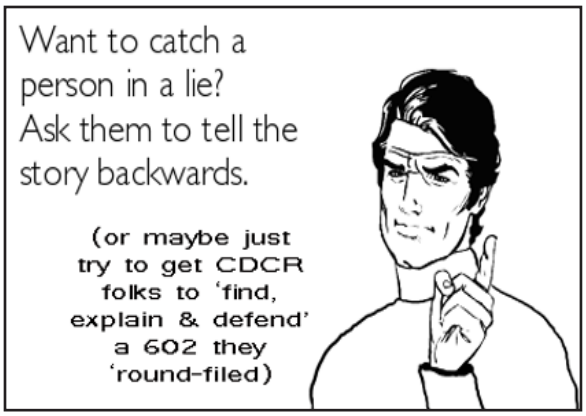
and the matter was "back to Mr. Olson's office to process as he would any 602 that was going to be processed."

In mid-September 2014, RJDCF moved for reconsideration of the court's August 22 oral pronouncement of findings following the evidentiary hearing. RJDCF contended that even if Andres in fact submitted his January 25 appeal, as found by the court, he was not entitled to have RJDCF process his appeal because he failed to follow the proper procedure for submitting his appeal when he used institutional mail in lieu of the secure collection box.

On October 10, 2014, the court issued a written order granting Andres's petition nunc pro tunc to August 22, 2014. On October 21, 2014, the court issued another order denying RJDCF's reconsideration motion. In so doing, the court noted that RJDCF's motion included evidence that was available but not presented at the August 22 evidentiary hearing and, thus, found the attachment of such evidence to be "unauthorized and untimely."

However, the court addressed the merits of the reconsideration motion, in which RJDCF contended the exclusive means for inmates to submit form 602 administrative appeals was through the secured collection boxes. The court found that RJDCF's position in its reconsideration motion was "contradicted by evidence [RJDCF] presented at the evidentiary hearing." The court cited Olson's testimony from the August 22 evidentiary hearing that there were different, approved methods at RJDCF to submit a form 602 appeal, including submitting the appeal "through the institutional mail" as Andres had done, "giv[ing] it to staff to deliver to the appeal[s] office," or the "official method," which was to place the appeal in the "appeal[s] collection box."

The court thus found in its October 21 order that Olson's testimony at the August 22 hearing "makes clear that [Andres] utilized an approved method for submitting [his] administrative appeal[], namely the use of institutional mail through submission of a 'U-save, Em envelope,' that does not require postage. [Citation.] Mr. Olson's testimony at the evidentiary hearing credibly confirms that the Appeals Coordinator at RJDCF accepts administrative appeals submitted by inmates by way of institutional mail. To the extent the court may be required to consider belated evidence that secured appeal collection boxes are the only approved method to submit administrative appeals, such evidence is simply not credible. Moreover, [RJDCF's] attempt to limit [Andres] to filing his appeal by means of a secured appeal collection box in the present case is arbitrary, irrational, and constitutes [an] abuse of discretion, inasmuch as the Appeals Coordinator accepts administrative appeals through institutional mail and by personal delivery by other staff members.



"The court also finds that the mailing of administrative appeals is authorized by the applicable regulations. Mr. Olson testified that the proper submission of appeals is governed by Cal. Code Regs. tit. 15, § 3084. [Citation.] Cal. Code Regs. tit. 15, § 3084.2(b)(2) . . . authorizes inmates to submit their administrative appeals via mail. It provides, 'Inmates or parolees shall submit their appeal documents in a **single mailing** and shall not divide their appeal documents into **separate mailings.**' (Emphasis added.)" As a result, the court in its October 21 order found that to the extent RJDCF policy regarding submitting an appeal conflicted with this regulation, such policy was void.

Finally, in early March 2015, our court granted the supersedeas petition of RJDCF to stay the August 22 and October 10, 2014 orders of the court.

The Court of Appeal fully upheld the superior court. In so doing, the appellate court did not need to reach the authority of the U.S. Supreme Court in *Houston v. Lack*.

In light of the evidence in the record, the fact the applicable regulations do not require an inmate to use any specific mail procedure to submit an administrative appeal and the fact that RJDCF's own procedures allowed inmates to use means other than a secure collection box to submit an appeal, we conclude that the court properly found Andres's January 25 appeal was timely filed.

In light of our decision, we deem it unnecessary to decide whether Andres's separate appeal of the January 20 incident, which he submitted on February 19, was also timely. (See, e.g., *Houston v. Lack* (1988) 487 U.S. 266, 271, 276 [noting the prison-delivery or mailbox rule provides that a document is constructively filed when a prisoner properly delivers the document to prison officials for forwarding to the court].) As such, we also deem it unnecessary to decide whether the court erred when it found Andres was excused from appealing the cancelation of his February 19 appeal because that appeal would have been "futile."

One can only hope that CDCR will take note of *In re Andres,* and rehabilitate the often abused inmate appeals process.

BPH F.A.D. PSYCH EVALS NOW PERFORMED EVERY 3 YEARS

Johnson v. Shaffer

USDC (E.D. Cal.) Case No. 12-CV- 1059-KJM-AC P
May 27, 2016

On May 27, 2016, the U.S. District Court (ED Cal) issued a final ruling memorializing the December 4, 2015 settlement agreement in *Johnson v. Shaffer*. Although the case originally embodied complaints of due process violations asserting unfairness and bias in lifer parole hearings, all due process violation complaints were dismissed by the Court, relying on *Swarthout v. Cooke* (562 U.S. 216 (2011). The remaining issues revolved around the use and frequency of the Board's Forensic Assessment Division (FAD) psychological reports in lifer hearings. The parties settled the case with the following major points:

The FAD will no longer prepare Subsequent Risk Assessments. Rather, the Board will now order new Comprehensive Risk Assessments (CRA) every three years. If the Board proposes any changes in how or whether the CRA, including the HCR-20 Version 3, PCL-R, or Static 99-R will be administered, or proposes using a risk-assessment tool other than the HCR-20 Version 3, PCL-R, and Static 99-R, such changes will be submitted for review by the attorneys for both Johnson and Shaffer before implementation. The CRA time periods, and any changes in the CRA's standards, shall become the subject of new Board regulations, to be promulgated after inviting appropriate public comment. Importantly, the Board will institute a new administrative appeals process that permits prisoners or their counsel to lodge timely written factual objections to FAD evaluations. Factual errors in these reports has long been a stumbling block to fairness in lifer parole hearings.

The full settlement agreement has been posted in all CDC law libraries, so it will not be repeated here. As required new regulations are proposed, they will be posted in law libraries, for anyone to comment on.

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FOR JUVENILE LWOP, AVAILABILITY OF RECALL AND RESENTENCING PURSUANT TO PC § 1170(d)(2) IS AN ADEQUATE REMEDY FOR A VIOLATION OF *MILLER V. ALABAMA*

In re Kristopher Kirchner
___Cal.App.4th___; CA4(1); D067920
February 23, 2016
Review Granted: S233508
April 4, 2016

NOTE: THIS CASE HAS BEEN GRANTED REVIEW BY THE CA SUPREME COURT.

The case is reported here to alert CLN readers of its existence, although the appellate court decision reported is NOT citable, pending the review.

Kristopher Kirchner was convicted of 1st degree special circumstance murder committed at age 16, and was sentenced to LWOP. He filed a habeas petition contending that under *Miller v. Alabama* and *People v. Gutierrez* (2014) 58 Cal.4th 1354, his sentence violated the Eighth Amendment because the court imposed LWOP without taking into consideration the juvenile factors set forth in those cases. Kirchner's trial court agreed and granted relief, rejecting the Attorney General's argument that *Miller* and *Gutierrez* could not be applied retroactively. The State appealed, and the Court of Appeal reversed, with directions.

In *Montgomery v. Louisiana(*2016) 577 U.S. __ , the U.S. Supreme Court recently held that *Miller* was retroactive and for that reason individuals like Kirchner, whose judgments are final, are still entitled to its benefits. But the Court in *Montgomery* recognized that states may cure *Miller* violations by simply permitting defendants like Kirchner "to be considered for parole" rather than resentencing them in compliance with *Miller*.

California PC § 1170(d)(2) is such a cure. It permits an inmate serving an LWOP sentence for a crime committed while a juvenile to file a petition in the sentencing court for recall and resentencing after serving 15 years of the LWOP sentence. However, at both the trial court's review of the sufficiency of the section 1170, subdivision (d)(2) petition and at any hearing ordered thereafter, the People bear the burden, as they would at any initial sentencing under *Miller* and *Gutierrez*, of showing that the defendant is one of the

Kircher **cont. pg. 14**

***Kircher* from. pg. 13**

rare incorrigible criminals for whom no possibility of parole should be provided.

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FOR JUVENILE LWOP, AVAILABILITY OF RECALL AND RESENTENCING PURSUANT TO PC § 1170(d)(2) IS NOT AN ADEQUATE REMEDY FOR A VIOLATION OF *MILLER V. ALABAMA*

P. v. Jason Berg
___Cal.App.4th___; CA4(1);
D068557
May 12, 2016

And, for those of you who didn't like the decision reported above in *Kirchner,* here's one that cuts the opposite way, also issued by the Fourth District Court of Appeal, Div. 1. Because it is published, as is *Kirchner*, it is likely that the CA Supreme Court will grant review of this decision as well. For the record, here is a summary from the *Berg* court's decision.

In 1997, the trial court sentenced Jason Berg to life without the possibility of parole (LWOP) for committing a first degree murder with special circumstances when he was 17 years old. (See Pen. Code, § 190.5, subd. (b) [providing that the penalty for a first degree murder with special circumstances for a person "16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life"].)

Berg filed a petition for habeas corpus in December 2014, in which he requested that the court vacate his sentence and order a new sentencing hearing on the ground that the sentencing court's imposition of an LWOP sentence was unconstitutional under *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*). In *Miller,* the United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments,' " (*Id*. at p. 2460) and stated that the "appropriate occasions" for sentencing juveniles to LWOP are "uncommon." (*Id*. at p. 2469.)

The habeas court ruled that the sentencing court's statement of reasons for imposing an LWOP sentence was "inconsistent with the evolving Eight Amendment jurisprudence and the requirements of *Miller, supra*." The court granted the petition, vacated Berg's sentence, and ordered that the matter be set for resentencing.

On appeal, in their opening brief, the People contend that the habeas court erred in granting Berg's petition because *Miller* does not apply retroactively. However, while this appeal was pending, the United States Supreme Court held that *Miller* announced a substantive rule of constitutional law that must be given retroactive effect. (*Montgomery v. Louisiana* (2016) 577 U.S. ___ [136 S.Ct. 718] (*Montgomery*)). Accordingly, we reject the People's argument that *Miller* does not apply retroactively.

The People also claim that, even assuming *Miller* applies retroactively, the sentencing court complied with *Miller* by considering "youth-oriented factors" before imposing an LWOP sentence. In *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*), the California Supreme Court

stated, "We understand *Miller* to require a sentencing court to admit and consider relevant evidence," pertaining to five specific categories of evidence relevant to the determination of "whether a particular defendant is a ' "rare juvenile offender whose crime reflects irreparable corruption." ' " (*Id*. at p. 1388.) The *Gutierrez* court also concluded that an LWOP sentence may be imposed on a juvenile homicide offender only "when the sentencing court's discretion is properly exercised in accordance with *Miller*." (*Id*. at p. 1379.) While the court carefully considered numerous factors in sentencing Berg, including Berg's youth, the court did not exercise its discretion in accordance with the principles espoused in *Miller* and *Gutierrez*, which were both decided long after Berg's sentencing. We therefore reject the People's contention that the trial court complied with *Miller* and *Gutierrez*.

Finally, in a supplemental brief, relying on a recent decision of another panel of this court in *In re Kirchner* (2016) 244 Cal.App.4th 1398, 1416 (*Kirchner*), the People contend that Berg's petition should be denied because section 1170, subdivision (d)(2) provides an adequate statutory remedy for *Miller* error. In *Montgomery*, the United States Supreme Court concluded that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them," and cited a Wyoming statute providing that juvenile homicide offenders are eligible for parole in that state after 25 years of imprisonment. (*Montgomery, supra*, 136 S.Ct. at p. 736.)

