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CALIFORNIA LIFER NEWSLETTER

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by John E. Dannenberg

***Editor's Note**: The commentary and opinion noted in these decisions is not legal advice.*

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On January 9, 2017, the petition for writ of certiorari was denied. U.S. Supreme Court case number 16-6598. This concludes all legal process in this case.

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Reviewed in this Issue:

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STATUS OF *IN RE ROY BUTLER*

In re Roy Thinnes Butler

CA Supreme Court No. S237014
___Cal.App.4th___; CA1(2); A139411
May 15, 2015

On January 17, 2017, CDCR filed its opening brief on the merits. On January 25, 2017, the Court granted Butler's request for an extension of time until March 20, 2017 to file his answer brief on the merits.

For the record, the question on review is: Should the Board of Parole Hearings be relieved of its obligations arising from a 2013 settlement to continue calculating base terms for life prisoners and to promulgate regulations for doing so in light of the 2016 statutory reforms to the parole suitability and release date scheme for life prisoners, which now mandate release on parole upon a finding of parole suitability? (*In re Butler* (July 27, 2016, A139411) [nonpub. order])

GOVERNOR'S REVERSAL OF GRANT OF PAROLE, WHICH WAS ABATED ON HABEAS CORPUS BY THE SUPERIOR COURT, IS REINSTATED BY THE COURT OF APPEAL

In re Joseph Shelton

CA1(1); A147754
December 14, 2016

In an unusual sequence of events, Joseph Shelton's grant of parole was snuffed out by the state Court of Appeal.

> Joseph P. Shelton was sentenced to 40 years to life for the brutal kidnapping and murder of two college students. After serving over 30 years in prison, the Board of Parole Hearings (the Board) granted Shelton parole. The Governor subsequently reversed the Board's decision, concluding Shelton posed a current danger because he had minimized his role in the crimes. A few months later, the Ninth Circuit Court of Appeals granted Shelton habeas relief, finding a prosecutor had concealed concerns about

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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 nonprofit, 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 nonpolitical but not nonpartisan. 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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EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility

www.lifesupportalliance.org

Our editorial this issue is from Dr. Meredith Smith, who recently left the employ of CDCR after many years helping her patients restore their lives and humanity. Dr. Smith speaks to the heart of what it means to change your life, become suitable and rebuild. You are not your crime, but the work of changing your life is yours to do.

A Letter to All

As I retire from working in the prison I write this letter for each of you. I have gained a deeper appreciation of the healing process. You have taught me about shame, kindness, courage and acceptance. As a person whose cousin was murdered, I know the enduring devastation created by his death. I am also the cousin of a man who murdered and am aware of the struggles of his early years which created the disconnect with himself and ultimately with humanity. The lives of my cousins and what I have learned from each of you has reinforced my belief in Restorative Justice as it provides a healing opportunity for both the victim's family and for the person who created the pain.

I wish each of you the best as you continue your journey. Learn your lessons, challenge your old thought patterns, tackle your demons and continue to demonstrate bravery while you search for healing. Don't accept having a lifetime label for the worst moment of your life. Make amends. Stop sabotaging yourselves with cell phones and drugs. Insulate yourself from negative thoughts and negative people. Be prepared to contribute to your communities. Do better. Don't short change yourselves or the lives you have damaged. We all (you included) deserve better. We need you to return home far better than when you left.

Thank you for allowing my presence in your lives. Thank you for the personal strength you demonstrated as you sought understanding and healing. I will continue to expect the best from each of you and will welcome you home when that time arrives.

Sincerely,

Meredith Smith, PhD

California State Prison-Solano
2016-2016
Ironwood State Prison
2001-2010

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> the mental competency of Norman Thomas, a key witness in Shelton's criminal trial. Based in part on the Ninth Circuit's opinion, the trial court granted Shelton's petition for a writ of habeas corpus challenging the Governor's parole decision. The trial court found the Governor erroneously relied on Thomas's discredited testimony. The Attorney General now appeals from that decision. We find the Governor's decision was supported by some evidence, even without Thomas's testimony. Accordingly, we reverse.

In November 1981, Shelton was convicted of the first degree murder of Kevin Thorpe, the second degree murder of Laura Craig, two counts of kidnapping, two counts of theft, and two weapons charges, and one special circumstance with respect to the Thorpe murder. Shelton was initially sentenced to life without parole on that charge and 15 years to life for Craig's murder, to be served consecutively. After an appeal, the special circumstances were struck and Shelton was resentenced to 40 years to life.

In December 2014, Shelton, then 62, appeared before the Board. His FAD psychological evaluation concluded that Shelton represented a low risk for violence and presented with non-elevated risk relative to life-term inmates and other parolees. Shelton had told the psychologist drugs impaired his ability to think clearly and contributed to his poor decisions at the time of the commitment offense. He has since attended NA, and took advantage of various work, vocational training, self-help programs and educational opportunities. Shelton discussed his crimes during both the risk assessment and parole hearing.

The Board granted parole. The commissioners gave special consideration to the fact Shelton qualified for the Elderly Parole Program because he was over the age of 60 and had spent over 25 years in prison. The Board also based its decision on Shelton's lack of violent behavior prior to or after the crime, his acceptance of responsibility, his self-help participation, his educational and vocational achievements, and the psychologist's findings that he had insight into and had accepted responsibility for the crime. Despite finding Shelton's description of the crimes hard to believe, the Board could not link Shelton to current dangerousness because of the other factors discussed above.

In April 2015, the Governor reversed the decision to parole Shelton, stating Shelton's minimization of his involvement in the crimes was extremely troubling. Specifically, the Governor took issue with Shelton's statement he was merely a follower who feared he or his family would be killed if he did not go along with his crime partner's plan. The Governor was also concerned Shelton denied assaulting the victim, and by his claim that he unsuccessfully tried to help her escape. The Governor explained: The record indicates that Mr. Shelton was far from a passive participant in these crimes. Mr. Shelton and the other two men planned to kidnap and assault a woman. Mr. Shelton and the others also discussed killing whoever they kidnapped. He willingly followed his crime partners in his own vehicle to his ranch, and shot one victim several times with a machine gun. . . . He was

present when the second victim was murdered and helped dispose of her body. While Mr. Shelton purports to accept responsibility for his actions, his statements minimize his involvement and culpability, and show that he lacks insight into his reasons for kidnapping and murdering the two victims.

Shelton, meanwhile, had separately been pursuing habeas relief in the federal courts of his original conviction. Four months after the Governor's reversal, he won relief in the Ninth Circuit U.S. Court of Appeal.

> In August 2015, about four months after the Governor's reversal of the Board's decision, the Ninth Circuit issued an opinion granting Shelton habeas relief, finding the prosecutor in Shelton's criminal trial committed Brady error by concealing evidence (*Shelton v. Marshall, supra*, 796 F.3d at p. 1089), and on a petition for rehearing the court directed the district court to issue a writ ordering the state to retry Shelton for the murder of Thorpe within a reasonable time (*Shelton v. Marshall* (2015) 806 F.3d 1011).

In a separate opinion, the Ninth Circuit held evidence of the prosecutor's secret deal with Thomas was not material with respect to Shelton's convictions for the second degree murder of Craig, or the kidnapping and theft convictions. (*Shelton v. Marshall* (9th Cir. 2015) 621 Fed. Appx. 873, 874.) The court found that, even without Thomas's testimony, there was "overwhelming evidence" of Shelton's intentional participation in the kidnapping of Thorpe and Craig. (*Ibid*.) Moreover, Thomas's testimony regarding Craig's death was largely consistent with Shelton's own testimony. (*Id*. at pp. 874–875.) As to the theft convictions, there was evidence Shelton was wearing Thorpe's boots when he

> turned himself in, his fingerprints were on a car stereo removed from the victim's car, and Shelton acknowledged receiving $100 from Silva the day after the kidnapping. (*Id*. at p. 875.)

On June 23, 2015, Shelton filed a petition State habeas petition, arguing the Governor erred in reversing the Board. The trial court granted the writ, finding the Governor's decision was not supported by some evidence Shelton would be a current threat to public safety if released. Citing to the Ninth Circuit's decision, the court also found the Governor had relied on tainted evidence from Thomas, and that evidence could not be used to justify the Governor's decision to overturn the Board. The State then appealed this writ to the CA Court of Appeal – the decision of which is reported here now.

The Court of Appeal rejected the superior court's acceptance of the Governor's reliance on the lately-determined tainted evidence at trial.

> The central question presented is whether some evidence supports the Governor's finding that Shelton is currently dangerous and would pose an unreasonable danger to society if released from prison. The Governor's decision was based on his conclusion Shelton lacked insight because he minimized his involvement in the underlying crimes. The trial court found the Governor's denial of parole was an abuse of discretion because the Governor relied on tainted evidence from Thomas, which Shelton was unable to impeach at trial because of Thomas's secret deal with the prosecutor. However, even without Thomas's testimony, there is evidence to support a finding Shelton lacked insight into his crimes. Accordingly, we conclude some evidence supports the Governor's decision.

The Court of Appeal noted that the Ninth Circuit's ruling was based on a procedural error; other trial evidence of Shelton's guilt was "overwhelming."

> At the parole hearing, Shelton painted himself as an unwilling participant in the crimes, and stated he acted out of fear for himself and his family. But even the Ninth Circuit, which granted Shelton partial habeas relief based on the tainted evidence from Thomas, rejected Shelton's coercion defense to the kidnapping charges. The court explained: "Nor was there a reasonable probability that, had Thomas been totally impeached, the jury would have accepted a coercion defense to the kidnappings. This defense required a threat of immediate, rather than future, danger to one's life. [Citation.] Shelton had an opportunity to leave when he drove the truck behind the victims' car as well as later that evening when Silva and Thomas left him alone in the cabin with Craig. Shelton testified that he did not try to leave because he feared that Silva would kill him and his family, but this was a threat of future—not immediate—danger." (*Shelton v. Marshall, supra*, 621 Fed. Appx. at p. 874.) The Ninth Circuit also noted that Shelton himself testified he stayed with the victims while Thomas and Silva were absent. (*Ibid*.)

The Court of Appeal cited to more evidence in the parole hearing record.

> We also note the Board, which granted parole, was also concerned Shelton lacked insight. In explaining the Board's decision, one commissioner told Shelton: "[T]his was an absolutely horrific, unconscionable case. And the way that you describe it is hard to swallow as far as, you know, [']I was just there. I was just a part of it and I was in fear

> and that's why I went along with this all.[']
> You've been here for what, 32 years. You've said the same thing over and over again. So for me as a Commissioner, that was very difficult because to me it suggests that you're minimizing your behavior and that you are not taking responsibility for your crime." The Governor expressed similar concerns, but placed greater weight on Shelton's lack of insight. We are in no position to second-guess the Governor's determination or reweigh the evidence.

Shelton's additional argument that he should be cut some slack by the Elderly Parole Program didn't wash with the Court of Appeal.

> Even if the evidence would provide some evidence of future dangerousness, Shelton argues the Governor's decision cannot stand because the Governor failed to consider various factors, including the Elderly Parole Program, which requires special consideration of a prisoner's advanced age, long-term confinement, and diminished physical condition. But the Governor did acknowledge Shelton's age and the length of incarceration. The Governor also indicated he had considered other evidence in the record, including the Board's finding that Shelton was suitable for parole because of his advanced age, along with a variety of other factors. This was sufficient. The Governor was not required to describe in his decision "the exact or relative weight given any particular circumstance." (*In re Stevenson* (2013) 213 Cal.App.4th 841, 862.) "As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

Accordingly, the appellate court reversed the superior court's grant of habeas relief, which then had the effect of reinstating the Governor's reversal. Not known at this time is whether the state will retry Shelton, now not using the disqualified testimony from the first trial.

BOARD'S DENIAL OF PAROLE, LACKING "SOME EVIDENCE OF CURRENT DANGEROUSNESS," REMANDED FOR NEW HEARING

In re David Perez

---Cal.App.4th---; CA1(2); A145279 & A148392
December 29, 2016

In this opinion, the First District Court of Appeal made it abundantly clear that not only would the finding of an absence of "some evidence" of *current* dangerousness bar the Board from denying parole, but that such a finding would estop the Governor's review of the decision, thus requiring immediate parole.

> Petitioner David Perez is a state prison inmate convicted of kidnapping during the commission of a carjacking and kidnapping to commit robbery, committed when he was 16 years old. He was sentenced to seven years to life in prison in 1999. He has petitioned for writs of habeas corpus, following the October 2014 and April 2016 decisions of the Board of Parole Hearings (the Board) denying him parole. He contends the Board's decision at the 2014 hearing, based on his purported lack of insight into his criminal conduct and his disciplinary history in prison, was arbitrary, in violation of due process, because it was unsupported by some evidence of his current dangerousness. He also contends the Board's failure to set a base term and an adjusted base term for him in accordance with the stipulated order in *In re Butler* (A139411) issued by this court on December 16, 2013, constituted a denial of both his right to due process and his right to be free from cruel and unusual punishment. Petitioner likewise challenges the Board's subsequent

decision at the 2016 hearing to deny parole based on his failure to take responsibility for the life crime.

As we shall explain, because the evidence relied on by the Board at both the 2014 and 2016 hearings is not rationally indicative of current dangerousness, its decisions violate due process. We shall therefore grant the consolidated petitions and remand the matter to the Board for further proceedings as set forth in this opinion. (See *In re Prather* (2010) 50 Cal.4th 238, 244 (*Prather*).) However, because the Board recently set a base term and adjusted base term, we conclude petitioner's claim challenging the Board's failure to do so is moot.

David Perez was convicted in 1999 of kidnapping during a carjacking, kidnap to commit robbery, and was armed with a gun. He was 16 at the time, and was sentenced to 7-life, plus one year for the gun. He became eligible for parole in 2005, and has currently served 18 years.

He was repeatedly denied parole. After his 3-year denial in 2014, he filed a writ petition. While that was pending, he had another 3-year denial in 2016. He petitioned for relief on that denial as well; the Court of Appeal consolidated the cases.

The Court explained that it would reject the state's request to deny the earlier petition, because of the subsequent hearing "mooting" it, and it would reject the state's request to require Perez to take his second petition initially to the superior court, rather than, as here, directly to the Court of Appeal.

Citing *In re Roberts* (2005) 36 Cal.4th 575, 593, respondent asserts that because petitioner did not file a habeas petition in the trial court before filing his 2016 petition in this court, we should remand the 2016 matter to the trial court to initially resolve his claims. A panel of this court rejected a similar claim in *In re Kler* (2010) 188 Cal.App.4th 1399, 1404 (*Kler*), in which we found it appropriate to directly review a challenge to a denial of parole that followed the reversal of a prior denial. We explained: "This case presents an 'extraordinary' situation justifying the exercise of our constitutional prerogative. . . . [H]ere, the issues presented directly flow from our prior decision and the limited hearing conducted after our decision. As such, no court is better suited to first consider this petition; no court is more familiar with the intricate details of the case. Thus, we find this to be one of the rare cases where the directive that 'a habeas corpus petition challenging a decision of the parole board should be filed in the superior court ([*In re] Roberts*, . . . at p. 593) does not apply.' " (Accord, *In re Scott* (2005) 133 Cal.App.4th 573, 578.)

Although, in this case, unlike in *Kler*, the issues raised in the new petition do not relate to a prior decision of this court, the same rationale applies since those issues do flow directly from the now consolidated habeas petition filed in this court following both the 2014 parole denial and the trial court's subsequent denial of petitioner's habeas petitions filed in that court. We therefore will exercise our original habeas jurisdiction and address the merits of the petition from the 2016 parole denial. (See *Kler, supra*, 188 Cal.App.4th at p. 1404; accord, *In re Cerny* (2009) 178 Cal.App.4th 1303, 1305, fn. 1 [Division Three of this District considered a habeas petition challenging a 2008 denial of parole that was filed in appellate court in first instance, where earlier habeas petition challenging 2007 denial of parole was pending oral argument].)

We also decline respondent's invitation in its return to the 2016 petition—in a one-

sentence statement containing no legal argument—to find that because petitioner participated in a new parole hearing in 2016, his claims related to the 2014 denial are moot. (See *In re Cerny, supra*, 178 Cal.App.4th at p. 1305, fn. 1 [consolidating two habeas petitions challenging 2007 and 2008 parole denial decisions, where petitions were not identical, but "raise[d] key issues with significant overlap"].) As petitioner puts in his traverse, the April 2016 parole denial "simply exacerbated and enlarged upon the arbitrariness of the Board's denial of parole to him in 2014 because he has been entitled to a grant of parole since at least 2014 and yet the Board repeatedly has refused to grant parole on increasingly arbitrary bases."

On October 20, 2016, the Board set a base term and an adjusted base term of 10 years for petitioner's life crime.

The Court recounted the FAD psych report for Perez' institutional behavior.

He had also participated in numerous self-help groups while incarcerated. Since his last parole hearing in 2011, he had participated in, inter alia, "In-Building Self Help Program Associations as well as Criminal and Addictive Thinking Short-Term, CA New Start Transition Program, Employment Readiness Program, Victim's Awareness, Conflict Management, KATARGEO Going Home and Substance Abuse Program."

Dr. Smith reported that petitioner had "demonstrated some problems with abiding by the rules and regulations of the institution" in that he had been issued a total of six "CDC-115's," including two for violent behavior: participation in a riot in 2000 and battery on a peace officer in 2003. His most recent CDC-115 was issued in 2012 for excessive physical contact. He had also been issued a "CDC-128A" in 2007 for disobeying "C status procedures."

The psych added further observations and comments on Perez.

In assessing petitioner's risk for violence, Dr. Smith believed that historic factors indicated "pervasive antisociality characterized by early behavioral problems, juvenile delinquency, problems with abiding by conditional release, commission of varied criminal offenses, manipulative behavior, lack of remorse and failure to accept responsibility for his own actions." In her analysis of clinical factors, Dr. Smith stated that petitioner "demonstrated one factor in the clinical domain that is associated with an increased risk for violence. He has a lack of insight with regard to his personality, behavior and criminal past. He chose not to speak about the crime. . . . He said '[he was] very sorry for what happened to [the victim] with that crime.' It should be noted that [petitioner] has not discussed the crime in previous evaluations as well. He maintains his innocence and has yet to discuss or accept responsibility for the crime. Given he has not accepted responsibility for his crime and declined to discuss anything related to the crime he has yet to express any credible remorse for his behavior."