Unlike the Wyoming statute cited in *Montgomery*, section 1170, subdivision (d)(2) does not provide that California juvenile homicide offenders may be considered for parole after some specified period of time. Instead, the statute sets forth

"Considering my client's age, Your Honor, *life* could be a long time."

a process pursuant to which a select group of defendants sentenced to LWOP for crimes committed as juveniles may file petitions for recall and resentencing, which, if granted, may lead to the imposition of a new sentence containing a period of parole eligibility. (*Ibid*.) The statute expressly disqualifies certain defendants from obtaining relief pursuant to the statute (*id*., subd. (d)(2)(A)(ii)), requires a defendant to file a petition "describing his or her remorse and work towards rehabilitation," (*id.*, subd. (d)(2)(B)), requires the petition to affirm that one of four qualifying factors is true (*id*., subd. (d)(2)(B)(i)-(iv)), and sets forth a nonexclusive list of eight factors for a trial court to consider in determining whether to grant the petition (id., subd. (d)(2)(F)(i)-(viii)). In short, while section 1170, subdivision (d)(2) provides a statutory procedure by which some defendants serving LWOP sentences for crimes committed as juveniles may obtain resentencing, we disagree with the *Kirchner* court's conclusion that the statute provides such defendants with "all the rights set forth in *Miller and Montgomery*." (*Kirchner, supra*, 244 Cal.App.4th at p. 1416.) For reasons that we explain in greater detail in part III.C., post, we conclude that section 1170, subdivision (d)(2) does not provide an adequate statutory remedy for *Miller* error.

Accordingly, we affirm the trial court's order granting Berg's petition and directing that the matter be set for resentencing.

PROP. 36 CASES

BASED ON THE 2006 AMENDMENT TO PC § 667.61, DEFENDANTS SENTENCED UNDER THE ONE STRIKE LAW MAY NOT RECEIVE ANY CONDUCT CREDITS

P. v. Kevin Adams
___Cal.App.4th___;
CA2(5); B257829
March 3, 2016
Review Granted: S233099
April 5, 2016

Defendant Kevin Adams was convicted of forcible rape in concert (PC § 264.1(a)), forcible oral copulation in concert (PC § 288a(d)(1)), aggravated kidnapping (PC § 209(b)(1)), and other offenses. The jury found true multiple allegations and enhancements, including One Strike (PC § 667.61(a), (d) & (e)) allegations. The Court of Appeal asked for briefing on the application of an amendment to PC § 667.61 to this case.

The Court ordered presentence conduct credits stricken. Because Adams ha been convicted of violent felonies, the trial court (mistakenly) awarded 15% presentence conduct credits per PC § 2933.1(c). However, PC § 667.61 was amended in 2006 to eliminate any reference to presentence conduct credits. The legislative history of the

Adams **from pg. 15**

amendment shows the intent was to allow no conduct credits against the minimum term of confinement for defendants sentenced under the One Strike law. The presentence conduct credits that the trial court had awarded in this case were therefore stricken on appeal.

Lately, however, the CA Supreme Court granted review. The Appellate

Decision reported here is therefore currently not citable. When the Supreme Court hands down its ruling, it will be reported by CLN.

> The trial court awarded Mr. Adams 562 days of presentence custody credit. However, the parties agree that Mr. Adams was in custody for conduct attributable to the present case from January 2, 2013, to July 18, 2014, a period of 563 days. A defendant is entitled to credit for all days in presentence custody including the day of arrest and the day of sentencing. (*People v. Rajanayagam* (2012) 211 Cal. App.4th 42, 48; *People v. Morgain* (2009) 177 Cal.App.4th 454, 469.) Mr. Adams's judgment must be modified and his abstract of judgment corrected to reflect 563 days of presentence custody credit.
>
> The trial court awarded Mr. Moreland 603 days of presentence custody credit. However, according to the record before us, Mr. Moreland was arrested on December 12, 2012. He was sentenced on August 14, 2014. Therefore he was in presentence custody for 611 days. (*People v. Rajanayagam, supra*, 211 Cal.App.4th at p. 48; *People v. Morgain, supra,* 177 Cal.App.4th at p. 469.) Mr. Moreland's judgment must be modified and his abstract of judgment corrected to reflect 611 days of presentence custody credit.
>
> Because they were convicted of violent felonies as defined in section 667.5, subdivision (c), the trial court limited defendants' presentence conduct credit to 15 percent under section 2933.1, subdivision (c). We asked the parties to brief the question whether the 2006 amendment to section 667.61, subdivision (j), eliminated defendants' eligibility for conduct credit. (Stats. 2006, ch. 337, § 33, p. 2641.) We hold as a matter of statutory interpretation that it did. The parties agree.
>
> Our review is governed by well established rules of statutory construction. Our Supreme Court examined these rules in *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th at 830, 837-838: "'Our fundamental task in construing' . . . any legislative enactment, 'is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.' (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) We begin as always with the statute's actual words, the 'most reliable indicator' of legislative intent, 'assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.' (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190.)" (Accord, *People v. Johnson* (2015) 61 Cal.4th 674, 682.)
>
> As enacted in 1994, section 667.61, subdivision (j) provided: "Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 [Credit on Term of Imprisonment] shall apply to reduce the minimum term of 25 years in the state prison imposed pursuant to subdivision (a) or 15 years in the state prison imposed pursuant to subdivision (b). However, *in no case shall the minimum term of 25 or 15 years be reduced by more than 15 percent for credits granted pursuant to Section 2933* [prison conduct credit], 4019 [presentence custody conduct credit], *or any other law providing for conduct credit reduction*. In no case shall any person who is punished under this section be released on parole prior to serving at least 85 percent of the minimum term of 25 or 15 years in the state prison." (Stats. 1994 (1993-1994 1st Ex. Sess.) ch. 14, § 1, p. 8572, italics added.) Section 667.61, subdivision (j) by its terms, specifically its express reference to section 4019, limited to 15 percent the presentence conduct credit available to a defendant sentenced under section 667.61.
>
> Section 667.61 was amended in 2006—prior to the present crimes—to eliminate the existing section 667.61, subdivision (j) and any reference to presentence conduct credits. (Stats. 2006, ch. 337, § 33, p. 2641.) It is uncertain on its face whether the amendment was intended to eliminate presentence conduct credit for defendants sentenced under section 667.61, or to authorize full conduct credit under section 4019. We turn, therefore, to the legislative history. Committee reports evidence the Legislature's intent to eliminate conduct credit for defendants sentenced under section 667.61, the so-called

"One-Strike Law." The Senate Committee on Public Safety's analysis of Senate Bill No. 1128 unambiguously states: "Elimination of Sentencing Credits for One-Strike Inmates [¶] Existing law provides that a defendant sentenced to a term of imprisonment of either 15 years to life or 25 years to life under the provisions of the 'one-strike' sentencing scheme shall not have his or her sentence reduced by more than 15% by good-time/work-time credits. (Penal Code 667.61, subd. (j).) [¶] This bill eliminates conduct/work credits for inmates sentenced under the one-strike law." (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (as amended March 7, 2006) p. N; accord, *id.* at p. W ["This bill eliminates sentencing credits that under existing law can reduce a defendant's minimum term by up to 15%"]; Sen. Rules Com., Off. of Senate Floor Analyses, 3d Reading Analysis of Sen. Bill No. 1128 (as amended May 26, 2006) pp. 8-9 [Sen. Bill No. 1128 eliminates eligibility "for credit to reduce the minimum term imposed"]; Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1128 (as amended May 30, 2006) p. 9 [same].) In Couzens and Bigelow, Sex Crimes: California Law and Procedure (The Rutter Group, 2015) section 13:15, page 13-78, the authors conclude: "Section[] . . . 667.61 (One Strike law) . . . [was] amended in 2006 to eliminate the provision that allowed such crimes to accrue 15 % conduct credits, whether before or after sentencing[.] Now there are no conduct credits allowed against the minimum term." We hold, therefore, that defendants given indeterminate terms under section 667.61 are not entitled to any presentence conduct credit. The present judgments must be modified and the abstracts of judgment amended to so reflect as to both defendants.

PROP. 36 RELIEF DENIED BECAUSE PETITION WAS FILED AFTER THE TWO-YEAR APPLICATION PERIOD EXPIRED

P. v. Kenneth Lee Taylor
CA1(4); A146209
May 11, 2016

Kenneth Taylor is currently serving a 42-life Three-Strikes sentence for carjacking, assault, firearm possession, and the allegations that he personally used a firearm during the carjacking and assault and suffered two prior "strike" convictions. He appealed from an order denying his Prop. 36 petition for recall of his sentence and requests resentencing that was predicated on the grounds that Taylor failed to file with the two-year period

***Taylor* cont. pg. 18**

***Taylor* from pg. 17**

permitted by PC § 1170.126. The Court of Appeal affirmed the Superior Court's order. The facts related to the timing exclusion were detailed by the Court of Appeal.

> On May 20, 2015, defendant filed a petition for a resentencing hearing under Proposition 36 to reduce his three strikes sentence of 42 years to life. Proposition 36, known as the Three Strikes Reform Act of 2012 (the Act) was approved by the voters on November 6, 2012, and became effective the next day. (Penal Code, § 1170.126, subd. (b); *People v. Brown* (2014) 230 Cal.App.4th 1502, 1507.) Penal Code section 1170.126 provides a procedure for resentencing defendants who are serving an indeterminate term of imprisonment under the Three Strikes Law to petition to recall his or her sentence if his or her third strike was not a serious or violent felony and hence would not qualify under the Act for a third-strike term. In addition, the Act requires that the petition be filed "within two years after the effective date of the act that added this section or at a later date upon a showing of good cause . . . ." (Pen. Code, § 1170.126, subd. (b).)
>
> The trial court denied the petition as untimely because it was not filed within two years of the effective date of the statute.
>
> The trial court properly denied the petition. This court has reviewed the entire record and there are no meritorious issues to be argued.
>
> The order is affirmed.

PROP. 36 RELIEF DENIED BECAUSE PETITION WAS FILED AFTER THE TWO-YEAR APPLICATION PERIOD EXPIRED

P. v. Samuel Anderson

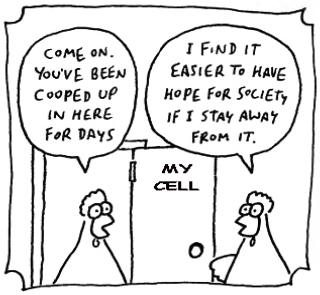
CA2(1); B264842
April 29, 2016

Samuel Anderson is currently serving a 25-life Three-Strikes sentence for aggravated assault. He appealed from an order dismissing his Prop. 36 petition for recall of his sentence and requests resentencing. The dismissal was predicated on the grounds that Anderson failed to file with the two-year period permitted by PC § 1170.126. The Court of Appeal affirmed the Superior Court's order. The facts related to the timing exclusion were detailed by the Court of Appeal.

FACTUAL AND PROCEDURAL SUMMARY

In 2005 a jury convicted Anderson of assault with a deadly weapon under a former version of section 245, subdivision (a)(1). The court thereafter found that Anderson had been convicted of two strikes: voluntary manslaughter in 1977, and attempted robbery in 1979. The court sentenced him under the "Three Strikes" law to 25 years to life. This court affirmed the judgment in 2006. (*People v. Anderson* (April 19, 2006, B183767) [nonpub. opn.] (*Anderson*).)

In February 2015, Anderson wrote to Eekoo Yun, an attorney employed by the Los Angeles County Superior Court. Anderson told Yun that he believed he qualified for resentencing under Proposition 36, and included documents pertaining to his prior convictions. He concluded by stating, "I truly hope that these documents will show that I am entitled to be re-sentenced with just one strike," and "[h]ope to hear from you soon!" Anderson did not explain why he did not seek relief under Proposition 36 earlier.



The court filed Anderson's letter on February 13, 2015, and deemed it to be a petition for recall of Anderson's sentence pursuant to Proposition 36. On February 27, the court denied the petition because Anderson did not file it within two years from the enactment of Proposition 36 and failed to show good cause for failing to do so, as required. (See § 1170.126, subd. (b).)

Anderson responded to the court's order in a letter dated March 8 and filed on March 16, in which he informed the court that he "had just found out that [he] qualif[ied] for Proposition 36 just a few months ago," and that he "had been under the assumption that [he] did not qualify." He further explained that he sent documents to attorney Yun "3 to 4 weeks ago" and that Yun "should have informed" the court as to why his petition was late. Anderson requested the court reconsider its order denying his petition.

On March 25, the court deemed Anderson's March 8 letter to be a motion for reconsideration, and denied the motion. The court explained that neither the petition nor the motion for reconsideration contained "any adequate explanation or facts as to why the petition was filed late." Therefore, the court concluded, Anderson "has not shown good cause."