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The Court noted that Dr. Smith's conclusions were qualified.

Regarding the risk of future violence, Dr. Smith opined that petitioner "continues to present with risk factors which suggest a moderate level of risk. Notably, he continues to accrue CDC-115's since his last hearing date. This willingness to break rules may impact his

ability to follow parole rules in the community. He has yet to accept responsibility for the crime or develop an understanding with regard to the causative factors to the crime." Petitioner's understanding and exploration of his criminal behavior in general was also limited and he was therefore unable to develop adequate risk management strategies to avoid such behavior in the future. Dr. Smith concluded, inter alia, that petitioner "can mitigate his risk by taking full responsibility for the offense [and] developing an understanding of his motives for the life crime and additional criminal behavior . . . ."

At his hearing, Perez denied his guilt of the offenses, but admitted he was the "type of person" who would have committed them – and was thankful for his prison experience to straighten himself out.

Petitioner then affirmed that he had always maintained that he was not involved in the life crime in 1997. The commissioner stated the Board's understanding that petitioner was not required to admit the circumstances of the life crime, but asked about what kind of person he was in 1997. Petitioner stated that he "was exactly the kind of person that committed all those crimes before 1997. I was still trying to be that macho-ass kid." After returning from the boys' ranch, he quickly found himself back in trouble and knew that his "behavior was escalating fast." He was "still at this time the type of kid who would have committed this crime, no problem. . . . [G]iven the opportunity to do this, this is the kind of thing I would have did." Petitioner then stated that he was "a very thankful person today" because of what had been provided to him since he had been arrested. He explained, "When I created victims, I didn't ask them for their rights. I didn't offer that to them. I didn't think about, you know, what they deserved." He noted that he was two classes away from

……see Petitioner pg. 11

....from petitioner pg. 10

an "AA degree," had learned vocational trades, and had "a different kind of maturity now," stating that he was "hell of ashamed." And, even though it was frustrating to be convicted for something he had not done, "[i]f I didn't come to prison for this, I could have very easily been coming to prison for something more serious than this." He was thankful to have been taken off the streets "because I think it saved my life and it just as very well could have saved other people's lives."

Petitioner explained how he had changed since he was younger, when "my only self-worth valued from how other people saw me. I wanted to be a criminal." His values had completely changed since then; now, "[i] nstead of seeing my father as being a failure, he's my rock, and I value family. I value hard work. I value struggles [that] shape you and make you who you are. . . . I value people's rights and their freedoms from being injured, all right, from the violence and stuff that crime perpetuates out there. Life is precious. . . . I value the struggle that it's been to go home . . . because I've learned something every step of the way. . . ."

The panel was just not satisfied that Perez really had dealt with what had made him a criminal, notwithstanding youth considerations it was required to apply.

At the conclusion of the hearing, the presiding commissioner acknowledged that the Board must give great weight to the diminished culpability of juveniles, but stated that the panel had nonetheless determined that petitioner still posed an unreasonable risk of danger to society or a threat to public safety, and therefore found him not suitable for parole. With respect to petitioner's insight, the commissioner stated, "In our discussions today, your statements were very, very general. You were very general about your causative factors and . . . were very—I don't want to say the word clinical, but you were almost to that point where you have . . . this understanding in a—in an educational sense of, you know, you said, 'I was an insecure person and I needed to compensate by, you know, being involved with negative influences. I gravitated towards negative influences.' So it was very general, and we kept coming back to the specifics of why. And we understand that at 16 you may not have understood it, but at 33, we need to make sure you understand it so that when you're back in the community, you're not going to be that person who is gravitating towards the negative influence who is feeling the insecurity and the need to compensate by going towards negative influences. Because quite frankly you hadn't addressed yet to this Panel to our satisfaction of why you did what you did, why you want to be a criminal, what was the attraction to the criminal lifestyle. . . . [Y]ou kept saying, 'I had negativeness [sic] in my decisions in the past,' and it's all still very general. And you've been doing all of these self-help programs, so that's why we kept delving into why, the why, why, why."

The presiding commissioner then discussed petitioner's rules violations in prison, stating that "what caused this Panel a lot of trouble, is what is preventing you from following the rules. You go a few years and you make great decisions, and then you make bad decisions." The commissioner stated that these bad decisions coupled with petitioner's inability to explain "the causative factors" of his behavior made him a threat to public safety. He noted that these concerns were echoed as well in the recent risk assessment, in which the psychologist noted that "you have exhibited poor judgment, you have an underdeveloped sense of responsibility, a lack of appreciation for the consequences of your behaviors, inability to comply with rules and regulations, which was

evident during your adolescence and at the time of the commitment of the crime."

The presiding commissioner further stated that because petitioner was a youth offender, no base term calculation was required. The Board then issued a three-year parole denial.

The Solano Superior Court found that there *was* "some evidence" of current dangerousness upon which the Board had relied.

The court denied the habeas petition after finding that there was some evidence in the record to support the Board's conclusion that petitioner presented "a current and unreasonable danger to the public."

In particular, the court found the evidence showed that petitioner "lack[ed] insight into the causative factors of his criminal behavior," which was indicative of current dangerousness; that he continued to break prison rules, "willfully engag [ing] in misconduct [and] exhibiting criminal thinking, despite knowing the rules," and that the 2014 psychological evaluation indicated that he presented "a moderate risk of violence in the community," with the psychologist explaining "that she reached this conclusion based on various factors beyond [p] etitioner's denial of responsibility for his life offense. [Citation.]"

At his 2016 hearing, denial of the crime continued to weigh on the Board.

At the conclusion of the hearing, the panel found that petitioner "poses an unreasonable risk of danger or a threat to public safety, and is therefore not eligible for parole." The presiding commissioner stated that the panel had considered the fact that petitioner was a juvenile when he committed the life crime and also noted that "he has engaged in institutional activities that indicate that he has the ability to follow the law, and he has not had any major rule violations for some time." The panel found, however, that those factors were "far outweighed" by other factors: "Specifically, we find that the life crime is still relevant here today."

The presiding commissioner explained that petitioner had asserted that he was innocent even though he was tied to the crime by latent prints and the victim's positive identification of him as the driver. "So the life crime has never been reconciled by [petitioner]." He then said the Board respected petitioner's right to claim his innocence, but that "this Panel finds that your explanation for the life crime is implausible and find that it by evidence [sic] of an implausible denial due to the ongoing evidence in this case. . . . He's never—he just says he's innocent. He's never talked about anything where it shed light on this. And that's his right. The court also said that they support us when we have [sic] no insight. We have no responsibility, we have no level of insight, and how can you have remorse when you don't have insight?" The presiding commissioner continued, "An inmate who refuses to interact with the Board at a parole hearing deprives the Board of a critical means of evaluating the risk to public safety . . . ." The commissioners also relied on Dr. Smith's 2014 evaluation, in which she had found that petitioner needed to "accept responsibility for the crime or develop an understanding with regard to the causative factors to the crime."

In addition, the deputy commissioner stated that he found petitioner's claim that he knew

> the person who had driven the victim's car during the crime, but had not used that information to attempt to exonerate himself, to be "irrational and it makes no sense, and that bears indicia of implausibility." The commissioner also found it implausible that the victim would have identified petitioner, a young teenager, as the driver when petitioner asserted that the actual driver was older than him. He believed that "when all the facts point to implausibility, then that also then turns to current dangerousness in remaining married to the implausible tale."

Twenty-four pages of legal analysis later (it's published; you can read it in the law library), the Court, relying heavily on its recent *Stoneroad* and *Swanigan* decisions, found that refusal to admit to the crime was wrongly used against Perez, and that youth factors were not given their due.

> Finally, as at the 2014 hearing, in reaching their decision, the commissioners at the 2016 hearing relied on Dr. Smith's flawed psychological evaluation and assessment of dangerousness, in which she improperly based her findings on petitioner's refusal to take responsibility for the life crime. (See Pen. Code, § 5011, subd. (b); Regs., § 2236.)

The evidence from the 2016 hearing, examined together with the evidence from the 2014 hearing, compels us to conclude that the Board was determined to find a way to deny petitioner parole, even as the evidence supporting a finding of current dangerousness diminished with each year that went by. The records from both parole suitability hearings make clear that petitioner, a young man whose life crime, while serious, did not lead to any injuries and occurred some 19 years ago when petitioner was 16 years old, has been an exemplary prisoner for many years. He has repeatedly

…….see evidence pg. 14

…….from evidence pg. 13

been lauded by his supervisors and has used his time in prison to achieve as much as possible educationally, vocationally, and personally, and has even, as he put it, been "paying it forward" by facilitating a group of young men with the goal of supporting them in becoming contributing members of society. Unable to justify petitioner's continued detention on any lawful ground, the commissioners at the 2016 hearing latched onto his continuing claim of innocence, violated the law, and improperly found him unsuitable based on his refusal to admit to having committed the life crime.

Like the 2014 decision, the Board's 2016 parole denial based on petitioner's failure to take responsibility for the life crime does not provide some evidence demonstrating that petitioner poses a current threat to public safety. The Board's decision, therefore, cannot stand. (See *Shaputis II, supra*, 53 Cal.4th at p. 209; *Lawrence, supra*, 44 Cal.4th at p. 1225.) In light of the fact that the Board has now rendered two decisions that are contrary to law and not supported by any evidence of current dangerousness, we shall make the following order proposed by petitioner's counsel at oral argument: Upon remand of this case, the Board will have 35 days to do one of the following: (1) It may choose to review the full record to determine whether there is any evidence, which does not rely on the purported evidence of petitioner's dangerousness rejected in this opinion, that it believes could provide a basis for finding that petitioner is currently dangerous. (See *Prather, supra*, 50 Cal.4th at p. 258 ["a judicial order granting habeas corpus relief implicitly precludes the Board from again denying parole—unless some additional evidence (considered alone or in conjunction with other evidence in the record, and not already considered and rejected by the reviewing court) supports a determination that the prisoner remains currently dangerous"].) If any such evidence is found in the record, the Board shall immediately set an expedited parole hearing, at which the additional evidence can be explored and petitioner's parole suitability determined. If no such additional evidence suggesting current dangerousness is found during the review of the record, petitioner shall be granted parole immediately, subject to the Governor's review. (See Cal. Const., art. V, § 8, subd (b); Pen. Code, § 3041.2; *Prather*, at p. 251.) (2) In the alternative, the Board may choose to hold an expedited parole hearing within 35 days of remand, in the first instance, consistent with due process and this decision. (See *Prather*, at p. 258.)

Finally, on modification of its own order, the Court amended the above by deleting the portion containing the second to last sentence:

> "If no such additional evidence suggesting current dangerousness is found during the review of the record, petitioner shall be granted parole immediately, subject to the Governor's review. (See Cal. Const., art V, § 8, subd. (b); Pen. Code § 3041.2; *Prather*, at p. 251.)"
>
> Replace the deleted portion with the following:
>
> If no such additional evidence suggesting current dangerousness is found during the review of the record, petitioner shall be granted
>
> parole immediately.

The essence of this stark modification is apparently under the logic that if there was (by the Court's finding) no evidence of current dangerousness, and if the Board still does not find any on remand, then there is logically *no* evidence that the Governor could use to find Perez a danger, and with which to overturn the Board. It remains to be seen if the Governor agrees

with thus being stripped of his Constitutional authority to review the Board.

(Perez commenced his petitions *in pro per*; attorney Michael Satris was appointed by the Court to represent Perez after an Order to Show Cause issued.)

JUVENILE WITH 125-LIFE SENTENCE ENTITLED TO REMAND FOR HEARING TO MAKE A RECORD OF YOUTH FACTORS

In re Anthony Cook, Jr.

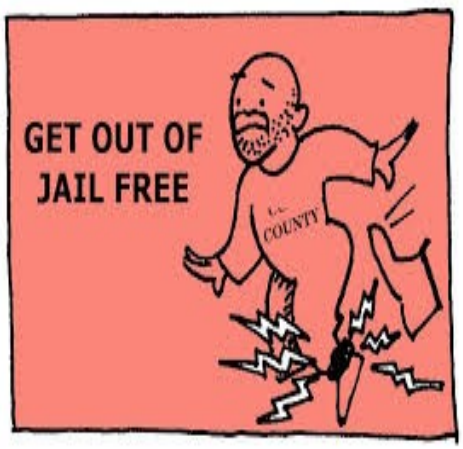
___Cal.App.4th___; CA4(3); G050907
January 10, 2017

In a published case, the Court of Appeal held that a juvenile sentenced to 125-life, whose adult conviction was final on appeal, could yet petition on habeas corpus for a hearing in the trial court wherein he could make a record of youth factors that would be considered at his future parole hearing.

Anthony Cook, Jr. had already tried to gain resentencing because of his juvenile status at the time of his life crimes, but was denied based on the recent change in the law that provide persons such as him future parole hearings.

> In 2009, the convictions against petitioner Anthony Maurice Cook, Jr. (Petitioner), for two counts of murder, one count of attempted murder, and firearm enhancements were affirmed in *People v. Shaw and Cook* (May 28, 2009, G041439) (nonpub. opn.). By petition for writ of habeas corpus, Petitioner challenged his sentence of 125 years to life in prison. Petitioner, who was 17 years old when he committed the crimes, contended his sentence was unconstitutional under *Miller v. Alabama* (2012) 567 U.S. [132 S.Ct. 2455] (*Miller*) and, as relief, asked to be resentenced.
>
> In *In re Cook* (Apr. 6, 2016, G050907) (nonpub. opn.) (*Cook*), we denied Petitioner's petition for writ of habeas corpus. We concluded, based on *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718], that *Miller* applied retroactively to cases on collateral review but that recently enacted Penal Code sections 3051 and 4801 had the effect of curing the unconstitutional sentence imposed on Petitioner. (*Cook, supra*, G050907.) In July 2016, the California Supreme Court granted Petitioner's petition for review of our opinion and transferred the matter to us with directions to vacate our decision and consider, in light of *People v. Franklin* (2016) 63 Cal.4th 261, 268–269, 283–284 (*Franklin*), "whether petitioner is entitled to make a record before the superior court of 'mitigating evidence tied to his youth.'"

In the intervening time, California passed new laws [PC §§ 3051 and 4801], comporting with *Miller* that give parole opportunities to persons such as Cook. Accordingly, the need for resentencing was moot. But his future parole hearing would need to reflect consideration of factors attending his youth, which must be found in the record. At sentencing, Cook was not given the opportunity to make such a record, and the Court of Appeal now remanded him to the trial court so that he could make such a record. The Court explained the intervening changes in the law.



The Supreme Court explained that if, after remand, the trial court were to determine the defendant did not have sufficient opportunity to make a record at sentencing, then "the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in [Penal Code] section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence." (*Franklin, supra*, 63 Cal.4th at p. 284.) "[The defendant] may place on the record any documents, evaluations, or testimony (subject to cross‑examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth‑related factors ([Pen. Code,] § 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Ibid*.)

In this case, Petitioner asserts, "the record of [his] characteristics and circumstances at the time of the offense is bare bones at best, with the probation officer's report consisting of less than a half page of 'personal history'; as opposed to ensuring a full and accurate record, the report noted that the information in that personal history section was 'not independently verified.'"

We agree with Petitioner. *In Franklin, supra*, 63 Cal.4th at page 284, it was "not clear" whether the defendant "had sufficient opportunity to put on the record the kinds of information that [Penal Code] sections 3051 and 4801 deem relevant at a youth offender parole hearing." Here, in contrast, it is clear that Petitioner was not given sufficient opportunity to make such a record. Petitioner's sentence was imposed before the decision in *Miller* and before enactment of Penal Code sections 3051 and 4801. We noted in *Cook* that the trial court, when sentencing Petitioner, did not consider his age, youthful attributes, and capacity for reform and rehabilitation. (*Cook, supra*, G050907.)

Thus, rather than direct the trial court to make the determination whether Petitioner had sufficient opportunity at sentencing to make a record of "information that will be relevant to the Board as it fulfills its statutory obligations under [Penal Code] sections 3051 and 4801" (*Franklin, supra*, 63 Cal.4th at pp. 286‑287), we will direct the trial court to conduct a hearing at which Petitioner will have the opportunity to make such a record.

The Court expressly rejected the state's attempt to deny Cook access to the courts via habeas corpus.

Respondent asserts that relief by writ of habeas corpus is unavailable to Petitioner because he is not challenging the legality of his restraint. Respondent argues: "[H]abeas corpus has traditionally been limited to providing a forum for challenges to a custodian's legal authority to hold a petitioner in custody or otherwise restrain his liberty or to the manner in which the petitioner is confined. It has not been used as a procedural mechanism for reopening or supplementing otherwise closed proceedings for any less fundamental purpose." The relief offered by *Franklin* is, according

to Respondent, available only by direct review.

The California Supreme Court's order directing us to reconsider the matter in light of *Franklin* strongly suggests the Supreme Court recognizes that the relief afforded by that opinion is available by habeas corpus. Otherwise, it seems, the Supreme Court would have denied the Petitioner's petition for review.

In any event, Respondent takes an overly narrow view of the scope of the writ of habeas corpus. A previously convicted defendant may obtain relief by habeas corpus when changes in case law expanding a defendant's rights are given retroactive effect. (E.g., *In re Cortez* (1971) 6 Cal.3d 78, 82–83 [new California Supreme Court decision justifies habeas corpus relief]; *In re Terry* (1971) 4 Cal.3d 911, 916 [new United States Supreme Court decision justifies habeas corpus relief]; *In re Johnson* (1970) 3 Cal.3d 404, 407–408, 409–410 [same].)

The Court summarized its holdings:

The petition is granted insofar as the relief sought in the prayer of Petitioner's supplemental opening brief seeks a hearing to allow Petitioner to make a record of mitigating evidence tied to his youth at the time of the offense. The matter is remanded with directions to the trial court to grant Petitioner a hearing at which he can make a record of such mitigating evidence. In doing so, we hold that the relief afforded by *Franklin* is available by both direct review and petition for writ of habeas corpus.

VINDICTIVE PROSECUTION UPON RETRIAL BARRED

In re Cleamon Johnson

___Cal.App.4th___; CA2(3); B266421
October 27, 2016

In this appeal, Cleamon Johnson claimed that when his earlier conviction and death sentence were reversed and remanded for a new trial, the prosecution illegally upped the ante by adding new charges - amounting to vindictive prosecution for having mounted a successful appeal below. Upon such an allegation, the burden falls to the prosecution to rebut this charge. Here, the prosecution failed to rebut the presumption of vindictiveness for adding three of four murder charges after Johnson successfully appealed his convictions.

In 1997, Johnson was convicted of two murders with special circumstances and sentenced to death. In 2011 his judgment was reversed and the case was remanded for a new trial. Prior to retrial, the prosecution added four new murder charges, an attempted murder charge, and gang enhancements. Johnson's motion to dismiss for vindictive prosecution was denied and he petitioned for writ of mandate.

Relief was granted in part. The due process clauses of the state and federal Constitutions prohibit the state from punishing a person for exercising a statutory or constitutional right. The vindictive prosecution doctrine has developed as a protective rule to assure a defendant that exercising his right to an appeal will not be met with a retaliatory increase in charges and/or

punishment. To establish a presumption of vindictive prosecution, a defendant must show that the state increased the charges against him in response to his exercise of a procedural right. The burden then shifts to the prosecution to rebut this presumption, by showing that new evidence or an objective change in circumstances legitimately influenced the charging decision and this information could not have been discovered before the first trial.

Here, the prosecution charged Johnson with additional crimes and enhancements in response to his successful appeal. Where Johnson had been convicted of two capital-murder charges before his successful appeal, he now faced five capital-murder charges and an attempted murder charge—plus newly added gang enhancements—in the same case.

The fact that the crimes were distinct from those initially charged did not resolve the question of vindictiveness. The addition of charges in this case had the appearance of vindictiveness that may deter future defendants from exercising their right to appeal. The prosecution failed to rebut the presumption of vindictiveness as to three of the four new murder charges and the attempted murder charge, requiring those counts be dismissed.

HABEAS PETITIONER ENTITLED TO MAKE CCP § 170.6 CHALLENGE TO DISQUALIFY JUDGE

Maas v. Superior Court

___Cal.4th___; CA Supreme Court; S225109
November 7, 2016

The question arises for repeat habeas petitioners, such as lifers challenging parole denial after denial in separate filings, whether such a petitioner has a right to make a peremptory challenge to remove the judge, under Code of Civil Procedure § 170.6. The California Supreme Court held that a habeas petitioner does have that right. Moreover, he can request that the court name the judge to whom the case has been assigned, before any actions are taken by that judge, in order to permit the petitioner to decide whether to file a § 170.6 petition.

Under CCP § 170.6, a party may challenge the judge assigned to hear a petition for writ of habeas corpus at the initial stage of the habeas corpus process, before an order to show cause (OSC) has been issued. When Michael Maas (a Three-Strikes lifer seeking belated relief from his 15-year-old conviction, on ineffective assistance of counsel grounds) filed a habeas petition in superior court he requested the name of the judge assigned to rule on the petition. However, he received no response.

Shortly thereafter Judge Thompson summarily denied the petition. Maas filed a new petition in the Court of Appeal along with a declaration stating that he would have moved to disqualify Judge Thompson pursuant to § 170.6 if he had been informed of his assignment. The Court of Appeal issued a writ of mandate directing the superior court to vacate the denial of Maas' petition and to reassign the petition to another judge. On its own motion, the Supreme Court granted review.

The Supreme Court affirmed. § 170.6, subd. (a)(1) provides that "a judge ... shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it is established as provided in this section that the judge ... is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding."

The court here concluded that a habeas corpus proceeding (including a ruling on a habeas petition before an OSC has issued) is a "special proceeding." The court also determined that a judge who decides whether a habeas petition states a prima facie case for relief hears and resolves a contested issue of law within the meaning of § 170.6. As a result, "a petitioner who asks to be informed of the identity of the judge assigned to examine his or her habeas corpus petition prior to the judge's ruling on the petition is entitled to notice of that assignment." The petitioner is also entitled to "challenge the assigned judge, so long as all of the procedural requirements of under § 170.6 have been satisfied, including the requirement that the assigned judge not have participated in petitioner's underlying criminal action." Here, Maas met all the requirements.

INDIGENT LWOP PETITIONER ENTITLED TO POST-CONVICTION DISCOVERY MATERIAL IN SUPPORT OF HIS HABEAS PETITION

McGinnis v. Superior Court

___Cal.App.4th___; CA 1(3); A149006
January 27, 2017

PC § 1054.9 authorizes post-conviction discovery of prosecutorial documents in order to prepare a writ of habeas corpus for an inmate sentenced to death or life imprisonment, but requires the cost of copying those documents to be "borne or reimbursed by the defendant." The Court of Appeal determined here that a motion for postconviction discovery may not be denied solely due to a defendant's inability to pay in advance for copies of the discovery materials. Where a moving party demonstrates entitlement to postconviction discovery but asserts he is unable to pay copying costs, the court must determine if defendant is indigent as claimed and, if so, fashion a reimbursement plan or other means to permit the discovery to proceed.

Common law principles provide that a person seeking habeas corpus relief is not entitled to court-ordered discovery unless and until the court issues an order to show cause and thus determines that the petition states a prima facie case for relief. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1255-1261.) That rule was changed by statute, effective 2003, for persons sentenced to death or LWOP. (*In re Steele* (2004) 32 Cal.4th 682, 690.)

Section 1054.9, subdivision (a) provides: "Upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment in a case in which a sentence of death or of life in prison without the possibility of parole has been imposed, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c) [which relates to physical evidence], order that the defendant be provided reasonable access to any of the materials described in subdivision (b)." Subdivision (b) provides: "For purposes of this section, 'discovery materials' means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of tri-

al." Pertinent here is subdivision (d), which provides: "The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant."

McGinnis did not oppose reimbursement – he only requested that he be given a payment plan he could work with, but get the documents up front. This paralleled the resolution in an earlier death-penalty case.

> The parties' positions are in accord with *Davis v. Superior Court* (2016) 1 Cal.App.5th 881. In *Davis*, a LWOP inmate asserted that "forcing him to pay for copies of postconviction discovery violates his right to equal protection under the law because it places him on different footing from wealthier inmates who can afford to pay for the discovery they request." (*Id*. at p. 888.) The appellate court, "mindful that 'a court, when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which avoids any doubt concerning its validity' " (*ibid*.), found no need to address constitutional concerns because section 1054.9, fairly read, "does not require an inmate seeking postconviction discovery to pay in advance for copies of discovery" (*id*. at p. 889). The statute requires the costs of copying to be "borne *or reimbursed* by the defendant." (§ 1054.9, subd. (d), italics added.) The court held that, pursuant to the terms of the statute itself, one "may not completely prohibit petitioner from receiving postconviction discovery without first paying for copies of what he receives." (*Id*. at p. 889.) The court declined to "instruct the trial court as to exactly how to address the payment of costs by petitioner, as there are many ways in which an inmate may receive postconviction discovery without paying the copying costs in advance" and left to the trial court's discretion a manner of payment appropriate to the circumstances. (*Ibid*.) One possibility noted by the appellate court was that "the parties might agree that petitioner can pay costs over time using his prison wages or other funds to which he has access." (*Ibid*.)
>
> Here, the parties are agreed that petitioner may receive the postconviction discovery he requested and reimburse copying costs over time from his prison wages. The trial court may, given the parties' stipulation, issue an order garnishing a portion of petitioner's prison funds and remitting the payment to the district attorney

CLN readers should note that, per § 1054.9, this ruling applies *only* to LWOP or death-sentenced petitioners.

JUVENILE LIFER'S PAROLE ELIGIBILITY AT AGE 55 IS NOT CRUEL AND UNUSUAL PUNISHMENT

People v. Michael Bell

___Cal.App.4th___; CA 2(8); B263022
September 29, 2016

Michael Bell appealed from his sentence of 43 years to life for multiple violent acts that occurred when he was 14, contending that his parole eligibility date at age 55 violated the equal protection and cruel and unusual punishment provisions of the state and federal Constitutions under *Graham v. Florida* (2010) 560 U.S. 48, 63-64 (*Graham*).

The law concerning punishment of juvenile offenders has evolved lately in the US Supreme Court, the California Supreme Court, and the California Legislature.

> In *Graham, supra*, 560 U.S. 48, the United States Supreme Court announced a categorical rule prohibiting life without parole (LWOP) sentences for minors who were convicted of non-homicide offenses. *Graham*'s holding was based on the following: (1) scientific studies

showing fundamental differences between the brains of juveniles and adults; (2) a juvenile's capacity for change as he matures, which shows that his crimes are less likely the result of an inalterably depraved character; (3) the notion that it is morally misguided to equate a minor's failings with those of an adult; and (4) the fact that even though non-homicide crimes may have devastating effects, they are cannot be compared to murder in terms of severity and irrevocability. (*Id*. at pp. 67-70.)

In *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455] (*Miller*), the Supreme Court held that sentencing schemes that made LWOP sentences mandatory for juveniles who commit homicide offenses violated the Eighth Amendment's ban on cruel and unusual punishment. Under *Miller*, LWOP sentences are still permissible, but may be imposed on only the "rare juvenile offender whose crime reflects irreparable corruption. [Citations.]" (*Id*. at p. 2469.) This determination must be made as part of a sentencing scheme that requires trial courts to take into account the "distinctive (and transitory) mental traits and environmental vulnerabilities" of children. (*Id*. at p. 2465.)

Mandatory LWOP sentences for juveniles "preclude[] consideration of [their] chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds [them] – and from which [they] cannot usually extricate [themselves] – no matter how brutal or dysfunctional. It neglects the

circumstances of the homicide offense, including the extent of [their] participation in the conduct and the way familial and peer pressures may have affected [them]. Indeed, it ignores that [they] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, [their] inability to deal with police officers or prosecutors (including on a plea agreement) or [their] incapacity to assist [their] own attorneys." (*Miller, supra*, 132 S.Ct. at p. 2468.) Accordingly, trial court sentencing of juvenile homicide offenders must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id*. at p. 2469.)

In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court applied *Graham* to non-homicide juvenile offenders who receive a sentence which, although subject to the possibility of parole, is so long that it amounts to a de facto LWOP sentence. Under *Caballero*, the sentence for a juvenile non-homicide offender must provide a "meaningful opportunity to demonstrate [his] rehabilitation and fitness to reenter society in the future" and must take into account all the mitigating circumstances, including the juvenile's age, role in the crime, and physical and mental development. (*Id*. at pp. 268-269.)

In response to *Caballero*, the Legislature enacted section 3051, which sets mandatory parole eligibility dates for most persons convicted of crimes committed before they turned 23: (1) at the

15th year of incarceration if the sentence is a determinate term; (2) at the 20th year of incarceration if the sentence is a life term of less than 25 years to life; and (3) at the 25th year of incarceration if the sentence is a life term of 25 years to life. (§ 3051, subd. (b)(1)-(3).) These provisions do not apply if the juvenile was sentenced: (1) under the Three Strikes law (§§ 667, subds. (b)-(i) and 1170.12, subds. (b)-(i)); (2) under the One Strike law for committing certain felony sex offenses (§ 667.61); or (3) to life without possibility of parole. (§ 3051, subd. (h).) Bell's sentence included a term of 25 years to life because he committed [crimes falling under this section], thus falling into the One Strike sentencing scheme. (§ 667.61, subd. (e)(2), (3).) As a result, the mandatory minimum parole eligibility requirements do not apply to him.

The court then analyzed Bell's complaint with respect to precedent, and concluded that Bell's case was not one of the 'rare' cases where his sentence would run afoul of constitutional protections.

> Bell contends that his age 55 parole eligibility date is unconstitutionally cruel and unusual for three reasons: (1) it amounts to a de facto LWOP sentence because the possibility of parole comes too late to leave him with a meaningful life expectancy; (2) it is grossly disproportionate to the punishment for more serious crimes such as special circumstances murder because section 3051 requires a parole eligibility date at 25 years after incarceration for that offense, while he is not eligible for parole for 41 years; and (3) it did not adequately account for his horrific childhood, which was marked by abuse, neglect, and mental illness.
>
> Although a parole eligibility date must occur while a defendant has some meaningful life expectancy remaining, how much life expectancy that entails is somewhat of an open issue. (*People v. Perez* (2013) 214 Cal.App.4th 49, 57-58 (*Perez*).) The *Perez* court held that an age 47 parole eligibility date could "by no stretch of the imagination" be considered a de facto LWOP sentence. (*Id*. at p. 58.) We believe that rationale applies to Bell's age 55 parole eligibility date and that, standing alone, the eligibility date is not a de facto LWOP sentence. The record does not suggest that Bell would not have a meaningful life expectancy.

As for Bell's disproportionality argument, he relies on *In re Nunez* (2009) 173 Cal.App.4th 709, where a 14 year old convicted of kidnapping for ransom received an LWOP sentence. Noting that the defendant could have received no more than 25 years to life had he committed murder instead, the *Nunez* court held that the LWOP sentence was "among the rarest of the rare" because he was the only known offender under age 15 to receive an LWOP sentence throughout the nation. The *Nunez* court therefore reversed the LWOP sentence. (*Id*. at pp. 715, 726.)

Nunez is inapplicable here. Bell did not receive an LWOP sentence: he was sentenced to 43 years to life with parole eligibility after 41 years at age 55. Bell committed multiple violent crimes of a horrific and devastating nature. He broke into the victim's home in order to commit [grievous violent crimes], and tried to kidnap her in order to facilitate his crimes. Even taking into account the admittedly unfortunate circumstances of Bell's childhood, we cannot say that his age 55 parole eligibility

date makes this the "rarest of the rare" cases where the punishment is grossly disproportionate to the crimes he committed. We therefore conclude that Bell's sentence was not cruel and unusual under either the federal or California Constitutions.

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PROP. 36 CASES

BURDEN OF PROOF IN PROP. 36 RESENTENCING HEARING IS NOT PROOF BEYOND A REASONABLE DOUBT

People v. Victor Buford

___Cal.App.4th___; CA 5; F069936

October 27, 2016

In this decision, the Court of Appeal held that the burden of proof in a Prop. 36 resentencing hearing is not "proof beyond a reasonable doubt," nor does the law (PC § 1170.126) create a presumption of resentencing.

In 1995, Victor Buford was convicted of a number of nonserious, nonviolent offenses, including driving under the influence (DUI) and felony evasion (neither violent (see PC § 667.5, subd. (c)) nor serious (see PC § 1192.7, subd. (c)), and was sentenced as a third-striker to a life term. The trial court conducted a hearing, wherein it denied his Prop. 36 petition, reasoning that he posed an unreasonable risk of danger to public safety because if resentenced and released he would likely drive drunk again.

Buford appealed, arguing that the People failed to prove *beyond a reasonable doubt* that he posed an unreasonable risk of danger to public safety if resentenced. ..see decision pg 24

.....from decision pg 23

The Court of Appeal held that the People have the burden of proving, *by a preponderance of the evidence*, facts on which a finding that resentencing a petitioner would pose an unreasonable risk of danger to public safety reasonably can be based. Those facts are reviewed for substantial evidence. The Court further held that the preponderance of the evidence standard does not apply to the trial court's determination regarding dangerousness, nor does section 1170.126, subdivision (f), create a presumption in favor of resentencing. The ultimate decision — whether resentencing an inmate would pose an unreasonable risk of danger to public safety — instead lies within the sound discretion of the trial court.

But Buford's record, before prison and in-prison, provided "substantial evidence" that the trial court could have, and did, rely upon in its denial of resentencing relief.

> Applying the foregoing principles, we conclude defendant has not borne his burden on appeal of establishing the trial court's ruling exceeds the bounds of reason. Defendant had a longstanding substance abuse problem, involving both alcohol and drugs. As the trial court noted in its written denial of the petition for resentencing, despite having two prior convictions for driving under the influence and being sentenced to prison for 25 years to life for an offense during which he was driving under the influence, defendant continued his substance abuse in prison. The trial court was not required to ignore this past behavior. Although defendant clearly and commendably took steps to change his life and, insofar as the evidence showed, had been sober for some time, the evidence also showed him to have relapsed in the past. In addition, although defendant professed to have realized that actions have consequences and to take responsibility for his actions, probation officers' reports (which the court considered without objection) showed defendant made similar pronouncements in the past and yet continued to offend. His explanations for his past misconduct, both in and out of prison, suggested he tended to minimize that responsibility when confronted with those actions. Taking all the circumstances into account, the concerns expressed by the trial court in its ruling were neither unfounded nor unreasonable.

The appellate court denied Buford relief. It noted that Prop. 36 created a postconviction procedure permitting qualified defendants serving a life strikes sentence for a nonserious, nonviolent felony to petition for resentencing. Pen. Code, § 1170.126, subd. (f) states that an otherwise eligible defendant "shall be resentenced [as a second strike offender] unless the court, in its discretion determines that resentencing the [inmate] would pose an unreasonable risk of danger to public safety." While the determination of whether an inmate poses an unreasonable risk is a matter for the trial court's discretion, *the facts underlying that determination must be proven by the People by a preponderance of the evidence*.

Neither the Sixth Amendment nor due process provide a right to a jury determination of facts beyond a reasonable doubt where, as here, a downward modification of a sentence is at is-

sue. (See *People v. Superior Court (Kaulick*) (2013) 215 Cal.App.4th 1279.)