Anderson responded in a letter dated April 19 and filed on May 1. He demanded a copy of his petition and other documents for purposes of an appeal and made arguments pertaining to his prior convictions, the alleged ineffectiveness of his former attorneys, and his right to discovery.

On May 12, the court issued a memorandum of decision, noting that Anderson has alleged claims "not cognizable in a petition for recall of sentence" and suggested that arguments regarding his underlying convictions should be made in a petition for writ of habeas corpus. The court again dismissed Anderson's Proposition 36 petition.

Anderson filed a notice of appeal. In the notice, he indicated that he intended his February 2015 letter to Yun to be a request for representation to help him file a petition for recall of his sentence and that Yun should have explained to the court the reasons why he did not file a petition earlier. These reasons, Anderson explained, are: (1) An attorney with the "Three Strikes Justice Center" told him in a letter dated December 15, 2014, that he did not qualify for resentencing; and (2) He had "just found out" that his prior conviction for assault might not constitute a strike because the jury that found him guilty of assault also found not true an allegation that he personally inflicted great bodily injury upon the victim. Anderson further stated that Yun provided ineffective assistance of counsel.

We appointed counsel to represent Anderson. On September 2, 2015, counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, raising no issues on appeal and requesting that we independently review the record to determine if the lower court committed any error. Anderson subsequently filed a letter brief asserting numerous arguments.

In November 2015, we requested that the parties brief two questions: (1) Did the trial court err in determining that Anderson failed to show good cause for the late filing of the petition for recall of his sentence? (2) Assuming the trial court erred, did Anderson qualify for resentencing? The parties submitted the requested briefs, which we have considered.

For the reasons that follow, we conclude that if Anderson had filed a timely petition for recall of his sentence, he would not have been eligible for resentencing. Therefore, even if the court erred in determining that Anderson failed to show good cause for failing to file a timely petition, the error was harmless. Because we also reject Anderson's other arguments, we affirm the trial court's order.

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Prop 36 **from pg. 19**

PROP. 36 RELIEF DENIED BECAUSE PETITION WAS FILED AFTER THE TWO-YEAR APPLICATION PERIOD EXPIRED

P. v. Andre Booker
CA4(2); E064657
May 16, 2016

In a case virtually identical to the *Anderson* case reported above, Three-Strikes lifer Andre Booker appealed from an order dismissing his Prop. 36 petition for recall of his sentence and requested resentencing. His dismissal was, *inter alia*, predicated on the grounds that he failed to file with the two-year period permitted by PC § 1170.126. The Court of Appeal affirmed the Superior Court's order. The facts related to the timing exclusion were detailed by the Court of Appeal.

> On September 21, 2015, defendant filed an in *propria persona* petition for recall of sentence under section 1170.126. Defendant argued that possession of a firearm by a felon (§ 12021, subd. (a)(1)) was not a violent or serious felony; thus, he should be resentenced on that count, pursuant to Proposition 36. He also argued that he had good cause for filing his petition after the two-year deadline because he only recently discovered the holding in *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), which was applicable to his case. The court denied the petition because it was untimely and because defendant was statutorily ineligible, since the record showed he was armed with a firearm during the commission of the offense.

The Court of Appeal explained the law regarding untimeliness.

> First, the trial court properly denied defendant's Proposition 36 petition on the ground that it was untimely. Section 1170.126, subdivision (b), provides that "[a] ny person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, *within two years after the effective date of the act* that added this section or at a later date upon a showing of good cause . . . ." (Italics added.) The effective date of Proposition was November 7, 2012, and defendant filed his petition on September 21, 2015—almost three years later. Defendant contends that he had good cause for filing his petition late, since it was based on the holding in *Johnson, supra*, 61 Cal.4th 674. He asserts that he did not know he was entitled to be resentenced under Proposition 36 until the Supreme Court decided *Johnson*, which affirmed that the presence of a conviction of a serious or violent felony did not disqualify an inmate from resentencing with respect to a current offense that was neither serious nor violent. He claims that since the *Johnson* court did not conclude that resentencing was allowed in this situation until 2015, he was entitled to file his petition late. We disagree. *Johnson* affirmed the appellate court decisions in two cases, and there is nothing in the Supreme Court's holding that permits an inmate to file a petition past the two-year statutory deadline. (*Johnson, supra*, 61 Cal.4th at p. 695.)

Even if Booker were not untimely in his filing, he was not eligible for Prop. 36 relief. His 14 strike priors with four serious felony convictions (including being armed during the commission of an offense) barred any hope of Prop. 36 relief.

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PROP. 36 RELIEF DENIED BECAUSE PETITION WAS FILED AFTER THE TWO-YEAR APPLICATION PERIOD EXPIRED

P. v. Steve Cordova
CA2(2); B266340
April 26, 2016

In yet another recent appellate decision on the two-year limitation for filing a Prop. 36 petition, the Court of Appeal affirmed the Superior Court's order of dismissal based on untimeliness. The facts related to the timing exclusion were detailed by the Court of Appeal. This case differs from the two reported above in that the petitioner *admitted* he knew of the two-year rule, but intentionally delayed filing for other reasons. He pled to the Court that he should be given relief from the two-year limitation.

> The Request for Relief states that soon after the passage of Proposition 36, appellant wrote the public defender, who replied that because one or more of appellant's prior convictions were for serious or violent felonies, he was ineligible. Appellant also heard from persons he describes as "prison law library inmate clerks" that sooner or later someone would take up the question whether inmates with

"combination judgments of eligible and ineligible counts" would be entitled to relief on the eligible counts. Accordingly, appellant ". . . opted to wait and see since he had been told he had 2 years from 11-7-2012 and reasonably figured something would happen in his favor in that time."

The Request for Relief goes on to relate that in *Braziel v. Superior Court* (Apr. 9, 2014) 225 Cal. App. 933, review granted on Jul. 30, 2014, the Court of Appeal had held that if any of the counts were serious or violent felonies, the inmate was barred from seeking relief. According to appellant's opening brief, there were three other published decisions which so held. The "inmate clerks" informed appellant, apparently based on *Braziel v. Superior Court,* that he was precluded from relief under Proposition 36. The Request for Relief states: ". . . so Jackson [an alias for appellant] did not file."

We digress from an account of the Request for Relief to note that in *In re Machado* (May 30, 2014) 226 Cal.App.4th 1044, 1057, review granted Jul. 30, 2014, the Court of Appeal held that a person who had been convicted of both an ineligible and an eligible offense was nonetheless entitled to Proposition 36 relief on the eligible count. This was the view eventually endorsed by the California Supreme Court in *People v. Johnson and Machado* (Jul. 2, 2015) 61 Cal.4th 674.

Returning to the Request for Relief, appellant relates that upon the passage of Proposition 47, he "had new hope" and that he filed an application to reduce one (or possibly more than one) of his convictions to a misdemeanor but that this application was denied, allegedly with instructions that "he may only file a Prop[] 36 petition—but did not advise [appellant] he would also need to include an explanation why his Prop[] 36 petition was being filed after 11-7-2014."

The Request for Relief closes by noting that the issue was pending before the California Supreme Court. In fact, *People v. Johnson and Machado, supra*, 61 Cal.4th 674, came down three days after the Request for Relief was filed. Noting that it was not clear what constitutes good cause for delay in filing an application for relief, the Request for Relief concludes by stating that appellant ". . . believes that waiting for a decision from the Supreme Court on the question of threshold eligibility for persons committed on so-called 'hybrid' judgments probably constitutes good grounds to relieve a party from default and permit an untimely Prop[] 36 petition."

The Court put all of this into a Time Table:

April 9, 2014-*Braziel v. Superior Ct (2014) 225 Cal.App. 933*

May 30, 2014-*In re Machado (2014) 226 Cal.App.4th 1044*

July 30, 2014-*The Supreme Court grants the petitions for review in* ***Braziel and Machado***

November 7, 2014-*The two-year limitation on filing section 1170.126 expires*

April 1, 2015 -*Appellant files his first section 1170.126 petition*

June 29, 2015-*Appellant files the Request for Relief*

July 2, 2015 -*The Supreme Court hands down* ***People v. Johnson and Machado*** *(2015) 61 Cal.4th 674.*

The Superior Court had made relevant findings, in its earlier denial to Cordova.

The superior court's written ruling states: "[Appellant] admits that he knew of the two-year deadline imposed by Penal Code section 1170.126(b) from the effective date of Proposition 36 (November 7, 2012). He made a calculated decision not to file his own petition within the two-year time frame when he could have filed his own petition, had it denied and filed an appeal or waited for an appeal from another petitioner's denied petition on the same point of law. Instead, [appellant] failed to timely file his petition and simply hoped that the law would change within the two-year time frame. Having second thoughts, it appears that [appellant] then filed an untimely petition almost five months after the two-year deadline imposed by Penal Code section 1170.126(b). [¶] Many other inmates have timely filed their petitions without hoping that the law would change in their favor prior to filing the petition. They simply filed their petitions in a timely fashion and awaited the trial court's decision before appealing an unfavorable ruling. Here, [appellant] admits that he expressly knew of Proposition 36's deadline and made a calculated decision not to file in a timely manner. He illogically 'figured [a change in the law] would happen in his favor in that time.' [Citation.] [¶] Accordingly, the Court did not find 'good cause' under Penal Code section 1170.126(b) after [appellant's] April 1, 2015 petition was late filed and it does not find any new law, facts or circumstances to warrant reconsideration of its prior order denying the petition for recall of sentence under Penal Code section 1170.126."

The Court of Appeal upheld the Superior Court, but added its detailed legal analysis (not published, however) to support the ruling. It is repeated here in full, to aid deal Three-Strikers with what this writer suspects will become a flood of such late petitions, now that Prop. 36's two-year application time limit has expired.

***Cordova* cont. pg. 22**

APPLICABLE STANDARDS

1. Standards governing delays in filing

Subdivision (b) of section 1170.126 provides in pertinent part that a person may file a petition "for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause." Appellant and respondent agree that section 1170.126 does not define "good cause."

Section 1382 contains various time limitations that ensure that a defendant receives a speedy trial. Appellant suggests, and respondent agrees, that the judicially crafted elements of good cause under section 1382 should apply to good cause as set forth in section 1170.126, subdivision (b): "Section 1382 does not define 'good cause' as that term is used in the provision, but numerous California appellate decisions that have reviewed good-cause determinations under this statute demonstrate that, in general, a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay." (*People v. Sutton* (2010) 48 Cal.4th 533, 546.)

Bringing a person to trial is, of course, an entirely different matter from filing an application under section 1170.126. However, the analogy is not based on the similarity in the functions that are involved in sections 1382 and 1170.126 but rather on whether delays should be evaluated along similar lines under these provisions.

It seems that delay and good cause have identical relationships in sections 1170.126 and 1382. Delay is a negative under both provisions and good cause functions under both provisions as a rationale or excuse for the delay.

Prejudice, on the other hand, is far less likely to be a significant factor under section 1170.126 than under section 1382. Under the latter provision, prejudice is a very important and highly pertinent consideration. However, under section 1170.126, it is difficult to see how the prosecution would ever be significantly prejudiced by a delay in the filing of an application under section 1170.126. Thus, we conclude that the first two factors set forth in *People v. Sutton, supra*, 48 Cal.4th 533, 546, are helpful analytical tools in the determination of good faith under section 1170.126 but that the third factor is, in most cases, of little or no moment.

2. Standards of appellate review

Respondent states that the standard of appellate review should be whether the trial court abused its discretion in making the good faith determination. While respondent suggests that appellant would also apply this standard, it appears to us that this may not be the case since appellant contends that the superior court erred in concluding that good cause was not shown. At another juncture, however, appellant's opening brief states that good cause determinations are reviewed for abuse of discretion.

It has been noted that good cause determinations generally are subject to the abuse of discretion standard of review. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 8:104.21, p. 8-71.) Good cause determinations under section 1382 are reviewed under the abuse of discretion standard. (*People v. Sutton, supra*, 48 Cal.4th at pp. 546-547.)

We will not decide as a general proposition which standard should govern because in this case there is no dispute about the facts. The issue before us is whether, as a matter of law, waiting for a Supreme Court decision is good cause for the late filing of a section 1170.126 application. When the issue on appeal is one of law, usually the independent or de novo standard of review applies. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, supra, ¶ 8:106, p. 8-74, citing, inter alia, *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.)

THERE WAS NO GOOD CAUSE FOR THE DELAY

The justification for late filing that appellant offers in his petition for a writ of error coram nobis is that he was waiting for the California Supreme Court to decide what turned out to be *People v. Johnson* and *Machado, supra*, 61 Cal.4th 674. In appellant's brief on appeal, he claims there was good cause because he was told by the public defender's office and by the prison library inmate clerks that he was not eligible and this excused him from filing his petition.