ASSAULT WITH INTENT TO COMMIT RAPE IS NOT NECESSARILY COMMITTED WITH FORCE, FOR PROP. 36 INELIGIBILITY PURPOSES

People v. Stanley Cook

___Cal.App.4th___; CA 5; F070733

February 8, 2017

The novel, and narrow, question here is whether a Three-Strikes lifer is automatically ineligible for Prop. 36 resentencing relief just because he suffered a prior conviction for an enumerated violent offense – even if that offense was not committed with force. The answer is "no."

> Under Proposition 36, the Three Strikes Reform Act, a prisoner serving a third-strike sentence is eligible for resentencing if his third strike was not serious or violent as defined, and if his prior strikes are not included in an enumerated list of particularly grave offenses. That list includes assault with intent to commit rape, but only if this crime was committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or a threat to retaliate in the future against any person. The question presented here is whether assault with intent to commit rape is necessarily committed with force or one of these other features, so that a defendant whose prior strikes include that offense is always necessarily ineligible for resentencing based on that prior conviction alone.
>
> We conclude it is not. As we will explain, it is possible for an assault to be completed before any force has been applied and also without the use of threats or fear. The trial court, however, found defendant Stanley Cook ineligible for resentencing based on the bare elements of his prior assault with intent to commit rape. We will reverse and remand with directions to the trial court to consider whether Cook's prior assault with intent to commit rape is shown, by case-specific

> matter in the record of that prior conviction, to have been committed by force, fear, or threats. If it is not, the trial court should also consider on remand whether resentencing Cook would pose an unreasonable risk of danger to public safety.

The facts are relatively straightforward. Cook's third conviction for commercial burglary did not exempt him from Prop. 36 relief. Rather, he was given a hearing in the trial court. But that court denied resentencing based solely on the *assumption of the use of force* in his one prior involving assault.

> Cook's conviction was of a violation of section 220, assault with intent to commit a violation of section 261. The People's brief argued that the fact of this conviction alone made Cook ineligible for resentencing, without proof that he committed the offense by force or fear. This was "because the elements for assault with intent to commit rape already involve willfully applying force to a person." The People's brief did not discuss any specific facts about the assault committed by Cook.
>
> The hearing on the petition,

held on December 19, 2014, was very brief. Counsel for Cook said, "[U]nless the People can prove, by a preponderance of the evidence, that [the assault] was accomplished through force, fear, et cetera, my client is not ineligible." Counsel for the People said, "[T]he elements of an assault with the intent to commit rape include force or fear. Submitted." The court's remarks consisted, in their entirety, of this ruling: "I will find he is not eligible based on that prior he has." There was no discussion of the circumstances of the prior. The court denied the petition.

Importantly for Cook, the Court of Appeal found that force is *not* automatically a fact in such attempted assault cases.

The trial court's conclusion was in error. A majority of cases of assault with intent to commit rape undoubtedly involve an application of force to the victim, but this is not an element of the offense. An assault is an unlawful attempt, coupled with a present ability, to inflict a violent injury on a person (§ 240), and unlike a battery (§ 242), it does not require contact with the victim. "An assault is an incipient or inchoate battery; a battery is a consummated assault." (*People v. Colantuono* (1994) 7 Cal.4th 206, 216.) The only additional element of assault with intent to commit rape is the perpetrator's subjective intent, during the commission of the assault, to commit a rape. (*People v. Maury* (2003) 30 Cal.4th 342, 399-400; *People v. Clifton* (1967) 248 Cal.App.2d 126, 129.) It follows that no actual force need be applied for this offense to be completed.

The court reversed and remanded to the trial court to conduct a full evaluation of Cook's prior crime to redetermine Prop. 36 eligibility, if, under the unique facts in Cook's record, his prior included the use of force.

Our holding does not mean Cook necessarily is eligible for resentencing—only that the trial court did not use the correct analysis or consult the necessary sources of information in finding he was not. The bare elements of the offense of assault with intent to commit rape cannot establish that Cook used force or fear to commit the offense within the meaning of Welfare and Institutions Code section 6600, subdivision (b), but the circumstances of the offense could possibly establish this. This court has held that a trial court considering a section 1170.126 petition can consult the entire record of conviction (but not evidence outside that record) of the current offense (i.e., the offense upon which the third-strike conviction was imposed), and can rely on "relevant, reliable, admissible portions" of that record in making the eligibility determination. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063.) At least two other Court of Appeal panels have reached similar conclusions. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1338-1339; *People v. Guilford* (2014) 228 Cal.App.4th 651, 659-660.) We see no reason why a trial court could not similarly consult the record of conviction of each prior strike, assuming the court can obtain access to those records. This path will

be open to the trial court in determining on remand whether Cook used force or fear when he committed the assault with intent to commit rape. We express no opinion on questions regarding the evidentiary burdens that will apply on remand, as the parties have not briefed that issue.

If the court finds Cook is eligible for resentencing, the question will still remain of whether resentencing him "would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) The trial court will need to exercise its discretion to make that determination unless Cook is ineligible.

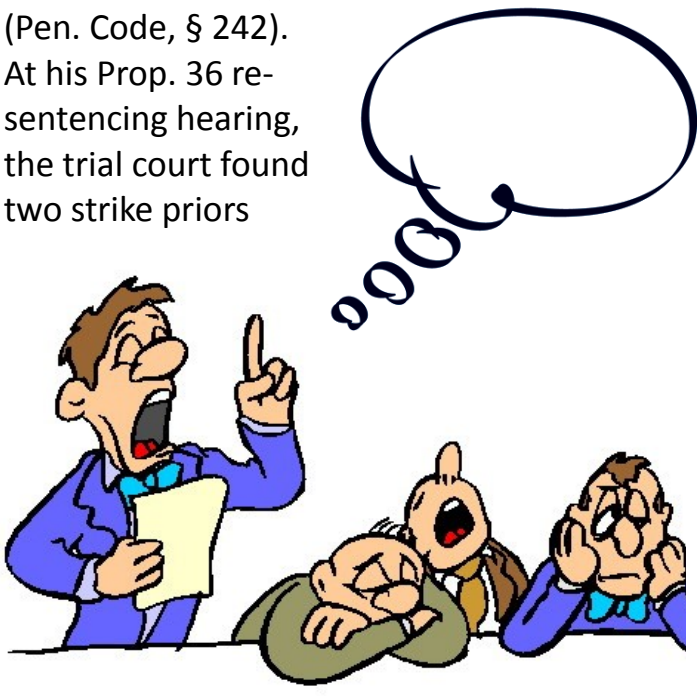
TRIAL COURT'S JUDICIAL FACTFINDING IN PROP. 36 HEARING TO DETERMINE ELEMENTS OF THE OFFENSE OVERRULED

People v. Chadwick Learnard

___Cal.App.4th___; CA 2(1); B260824

October 28, 2016

Chadwick Learnard was convicted of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and battery (Pen. Code, § 242). At his Prop. 36 resentencing hearing, the trial court found two strike priors (Pen. Code, § 667, subds. (b)-(i)), two prior serious felony enhancements (Pen. Code, § 667, subd. (a)), and two prior prison term enhancements (Pen. Code, § 667.5, subd. (b)) to be true. Learnard was sentenced to 35-life and appealed.



The Court of Appeal reversed in part. At the time that Learnard pled guilty to aggravated assault, PC § 245, subdivision (a)(1) applied to assaults committed by use of a deadly weapon *or by means of force likely to produce great bodily injury (GBI)*. Under the Three Strikes law, only assault with a deadly weapon constitutes a serious felony (Pen. Code, §§ 1192.7 subd. (c)(31), 667, subd. (d)(1)). Thus, the mere fact of a conviction under former § 245, subdivision (a)(1) does not establish the prior conviction was a strike.

Moreover, a no contest plea admits the elements of a crime but *not* any aggravating circumstances. The trial court is permitted to draw reasonable inferences from the record to find the defendant's prior conviction was for a serious felony. The fatal flaw here was that the court actually weighed the evidence contained in the record to make its own factual determination about the nature of the offense, by finding that references to a baseball bat established the crime as a serious felony. In so doing, the court disregarded references to assault by force likely to cause GBI, contained in the information, the abstract of judgment, and the preliminary hearing transcript. Defendant's prior assault conviction could have rested on either assault with a deadly weapon or by force likely to cause GBI. The evidence was insufficient to establish it was a serious felony.

The appellate court reviewed the case record

that the trial court had relied upon.

The information alleged two prior convictions under the Three Strikes law: (1) a 2002 conviction for aggravated assault following a guilty plea (§ 245, subd. (a)(1)); and (2) a 2012 conviction for criminal threats (§ 422). Appellant waived his right to a jury trial and admitted he had suffered the two prior felony convictions, while contending the assault conviction did not constitute a serious or violent felony, and thus did not qualify as a strike. The trial court reviewed what it described as the "record of conviction" in the assault case, which included the abstract of judgment, the information, the transcript from the preliminary hearing, and the probation department's preconviction report. The trial court did not have before it the transcript from appellant's plea colloquy in the case.

The notation in the abstract of judgment described the offense as a violation of section 245, subdivision (a)(1), "Assault w deadly wpn/GBI." The information charged: "On or about February 9, 2002, . . . the crime of *assault with deadly weapon, by means likely to produce GBI*, in violation of Penal Code section 245(a)(1), a Felony, was committed by [Defendant], who did willfully and unlawfully commit an assault . . . with a *deadly weapon, to wit, [a] baseball bat, and by means of force likely to produce great bodily injury*." (Italics added.)

Defense counsel argued that because the information and the abstract referred to the offense as both an assault with a deadly weapon and an assault with force likely to produce great bodily injury, it was impossible to determine whether appellant had admitted an assault with a deadly weapon when he entered his plea. Counsel further maintained that the testimony adduced at the preliminary hearing had no bearing on what facts, if any, appellant admitted as part of his guilty plea. Based on appellant's record of conviction, counsel argued it was not possible to find beyond a reasonable doubt that appellant admitted use of a deadly weapon at the time of his plea.

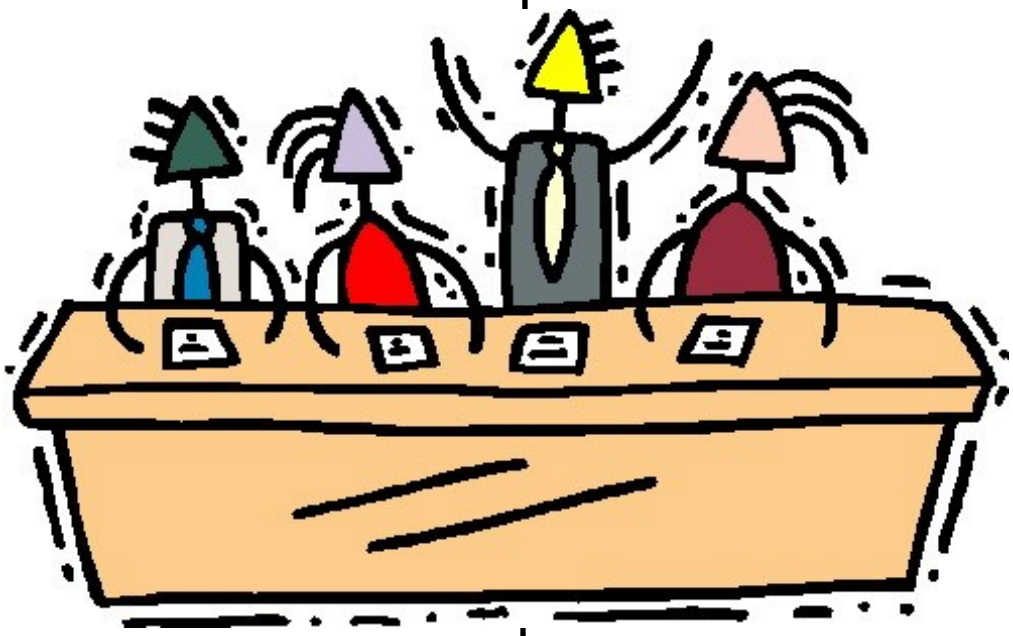
The trial court determined the prior assault conviction qualified as a strike. The court recognized that the reference in the abstract of judgment to both a deadly weapon and great bodily injury created some ambiguity, but noted that the information "set[] out clearly that

a baseball bat was used in the assault under 245(a)(1)." The court further declared that both the preliminary hearing transcript and the preconviction report showed that appellant had used a deadly weapon.

The court then recounted the law of former PC § 245(a)(1).

When appellant pleaded guilty to aggravated assault in 2002, section 245, subdivision (a)(1) provided in relevant part: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished . . . ." Former section 245, subdivision (a)(1) thus described alternative means of

committing the same offense, aggravated assault, within the same subdivision, and a jury could convict without regard to whether the crime was committed by means of a deadly weapon or by force likely to produce great bodily injury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1036–1037 [violation of section 245, subdivision (a)(1) required proof of two elements: "One, a person was assaulted, and two, the assault was committed by the use of a deadly weapon or instrument or by means of force likely to produce great bodily injury"]; *People v. Martinez* (2005) 125 Cal.App.4th 1035, 1043; *In re Mosley* (1970) 1 Cal.3d 913, 919, fn. 5 [section 245 "define [d] only one offense, to wit, 'assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury' "].)



Although use of a deadly weapon and great bodily injury were interchangeable for purposes of conviction under former section 245, subdivision (a)(1), under the Three Strikes law only assault with a deadly weapon constitutes a serious felony. (§§ 1192.7, subd. (c)(31), 667, subd. (d)(1), 1170.12, subd. (b)(1); *People v. Delgado* (2008) 43 Cal.4th 1059, 1065 (*Delgado*).) Accordingly, the mere fact of a conviction for aggravated assault under former section 245, subdivision (a)(1) would be insufficient to establish the prior conviction was a strike in any case in which the verdict or plea did not specify the precise means used to commit the offense.

Examining the record, the court found a lack of substantial evidence supporting the trial court's determination.

The prosecution is required to prove each element of an alleged sentence enhancement beyond a reasonable doubt. (*Delgado, supra*, 43 Cal.4th at p. 1065; *People v. Miles* (2008) 43 Cal.4th 1074, 1082.) Where, as here, the mere fact that a defendant was convicted under a particular statute does not establish the serious felony allegation, our Supreme Court has held that the sentencing court may examine "the record of the prior criminal proceeding to determine the nature or basis of the crime of which the defendant was convicted." (*People v. McGee* (2006) 38 Cal.4th 682, 691 (*McGee*); *People v. Trujillo* (2006) 40 Cal.4th 165, 179; *Delgado*, at p. 1065.)

A plea of no contest admits the elements of the crime, but does not constitute an admission of any aggravating circumstances. (*People v. French* (2008) 43 Cal.4th 36, 49.) "[I]f the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.]

.....see prosecution pg. 32

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	CASSADY	CHAPPELL	FRITZ	GARNER	GROUNDS	LABAHN	MINOR	MONTES	PECK	ROBERTS	TAIRA	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR
Suitability Hrg Total	**25**	**28**	**28**	**26**	**19**	**5**	**25**	**30**	**33**	**29**	**11**	**13**	**22**	**32**	**126**	**452**	**38**
Grants	3	9	4	7	4	3	9	8	7	5	0	5	3	8	0	75	14
Denials	14	13	19	12	11	2	9	16	15	24	8	8	16	18	0	185	21
Stipulations	5	2	3	4	2	0	1	3	8	0	1	0	1	5	0	35	1
Waivers	1	1	0	0	0	0	0	0	2	0	1	0	1	0	19	25	1
Postponements	1	3	2	2	1	0	6	2	1	0	1	0	1	1	96	117	1
Continuances	1	0	0	0	1	0	0	1	0	0	0	0	0	0	0	3	0
Tie Vote	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	11	11	0

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

Subtotal (Deny+Stip)	**19**	**15**	**22**	**16**	**13**	**2**	**10**	**19**	**23**	**24**	**9**	**8**	**17**	**23**	**0**	**220**	**22**
1 year	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	2	1
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	10	11	16	11	5	2	7	10	15	10	6	7	9	9	0	128	18
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	6	3	4	5	6	0	2	7	7	7	1	1	7	10	0	66	3
7 years	1	0	1	0	2	0	0	2	1	4	2	0	1	3	0	17	0
10 years	2	0	0	0	0	0	1	0	0	2	0	0	0	1	0	6	0
15 years	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**1**	**0**	**0**	**0**	**0**	**0**	**0**	**2**	**0**	**1**	**0**	**1**	**0**	**19**	**25**	**1**
1 year	1	1	0	0	0	0	0	0	2	0	1	0	1	0	11	17	1
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0
4 years	0	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	0	0	2	2	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**1**	**3**	**2**	**2**	**1**	**0**	**6**	**2**	**1**	**0**	**1**	**0**	**1**	**1**	**96**	**117**	**1**
Within State Control	1	2	2	0	0	0	3	1	0	0	1	0	0	0	88	98	1
Exigent Circumstance	0	0	0	1	1	0	3	1	1	0	0	0	0	1	5	13	0
Prisoner Postpone	0	1	0	1	0	0	0	0	0	0	0	0	1	0	3	6	0

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	CASSADY	CHAPPELL	FRITZ	GARNER	GROUNDS	LABAHN	MINOR	MONTES	PECK	ROBERTS	TAIRA	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR
Suitability Hrg Total	**29**	**31**	**23**	**20**	**32**	**27**	**22**	**19**	**29**	**16**	**27**	**27**	**30**	**3**	**98**	**433**	**0**
Grants	3	7	2	7	9	4	8	6	8	4	5	9	8	1	0	81	0
Denials	17	20	17	11	13	16	9	8	15	12	14	12	14	2	0	180	0
Stipulations	5	1	2	1	1	3	3	3	5	0	5	5	5	0	0	39	0
Waivers	1	0	0	0	1	0	0	0	0	0	1	0	1	0	23	27	0
Postponements	0	3	1	1	5	4	2	1	1	0	1	1	2	0	68	90	0
Continuances	3	0	1	0	3	0	0	1	0	0	1	0	0	0	0	9	0
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	0	7	7	0

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

Subtotal (Deny+Stip)	**22**	**21**	**19**	**12**	**14**	**19**	**12**	**11**	**20**	**12**	**19**	**17**	**19**	**2**	**0**	**219**	**0**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	11	11	11	9	10	12	5	8	13	9	6	8	16	1	0	130	0
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	5	8	5	2	3	4	7	3	5	2	10	3	2	0	0	59	0
7 years	4	1	3	1	1	1	0	0	1	1	3	3	1	0	0	20	0
10 years	1	1	0	0	0	2	0	0	1	0	0	3	0	1	0	9	0
15 years	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**1**	**0**	**23**	**27**	**0**
1 year	1	0	0	0	1	0	0	0	0	0	1	0	1	0	17	21	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0
4 years	0	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	0	0	0	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**0**	**3**	**1**	**1**	**5**	**4**	**2**	**1**	**1**	**0**	**1**	**1**	**2**	**0**	**68**	**90**	**0**
Within State Control	0	0	0	0	1	0	0	1	0	0	1	0	1	0	61	65	0
Exigent Circumstance	0	2	0	0	4	1	2	0	0	0	0	1	1	0	3	14	0
Prisoner Postpone	0	1	1	1	0	3	0	0	1	0	0	0	0	0	4	11	0

...from prosecution pg. 29

In such a case, if the statute under which the prior conviction occurred could be violated in a way that does not qualify for the alleged enhancement, the evidence is thus insufficient, and the People have failed in their burden." (*Delgado, supra*, 43 Cal.4th at p. 1066.)

We review the record in the light most favorable to the judgment to determine whether it is supported by substantial evidence. (*Delgado, supra*, 43 Cal.4th at p. 1067.) "In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Miles, supra*, 43 Cal.4th at p. 1083; *People v. Ledbetter* (2014) 222 Cal.App.4th 896, 900.)

The trial court was permitted to draw reasonable inferences from the records offered to prove appellant suffered a prior serious felony conviction. (*Delgado, supra*, 43 Cal.4th at p. 1066; *People v. Henley* (1999) 72 Cal.App.4th 555, 561.) But the court here went beyond reasonable inference when it actually weighed the evidence contained in those documents in order to make its own factual determination about the nature of the

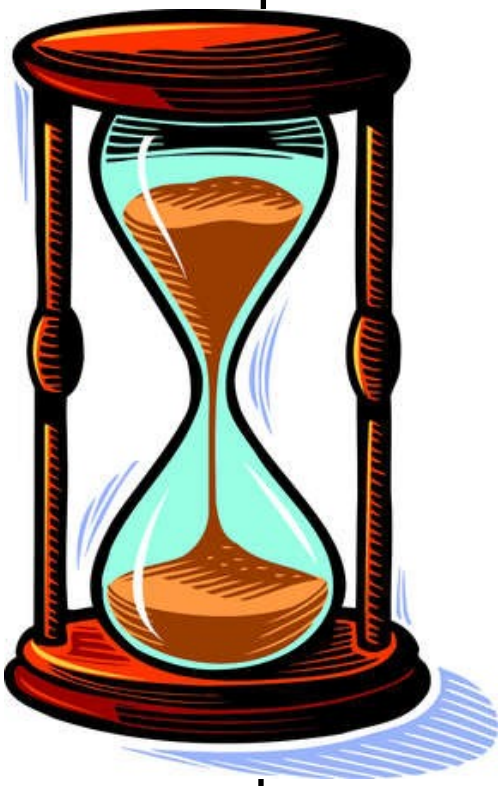
offense. In reaching its conclusion that the reference to a deadly weapon (a baseball bat) established the crime as a serious felony, the court simply disregarded references in both the information and the abstract of judgment to assault by means of force likely to produce great bodily injury. The court did the same with respect to the conduct described at the preliminary hearing. There, the victim testified that the defendant hit the victim's left shoulder as he struck the victim's car with a baseball bat. But the victim also testified that the defendant grabbed him with both hands and tried "to tear [him] out of the car." In concluding that the conduct described constituted an assault with a deadly weapon and thus a serious felony, the court again simply ignored evidence that established an assault with force likely to produce great bodily injury.

Because the evidence presented by the prosecution established appellant's prior conviction could have rested on use of a deadly weapon or force likely to produce great bodily injury, it was insufficient to prove appellant guilty of a prior serious felony conviction beyond a reasonable doubt. Without further evidence of the underlying circumstances, it must be presumed that appellant's conviction under former section 245, subdivision (a)(1) was for the least serious form of the offense, that is, assault by means of force likely to produce great bodily injury. (*Delgado, supra*, 43 Cal.4th at p. 1066.)

Accordingly, the court overturned the trial court's finding.

We reverse the trial court's determination that appellant's 2002 conviction for aggravated assault constituted a serious felony conviction and hence a strike based on the court's reliance on judicial fact-finding beyond the elements of the prior conviction itself. Given that none of the documents in the record of the prior conviction distin-

guished between assault with a deadly weapon and assault by means likely to produce great bodily injury, the trial court's determination that the prior conviction constituted a serious felony is unsupported by substantial evidence.



LATE FILING FATAL TO THIRD-STRIKER'S PROP. 36 RESENTENCING PETITION

People v. Willie Norton

CA 2(2); B272191

January 5, 2017

In a case reflecting the now-expired two-year statute of limitations in which to file a Prop. 36 resentencing petition, lifer Willie Norton was recently barred any relief.

In July 2011, a jury convicted defendant of one count of assault with a deadly weapon, a knife, in violation of section 245, subdivision (a)(1), and found true the allegation that defendant personally used a deadly or dangerous weapon, a knife, within the meaning of section 12022, subdivision (b)(1). Defendant waived a jury trial on the prior conviction allegations, including the allegations that he had suffered two prior felony convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)). At the court trial on the prior conviction allegations, defense counsel contended defendant's 2000 conviction in case No. BA197473 for violating section 245, subdivision (a)(1) was for assault by means of force likely to produce great bodily injury and so did not qualify as a strike conviction. Based on the documentary evidence produced by the prosecution, the court found that defendant pled guilty to assault with a deadly weapon, to wit, an automobile or van, in violation for section 245, subdivision (a)(1), which qualified as a strike conviction under the Three Strikes law.

In August 2013, defendant filed a petition for writ of habeas corpus with this Court, contending that his 2000 assault conviction did not qualify as a strike conviction. In September 2013, we denied the petition. (B250914.)

In March 2016, defendant filed his motion for recall of sentence pursuant to section 1170.126 in the trial court. In this motion, he asserted that he was eligible for resentencing because his 2000 conviction for violating section 245, subdivision (a)(1) was not a serious or violent felony within the meaning of the Three Strikes law. He maintained the conviction was for assault by means of force likely to cause great bodily injury.

The trial court denied the motion on the ground that it "was not filed within the two-year deadline from the effective date of Proposition 36 (November 7, 2012), as required by section 1170.126(b) and good cause was not stated for the late filing." The court noted that an additional ground for the denial was that defendant's "current conviction is for assault with a deadly weapon, to wit, a knife (see February 10, 2011 minute order in . . . case number TA114930), which is a serious felony (Penal Code section 1192.7(c)(23)), which makes him ineligible for relief under Proposition 36 (Penal Code section 1170.126 (e)(1)."

In April 2016, defendant filed a petition for writ of error coram nobis in the trial court. The trial court denied the petition, finding that it was essentially a motion for reconsid-

eration of the motion for recall, but contained no new law, facts or circumstances that the court could reconsider. This appeal followed.

We have examined the record and are satisfied defendant's attorney on appeal has complied with the responsibilities of counsel and no arguable issue exists. (*Wende, supra*, 25 Cal.3d at p. 441; see also *Smith v. Robbins* (2000) 528 U.S. 259, 278-282; *People v. Kelly* (2006) 40 Cal.4th 106, 122-124.)

The judgment is affirmed.

SUCCESSFUL PROP. 36 PETITIONER NOT ENTITLED TO POST-RELEASE CREDITS FOR EXCESS TIME SERVED

People v. Superior Court (Rangel)

CA 4(2); E061292

October 21, 2016

In 1996, Leonard Rangel was convicted of being a felon in possession of a gun and sentenced as a three-striker to 25-life. Rangel's later Prop. 36 petition for resentencing was granted and he was given a determinate term. After applying excess custody credits, the trial court did not place him on post-release-community-supervision (PRCS) (Pen. Code, § 3451, subd. (a)).

The state objected, but the Court of Appeal denied its petition for writ of prohibition/mandate. The California Supreme Court granted review and subsequently transferred the case back to the reviewing court with directions to vacate its prior opinion and reconsider the case in light of *People v. Morales* (2016) 63 Cal.4th 399.

The Court of Appeal granted the writ of mandate. Proposition 36 amended the Three Strikes law to reserve a life sentence for those defendants who are convicted of a serious felony and have two or more prior serious felonies. Based on the nature of his current conviction, upon resentencing Rangel was subject to PRCS (Pen. Code, § 3451; PRCS Act of 2011).

Rangel claimed he was similarly situated to prisoners who are released on parole and they are allowed to apply excess credits to reduce parole. However, Penal Code section 2900.5 expressly allows excess custody credits to be used to reduce or eliminate a parole period (subds. (a), (c)), but no similar provision is contained in section 3451. In the context of a Proposition 47 resentencing, the *Morales* court concluded the defendant could not apply excess custody credits to reduce his one-year parole period, based on the plain language of section 1170.18 (defendant shall receive credit for time served and shall be subject to parole). Similarly, Proposition 36 petitioners who are subject to PRCS are not entitled to use excess custody credits to reduce the period of supervision required by section 3451, as this would conflict with the plain language of the statute.

Persons subject to PRCS are not similarly situ-

ated with parolees, so are not entitled to apply excess custody credits to reduce the period of supervision under principles of equal protection. The concept of equal protection under the laws means that persons similarly situated regarding the legitimate purposes of the law should receive equal treatment. Although there are some similarities between PRCS and parole, for purposes of applying excess custody credits to PRCS, persons subject to supervision are not similarly situated to parolees. This is because the ability to apply excess credits to a period of parole under section 2933.5 is tied to the purpose of that statute—to eliminate unequal treatment of persons who cannot afford to post bail pending trial and therefore serve longer periods in custody. But persons resentenced under Prop. 36 were serving a proper sentence and when originally sentenced received presentence custody credits. The legislative purpose behind section 2900.5 is irrelevant at the time of resentencing under Prop. 36 and therefore those resentenced under Prop. 36 may be treated differently from persons sentenced under section 2900.5.

> Because we conclude Rangel was not entitled as a matter of equal protection to apply excess postsentence custody credits to reduce or eliminate his mandatory period of community supervision, we further conclude the superior court erred by not ordering him to serve such a period.
>
> The petition is granted. Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to enter an order placing Rangel on community supervision pursuant to section 3450 et sequitur.

PRELIMINARY HEARING TRANSCRIPT MAY BE USED BY TRIAL COURT IN DENYING PROP. 36 PETITION

People v. Robert White

CA 5; F070763

January 5, 2017

In 2003, Robert White was convicted by a jury of possession of a firearm after being convicted of a violent felony (Pen.Code, § 12021.1, subd. (a)), with two prior strike convictions, and sentenced to the third strike term of 25-life, plus one year for a prior prison term.

White subsequently filed a Prop. 36 petition for recall of his sentence, arguing that he was eligible for resentencing because he was not convicted of a serious or violent felony. The People filed opposition and exhibits from the record of conviction, including the preliminary hearing transcript and his unpublished opinion on appeal from his prior case, and asserted that he was "armed with a firearm" and thus ineligible for resentencing. The superior court denied White's petition.

On appeal, White argued that the superior court improperly relied on the preliminary hearing transcript to deny his petition, and asserted that court was instead required to review the transcript from his jury trial to determine if he was "armed with a firearm." He further argued that while the appellate court's nonpublished opinion from the direct appeal of his conviction is part of the record of conviction, the facts stated in that opinion fail to establish that he was armed with a firearm.

White tried to distinguish "being in possession" from "armed."

> Appellant argued he was eligible for resentencing because his conviction for being a felon in possession of a firearm was not a serious or violent felony.
>
> Appellant acknowledged that being armed with a

firearm rendered an inmate ineligible for resentencing. Appellant argued he was only convicted of simple possession, that offense was distinct from being armed with a firearm, and there was no evidence he was "armed."

Appellant requested the court take judicial notice of its own records and the following exhibits which he filed in support of his petition: the amended information in case No. BF100785A; the probation officer's report; the minute order reflecting his convictions; the abstract of judgment; and this court's unpublished opinion in *People v. White, supra*, F043434, as summarized above.

The appellate court gave a brief review of the facts.

On December 19, 2014, the superior court conducted a hearing on appellant's petition, stated it had reviewed the pleadings and exhibits, and it was going to rely on "the preliminary hearing transcript and the Court of Appeal's opinion." The parties did not object.

Appellant's counsel stated appellant was not armed because there was no evidence he brought firearms into the motel room. When he was informed about the firearms, he took affirmative steps to unload the guns and make them unavailable for use. He placed the guns on the bed so that they were in plain sight when the officers entered the room.

The prosecutor replied that it was not reasonable to believe appellant learned about the guns at the moment the police officers arrived, especially since he took steps to unload the weapons. "Clearly he was in possession of them. And as the Court pointed out, when he learned about the firearms, he could have walked out. He could have got rid of the firearms. He didn't. He kept them in the room with him. He was in possession of the firearms and it doesn't matter if … it was loaded or not."

The court denied appellant's petition and found he "was armed with a firearm in this particular set of facts and find that he's not eligible for resentencing so your petition is denied."

After reviewing the preliminary transcript and appellate court records, the appellate court found adequate evidence to support the superior court's denial of Prop. 36 relief.

Appellant asserts he was not "armed" with a firearm based on the facts recited in this court's appellate opinion: he did not know the guns were in the motel room and, when he learned of their presence, he briefly took possession to unload them and leave them in plain view before he surrendered to the officers. This is the same argument which appellant presented to the jury at trial. Indeed, the jury may have had credibility problems with appellant's benign version of events, based on the factual statement contained in this court's opinion. Lee testified that the guns belonged to a friend, but she was impeached by her prior statement at the preliminary hearing, that she did not know who owned the guns. In addition, appellant realized that he should not possess any firearms because

he claimed that he left the guns where the officers would see them, and told the police during one of his telephone conversations that there were weapons in the motel room. After he was arrested, however, appellant was asked if he had anything illegal and he said no, and failed to disclose that there were bullets in his pocket, further undermining the credibility of his account.

Based on the factual statement contained in this court's appellate opinion, we find substantial evidence to support the superior court's determination that appellant was armed with a firearm in this case. Appellant had stayed for a substantial period of time in a motel room, and there were two guns in that room. He had ready access to the guns and they were obviously available for use, either offensively or defensively. He apparently decided at the last moment to unload the guns and leave them in the motel room, but this decision was made after a delayed period where he refused to comply with an officer's orders to immediately vacate the room and surrender on a parole violation.

In addition to the facts contained in this court's opinion, the preliminary hearing transcript contains Officer McBride's testimony about his interrogation of appellant after he was arrested, and appellant admission that the guns belonged to him. This evidence further supports the determination that appellant was armed with a firearm.

Accordingly, the appellate court upheld the superior court's denial of Prop. 36 relief based upon facts drawn from White's preliminary hearing transcript.

GUN POSSESSION CONTINUES TO BAR PROP. 36 CLAIMS

GUN IN GIRLFRIEND'S PURSE IS "ARMED"

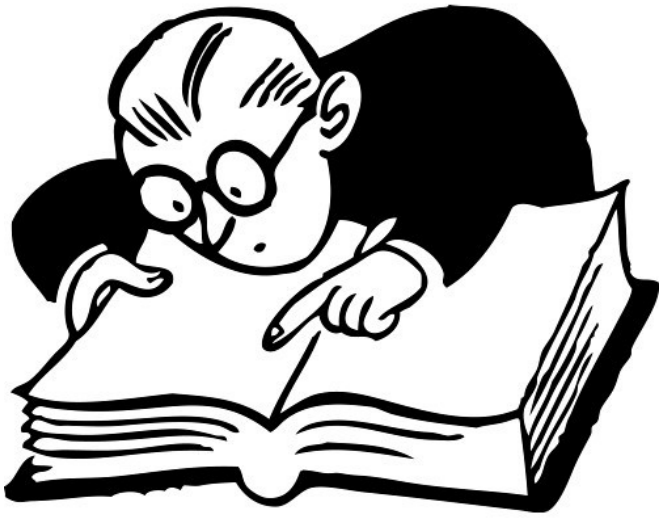
People v. Quantis Griffin

CA3; C074779

December 19, 2016

Quantis Griffin sought Prop. 36 relief, but was declared ineligible by the trial court because he was armed with a gun. He disagreed, unsuccessfully, that the fact that the gun was in his girlfriend's purse in the back seat of the car exonerated him.

The trial court issued a written ruling finding defendant statutorily ineligible for resentencing. The court said it "reviewed factual information contained within the court record, specifically, the transcript of the plea and the preliminary hearing transcript. Based upon the Court's review, [defendant] was a backseat passenger during a vehicle stop. On the backseat floorboard near where the defendant had been sitting was a purse containing a handgun. [¶] [Defendant] argues the record is insufficient to establish that he was aware that the weapon was near him. The Court disagrees. The Court finds that during the commission of the present offense [defendant] was 'armed with a firearm,' as defined in *People v. Bland* [(1995)] 10 Cal.4th 991, 997 [*Bland*]. The firearm was near to where the defendant was seated in the vehi-



cle and available for use either offensively or defensively. Further, during his plea, the defendant admitted possession of the firearm, an element of the offense." The trial court noted defendant did not admit, nor was any sentence imposed for, an arming enhancement (§ 12022, subd. (a)(1)). The court viewed section 1170.126 as "arguably unclear" but found "the clear intent of the voters was to prohibit resentencing for felonies committed when the defendant was armed with a handgun, regardless of whether an arming enhancement was admitted or a sentence imposed for that particular enhancement. . . . The Court finds that because [defendant] was armed with a firearm during the commission of his present offense, he is ineligible for resentencing."