We begin our discussion of these justifications with the superior court's observation that the decision to delay past the deadline was a calculated decision on appellant's part. This is certainly confirmed by the petition for the writ of error coram nobis, as well as by appellant's briefs on appeal. Thus, the usual grounds for rescuing a litigant who has filed late—mistake, inadvertence, surprise, or excusable neglect—are not even remotely invoked. This means that analysis must center on the reason or reasons for deliberately delaying the filing. By what standard should those reasons be judged in determining whether they constitute good cause?

If the "good" in good cause means

anything in the context of this case, it means that the reason given should be at least arguably a sound reason. Certainly, a frivolous reason could not qualify as good cause. The soundness of the reasons given can be evaluated in terms of what we know about the operations of the legal system. If, on balance, the reason given is sound, the reason ought to amount to good cause. However, the less sound the reason, the more likely that there should not be a finding of good cause.

With the foregoing in mind, we analyze the soundness of the reasons appellant gives for the deliberate late filing.

Appellant gives two reasons, one in his petition and the other in his appellate brief, why he deliberately decided not to file within the deadline. Both of those reasons are predicated on the assumption that following the decision in *Braziel v. Superior Court, supra,* 225 Cal. App. 4th 933, the law was against him. That is, he was waiting for the Supreme Court decision in the hope that the law would change in his favor (the reason in the petition) and he was told by various parties that, under existing law, he was ineligible (the reason in the appellate brief).

However, it is not true that the law was uniformly against him.

Between May 30, 2014 and July 30, 2014, *In re Machado, supra*, 226 Cal.App.4th 1044, 1057, held in appellant's favor. Had he filed his application between May 30, 2014 and July 30, 2014, he could have relied on *In re Machado*. The application would have been timely and it would have been supported by a favorable appellate decision.

Appellant cites *In re Machado*, *supra*, 226 Cal.App.4th 1044, in his appellate brief, but he does not acknowledge that this case significantly undermines his claim that the law was against him. *Machado* is significant for more than its midsummer night's existence from May to July 2014. When the issue wound up in the Supreme Court on July 30, 2014, with the grants of review in all the cases on threshold eligibility, there was at least one case that favored appellant's side of the issue and that was, of course, *Machado*. That it is not numbers but principles that count in this setting is shown by the fact that the Supreme Court opted for *Machado.* Thus, appellant's position throughout 2014 and before the deadline was not nearly as hopeless as he portrays it. In fact, some might say that if the Courts of Appeal are split on a given issue, one would usually give both sides something close to an even chance of success.

Given what the situation actually was in 2014, and particularly in the early summer of that year, and also given that there was a clear two-year limitations period, there simply was no reason not to file the section 1170.126 petition or application prior to the deadline. We agree with the superior court's observation that many inmates did file their petitions in a timely manner without the hope that the law would change in their favor. There was absolutely no downside for appellant to have done the same.

Another way of evaluating the decision not to file is that there was nothing to be gained by not filing. Appellant's chances were not improved by not filing; in fact, they were diminished by not filing, in that appellant was not in a position to benefit from what eventually happened. It was much better to be waiting for a Supreme Court decision with a petition on file than to wait for it with an unfiled petition.

As far as not filing because appellant was told he was ineligible, the law, as we have seen, was much in flux throughout 2014. Given the instability and flux in the system, it was simply too early to conclude that appellant was ineligible.

In sum, taking account of the realities of the legal system, neither reason given by appellant is sound. In fact, both reasons are remarkably poor.

Finally, appellant's position is substantially weakened by the fact that he did not in fact wait until the Supreme Court made its decision. If he filed the application, as he did, late and before the Supreme Court decision, why not file the application in a timely fashion, albeit also before the Supreme Court's decision? This strongly suggests that the good cause that appellant espouses—waiting for the Supreme Court decision—was not in fact the cause of the delay. As far as ineligibility is concerned, that became an open question as soon as the Supreme Court granted review in July 2014. Appellant was no less or more eligible when he ultimately filed his application than he was prior to the expiration of the two-year limitations period. In short, appellant's act of filing the untimely petition before the decision of the Supreme Court in *People v. Johnson* and *Machado*, supra, 61 Cal.4th 674, seriously undermines his credibility in claiming to rely on the two stated reasons for not filing. Thus, not only were his reasons unsound, it is questionable whether he ever actually relied on them.

Finally, while the delay was short, the case for filing in a timely manner was, on these facts, so strong as to render the factor of the length of the delay relatively unimportant.

We hold as a matter of law that, on these facts, neither reason given by appellant not to file a petition under section 1170.126 by the statutory deadline was good cause under subdivision (b) of section 1170.126.

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SENTENCING RELIEF UNDER PROP. 36 NOT AVAILABLE FROM LATELY REDUCED PUNISHMENT ATTACHING TO POSSESSION OF COCAINE BASE

People v. Ravon Good
CA 2(3); B266888
May 19, 2016

In January 1999, a jury convicted Good of selling cocaine base (Health & Saf. Code, § 11352, subd. (a)). The jury also found Good had suffered three prior "strike" convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), for attempted murder (§§ 664, 187, subd. (a)), robbery (§ 211), and attempted robbery (§§ 664, 211), and had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court declined to strike any of Good's prior convictions and sentenced him to a term of 26 years to life in prison, consisting of 25 years to life for the cocaine sales offense, and one year for the prior prison term.

On February 28, 2013, Good petitioned for recall of his sentence and resentencing pursuant to Proposition 36, the Three Strikes Reform Act of 2012, section 1170.126. On December 17, 2014, the trial court denied the petition with prejudice, finding Good ineligible for relief because one of his prior convictions was for attempted murder (§§ 664, 187, subd. (a)), a disqualifying offense. The Court of Appeal affirmed the trial court's ruling in an unpublished opinion. (*People v. Good* (Sept. 11, 2015, B261180) [nonpub. opn.].)

In 2014, the Legislature enacted the California Fair Sentencing Act. (Stats. 2014, ch. 749, 2013-2014 Reg. Sess.) As pertinent here, that act amended Health and Safety Code section 11351.5 to reduce the proscribed sentencing triad for possession of cocaine base for sale from three, four, or five years to two, three, or four years. (Stats. 2014, ch. 749, § 3.) The Legislature "[found] and declare[d] that cocaine hydrochloride (powder cocaine) and cocaine base (crack cocaine) are two forms of the same drug, the effects of which on the human body are so similar that to mete out unequal punishment for the same crime (e.g., possession for sale of a particular form of cocaine), is wholly and cruelly unjust." (Stats. 2014, ch. 749, § 2, subd. (a).) The Legislature's stated intent was to ensure that the crimes be treated in "an identical manner." (*Id*., subd. (b).)

On June 1, 2015, Good filed in the superior court a document captioned "Petition for recall and resentencing pursuant to Senate Bill No. 1010 recommending lower rate sentence for cocaine base sentences." Good therein requested that he be resentenced "in compliance with the changes in sentence time," and also requested "reduction of the [enhancement] terms." On June 22, 2015, the trial court denied Good's petition. It explained Good had not been sentenced under the determinate sentencing law, but under the Three Strikes law. Under the Three Strikes sentencing scheme, Good received a mandatory term of 25 years to life, plus a consecutive one year enhancement pursuant to section 667.5, subdivision (b). Therefore, Good's petition failed to demonstrate he was entitled to resentencing. Good appealed.

DISCUSSION

After review of the record, appellant's court-appointed counsel filed an opening brief that raised no issues, and requested this court to conduct an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. On January 8, 2016, we advised appellant that he had 30 days to submit by brief or letter any contentions or argument he wished this court to consider. We have received no response.

Even assuming arguendo that the amendment to Health and Safety Code section 11351.5 applies retroactively to Good's offense of selling cocaine base (as opposed to possessing it for sale), that the petition was a proper procedural vehicle by which to request resentencing, and that the trial court's order is appealable, the trial court's ruling was correct. The Three Strikes law constitutes an alternative sentencing scheme. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.) Because Good was properly sentenced pursuant to the Three Strikes law, he was subject to a mandatory indeterminate term of 25 years to life. (*See People v. Johnson* (2015) 61 Cal.4th 674, 680-681; *Teal v. Superior Court* (2014) 60 Cal.4th 595, 596.) The amendment to the determinate sentencing triad is therefore inapplicable to Good because he was sentenced to an indeterminate term pursuant to the Three Strikes law.

We have examined the entire record and are satisfied appellant's attorney has fully complied with the responsibilities of counsel and no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 126; *People v. Wende, supra*, 25 Cal.3d at p. 441.)

IN-PRISON CONDUCT RECORD DOOMS PROP. 36 RELIEF

People v. Sasha Campos
CA 2(2); B265831
May 19, 2016

Sasha Campos appealed the trial court's order denying his petition for resentencing under Prop. 36, arguing that the court (1) erred in not applying the definition of "unreasonable risk of danger to public safety" enacted as part of Prop. 47, and (2) abused its discretion in concluding that he posed such an unreasonable risk. Although the first issue is pending before the CA Supreme Court, the Court of Appeal concluded that (a) Prop. 47's definition does not apply to Prop. 36 and that (b) the trial court did not abuse its discretion in finding him not suitable for resentencing. That decision was in large part based on Campos' in-prison record.

> He delayed a peace officer in 2001 by disobeying a "lock down" order; he refused to report to his prison job for 18 days in 2003; and he was declared "out of bounds" in 2004 because he was in a building that was off limits to him. He destroyed state property: In 2005, he shattered the window in his cell by drilling a small hole in it. He attempted to import drugs and alcohol into the prison: In 2001, he had a telephone conversation with a woman who said she would mail him a "quarterly package," told her he liked Baby Ruth candy bars, and discussed how to reseal their wrappers; nine days later, a package arrived addressed to his cellmate that contained marijuana and nine balloons of powder methamphetamine secreted inside individually wrapped Baby Ruth candy bars. In 2004, he brewed his own alcohol, got drunk with his cell mate, got into a fight with him and proceeded to "trash" the contents of their cell. He also got into fist fights with other inmates in 2008, 2012, and 2013; in the 2008 fight, he broke his opponent's jaw and knocked out one of his opponent's teeth.

The appellate court detailed how the superior court's exercise of discretion to deny Prop. 36 relief was not unreasonable.

> In its detailed order, the trial court considered each of the three categories of evidence outlined in section 1170.126, subdivision (g); weighed them; and ultimately concluded that defendant's criminal history, disciplinary history, lack of rehabilitation and absence of re-entry plans indicated that he poses an unreasonable risk of danger to public safety.

Defendant levels five challenges at the trial court's reasoning. First, he argues that the court did not evaluate whether defendant currently poses an unreasonable risk to public safety. We disagree. The court recognized that its task was to assess "current[] risk," and explained why defendant's criminal history and disciplinary history translated to a current risk—namely, his criminal history reflected a current risk because his "prior incarcerations failed to dissuade him from continuing to reoffend in the community" and his "[s]erious rules violations in prison constitute powerful evidence of [his] current willingness to engage in serious rule-breaking behavior and are probative of recidivist tendencies and the danger to public safety."

Second, defendant asserts that the trial court erred in looking to all of the charges against him rather than just the ones of which he was convicted. In 1994, defendant was charged with two counts of second-degree robbery involving his use of an Uzi, one for confronting a man on the street and the other for demanding money from a restaurant hostess. Although it is unclear from the record we have on appeal to which of these robberies defendant pled guilty, it is of no consequence because both of them constitute "[a]ny other evidence the court . . . determines to be relevant" in assessing risk. (§ 1170.126, subd. (g)(3).)

Third, defendant argues that the trial court should not have relied on several of the prison disciplinary findings because they were subject to mitigating factors or were unsupported by sufficient evidence. More specifically, defendant contends that all three of the fights were "mutual combat," and that there was insufficient evidence to tie him to the drugs found in the Baby Ruth wrappers because they were addressed to his cellmate. Whether or not these findings are "final" for purposes of res judicata, they are "relevant" evidence in assessing his risk of re-offending. (§ 1170.126, subd. (g)(3).)

Fourth, defendant contends that many of his disciplinary proceedings occurred while he was part of the mental health delivery system. That is true, but also irrelevant in light of the repeated findings that his "mental state was not a factor influencing his misbehavior."