In reviewing the factual record, the court found the evidence easily sufficient to uphold the resentencing petition denial.

Defendant argues the factual record does not show he was armed during commission of the possession offense. However, he does not discuss the record but merely claims in one short paragraph that, because a person can be convicted of a possession offense without necessarily being "armed," he was not armed "as a matter of law." Defendant has not included the entire factual record in the record on appeal. He expressly agreed in the trial court that the factual basis for the plea included "190 pages of discovery and the approximately five videotaped tapes that we [the prosecution] have provided and the defendant's criminal history from both this case and the robbery case, constitutes the factual basis." Defendant has not asked for these exhibits to be transmitted for the appeal. (Cal. Rules of Court, rules 8.224, 8.320.) The appellant has the burden of providing an adequate record for review. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) Additionally, "an inmate . . . may be found to have been 'armed with a firearm' in the commission of his or her current offense, so as to be disqualified from resentencing under [Proposition 36], even if he or she did not carry the firearm on his or her person." (*People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 984-985, 990, 992 [defendant convicted of drug offense was ineligible for resentencing where law enforcement officers conducting parole search found defendant and drugs in kitchen and found guns in the house].)

In any event, the factual basis verbally stated in court suffices. By agreeing to that factual basis, defendant admitted he was in the car; it was his gun; his gun was in the car near his feet concealed in a woman's purse; everyone else in the car knew he and his gun were in the car; and he lied to police about his identity. That is more than enough to establish defendant was armed.

Artists Serving Humanity (ASH) is accepting art entries for a show May through July 2017. This is an opportunity for artists to give back to society through their art. Artists who are a part of ASH make the generous decision to donate a minimal portion from the sale of their art to a charity.

For information please write:
The Learning Center, Artists Serving Humanity
P.O.Box 8817
Redlands, California 92375

BACK IN THE DAY…

Prisons actually served food.

Thanks to some intrepid history buffs a relic of the past has been brought to light. And while we're sure in those bygone days, as now, CDC (what was the CDC called in 1946? Certainly, not CDC**R**) put their best face and carefully parsed words forward, it's still interesting to compare and contrast yesteryear's prison chow with today's.

So, for your consideration, we present a menu from Alcatraz, September, 1945 to compare with snapshots (literally) from the fare offered to inmates more recently---say, about 2015. Note that in that decade, what we call lunch was known as 'dinner', and the evening meal was 'supper.' Hench the old term 'dinner pail' to describe today's lunch box.

And how might we describe the more recent offering, if we were designing the menu?

Dinner	Supper
Legume blend	Tube steak
Fruit puree	Cooked beans and sauce
Whole grain and fruit cookies	Cabbage salad, dressing
Bread and coffee	Brownie
	Bread and coffee

Back in the day continue…… ***How about a menu from Alcatraz back in 1946***

COPY

MAIN LINE MENU 9/2 to 9/8, 1946

1946	BREAKFAST	DINNER	SUPPER
M L	Stewed Prunes	Split Pea Soup	Split Pea Soup
O aD	Bran Flakes	Roast Shoulder of Pork	Boston Baked Beans
N ba	Fresh Milk	Sage Dressing	Tomato Catsup
oy	Sugar	Brown Gravy	Beet & Onion Salad
r	Orange Roll	Mashed Potatoes	Canned Pears
9-2	Bread & Coffee	Stewed Corn	Bread & Coffee
		Apple pie	
		Bread & Coffee w/Milk	
T	Apple Sauce	Puree Mongole	Puree Mongole
U	Cracked Wheat	Baked Meat Loaf	Chili Con Carne
E	Fresh Milk	Pan Gravy	Steamed Rice
S	Sugar	Steamed Potatoes	Lettuce Salad
	Peanut Roll	Spinach w/Bacon	Crackers
9-3	Bread & Coffee	Bread & Tea	Layer Cake
			Bread & Coffee
W	Fresh Orange	Mexican Soup	Mexican Soup
E	Shredded Wheat	Beef Pot Pie Anglaise	Baked Meat Croquettes
D	Fresh Milk	Tomato Catsup	Bechamel Sauce
	Sugar	Buttered Beets	Mustard Greens
9-4	Mapeline Roll	Cole Slaw	Watermelon
	Bread & Coffee	Bread & Tea	Bread & Coffee
T	Stewed Peaches	Vegetable Soup	Vegetable Soup
H	Hot Griddle Cakes	Boiled Corned Beef	Spaghetti & Meat Sauce
U	Honey	Steamed Potatoes	Romaine Salad
R	Oleo	Quick Cooked Cabbage	Spiced Crab Apples
S	Bread	Prepared Mustard	Bread & Fruit Pudding
	Coffee w/Milk	Bread & Tea	Bread & Coffee
9-5			
F	Canned Pears	Potato Chowder	Potato Chowder
R	Farina	Breaded Rock Cod	Two Fried Eggs
I	Fresh Milk	Sliced Lemon	Fried Potatoes
	Sugar	Mashed Potatoes	Zucchini Saute
	Fruit Roll	Stewed Tomatoes	Iced Cup Cakes
9-6	Bread & Coffee	Bread & Tea	Bread & Coffee w/Milk.
S	Canned Plums	Minestrone Soup	Minestrone Soup
A	Rice Krispies	Stuffed Cabbage, w/Meat	Bacon Jumbolaya
T	Fresh Milk	Tomatoe Sauce	Tomato Saute
	Sugar	Steamed Potatoes	Cucumber & Onion Salad
9-7	Mint Roll	Fresh Green Beans	Orange Jello
	Bread & Coffee	Bread & Tea	Bread & Coffee
S	Half Canteloupe	Rice Tomato Soup	Rice Tomato Soup
U	Rolled Oats	Pounded Beef Steak	2 Slices Luncheon Meat
N	Fresh Milk	Pan Gravy	Tossed Vegetable Salad
	Sugar	Mashed Potatoes	Apricot Pie
9-8	Raspberry Bun	Corn on the Cob	Bread & Coffee
	Bread & Coffee	Bread & Coffee	

.S.P., ALCATRAZ, CALIF.

How about a typical lunch & dinner

On any typical day In 2015

THE FAD; FLAWED AND DUBIOUS

It should come as no surprise to anyone reading LSA/CLN newsletters for the past several years that we are no fans of the Forensic Assessment Division (FAD), the psychological assessment arm of the BPH. It certainly isn't news to Dr. Cliff Kusaj, the FAD head. If he hasn't actually been in meeting rooms over the last several months, not to say years, when we've expressed our concern, sometimes bordering on outrage, over the FAD practices, we're pretty sure he's gotten the word from someone.

And although we fully expect the BPH will unanimously adopt recently proposed regulations regarding the administering of Comprehensive Risk Assessments (CRA), Life Support Alliance, and several other groups and individuals, still do not believe the regulations up for approval are sufficient to protect the rights and liberty interests of inmates. And we're not shy about saying so.

During the multi-month process that is required for such regulations to be formally adopted and approved we have repeatedly expressed our concerns, both in person at BPH business meetings, and in writing. And once again, in January, we reiterated those concerns, in person, at the monthly business meeting of the BPH.

But this time we brought more than words. Harkening back to the beginning of the battle with the FAD we resurrected from our files information on the birth of the FAD; how did this infamous group begin and why? An interesting sidebar to this is that almost no one currently on the BPH, commissioner or administrator, was there at the beginning. And since education is part of our mission, we felt it incumbent on us to educate them.

In 2006 the administration then in charge at the BPH convened a meeting of six psychologists to discuss psychological evaluations of lifer inmates relative to parole suitability. This came hard on the heels of CDCR's court loss in the Rutherford case, which required the BPH to provide sufficient psychologists to write evaluations for inmates in a timely enough fashion to have parole hearings reasonably on time. At the time of the court decision the BPH was some 2,000+ hearings behind, some by as much as 2 years.

Since 2011 the BPH maintained "the consensus of the expert panel was that the HCR-20/PCL-R and LS/CMI were the most appropriate risk-assessment tools for the California lifer population and the panel recommended this battery of tools to the BPH." The above statement was taken verbatim from the Board's 2011 efforts to have the Office of Administrative Law (OAL) approve creation of the FAD. It was and is a lie. And we can prove it.

Let's be clear here; this fundamental misrepresentation was not instigated by the current BPH administration. Current BPH Executive Director Jennifer Shaffer came into her position with the FAD a fait accoompli, and she and her staff has done their best in the intervening years to increase the professionalism, training and transparency of the FAD—in short, the current BPH administration has done their level best to make the best silk purse possible out of this scandalous sow's ear.

But back to our story. During the 2011 OAL proceedings LSA found and spoke with all 6 of the 'experts' attending the 2006 confab that BPH has always maintained was the empirical basis for not only the creation of the FAD, but validation of the testing instruments used. And all are unanimous:

there was no consensus of opinion, no tests were recommended to the BPH, assuredly not the HCR-20/PCL-R and LS/CMI and the meeting can in no way be characterized as an empirical study. The statements and comments of these clinicians, identified by the Board as "experts," lay waste to the Board's claim of scientific justification and validation for the tests used by the FAD.

In fact, our exploration into the creation of the FAD lead to an interesting revelation. Not only was there no consensus on either the FAD or the test to be used, there was no real public record of this meeting either. The totality of public record to support the assertion of any consensus are notes of one participant, Dr. Wyman, taken on an easel pad—those large flip charts used in meetings to brainstorm and write down ideas and what-ifs.

We know because 5 years ago, when we asked for copies of the public record, BPH staff found and unrolled them for us. And because they were not reproducible, we were allowed to snap pictures of this dubious 'public record,' samples of which you will see accompanying this article. That's it; the sum toll and total of notes, reports, recommendations and conclusions from that meeting, the birth of the FAD. A few pages of easel pad paper; this is, alone, is the basis of the FAD.

To make the point of how dubious this 'public record' is, how vastly inadequate and capricious is the basis for what has become the FAD, we meticulously reproduced those pages, on easel pad paper, and exhibited them for the commissioners. A half dozen intrepid LSA volunteers were our personal easels, each holding aloft a life-size, faithful reproduction of one of the six pages of 'recommendations' and 'consensus.'

It's doubtful any of the commissioners were aware of the nature of this folly, but they are now. Most of the commissioners are, however, probably familiar with the legal doctrine of 'fruit of the poisonous tree.' For those who know this story, CRAs are that fruit and the FAD is the poisonous tree. And no matter how much one tries to sweeten the fruit of the that tree, polish it or even put lipstick on it, it remains tainted and toxic. As does the FAD. It was created on a gross misrepresentation that has never been addressed or corrected, or even admitted.

This fundamental misrepresentation is why we are skeptical of the FAD, have little confidence in CRAs and have and continue to question their methods and request FAD training be open to the public. Regarding the proposed regulations our concerns remain focused in these areas:

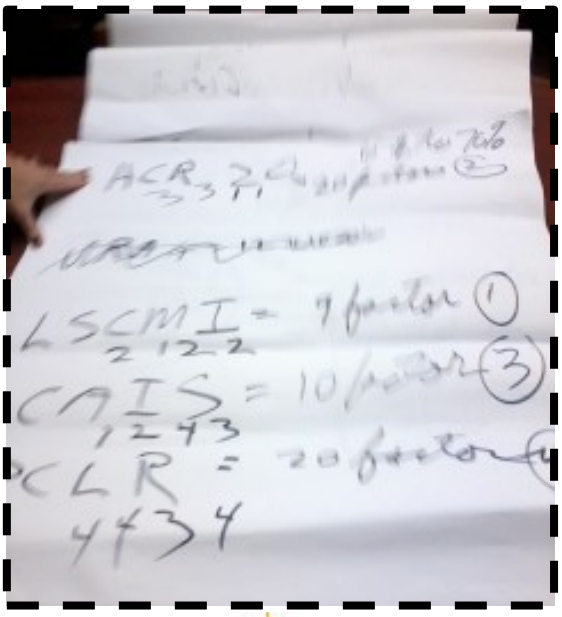
1. Recording the interview process is crucial. Recording the interviews would solve the issue outlines in section (e) (2) regarding clarification of statements attributed to inmates. The current proposed regulations do not in any substantive way address what continues to be a frequent and unresolved issue.
2. More structure is needed on how to address YOPH factors and should be included in the regulations. Currently CRAs are in no way standardized in how these factors are addressed or what weight is given to the hallmarks of youth, and certainly the intent of the authors of SB 260 and 261 was that the great weight standard would apply to all portions of the parole process, including the CRA evaluations.
3. Current proposed regulations do not in fact 'clarify' how the FAD will deal with out of state housed inmates, noting only that those inmates 'may' receive a psych evaluations, whereas all inmates housed in California are required to be so evaluated. This is hardly equal treatment under the law.
4. Training and actions remain largely hidden

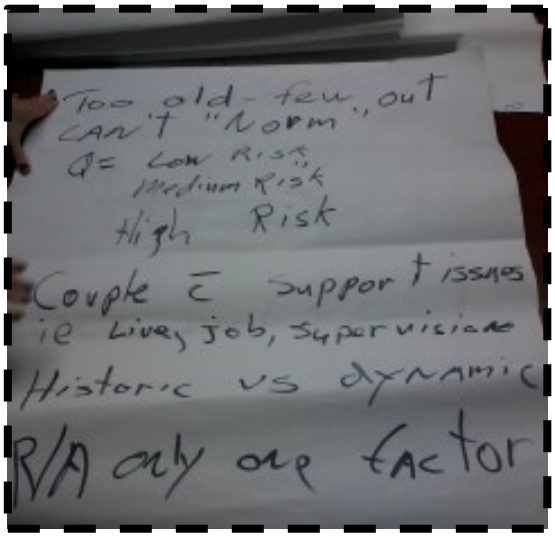
from public scrutiny, with no independent oversight, absent court action. This is perhaps the most brazen deficiency in these regulations, one which can and should be resolved.

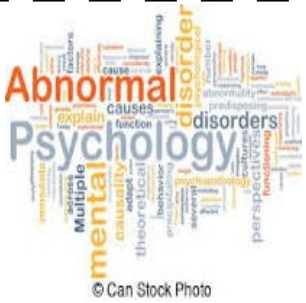
5. Lastly, but perhaps most importantly, the current regulations provide for no oversight or accountability. The FAD is accountable to virtually no one other than themselves, certainly not a confidence or trust inspiring situation, given what we know of the creation of this body and past experiences. We believe the time has come, some 10+ years since its creation, for a new and totally independent 'expert panel' to be convened, to evaluate the FAD, their training, work product, reliability and conformity to professional psychological standards.

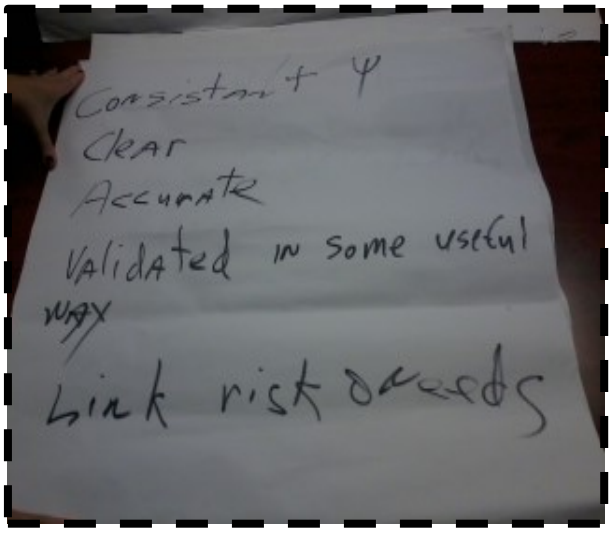
If course we have more objections to the FAD and CRAs, but these cover the major points. And while we do expect the regulations to be approved by the BPH in February, this battle is not over. The FAD a big blip on our radar, and we'll keep aiming at it.

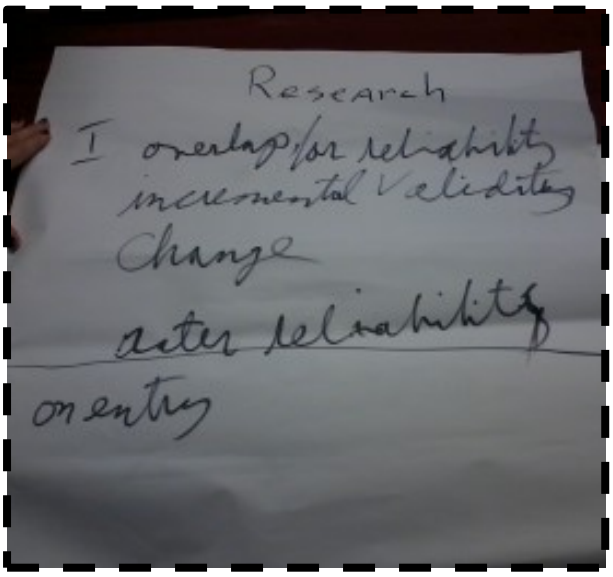
And in the meantime, take a look at the photos of the public record of the meeting that 'created' the FAD and perhaps ask yourselves, as we do, why hasn't this been addressed?











BOARD BUSINESS

The last BPH business meeting of the old year and the first meeting in the new year shared one common theme; brevity. Both meetings were short and rapid, attendees were out almost before getting settled in their chairs. But some business was conducted.

In December BPH Chief Legal Counsel Jennifer Neill reported that of those inmates who did not receive a term calculation at their most recent hearing, due to conflicting interpretations of the settlement terms of IN RE: Butler, BPH had, by December, issued miscellaneous decisions providing that term calculation to over 600 inmates, with another 230 decisions expected by the end of January, 2017. The remaining member of what has become known as 'the gap group,' will have those calculations performed by the end of May.

While Butler called for the board to calculate the base and adjusted base term of each inmate at their initial hearing going forward, and at the next hearing for all other prisoners, some inmates who came under the guidelines of SB 260-261 and elderly parole did not receive those calculations. The board's position was that by virtue of qualifying for those two specialty hearing processes, both of which require minimum periods of incarceration time, those prisoners were deemed to have had their base term set; the term required to qualify them for the specialty hearings.

However, attorneys for the class of inmates in the Butler case felt otherwise and took their argument back to the settlement court for an answer. Briefs on the matter were done in mid-January, but until the court rules on the board's method of interpretation, and to hedge their bets, the BPH has decided to set minimum terms at all hearings, YOPH, elderly or any other, going forward and to address those who did not have a term set via miscellaneous decision, providing them with a base term. The court's decision is expected sometime this year.

BPH Executive Director Jennifer Shaffer reported the BPH anticipates decisions on paroling those inmates affected by the passage of Prop. 57 (primarily not lifers) would be handled much along the lines of the Board's current process for deciding on parole viability of Non-Violent Second Strikers (NVSS). That process involves a review of the inmates' file and history by a Deputy Commissioners, no in-person hearing. Ms. Shaffer also mentioned she expected a 'significant' amount of regulations would have to be created to implement Prop. 57, which may be part of the reason CDC has indicated they do not expect to see the effects of Prop. 57 before October of this year.

Ms. Shaffer also introduced the new Correctional Counselor III who will head up a new division housed at the BPH, which will review the confidential files of all inmates headed to parole hearings, prepare a summary of those cogent items in the file and provide the summary to commissioners, DAs, inmate attorneys and inmates. This new unit is tasked with deciding which items of information in a confidential file are impactful to suitability, which are stale and which are probably groundless.

Shaffer expressed her expectation that this new unit would make a 'significant difference' in hearings where confidential information is an issue. Perhaps it will. And if so, it may also save BPH from another class action law suit.

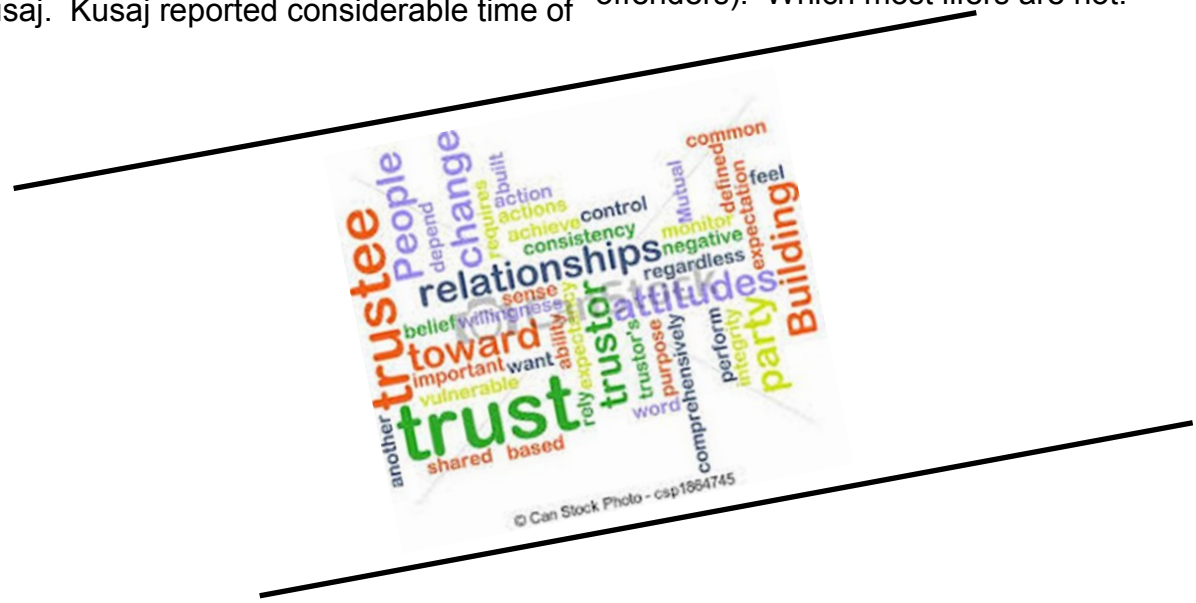
Also introduced in December were, at that time, the two newest commissioners appointed by the Governor. Patricia Cassady and Troy Taira, both seasoned Deputy Commissioners (see elsewhere in this issue for bios), Shaffer noting that Cassady alone had been on the panel of nearly 600 parole hearings.

The January business meeting was even more brief, with few surprises (aside from LSA's visual show-and-tell, detailed elsewhere in this issue). In the everything-old-is-new-again category was the introduction of Ali Zarrinnam, who stepped down as a commissioner in November to take a newly creat-

ed Associate Chief Deputy Commissioner position with the BPH. The new position, which will have Zarrinnam overseeing DC training and acting as the board's liaison with prisons in the southern end of the state in matters relating to hearings, means that while Zarrinnam will no longer be presiding at hearings, his impact will still be felt, via that training of DCs.

January also saw a brief and sparsely detailed report on FAD training in December from FAD head Dr. Cliff Kusaj. Kusaj reported considerable time of the 4 training days was spent in training FAD clinicians in how to administer and score the Static-99, used in evaluating those with a sex offender conviction. In November Kusaj reported the Static-99 was given to about 15% of those interviewed by the FAD.

Kusaj also gave brief bios of two new FAD clinicians recently hired. A common thread in both those instances was the new FAD members' extensive experience—with MDO (mentally disordered offenders). Which most lifers are not.



WHAT A DECISION REVIEW CAN OFFER

Most lifers are aware that if they are denied parole they can file action in court, a writ of habeas corpus (writ), challenging the legal basis for the denial. This long-time avenue of seeking relief for lifers is used less often now, and less successfully, following court rulings and changes in BPH procedure and policy in recent years.

While some writs are still successful they are costly, both financially and in time and resources. And, these days, they are not frequently successful. Which is not to say prisoners must simply sit and wait out a denial length. There are other actions you can take.

One of those actions is to request the BPH legal department to perform a Decision Review on your hearing. Basically, attorneys from BPH will review the transcript of the hearing, with an eye to legal errors in the commissioners' reasoning or actions, as well as a denial length that is excessive.

While the attorneys can suggest the decision be vacated and a new hearing held, if the errors they note could potentially make that decision vulnerable to being overturned by the court, they can <u>also reduce the denial length</u>. Yes, on their own, with a Miscellaneous Decision, BPH attorneys can reduce the length of parole denial; but they cannot increase the denial time. They can do nothing that would be adverse to the inmate without a new hearing.

But, and here's the really important fact, the request for decision review must be done within the Board's

legal window for review, 120 days from the decision. So your time is limited to request this action. You can request it right away, but the attorneys at BPH will not be able to actually do the review until they get that all-important transcript, no more than 30 days after the hearing. But they can often get is sooner. It might behoove you, however, to wait for the transcript, and then go over it carefully.

Pay particular attention to the decision portion, look for those factors that the commissioners felt supported denial and then find how those factors are addressed in the hearing itself. If you feel there are errors, or that, given the facts presented, you were saddled with an excessively long denial, request the decision review. It won't damage your chances at the next hearing, make you wait longer for that hearing or put you in the spotlight. BPH receives many decision review requests each month, some from prisoners, some from attorneys, and some from panel members themselves.

If you decide to request a Decision Review (and this is NOT to be confused with a PTA, Petition to Advance, Form 1045A), you should write to the BPH legal department and state your request. Also lay out for the attorneys at BPH why you feel the denial and/or length was unwarranted, providing references to pages and lines in the transcript if possible. If you're trying for a reduction of denial length and have examples you can offer of why the time is excessive, do so.

There are 3 results than can come from a Decision Review request, and two of them are positive for prisoners: no change, the denial and length remain the same; the denial is vacated and a new hearing ordered, or, the denial length is reduced. It's worth the chance.

Remember, asking for a decision review does not require an attorney, there is no CDCR form required (wow, that's a surprise!) BUT you must make the request in a timely fashion, before the Board's 120-day review window closes. If you decide to request a decision review, send your request and documentation to:

Board of Parole Hearings

Attn: Legal Division, Decision Review

Post Office Box 4036

Sacramento, CA 95812-4036

TIPS FROM HEARINGS

1. Be sure to speak when answering questions—the transcriber can't hear nods of the head
2. Don't interrupt the panel members—they'll let you know when they've finished their questions and want your response.
3. Don't use 'bad decisions' as the reason for your crime; bad decisions lead to wearing brown socks with a black suit, not committing a crime.
4. If AA is part of your recovery, know the 12 steps; if you can't memorize all of them, know which one is most important to you.
5. Ask your attorney what questions he's likely to ask you—you don't want any surprises there.
6. Don't say you'll deal with anger and stress by never getting mad or letting yourself get stressed. Reality check—it will happen, but it's how you deal with it that matters.
7. If you have victims at your hearing, keep your eyes focused on the panel during their

statements. The commissioners understand this, and the better ones will tell you to do so.

8. Wait for the commissioners to paraphrase or repeat clarifying questions from the DA—and then answer the commissioner. The DAs are not to question you directly, and commissioners sometimes decide some questions are irrelevant and don't require you to answer.
9. If you start to feel stressed and overcome, don't be afraid to ask for a short break; chances are, the panel members could use one too.
10. Don't try to impress anyone with your vocabulary. Even if you know what that 11-letter word means and when to use it (and chances are pretty good that you only think you know), this is a place to keep it simple.
11. If you are denied, don't become angry. Look at it as a temporary setback and read your transcript for where you need work and improvement. Showing your anger at a disappointment is proof to the panel that you might be dangerous.
12. Be honest. Don't take the blame for something you did not do, and don't try to make yourself look good. Honesty works, and it's much easier to deal with in the long run.

FROM 12, TO 14, THEN 13, NOW BACK TO 14

The number of commissioners has increased, and hopefully stabilized

Anticipating an increase in the number of proceedings requiring the participation of parole commissioners (an increase in the number of YOPH and elderly hearings, and three-strikers beginning to come into the hearing cycle), the number of BPH commissioners was increased in this year's budget for CDCR. Though expanded from 12 to a total of 14 members, the board has had a bit of trouble reaching, and holding, that number.

Starting in late summer, with the official board number still set at 12, the group suffered a reduction with former Commissioner Elizabeth Richardson resigned, leaving the board at 11 members. Shortly afterward, Gov. Brown appointed former warden Randolph Grounds, bringing the body back up to full strength.

In late November Brown added numbers 13 and 14, in the persons of Patricia Cassady and Troy Taira, both long-time deputy commissioners, appointed as commissioners. To be followed, in very short order, by the resignation of Commissioner Ali Zarrinnam; back down to a 13-member board.

The latest development; in late January, the Governor once again got the board back up to quota, appointing yet another former CDCR officer, Michael Ruff, to the board. Currently four commissioners await confirmation by the Senate, before being totally secure in their job, but, following a brief training period, all will be presiding at hearings until that confirmation process.

Herewith are the bios of the newest commissioners. LSA expects to be at the confirmations for all, and we welcome input from prisoners and/or attorneys who have had interactions with any of these individuals.

Patricia Cassady: has been a deputy commis-

sioner since 2013, an associate chief deputy commissioner at the Board from 2005 to 2013 and she served as a deputy commissioner from 1995 to 2004. Cassady was in private practice at Law Offices of Patricia A. Cassady from 1988 to 1995. She earned a Juris Doctor degree from the John F. Kennedy University College of Law.

Troy Taira: has been a deputy commissioner since 2015, a special assistant inspector general in the California Office of the Inspector General from 2013 to 2015 and administrative law judge in the California Office of Administrative Hearings from 2012 to 2013 and 2009 to 2011. He was an administrative law judge at the California Department of Social Services from 2011 to 2012, staff counsel and prosecutor for the U.S. Coast Guard from 1992 to 2009 and a senior staff attorney at the U.S. Department of Homeland Security from 1992 to 2009. He was a defense attorney in the Fresno County Public Defender's Office from 1991 to 1992 and served in the U.S. Navy Reserve from 1988 to 1992. Taira earned a Juris Doctor degree from the University of California, Davis School of Law.

Michael Ruff: has been a retired annuitant special agent reviewing high-security inmate conduct on the Special Projects Team at the California Department of Corrections and Rehabilitation since 2013. He was a special agent in charge at the California Department of Corrections and Rehabilitation Office of Correctional Safety from 2007 to 2013, where he was senior special agent from 2003 to 2007, acting as a gang interdiction specialist and liaison with federal, state and local law enforcement. Ruff was a captain at the Deuel Vocational Institute from 2001 to 2003, where he was a lieutenant from 1998 to 2001 and a sergeant at San Quentin State Prison from 1994 to 1998, and a correctional officer from 1986 to 1994. He served as a senior airman in the U.S. Air Force from 1982 to 1985.

12 + 2– 1 + 1 = 14

EN BANC RESULTS

Results of en banc decisions in December, 2016 and January, 2017 were nearly an even split, with as many prisoners experiencing good outcome as finding disappointment. The two months saw a total of four considerations for recall of sentence under PC 1170 (e), so called compassionate release, with results evenly divided.

In December three prisoners, all certified by CDCR's own medical personnel to be within 6 months or less of death, were considered for sentence recall, but only two were successful. **Guadalupe Alvarez** and **Gary Tomlin** were refused that consideration, while **Philip Rios** was granted.

Alvarez, 86 years old and suffering from dementia and impaired mobility as well as medical issues, was supported by family members, with whom he hoped to reside. However, the district attorney from Sacramento County expressed the opinion that Alvarez should die in prison, opining that despite his medical and mental issues he remained a danger to the community, in part due to his ability to use technology (despite his age). The DA also treated the audience and board to a detailed recitation of Alvarez' offenses, a common tactic. The panel declined to recommend Alvarez for recall of sentence, citing his continues mobility, anger issues and a plan to reside with family members in an apartment complex.

Gary Tomlin was also denied after an enthusiastic presentation by a young DA from Tulare County who also expressed the opinion that the courts intended Tomlin to die in prison. But neglected to point out any support for that supposition.

But, despite opposition from the LA DAs office, Philip Rios was granted recommendation for recall of sentence. The DA representative from LA also spent considerable time recounting the crime, and was moved to offer up the opinion that Rios would not survive in society, making it likely that he 'may' reoffend again.

Perhaps the DA missed the point of 1170 (e); none of the those submitted for this consideration are expected to survive, either in society or prison. In January. 2017, despite having no speakers either in favor or opposed to his possible release, **Kenneth McCurdy** received a recommendation for recall of sentence.

Also in December, the board affirmed the grant of parole given to **Orlagh Bewley**. The decision had been referred to the board by the Governor for review, Brown expressing his concerns that Bewley, should she be released, could be vulnerable to possible manipulation, due to her health issues, that could cause her to reoffend. That rather convoluted reasoning was met head on by members of Bewley's family, who presented a reasoned, cogent and persuasive support plan and network for her.

The board also affirmed a grant for **Robert Meister**, following a tie vote at his hearing, adding a handful of special conditions of parole to his release.

The remainder of January's en banc hearings revealed mostly negative outcomes, with parole grants to **Michael Davis** and **Voltaire Williams** being referred for rescission consideration, both on referral by the Governor. Davis' grant was supported by family and attorney Sabina Crocette, who informed the board the Governor's facts in referring for rescission were incorrect, in citing results of the Static-99 psychological test administered to Davis. Crocette maintained the Static-99 was not an appropriate evaluation tool for Davis, thus leading to inappropriate conclusions.

Most of the time in January's consideration of en banc hearings was consumed by a veritable parade, including many Los Angeles are law enforcement personnel, to oppose the parole of Williams. This consideration required the attention of DAs from Los Angeles, a legislative lobbyist for various law enforcement agencies, several law enforcement personnel, and victims' representatives, all of whom opposed Williams' release.

One DA representative's remarks attempted to tie Williams' crime, involving the killing of a LA police officer some 25+ years ago, with the more recent attacks on police in various parts of the country, notwithstanding the passage of time and distance. The second DA, who exceeded his time and was civilly but firmly cut off by Commissioner Anderson, opined that this was one of the "worst crimes" because the victim as a police officer. He also questioned and complained about the process which allows parole consideration for such crimes; perhaps he missed that day in law school.

EN BANC: WHEN YOUR FAMILY CAN GO TO BAT FOR YOU

As we wait, not without trepidation, for the February release of the Governor's report to the legislature on his reviews of parole grants (better known as the compilation of reversal letters) it's a good time to remind those who aren't subject to out-right reversal of a grant how the gubernatorial review process works for them. What can happen, how it works, and what you can do about it.

For those with a 187 PC conviction (murder, first or second), the Governor can, after reviewing the parole grant, simply insert himself into the equation and over-rule to commissioners. This is known as 'taking' a parole date, and it happens far too often in our minds. While previous governors reversed up to 80% of grants up for their consideration Governor Brown has stood fast at about 14-15% until

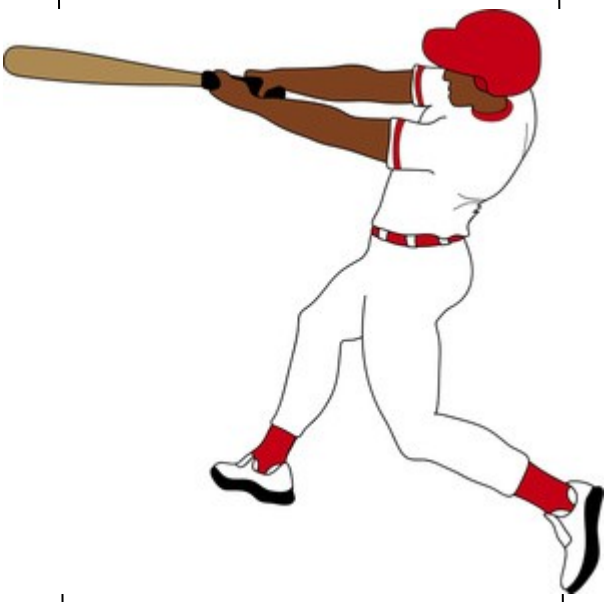
last year, when his reversal rate was just over 10%. For those lifers facing this possibility, we'll have more information on the Governor's 'triggers' in the next CLN issue, after we've received the report and had time to mine it for data.