Lastly, defendant claims that the trial court erred in placing any weight on his failure to participate in any rehabilitative programs

***Campos* cont. pg. 26**

***Campos* from. pg. 25**

while in prison until after he filed his Proposition 36 petition because he was not in a facility that offered those programs between 2004 and 2014. However, the court stated that "the relevant question" in assessing future risk "is not why [defendant] did not program, but whether he programmed." Moreover, defendant offered no evidence to support his argument that any and all rehabilitative programs were unavailable.

The lesson to be learned here is that Three-Strikers, just like lifers doing time for murder, need to demonstrate how they have made the internal changes in their persona for the better. Being released on a Third-Strike resentencing petition invokes the exercise of discretion by the fact-finder as to one's apparent *current* dangerousness, based on the factual record. It doesn't matter if this exercise of discretion is before a judge or a BPH panel.

Board of Parole

EN BANC PROCEEDINGS

In a rare show of compassion, three prisoners before the BPH for recall of sentence, so-called compassionate release, were granted that recommendation in April. Typically, those seeking release to live out the final 6 or fewer months of their life out of prison find relief from the BPH less than 50% of the time.

But in April **Greg Holbert, Lonnie Robinson** and **Guy Watts** were all referred back to their sentencing courts for possible recall of their sentence, due to terminal illness, and release. While no one spoke in favor or in opposition to the recall of sentence for Watts, both Holbert and Robinson were opposed by the Sacramento County District Attorney's office, in both instances questioning whether either inmate was truly suffering from a terminal illness.

Perhaps the Sacramento DA's office is unaware that the diagnosis is confirmed not by a private physician, but by CDCR medicos, not widely known for their soft hearts. In both cases family members supported the recall and release.

Also in April **Kalvin Harris**' parole grant was sent for rescission hearing, to consider several new allegations of confidential information. Harris' attorney, Susan Jordan, presented a concise and factual summary of the situation, noting several of the alleged incidents were not reported or entered into his file until after his grant of parole. The BPH has ordered an investigation "into the significance of his alleged misconduct or participation."

In two other April en banc cases the LA County DA's office, in the person of new representative DA Donna Lebowitz (replacing the ever-opposed Alexis De La Garza, who has apparently retired), unaccountably took no position on the grant for **Bobby McClelland** but predictably opposed the grant for **Travis Washington**. And in a head-scratching outcome, the BPH vacated McClelland's date, but affirmed the grant for Washington.

The May en bancs were even less cheery, from an inmate perspective, as 4 of the 7 cases before the commissioners saw outcomes that were, in BPH parlance, "adverse" to the inmate. **Stephen Bogovich's** parole grant was vacated and a new hearing will be held to consider all edged institutional misconduct on his part the previous month. **George Feliciano's** grant of medical parole was also vacated, and a new hearing ordered, to consider the conditions under which he would be paroled.

The denial of parole for **Jonathan Piccolo** was vacated and a new hearing held after the commissioners decided the February hearing did not meet the standards set in Penal Codes 3051 and 4801 (c). The last citation deals with the 'great weight' requirement for those under YOPH consideration. So, Piccolo gets a second shot at a YOPH hearing, despite LA County's opposition to a rehearing.

Governor referrals **Michael Henry, Clarence Tate** and **Brad Kohler** saw mixed results, the grant for Henry being affirmed, after a fine presentation by his attorney, Katey Gilbert, but the grant for Kohler being referred for rescission.

Kohler's mother supported the parole grant, but the decision was opposed by the Venture County DA's office and the victim's family, via another fine dramatic performance by Christine Ward of the I-Can foundation, who read a letter from the victim's mother. Tate's parole grant was affirmed, despite opposition (surprise?) from the LA County DA.

Last of the en bancs in May was the decision in what had been a tie vote in the case of **James McIntosh**, who was, in the end, denied parole.

BPH

WHAT 'WHISPERS' (WSP) ARE ALL ABOUT

Now days, with the implementation of youth, elderly and expanded medical parole, the BPH schedules something over 5,000 parole suitability hearings each year. That's over 400 each month, about 100 each week, give or take a few.

Parceled out between 30+ prisons, 12 commissioners, droves of attorneys and throngs prisoners, it's easy to see, scheduling parole hearings is a logistical Mt. Everest, especially when you take into consideration that at least some weeks of each year all 12 commissioners are 'off line,' for training. Plus the assorted vacations, sick days, travel days and other impediments.

But in any given year, roughly a third of the scheduled hearings are not held, often due to a combination of procedures colloquially known as 'whispers.' As with all things CDCR, 'whispers' is an acronym for several other words, in this case, waives, stipulations and postponements. All ways an inmate can delay, or reschedule, his hearing.

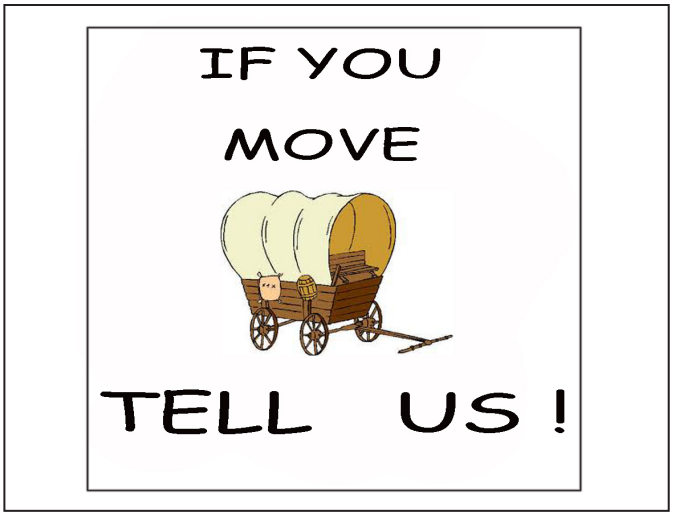
Attorneys, especially, it appears, state appointed attorneys, sometimes recommend to an inmate facing a hearing that he/she not go forward with that hearing, through one of these procedures. Sometimes for good reason; but sometimes these recommendations can come for what appears to be the convenience of counsel. Keep in mind, state appointed attorneys are paid in relation to the number of steps they complete in the representation process. From first meetings with clients (that would be you) through actual appearance at a parole hearing, each step of the representation process is assessed a payment amount and the attorneys are paid for the steps they take.

Whether it's in your best interest to reschedule your hearing depends on individual circumstances, but you should always carefully evaluate such recommendations. And since we are aware that attorneys often don't fully explain the various ways of putting off a hearing, here is a short explanation of each type of 'whisper.'

WAIVER: Waivers allow prisoners to put off their parole hearings for 1-5 years, and no particular reason need be stated. However, by waiving a hearing for a specified time, you give up the right to have a hearing within that time period. You must also submit a signed for (Form 1001(a)) at least 45 days prior to the scheduled hearing; such requests submitted less than 45 days before a hearing must show 'good cause' for the waiver request to be late.

STIPULATION: By requesting a stipulation you are acknowledging to the BPH that you are not suitable for parole. Stipulation lengths mirror parole denial lengths, 3,5,7,10 and 15 years. You must also tell the BPH why you feel you are currently unsuitable for parole, and that reason will become part of the record, and will be read at your next parole hearing. In that way the commissioners can assess whether or not you have addressed the issues you acknowledged you had at the time of stipulation. "Stips" can done at any time, including the day of your hearing.

POSTPONEMENT: A postponement can also be requested at any time, but the earlier this request is made prior to the scheduled hearing the sooner you can count on having that hearing rescheduled. The shortest postponement time available is "next available calendar date," but that will usually not be available for at least 3 and often 6 months. You can request a specific time frame for the postponement, but there is no guarantee the board will grant that time request, or the postponement, especially if made a the last minute. Postponements are considered the last ditch effort and usually only granted for extraordinary circumstance.



Board's Information Technology System

Commissioners Summary
All Institutions
March 01, 2016 to March 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	**34**	**23**	**29**	**25**	**26**	**28**	**24**	**25**	**27**	**29**	**27**	**35**	**146**	**478**	**1**	**477**
Grants	5	4	8	5	6	6	6	6	5	3	9	10	0	73	0	73
Denials	24	15	15	12	16	19	14	13	20	15	14	20	0	197	1	196
Stipulations	1	3	2	1	3	3	2	2	1	2	2	1	0	23	0	23
Waivers	1	0	0	2	0	0	1	1	0	6	0	3	44	58	0	58
Postponements	2	1	3	2	0	0	1	1	1	2	1	0	95	109	0	109
Continuances	1	0	0	3	1	0	0	2	0	1	1	1	0	10	0	10
Tie Vote	0	0	1	0	0	0	0	0	0	0	0	0	0	1	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	7	7	0	7

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

Subtotal (Deny+Stip)	**25**	**18**	**17**	**13**	**19**	**22**	**16**	**15**	**21**	**17**	**16**	**21**	**0**	**220**	**1**	**219**
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	16	6	14	9	12	15	11	9	15	8	11	9	0	135	0	135
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	5	6	1	3	4	6	5	5	2	8	2	8	0	55	1	54
7 years	4	3	1	1	1	0	0	1	3	1	3	3	0	21	0	21
10 years	0	2	1	0	2	1	0	0	1	0	0	1	0	8	0	8
15 years	0	1	0	0	0	0	0	0	0	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**0**	**0**	**2**	**0**	**0**	**1**	**1**	**0**	**6**	**0**	**3**	**44**	**58**	**0**	**58**
1 year	1	0	0	2	0	0	1	1	0	6	0	3	23	37	0	37
2 years	0	0	0	0	0	0	0	0	0	0	0	0	14	14	0	14
3 years	0	0	0	0	0	0	0	0	0	0	0	0	5	5	0	5
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	2	2	0	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	**2**	**1**	**3**	**2**	**0**	**0**	**1**	**1**	**1**	**2**	**1**	**0**	**95**	**109**	**0**	**109**
Within State Control	1	1	1	1	0	0	0	1	1	0	0	0	87	93	0	93
Exigent Circumstance	1	0	1	1	0	0	1	0	0	0	0	0	6	10	0	10
Prisoner Postpone	0	0	1	0	0	0	0	0	0	2	1	0	2	6	0	6

Board's Information Technology System

Commissioners Summary
All Institutions
April 01, 2016 to April 30, 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	**24**	**23**	**15**	**23**	**18**	**22**	**25**	**25**	**16**	**22**	**28**	**27**	**85**	**353**	**0**	**353**
Grants	4	3	5	8	9	4	5	4	1	7	10	3	0	63	0	63
Denials	17	16	7	8	7	14	13	10	8	11	13	14	0	138	0	138
Stipulations	1	0	1	1	1	1	2	7	7	0	3	4	0	28	0	28
Waivers	0	0	0	1	0	0	3	0	0	1	1	5	14	25	0	25
Postponements	1	4	2	2	1	2	2	3	0	2	1	0	65	85	0	85
Continuances	1	0	0	3	0	1	0	1	0	1	0	1	0	8	0	8
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	6	6	0	6

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

Subtotal (Deny+Stip)	**18**	**16**	**8**	**9**	**8**	**15**	**15**	**17**	**15**	**11**	**16**	**18**	**0**	**166**	**0**	**166**
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	11	12	5	4	3	12	10	8	4	6	11	5	0	91	0	91
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	5	4	3	3	4	3	4	7	7	5	3	10	0	58	0	58
7 years	1	0	0	0	1	0	1	1	3	0	2	2	0	11	0	11
10 years	1	0	0	1	0	0	0	1	1	0	0	1	0	5	0	5
15 years	0	0	0	1	0	0	0	0	0	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**0**	**0**	**1**	**0**	**0**	**3**	**0**	**0**	**1**	**1**	**5**	**14**	**25**	**0**	**25**
1 year	0	0	0	1	0	0	2	0	0	1	1	4	6	15	0	15
2 years	0	0	0	0	0	0	1	0	0	0	0	1	5	7	0	7
3 years	0	0	0	0	0	0	0	0	0	0	0	0	2	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)	**1**	**4**	**2**	**2**	**1**	**2**	**2**	**3**	**0**	**2**	**1**	**0**	**65**	**85**	**0**	**85**
Within State Control	0	0	2	0	0	0	0	3	0	2	1	0	64	72	0	72
Exigent Circumstance	0	1	0	1	1	0	2	0	0	0	0	0	0	5	0	5
Prisoner Postpone	1	3	0	1	0	2	0	0	0	0	0	0	1	8	0	8

BPH

THE WORD ON TRANSITIONAL HOUSING

In a nutshell, the word on transitional housing is YES. While not a requirement to be found suitable, plans by a lifer to enter a transitional residence when first released on parole are very favorably viewed by the BPH. And for good reason.

Not only does a lifer's willingness to make transitional housing his first stop after prison give the parole panel indications that he takes rehabilitation and reentry seriously, it also give them a bit of confidence that in those stressful and busy first few months that newly-freed ex-lifer will be in the middle of a support system to help him navigate the challenges of freedom. And those challenges can be numerous and unexpected.

Transitional housing can provide a stable base, especially for those long-serving lifers who have either lost family or lost touch with family and have no specific 'home' to parole to. It is also very useful even for those long-timers who do have family, as the shock of finally having a lifer come home is felt on both sides—by the former prisoner and his family, whether that family be Mom and Dad or wife.

The change, the stress and the day-to-day of getting back into life are a huge challenge and oft times a bit of help from someone else who has walked that path is very helpful. And that help can be found in the fellowship of transitional living.

And keep in mind, even if the BPH does not require a stint in transitional housing, the Division of Adult Parole Operations (DAPO), through your parole agent, can impose that condition separate and apart from the BPH. In fact, DAPO now finds transitional housing such a good idea the agency is starting to create their own facilities…. not that recommend those. So do your homework, check out what programs are available in the area you plan to live in on parole and find one that suits your needs.

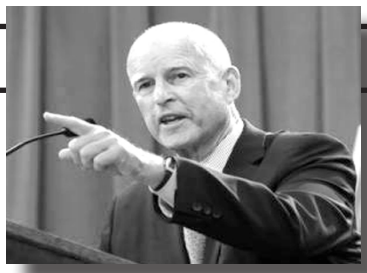
More and more transitional facilities are being created for and filled by paroling lifers, so that we no longer find across the board lifers being forced into the old substance abuse programming model. Many facilities are now lifer-friendly and welcoming.
The changed nature of relationships with friends and families is one of the biggest challenges returning lifers face, not to mention the changed world and the ever-present use of technology in everything. Transitional housing, geared to lifers, is a tremendous help to both returning lifers and their families, and lifers are the best mentors for other lifers.

Good programs will also help with re-establishing your identity (driver's license, social security cards), money and budgeting, navigating technology, and social skills. All things lifers sequestered from society for decades will need help in mastering.

Be sure to ask about costs, the length of the program required, religious expectations, job help, can your stay be extended, will the state help pay for the costs. But if you don't have a program lined up at your hearing, simply acknowledging that you're ready to go to transitional housing on release will give the BPH an indication that you're ready to do what it takes to succeed-and DAPO will find a program for you.

So consider signing on for transitional housing—it's a good step before the board, and an even better step once you're back in the world.

Politics



Gov. Jerry Brown

THE GOVERNOR'S TRIGGERS, 2015 EDITION

Every year for the past…several, LSA has undertaken the rather distasteful and dismal task of reading through the letters from Gov. Brown announcing his reversal of hard-won parole dates for lifers. Granted, Brown has historically reversed far fewer parole grants than any of his predecessors, a trend even more in evidence in this batch, but each missive means the dashing of hope for an individual, many of whom have worked years and served decades. It's not a fun job for us.

However, there is a purpose in this unpleasant undertaking. We're able to glean from this effort those factors of an individual's crime and presentation to the parole board that don't meet the Governor's standard, often for reasons known only to Brown. And we use that information, first to alert our lifer constituents to these issues, but also to query the Governor's office as to the rationalization, reason or relevancy of the factors outlined by the Governor for those reversals. And while he does believe in rehabilitation and redemption, Governor Browns' standards are his own. And also please keep in mind, the courts have upheld his, in fact any Governor's, ability to make those decisions, separate and apart from the Parole Board.

Although this year's list is very similar to previous years' reversal triggers there are a few new factors in parole grants reversed by Gov. Brown in 2015. Perhaps the most important new development is that the Governor's reversal rate decreased in 2015; for the past 4 years Brown had built a record of reversing about 14% of the parole grants made by the BPH. But in 2015 he reversed 95 of the 904 grants, for about a 10% reversal rate.

What offends Brown the most? As in past years the characteristics of the victims seem to be the top issue, especially if that victim is a woman. Of the 95 reversals, 47 were for crimes against women. But other vulnerable, or special victim cohorts, also bring extra scrutiny; children, the elderly, and special groups such as fire fighters or police, also are noted. And when that female victim has a special relationship with the inmate, usually wife or girlfriend, the Governor expresses special disdain. In sum, of the 95 reversals, the characteristics of the victims were mentioned by Brown in 82 of those reversals. Clearly, a trigger of the first order.

In about a third of the reversals (30 cases), the Governor accuses the lifer of minimizing his/her participation or culpability in the crime; a similar number of times (36), Brown castigates the inmate for not having a sufficient or acceptable explanation for the crime. We've asked before why the Governor expects anyone to explain the unexplainable, and most especially now, with YOPH. But the Governor seems unwilling, or unable, to explain his expectations.

The factors of youth, those 'hallmarks' of being unable to make good decisions while immature, even if one wanted to, provide significant information on why many youngsters get involved in crime, but in at least 15 cases Brown reversed a YOPH grant, often noting he did not find the explanation for the crime acceptable. Perhaps we should send him Dr. Hall's report on the adolescent brain.

In just over a fourth of the reversals (27) Brown mentions the CRA of the inmate, often citing what he terms 'elevated' risk assessment, and/or complaining that the report was outdated. However, in nearly all cases cited the risk assessments given were moderate or low/moderate. Perhaps we, again, need to visit the Governor's office with a reminder that 1) moderate means average, not elevated; and 2) Dr. Clif Kusaj, head FADer, has said repeatedly, in open session, that a moderate risk assessment for a lifer is the same as a low risk level for any other prisoner cohort.

Also interesting, if a bit confounding, is Brown's characterization of CRAs as old or outdated, when often those reports were well less than 3 years old, the current 'shelf-life' length the FAD has set for CRAs. The Governor often also directs the BPH, via the reversal

Politics cont. pg. 32

Politics from pg. 31

letter, to conduct a new CRA before the next parole hearing. When asked, BPH Executive Director Jennifer Shaffer confirmed that when it is so noted by the Governor, the BPH will, indeed, perform a new CRA evaluation, regardless of how old the previous, and to the Governor, unacceptable, CRA is.

Brown also feels no compunction about substituting his own opinion for that of FAD clinicians—specifically noting in at least three cases that "I disagree," with the risk assessment. And we thought Brown was only an attorney by training and a politician by nature; turns out he's also a closet clinician.

Other points of interest, of the 95 reversals 2 were women and 13 had had suffered a previous reversal by Brown. More than two dozen, 26, were over the age of 60 (the oldest was 75) and one qualified for both elderly parole and youth parole consideration.

There are some interesting changes in the numbers this year, but only future reversal reports will show if this year was an anomaly in Brown's reversal criteria or the beginning of a trend. Fewer mentions of confidential information as a reason for reversal were made this year, changing a trend over the last 2 years that saw the Governor frequently citing confidential information in his reversal, and often, in his remarks, revealing more of the nature of that information than the inmates were able to learn in the hearing.

More reversals were handed down this year for those prisoners who were juveniles at the time of their crime, but this may be a function of the increased numbers of those individuals going before parole boards as a result of SB 260/261. And while 'lack of insight' notations have somewhat decreased, it appears the Governor may be substituting his finding of 'no good explanation' for lack of insight. That, it appears to us, is simply a change in semantics.

And while his repeat reversals (reversing the same prisoner more than once) numbers have held steady for the last few years, at least in 2015 all those instances were done with a full transcript of the hearing available. In 2014 the Governor reversed several grants for which a transcript of the successful parole hearing was not available, due to equipment failure or other exigent circumstances. Hopefully, this is the result of improvements in the BPH's system of managing recordings of hearings.

In all, while we can say the reversal trend is, for this year, abating somewhat, the reasons and reasoning of the Governor are still a mystery. And in spite of the Governor's actions, 7 of those reversed last year are now in fact out of the CDCR system, including one former inmate, now working as a paralegal, who was reversed 3 times by Brown. Sometimes the Governor does not, in the end, have the final word.

Herewith are the raw numbers and factors of the 95 reversals:

Female victim	47	Second degree convictions	52
Child/youth victim	18	Victim/family opposition	19
Other special victim	17	Street/prison gang involvement	16
Minimizing	30	No good explanation	36
CRA concerns	27	Previous criminality	20
Insufficient insight	6	Excessive RVR (115)	19
Confidential info	6	Previously reversed	13
Female prisoners	2	Substance abuse concerns	14
YOPH	15`	Elderly parole candidates	26

Politics

WHAT'S ON THE BALLOT

Among the numerous ballot propositions that were proposed earlier this year for inclusion on November's ballot a few actually would directly impact prisoners in general and lifers in particular. Some have been successful in acquiring the number of verifiable signatures to be included on the ballot, some have not.

And for those that probably will be on the ballot, just how they might impact lifers is still not completely clear. And perhaps here we should mention, once again, the difference between a ballot initiative and a legislative bill. Legislative bills are introduced and must be approved by the state legislature, beginning either in the State Assembly (those bills are designated AB bills) or the state Senate (the SB bills). These pieces of potential law must navigate the legislative process, being approved by both houses of the legislature and then signed into law, or vetoed, by the Governor.

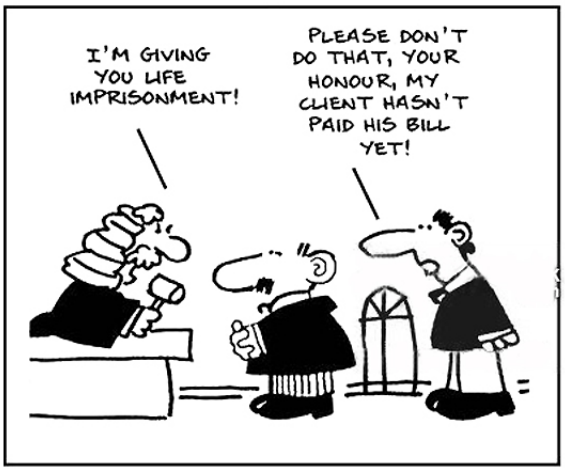
Initiatives, on the other hand, are initiated by members of the public, including various interest groups, who must collect signatures from a certain percentage of registered voters to secure a ballot slot for their proposed idea. If the proposed initiative manages to garner enough signatures, then the sponsors of the proposal must begin a campaign to convince voters to approve the measure. Two major hurdles, both very expensive.

For the November, 2016 ballot four measures could potentially impact lifers; two competing prospects for the death penalty, Governor Brown's 2016 Public Safety and Rehabilitation Act of 2016, and a potential additional change to the 3 Strikes laws, also known as Change1. By early June it appeared three of the four would indeed be up for voter approval this year, though the impact of any of the 3 is still not detailed.

The lone ballot drop-off, the Change1 proposal that would have amended the 3 Strikes law, failed to gain the requisite number of signatures to be included on the ballot. Although many prison families circulated petitions and the organizers maintained a webpage, the effort to secure a place on the ballot was a bit disorganized. The upshot of the effort was that the proposal failed to acquire the required number of signatures by a wide margin.

Two of the 3 prisoner-related measures that will appear on the ballot are at complete opposite ends of the issue both address. The first, called *The Justice that Works Act of 2016,* would repeal the death penalty, causing those now under that sentence to be resentenced to Life Without the Possibility of Parole (LWOP). If passed this law change would apply not only to those convicted of future crimes, but would apply retroactively, so that the 747 now on California's death row would become LWOP inmates.

The second ballot measure, *The Death Penalty Reform and Savings Act of 2016,* would not so much reform the death penalty, as it would speed up the implementation of that sentence. Under this proposal the number of appeals available to condemned inmates would be limited as would the time available to courts to review the petitions.



The relevance of either of the death penalty measures to lifers is largely contained in the first proposal, to abolish capital punishment. If this measure passes and now condemned inmates are resentenced to become LWOP, what, then of those currently serving under an LWOP?

Since, at the time of their sentence, the crimes did not merit the imposition of the ultimate penalty, would they now remain in the same category as those who did, in fact, receive an even more severe penalty? Is that appropriate? Constitutional? Even legal? California was faced with this situation once before, when in April, 1972 the courts decided the state's death penalty, as it was then codified, was unconstitutional.

That ruling resulted in 107 individuals then under sentence of death saw their sentences immediately commuted to

Politics cont. pg. 34 ***Politics***

life with parole, among those individuals were Charles Manson and Sirhan Sirhan. At that time, California had no life without parole sentence on the books.

Just a few months later, in November 1972, the voters passed Prop. 17, which reinstated the death penalty. As the political battle over the issue continued to play out another 70 inmates sentenced to death had their sentences changed in 1976 and in 1977 the life without parole sentence was added as a possible sentence for capital crimes.

So with capital punishment now, once again, coming before the electorate for assessment, if the initiative to abolish the death penalty wins a majority of votes (it narrowly missed this mark in 2012), what, then happens? If present follows past, those now serving the next most severe sentence, LWOP, would possibly see a reconsideration of their sentence. Possibly. Nothing assured. But…the impact on LWOP inmates could be significant.

Perhaps the least understood and the initiative garnering the most publicity and interest is that put forward by Gov. Brown, the *Public Safety and Rehabilitation Act of 2016.* Subject already to several challenges in court, Brown's proposal only recently received the go-ahead from the courts for inclusion in November's voting process.

But would this proposal, once called the *Parole, Early Release and Juvenile Trial Reform Initiative,* impact lifers? We must have spoken to at a dozen people on this question, and received at least 14 answers. What we usually hear is, well, it depends.

Here's what the official language of the initiative says:

The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law:

> *(1) Parole consideration: Any person convicted of a non-violent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.*
>
> *(a) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.*
>
> *(2) Credit Earning: The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements.*
>
> *(b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety*

The initiative also authorizes judges, rather than prosecutors, to decide whether to try defendants as young as 14 years old, as juveniles rather than adults. The judges would be directed to give great weight (sound familiar?) to the hallmarks of youth, family situation of the juvenile as well as his potential to be rehabilitated before expiration of the juvenile court's jurisdiction and his potential to grow and mature.

You'll notice the initiative is addressed to those who committed a "non-violent felony offense." That, on its face, would preclude most lifers, who, usually by virtue of their life sentence, have been held to have committed and serious and/or violent felony. And while early estimates are that as many as 25,000 current inmates MIGHT be impacted by this measure, if passed, no one as yet said a firm yes or no to whether that would include any lifers.

Nor is it clear whether or not the application of credits for programming will/could/were intended to be applied to lifers. Should it pass, would the provisions be retroactive? Unknown.

So the upshot of this year's election, even if one or more of these ballot initiatives pass, insofar as the impact on lifers, can be summed up in one word; unclear. Perhaps, as the election and campaign process unfolds and more information and/or clarity is forthcoming (both hard to find commodities in elections) we'll know more.

CDCR

NO. NO FAMILY VISITS. YET

If only we could get a donation for every time we answer this question/rumor/wistful thinking.

NO. There is not at this time any
1) pending legislation; 2) official proposal;
or 3) imminent restoration of family visiting for lifers.

So whatever rumors you've heard (or repeated), vague reports or even alleged information from 'sources', such as counselors, family visits for lifers is not happening. Yet. This year. So please, stop waiting with bated breath for this, expecting 'conjugal' visits or similar privileges anytime soon.

One of the things we suspect is fueling this recent up-tick in unfounded reports of lifers in some prisons already getting family visits (usually reported that such visits have been restored for female inmates; not true) is a current bill by Sen Holly Mitchell, SB 1157, currently the only piece of legislation mentioning prison visiting; which is perhaps why it's getting some attention.

However, Sen. Mitchell's bill address two specific areas that preclude lifers: it is aimed at local (county and city) lock ups and affects only juveniles. What SB 1157 addresses is the increasing use of video visiting in jails and county camps in place of actual contact visiting. The bill seeks to prevent those facilities from totally replacing in-person visiting with the video version and would require a specific number of hours of contact visiting.

And, once again, this bill addresses only juvenile facilities and only local institutions, it does not address adult prisoners and/or state prisons in any way. Sen. Mitchell introduced her bill in a preemptive effort to prevent any ideas in CDCR about replacing in-person visits with the video variety. Those should, all authorities agree, be used to supplement 'live' visiting, to replace it.

As we have repeatedly reported, we do believe, indeed are working for, the restoration of family visits for lifers…but not this year (an election year). We're not the only group advocating for this change, and we are not meeting the official resistance we have been faced with in the past. So we are encouraged.

And we are cautious. Again, petitions may be counter-productive, marches on the capitol can create backlash and in general, we'd like to keep things quietly moving along. And you can be sure, if it looks like family visiting in on the doorstep, we'll be shouting from the rooftops. Or at least the pages of the newsletter.

AND WHILE WE'RE ON THE SUBJECT…

A study released last year and based on data from the Prison Policy Initiative and reported by Vox Policy and Politics, notes that family visits for prisoners "that inmates who get more visitors are less likely to reoffend once they get out." The study quotes the Minnesota Department of Corrections reported that "a single visit correlated with a 25 percent drop in technical violations and a 13 percent drop in new crimes once the inmate got out of prison."

More specifically to California, the report notes, "deploys strip and dog searches against some visitors." Those visiting-discouraging actions are part of recently departed Sec. Beard's pet drug interdiction practices, practices that have cost the state millions and many prison visitors both time, embarrassment and lost visits and have produced zero results. Those visit-complicating practices may or may not continue to move forward now that their champion is no longer in the state.

And apparently California isn't the only state where the whims of officers often dictate visiting policy—the study also notes Washington State's "ban on "excessive emotion," is entirely subjective. That has a familiar ring.

States vary widely in what visiting opportunities are offered. While in years past California prisons

offered visiting every day, then reduced to 4 days… then 3 days, and now weekends (and a few special holidays) only, North Carolina allows just one visit per week for no more than two hours but visits in New York are available 365 days.

California prison visitors are required to fill out a form for background check, that includes their Social Security numbers; Arkansas and Kentucky require prospective visitors to provide their social security numbers, but Arizona charges visitors a one-time $25 background check fee. Anything to fill Sheriff Joe Arpaio's war chest.

The study also taps into federal prison data which reveals that prison visits are the exception rather than the norm: only an average of about 31 percent of inmates in state prisons nationwide reported a personal visit in the previous month, and 70 percent had a phone call in the previous week. However, research shows that while making visiting more accessible would probably not help those inmates who have no social network on the outside, increasing visits for prisoners who do get visitors, though infrequently, could help cut down on the recidivism rate.

The study suggests increased visiting could be facilitated by expanding visiting hours and days, providing transportation to prisons and housing inmates in facilities closer to their home area. It also suggests more states look at reducing the cost of prison phone calls and implement video visitation as a supplement, but only a supplement, not a replacement, to in-person visiting.

And although there will always be those who complain about any humanitarian moves being soft on crime, if the point of the criminal justice system is to promote public safety, then making visiting of inmates more difficult could actually be detrimental to that public safety. Food for thought, as we meet with newly appointed CDCR officials.

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from BPH pg. 30

WHO NEEDS A RELAPSE PREVENTION PLAN?

Short answer; everyone. While those who have been subject to substance abuse issues know and understand the importance of a relapse plan, with steps to acknowledge triggers and methods and contacts of dealing with those triggers, the same criteria can be applied to any situation or concern.

Parole commissioners often query prisoners in parole hearings if they know their internal and external triggers and how they'll deal with situations and individuals that pull those triggers. That self-knowledge is the basis of a relapse prevention plan.

For those without a history of substance abuse, a relapse prevention plan is still a good idea, and something the board is likely to ask about at the hearing. The same plan, knowing your triggers and how to deal with them, works for individuals with anger issues, hair-trigger reactions, self-esteem problems, basically any sort of anti-social trigger or concern.

Knowing what triggers your issues and how you can best deal with them is part of the plan. Another aspect is where help is available and who you can turn to for assistance. For many parolees that might be the Parole Outpatient Clinic at their parole office, a counseling center or religious organization.

cont. pg. 38

CDCR

THE NEXT STEP FOR UA 115?

It's been about 2 years now since we first began hearing about, and helping inmates fight, bogus 115s given after random (and pretty useless) UAs show drug usage when those prisoners were in fact prescribed the drugs causing the positive results. Two years and almost countless instances of this illogical and damaging practice.

We've had some successes and some assistance along the way, from the Medical Receiver's office and the Office of the Inspector General. But even those two agencies can only do so much when faced with a recalcitrant prison administration, the well-known green wall and insipid 'investigators.' Some victims of this outrageous practice have seen those undeserved RVRs removed, some have not, and all have suffered at least some consequences for conduct that was totally in line with CDCR 'guidelines.'

It's been a maddening and frustrating time for us as well as for those prisoners who have suffered loss of visiting, other privileges and sometimes adverse transfers for no good cause. We've followed trails of inept medicos, untruthful staff and uncaring officers. No surprises there. And the reports keep coming, from many institutions, but there are some that appear to be not only repeat offenders, but unconcerned with breaking their own rules in the process.

We've long suspected it might it might take legal action to straighten this mess out and now it appears one family is fed up enough, determined enough and have enough contacts to possibly take on this challenge. We've had several conversations with family members (we're not identifying the family or inmate, to protect both their privacy and his safety), helping them follow all the usual protocols to try and correct the problem for their loved one, and he's done his due diligence as well. But many of his 602s have, unaccountably, been dismissed or misplaced, in typical green-wall action.

Now the family has had enough and has contacted the federal government. The Department of Justice has responded, indicating that agency would investigate the problem as a violation of civil and Constitutional rights, but not for a single individual. What is needed are enough instances of this dumb-founding behavior to show systemic practices that violates or otherwise abuses the rights of a class of individuals.

That class would be those inmates who are taking medication as prescribed and being penalized for it.

REQUEST TO JOIN- CLASS ACTION
CDCR Rules Violation Report given for Prescribed Medication

CLAIMANT:
Name _____ CDCR # _____ Housing _____

Age _____ Address _____

Under Chronic Care ? _____ _____

Please list date(s) of RVR (s) (115) Recieved for Positive UA you claim was as a result of medicines you were authorized & given by licensed medical professional at your prison. List all medications you claim could be causing positive drug test results

DATE of UA	DATE OF 115	HEARING DATE & RESULT	RX/MEDICATION	ADDITIONAL ACTION OR COMMENTS

please complete both sides

(UA's from pg. 37)

We've offered to be the conduit between the family willing to take on the challenge and those prisoners in any institution who have been victim of this onerous practice and have received no relief.

If you've received a 115 for PRESCRIBED MEDS and not been able to have that RVR cleared or removed, if you suffered loss of privileges or other disciplinary actions after a 115 that was eventually cleared, if you have appeals in the pipe line on this issue, send you your information. We need your name, CDCR # and a summary of the facts—what meds you were on, when the RVR was issued, your actions attempting to receive relief and penalties you suffered. And we need your complete address, with housing assignment.

LSA/CLN is NOT a party in this potential action, nor are we instigating any action; we aren't attorneys. But we're happy to be a surrogate snitch in this case, reporting what we can find out and snooping for more. If you fall into this category, send us the requested information—but ONLY if you've been on prescribed meds and suffered a RVR because of those meds. We can't guarantee any action or results, but we'll do our part in pushing this along.

Relapse Plan from BPH pg. 36

Put that information in your relapse prevention plan; for instance, where are AA meetings in your area? When do they meet and how will you get there? Do you have a friend or mentor who can be your first contact and assist you in getting the advice and counsel you need?

For those lifers who may be on psychotropic medications, the board has said this situation alone will not be the cause of parole denial. But the commissioners like to know potential parolees in this situation show intent to remain on their medication, know where to obtain those meds and who to reach out to for additional assistance. If your current protocol of treatment is working, the board wants to be sure you plan to stay on it and know how to make that happen.

Each relapse prevention plan, like each parole plan itself, must be personalized to fit the specific needs and factors of the individual involved. The structure, however, is the same: know your triggers, know how to manage them, know where to get help in that management process and know who you can ask for assistance.

DATE of UA DATE OF 115 HEARING DATE & RESULT RX/MEDICATION ADDITIONAL ACTION OR COMMENTS

_____

_____

_____

_____

_____

_____

RESULTING IN; Actions, relief or penalties

Add additional sheets and documentation if needed

_____

_____

_____

_____

Send your information to
LSA
PO BOX 277
Rancho Cordova, Ca. 95741

Clearly mark the envelope: RVR Class Action

LIFE SUPPORT ALLIANCE

AMENDS UPDATE

Three months after first rolling out The Amends Project, we're pleased to announce we've issued the first of what we hope will be many Certificates of Achievement, to those workshop participants who have met the standard and written an appropriate, impactful apology and amends letter. Great job guys, we're proud to be able to send you our acknowledgement of your life change and rehabilitation.

We've visited 4 prisons (2 of them twice) and are now in talks with 3 others to arrange visits over the next couple of months. That still means we have requests from about 15 other institutions to go, but be assured we're working on them as fast as time, and funds, allow.

We're also receiving inquiries from individual inmates, who want to participate, and for now, we must reinforce, that we can't service individual inmate's letters; the workshop is done in a group setting to maximize our reach to all inmates interested. We'll present before any group that's interested in hearing and learning; just send us the contact information of the sponsor and their email if available (or their first and last name), or have said sponsor contact us to get the ball rolling.

The workshops, and chance to interact and talk with lifers directly, energize us every time. We love talking with lifers, hearing your questions and feedback and providing what answers we can. It's our mission, and fulfilling it directly is a great experience for us.

For those in outlying prisons, we haven't forgotten your requests. We're working on the logistics of maximizing our travel (and expenses) to perhaps reach a couple of institutions in the same general vicinity in the same trip.

And for those many pro-active inmates who have inquired about becoming facilitators and presenting The Amends Project, that's also in the works. We're now developing a curriculum for training facilitators that would allow Amends to be presented more frequently and wherever it's needed. Once that process is defined, we'll let you know, and if you're interested, we'll take sign-ups for facilitator training.

The response from those who have participated so far, gathered through evaluation forms, has helped us streamline the presentation and add a few new details, but generally have told us we're on track, providing helpful information on a needed topic. And the addition of a component to train inmate facilitators will ensure that The Amends Project will become self-sustaining.

ANNUAL LSA Picnic

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

Vet's Report

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

June 2016

Greetings,
Our first incursion in to issues affecting veterans brought a few inquiries, and some comments.

1. Letters from the last article asked what was "IFC" and what was "GRSC"?

   IFC is the Inmate Family Council. Planned to be in each institution, it is a gathering of friends and family members who meet with the warden and his/her senior staff periodically (usually every two months) to discuss the impacts that local procedures are having on the effort to maintain family ties. There is also a Statewide Inmate Family Council (SIFC) which meets ± quarterly with the Director of Adult Institutions to discuss issues that seem to have a more broad impact. Over the past 10 or so years SIFC has had considerable input in the creation of the Visiting Guidelines which is available for your families on the internet at www.cdcr.ca.gov.

   During the last year, we have put on three workshops for folks interested in servings on IFCs. These workshops are separate from the seminars that Life Support Alliance offers for the families of Lifers.

   GRSC is the Gender Responsive Strategies Commission, a group that has tried over an almost equal period to assure that the rules, regulations and procedures recognize the gender-based differences in the needs of incarcerated males and females. To answer the next logical question, we are unaware of any CDCR sanctioned commissions to work on the specific of those individuals who are in transition.

2. For the remainder of this issue, I want to throw a number of thoughts at you, and try to see were the responses show interest:

   a. New Regulations on Inmate Discipline – It appears that NCR 15-11 was adopted on May 24 of this year. It deals with a new step in the 115 process, noting if there is any mental illness which might impact on the rules violation. Once you get beyond the idea of mental illness as meaning crazy, I suggest you consider this in somewhat the same context as SB260 and SB261; if the juvenile offender did not have a mental capacity to realistically foresee the consequences of their actions, or otherwise be unduly susceptible to influence by peers, those factors should be taken in mitigation of the crime. I would respectfully suggest that likewise, a mental illness or disorder ought to be consider in mitigation of the violation for which a 115 might be issued, and this new regulatory change seems also to suggest that. Then the question becomes, why isn't PTSD identified as one of the mental disorders that should be taken into account?

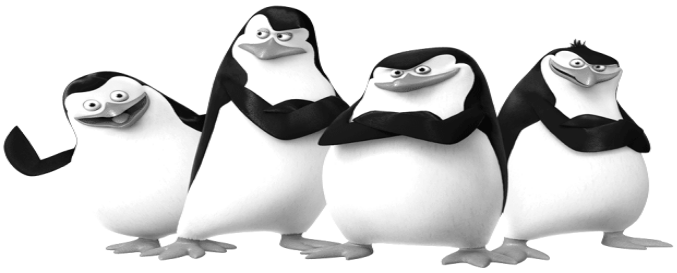
   b. Along the same lines, is it my imagination, or are the BPH commissioners and deputies at a loss for how to consider the impact of PTSD on the life crime? We're researching the subject and should have some more information to throw in the mix next issue.

3. Special thanks to the Associate Justice of the California Court of Appeal who apparently got a retired fellow jurist to provide pro bono legal assistance to a Folsom vet for his next parole hearing. Names withheld to protect them from abuse of the courtesy, but nonetheless, a sincere thank you to all involved. I am also told that independent legal assistant Jo Bracken has also been instrumental in helping that Folsom vet prep for his hearing. More amazing, all this help was delivered from Los Angeles & Orange County up to Folsom. Please say a prayer of thanks for those who care.

4. On the down side, the commissioners apparently have little knowledge of and respect for the veteran's self-help groups. Somehow, WE have to make them aware of your curriculum, efforts, and results, since unknown appears to be synonymous with un-respected. And by the way, to the vet at Folsom; the attorney can't do it for you.

I think that's my space limit. Look forward to responses, and input, ideas and suggestions. To all, hang in there; lots of changes in the past few years. I've had the pleasure of meeting a former youthful offender LWOP, released and employed – there should be hope!

GANG? DISRUPTIVE GROUP? MAYBE THAT'S US!



We've long made it a practice to try and know the answers to the questions before we ask the questions, and part of doing that is keeping up on the policies, practices and propaganda of those on the other side of the 'criminal justice' equation. You know, the 'authorities.'

So whereas the Sacramento County District Attorney's office has offered a Citizens Academy yearly, where every-day citizens could learn all about the practices of law and justice, we thought that sounded like an opportunity to get information straight from the horse's mouth. Or whatever part of the horse was moving.

Two of our intrepid staff-volunteers enrolled, passed the background check (not a very good one, apparently) and sacrificed one evening a week for 10 weeks to get an earful from DAs, police, and even a nominal appearance by a public defender, all to put them in the know about what's up in crime. And they got neat, spiffy certificates of graduation too, which we promptly hung on our office wall—sort of like putting a chrono in your parole packet.

And we'll be honest, while we didn't do it just for the chrono/certificate, we didn't expect to learn anything greatly significant, and that proved to be the case. As expected, the Academy was more propaganda and publicity than information and enlightenment. But there was one interesting presentation that really made us stop and think. And realize who and what we are. And we'd like to thank the Sac County DA's office for bringing us this realization.

We're a gang. A disruptive group. A posse. Maybe even a syndicate or a cartel.

How do we know? Because the authorities were good enough to give us the 10 hallmarks of a gang, mentioning that any group only has to meet 2 of those 10 be considered a gang. Only 2; we hit 5.

So here are the things that make LSA a gang:

1) We associate with criminals. Yeah, that would be you guys.

2) We travel in groups of 3 or more. Our normal posse is 3-6.

3) We dress alike. LSA T-shirts and jeans are uniform of choice.

4) We speak a special lingo. You know, things like PTA, BPH, RVR, CRA.

5) We self-identify as a cohesive group. Well, that we do. We have to be us, nobody else wants to be.

And that, apparently, makes us a gang. Or disruptive group, as CDCR now labels such groups. We'll own that too, we're pretty disruptive of the status quo.

So we're embracing our gang identity, and currently working on writing a rap, because every gang has to have a rap. Then we'll put it to music and video tape the results. It may be the next YouTube hit or maybe will go viral on the internet.

Only thing missing at the moment is a name for our gang….LSA doesn't have much of a street vibe to it and we can't call ourselves a bunch of persistent middle-aged broads anymore, as nearly half our Board of Directors is male and our Advisory Board of paroled lifers is all male. Maybe the Criminogenics. Or the Lifer-Lovers. Or the Observers.

The realization that we qualify as a gang has opened up a whole new field of possibilities for us. We'll probably need some sort of hand sign too, but the one that comes to mind is already pretty well known.

In all seriousness, we don't mean to make light of gang actions or involvement. Gangs, both the street and prison variety, have wreaked havoc on countless lives and sent many to prison with life sentences. There's nothing attractive, honorable or worthwhile about a gang.

cont. pg. 42

But at the same time, the over-reaction of those 'authorities' to what constitutes a gang is both maddening and troubling. The 5 'hallmarks' that can identify LSA as a gang could also be applied to police. Or correctional officers. Or even parole agents.

And if you only have to hit 2 (say, dressing alike and self-identifying as a group) to be a gang, Girl Scouts, fraternities and sororities could qualify. As could some religious groups or organizations that do great pro-social works, like the Shriners. Wonder how those groups and organizations would feel about being labeled a gang?

So when we do our rap video (yeah, we're gonna do it, it's too enticing not to) you can be sure it will be done with tongue firmly in cheek, and in the hope that a little dark humor will shed some light on the ridiculous reaches for 'enhancements' in some quarters, all in the name of being "tough on crime" and handing down longer sentences.

Hey DAs~does that have a familiar ring?

(*LSA Editorial cont. from pg.4*)

still reaching out to their fellow parolees. And those still inside should be asked not just about their 'criminogenic needs,' but about their needs coming home. How about help getting IDs for lifers before release? A little pre-release course on debit cards and the internet?

What do those still going before board need, may be help in getting new information into their C-file? Don't be all about the big splash, the huge issues. Take a look at the small areas, both inside prisons and in the world that need attention.

We're hoping CDCR continues to talk to all parties, all stakeholders in the equation, not just those that fit the message-of-the-moment or program-we-can-tweak-for-lifers. We have a lot to learn from each other, and no one has been at this longer than those of us with boots still firmly on in the muddy ground.

We only hope everyone jumping on the lifer bandwagon for the right reason—to further the rehabilitation and reentry of this group of men and women, to promote a healed and cohesive society, and not merely for the profit lifers represent, now that they've become the latest hot property.

LSA

Living Real Life!

Christopher Stewart

How long were you in?
21 years

How long have you been out, and where did you parole from?
10 months, paroled from Valley State Prison to Sacramento.

What are you doing now?
Just started as lead man for PitStop Community Program.

What helped you most in being found suitable?
I learned from two hearings to be able to make a connection with the victim's family, the commissioners and the DA.

Did you parole to transitional housing? Was it helpful?
I paroled to Restoration House in Sacramento, and it was absolutely pivotal. I would not have done nearly as well had I not felt safe to come home. I truly thought people would hate me because I'd been in prison, but with the guidance of staff and fellow residents at Restoration House, I learned it simply wasn't the truth.

What was your biggest surprise on coming home?
Finding out a 30 year old DUI conviction was still in effect and I had to do 18 months of DUI classes to get full restoration of my license. A lesson for everyone with a DUI on their record.

Any advice for those still inside, preparing to come home?
You've already chose who you are at this point. Now is definitely the time to make the choice "who do you want to be?" because you can be whatever you want to be whatever you wish but it is that what is going to be what sustains s you through life. Always keep looking forward; the future is tomorrow, not today. Be you. Be amazing.

What are you doing in terms of pro-social activities, giving back?
Pitstop is an amazing program just launched in Sacramento for staff to monitor self-cleaning bathroom facilities for homeless, keep needle exchange going and dog waste stations open for homeless. We also do data collection on who uses the facilities and what it takes to keep them open.
Why would a job like this mean so much to a person like me? Simply put, because I'm able to give back to my community, the one that I took so much from and I now come home to. There is a huge problem in Sacramento County and surrounding areas because of lack of facilities and people relieving themselves in public, so local governments are putting out these self-cleaning sites.
Also the man running the show is a like-minded man who will make every effort to make this rewarding for me personally—and it's a 40 hours a week of employment.

What's next for Chris Stewart?
Getting married to an amazing woman, one I waited my entire life to meet. I own a home, a new car and a rescue kitten. What more could I ask for? My employment is both pay and worthy as well as a definite boon to my community.

I love my life, always have always will. Whatever comes next will be up to God's grace. But I trust He will put me with and where I am needed the most.

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!)

NORTHERN CALIFORNIA

Bay Area-

Sacramento-

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

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

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

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

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

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

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

LIFE SUPPORT ALLIANCE
Doing Life as a Family Seminars

JULY 16, OAKLAND
SEPT. TBA, HAWTHORNE
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 & Why

Speakers
Lifer Attorneys
Parole Agents
Paroled Lifers

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

Stamps!

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we really appreciate them.
THANKS!!!!

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Life Support Alliance
will begin GALLERY SHOWINGS
throughout California FALL 2016
of
ART from the INSIDE

Artists recieve photo-graph of all submissions and 30% of sold work.

START CREATING NOW!
- paintings
- drawings
- jewelry
- ETC.

Watch for UPCOMING details ON HOW, WHEN & WHERE TO SEND YOUR ART

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