For those with a life, or long-term determinate sentence that were not charged with murder the Governor still can and does review those grants of parole, but lacks the power to simply reverse the decisions on his own. For those cases he must refer the grants back to the entire 14 member parole board, for a process called 'en banc' consideration/hearing.

Don't be fooled, en banc hearings are not parole hearings in the usual sense. The transcript and factors of the individual's case are reviewed by all commissioners at their monthly business meeting in Sacramento. At that time those who oppose or support parole for the prisoner can speak, for 5 minutes each, to the board, in person. This is the one time family and friends of lifers and other long-term inmates can testify to their support for that inmate in person, not simply via support letters.

To be sure the DAs and victims groups are there as well, and the presentations are often very emotional on all sides. The DAs rarely do anything but oppose parole, usually rehashing in the most sensational and graphic ways the crime, up to and including offering up crime scene photos. Trashing of inmates is common, wild prognostications not unusual. Victims and victims' families are often present, usually to oppose, many still very raw in their grief and pain, most unaware and unconcerned with the changes the inmate may have made in him/her self in the intervening years.

And into this mix is thrown the family and supporters of inmates seeking parole, facing a pretty daunting array of victims, DAs and parole commissioners, who may be the most reasonable individuals in the mix. We often watch prisoner family members struggle to find the words to support their inmate, desperate to make the case for their loved one, often afraid they must curry favor with the board to do so.



If you find yourself in the position of having your grant reviewed via en banc consideration, here are a few tips for your family members who want to support you, either via letter (to the BPH) or actually appear in person. Each person who wishes to speak will be allotted 5 minutes, and 5 minutes only, to make their case on your behalf. Pass these tips along to your family members, so they're prepared and can make the most of their opportunity.

Don't grovel. While it's appropriate to thank the board, they are offering no special consideration or favors by hearing you; it's your right. Don't waste precious time fawning over them for 'allowing' you to speak. And you can address them simply as commissioners: 'honorable' or 'respected' is not part of their job title.

Commissioners aren't dragons, they will listen to you and afford you every civility. Unless you go over your 5 minutes—then you will be politely but firmly cut off. They don't hate you, or your inmate, they won't interrupt you, belittle you or make snide comments. They are professionals.

Stick to the facts—this isn't the time to talk about how you've missed Johnny or Susie, how they were good kids who just 'made a mistake.' That language can be damaging to their chances—they've had to take responsibility for their actions in the hearing, and it would help if you show the board you understand the seriousness of their past actions.

Speak to the change and growth you have seen. Talk about how

your inmate now can make good decisions, understands how to get along and is dealing with whatever life factors helped bring them to prison. Let the commissioners know your inmate is committed to healthy reentry and positive life, and you are committed to helping and supporting them in that effort.

Don't bring pictures of where he/she will live, cars they will have, children. It isn't the point of the consideration, and it takes up precious time passing those along. The commissioners aren't as concerned about the size of the house as they are about the commitment of those living in it to help that inmate reenter society.

Let the commissioners know you understand parole will be something you all participate in and are willing to help your inmate abide by any parole conditions by creating a safe and supportive environment for him or her.

It's OK to show emotion, but don't let that be the basis of your comments—Grandma may be 100 years old and want to see Johnny home before she dies, but that isn't something that will sway the commissioners.

Don't react or try to counter any comments made by DAs or victims against parole; it isn't a debate. Just keep your comments positive and on point.

And keep your presentation to 5 minutes. You can write it out and read it or wing it, but you will only have 5 minutes, so be sure you cover the important stuff first, and if you're translating for someone addressing the board in a different language, be sure to keep that 5-minute limit in mind—just because there may be 2 of you standing at the podium doesn't mean you get 10 minutes.

Having family members appear before and speak to the board can be helpful in affirming your grant of parole, but making the process as positive for the board and as stress-free as possible for your family are both good goals.

NON-DESIGNATED PROGRAMMING FACILITIES

Get along, or 'get along,' to somewhere else.

Over the years CDCR has attempted many strategies to deal with prison violence, gangs and racial tensions, from strictly segregating inmates by race to required in-cell integration (that one raised eyebrows and blood pressure everywhere). Laudable aims and not unrealistic, given that when inmates return to society they must learn to get along with all factions and cohorts without resorting to violence. Unless they want to become inmates again.

One of the most extensive of these efforts was the creation of Sensitive Needs Yards (SNY) some years ago. Prisoners housed on SNYs ran the gamut of individuals, from those who would be targets on GP yards for a variety of reasons (all unacceptable) to those who were simply tired of prison politics and wanted to opt-out. About a decade ago, when SNYs were new and promising, one high ranking CDCR official, in discussing SNY placement with CLN, said the department hoped to convince 51% of the inmate population to go on SNYs, and if that happened, SNY yards would become the new GP.

Of course, that didn't happen and SNYs eventually proved to have their own set of problems, including formation of gangs even among those who supposedly wanted out of prison politics. Now comes a new policy from CDCR, once again attempting to answer the question, "Can't we all just get along?"

In a memo dated December 5, 2016 and signed by Kathleen Allison, the Director of Adult Institutions and John Dovey, Director of Corrections Services for the California Correctional Health Care Services (the medical receiver's office), the department explains non-designated programming facilities (PF) will be to provide a housing environment for inmates 'demonstrating positive programming

efforts and a desire to not get involved in the destructive cycles of violence.' The memo continues, "CDCR's Level I and Level II housing facilities, which currently house a large population of programming inmates, will slowly be transitioned into non-designated PF facilities.

"This will allow for greater access to lower level housing and therefore, greater privileges. Rehabilitative programs will also be available, such as Education, Vocation and Religious Activities, as well as a variety of Inmate Leisure Time Activity Groups (ILTAGS) and Self-Help Programs." As prisoners come up for their annual classification committee review, if the institution where they are currently housed has been designated as a PF, "classification committees [will] evaluate all eligible positive programming inmate[s], regardless of prior housing designations. As a non-designated PF, it is expected that all inmate[s] will program together" within the mission of the facility and will be expected to "comply with integrated housing expectations, regardless of prior GP or SNY programming or level designations."

Meaning, what? Meaning that as more and more institutions are converted to PF status more and more inmates will have to make the choice: program, with everyone, or those who are "non-compliant with transfer and/or housing placement recommendation shall be subject to the department disciplinary process and potential placement into higher level housing."

Forcible integration? Well, yes, in a sense. But. Once released, and as Sec. of Corrections Scott Kernan recently noted, about 90% if CDCR inmates are released, today's prisoners, who are tomorrow's neighbors and citizens, must function within a society that is inclusive, and function within the perimeters of that society.

Which means everyone must, to at least a certain extent, interact with everyone else. You don't have to like it, agree with it, or enjoy it. But you do have to 'get along.' To not do so, to express those old anti-social tendencies, those criminogenic needs, again is to guarantee a ticket back to CDCR. Where, if you want to have access to privileges and opportunities for ILTAGs, vocations and other actives—you'll have to agree to get along with everyone.

HINTS ON THE IMPACT OF PROP. 57 FOR LIFERS

Little if any impact on sentencing, some on credits, perhaps some on MEPD timing

Lifers, and families, hoping for the magic key that will provide them quick and drastic relief from their life sentence, have been flooding LSA offices with letters, calls, emails, every method of communication short of smoke signals, looking for that fast track home. And while no one likes to be the bearer of bad news, to us, providing the facts is more important than fostering false hope.

So here it is. Again. Prop. 57, which most sources don't even expect to be implemented until October, will provide scant, if any relief for lifers. Nor was it ever intended to. Anyone reading the language of the proposition on the ballot should have keyed in on the phrases mentioning 'non-violent' and 'non-serious' convictions. Most lifers have convictions for serious and/or violent offenses; never the target population for this action.

A recap of Prop. 57 was presented in the Governor's Budget Message a few weeks ago. It reads as follows: "*Proposition 57 reforms the juvenile and adult criminal justice system in California by creating a parole consideration process for non-violent offenders who have served the full term for their primary criminal offense in state prison, authorizing the California Department of Corrections and Rehabilitation to award credits earned for good behavior and approved rehabilitative or educational achievements, and requiring judges to determine whether juveniles charged with certain crimes should be tried in juvenile or adult court.*"

The summary later continues, "*The Department currently operates a court-ordered parole process whereby non-violent, non-sex registrant second-strike offenders are eligible for parole consideration by the Board after serving 50 percent of their sentence. Proposition 57 authorizes a similar process by establishing parole consideration eligibility for non-violent offenders who have served the full term for their primary criminal offense. The regulations for the new process will exclude sex registrants.*"

Here's what it will do:

- *"Increase and standardize good-time credit earnings. Good-time credits are earned when an inmate avoids violating prison rules.*
- *Allow all inmates, with the exception of life-term inmates without the possibility of parole and condemned inmates, to earn milestone credits. Milestone credits are earned when an inmate completes a specific education or training program that has attendance and performance requirements.*
- *Increase the amount of time an inmate can earn for milestone completion credits from 6 weeks per year to 12 weeks.*
- *Create new, enhanced milestone credits for one-time significant earned academic and vocational achievements, such as the earning of Associate of Arts and Bachelor's degrees, high school diplomas, the Offender Mentor Certification Program, and Career Technical Education certifications. Enhanced milestone credits will be applied retrospectively for those credits earned during the inmate's current term.*
- *Establish new achievement credits for inmates that have sustained participation in other rehabilitative programs and activities. Inmates will be able to earn up to four weeks of achievement credits in a 12-month period.*
- *Credits earned by life-term inmates will be credited towards their Minimum Eligible Parole Date. Additionally, consistent with current practices, all credit earning will be revocable based on behavior-based violations."*

As any regulation changes or other information becomes available on Prop. 57, we'll let you know. But it appears if you're a lifer, Prop. 57 will only marginally impact you.

FAMILY VISITS EDGING CLOSER

Latest update: On February 17 Secretary of Corrections Scott Kernan issued a memo to all facilities including the following language: "inmates shall not be prohibited from family visits based solely on the fact that the inmate was sentenced to Life Without the Possibility of Parole (LWOP) or was sentenced to Life and is without a parole date established by the Board of Parole Hearings."

"Processing requests for eligibility review of Life Term inmates will take effect on February 20, 2017. Please ensure all Correctional Counselors receive a copy of the memorandum." The memo also notes those inmates will be screened under the existing Title 15 Section 3177, which includes the following criteria:

- Work Group A, B or F only (no C or D)
- No condemned, close or maximum custody
- No prior convection for violent offenses involving a minor or family member or sex offense
- Those with substantial documented evidence or information of misconduct without criminal conviction
- No guilty findings of in-prison narcotics distribution
- No Division A or B offenses within 12 months

We don't expect this to be the final stop on the journey to total restoration of family visits for lifers, but it is a major milestone along the way. Still to come, we expect, are new regulations which may remove some of the current restrictions on why can participate. As more details and changes filter out, we'll do our best to keep you up to date.

THOSE NEW REGS

Are a good start, positive effects, but not the ones for Family Visits

Count on CDCR to create chaos where there is already confusion. In the midst of thousands waiting with breathless anticipation for new regulations outlines criteria for family visits and the anticipation regarding how Prop. 57 may impact lifers, with little fanfare and even less explanation CDCR 'enacted' on an 'emergency' (it's always an emergency when CDCR wants something done) basis new changes to Title 15 on classification and custody. And while there are many positive aspects to these new regs, like most things CDCR they have generated more questions than answers.

Signed by Director of Adult Institutions Ralph Diaz and filed with the Office of Administrative Law on January 23, the changes reference or impact more than a dozen sections of Title 15 dealing with inmate classification and discipline. Many changes are simply for consistency and reference, but several are important and impactful. As usual with CDCR-speak not much is clear, with many references to other sections of Title 15 to explain the new additions. But there are some take ways: the new regs will allow more inmates access to lower security level prisons and housing, making more programs available to them; expand endorsement authority to more staff to and eliminates the two-level close custody classification.

What they do not do is clear up confusion or provide information on which lifers will be able to participate in family visits, touch on any potential impact of Prop. 57 or provide new and understandable classification scores. These regulations are not those long-awaited changes, still in the works. It should be noted, all positive changes delineated in the regs are behavior-driven. Positively programming inmates will be rewarded with lower custody levels and more opportunities. Those who continue to engage in disciplinary-worthy behavior will not.

In summary, the most important impacts of the newly revealed regs are these

- Allow LWOP inmates to be housed in Level II facilities which have electrified fences
- Allow certain categories of lifers, those that meet the 'exceptional criteria' (detailed below) of the regs to be housed in some Level I facilities
- Eliminate Close A and Close B classifications, replacing them with a single Close Custody designation
- Modify the classification and disciplinary process to ensure prisoners convicted of substance use RVRs are housed in facilities where they can obtain treatment
- Modify classification to allow placement in Level I facilities of those inmates who have a history of violence but have refrained from violent behavior for at least 7 years and overall are determined to no longer present a violent threat to others
- Modify the calculation of placement scores for disabled inmates, to ensure they are housed in facilities where they can receive appropriate treatment
- Expand endorsement authority for transfers to additional staff classifications and expand inmate access to rehabilitative programs.
- New calculation method which, through application of good behavior points, appears to make it possible for some lifers to reach classification scores below 19.

Of great interest to lifers will be the criteria for being granted placement in Level I facilities. Those criteria include:

- A preliminary score of 18 or less
- Those given a 3-year denial at their last BPH hearing
- A low or moderate CRA rating at their last interview
- Do not have a VIO (violent inmate offense) designation
- Are not considered a Public Interest (high notoriety) case
- Do not have an "R" suffix attached to their case
- Have no history of escape/attempts
- Do not have a 'mandatory minimum score factor' that would preclude Level I, "Where determined eligible for placement, the mandatory minimum score factor for "other life term" shall be removed/not imposed." In other words, simply being a lifer no longer means a max minimum score of 19, thus precluding housing in Level I.

These regulation changes do not go into effect until February 20, 2017 and as written are less than crystal clear on several areas. How long is the new, single level Close Custody? What will be the new classification point scale? Will any provision be made, as we have heard, for inmates to lose more than 8 points per year, based on positive programming and behavior?

And while February 20 is the date floated as the potential release date of the memo directing prisons to begin accepting family visiting applications and starting that process, these changes, again, are not directed at family visiting and who can participate. Nor do these changes reflect possible impact of Prop. 57 on inmates—those are not expected until October.

So, we have questions and are ferreting out the answers. Once we know, we'll report, but in the meantime, the new regulations, albeit once again CDCR's fall back of 'emergency' changes, appear to be going in a positive step. Perhaps we will, eventually, reach the 'best practices' goal.

NEW LSA PROGRAMS ON THE HORIZON

As The Amends Project continues to roll through prisons from RJD to CTF and beyond, we're creating more programs to bring assistance and information directly to lifers. While the newsletters (Lifer-Line and California Lifer Newsletter) are reaching more and more inmates, nothing compares to the face-to-face interaction where answering questions in real time is possible.

Two new programs are in the final stages of planning and refinement for introduction in 2017. When finalized and ready for presentation, we'll announce it in the newsletters and those who are interested can contact us with the name and contact information of an ILTAG sponsor we can work with.

CONNECTING THE DOTS: You can't begin to understand the "causative factors of your crime" until you go back to what caused your thinking, your feelings, to be outside lines of society. Because the events of your life caused your feelings, which led to your thinking, which developed your belief system, which rationalized your actions as the best course you could take in any given situation. What you think you believe, and what you believe, you act on.

"Connecting the Dots" walks inmates through how to identify those aspects in their own lives, how to understand the impact they had on thinking and beliefs, as well as how to find the tools to cope with those factors, sometimes called character defects, that are present in everyone, but only become criminogenic needs in some instances. A 2-part workshop, the first sessions works on identifying and understanding an individual's 'dots,' with a follow up session to determine how to address and reconfigure those dots.

Developed with participation and input of psychologists experienced in dealing with California lifers, Connecting the Dots can assist inmates already examining their past lives and actions in articulating the change they are making in themselves and how they plan to sustain that change. This program will be available in Spring, 2017.

Late spring or mid-summer is the target date for launch of "LIFERS AND WIFERS." Coming home to the family you left behind, or the new family you're hoping to settle into, is as challenging as becoming suitable for parole. Leaving the artificial atmosphere and culture of prison and entering a world now unfamiliar to most lifers creates tremendous stress, not only on the paroled lifer, but on those closest to him as well.

"Lifers and Wifers," created for about-to-parole lifers and their significant others and parents, builds on the actual experiences of paroled lifers and their families in meeting and weathering those challenges. Using our common experiences, as well as the counsel of prison-savvy psychologists, this symposium throws a light on some of the areas we don't get a chance to discuss in visiting, but must abruptly deal with once a lifer is paroled and suddenly 'home.'

Whether you were married or attached before your life term began or found your partner and relationship while in prison, you've both been living parallel lives, in different worlds; worlds that are about to collide. And what determines if that collision produces a melding or an explosion can be shaped by some of the steps you take in the early days out, and even before release.

Both these programs will be offered through ILTAG groups who are interested in taking their exploration of rehabilitation and reentry past the basic, institutional level, to deal with some of the real problems and issues confronting lifers and lifer families.

LSA TAKING OUR SHOW ON THE ROAD AGAIN

Part of our mission to assist lifers in understanding the parole process and becoming suitable includes educating lifer families on the realities of a life term, how parole happens and what they can do to support and help their lifer reach that goal. The best way we do this is through the family seminars held 4-6 times each year in various areas and communities.

The 2017 curriculum is changed from the last couple of years, as we delve deeper into what it takes to become suitable for parole, what those esoteric terms like 'insight,' 'causative factors' and 'remorse' mean. "The Road to Parole" will help your family and supporters understand what you're up against in working to make yourself suitable for parole, so they have real knowledge and abilities to help you in travel that road.

Our first seminar will be March 18 in Sacramento and Jennifer Shaffer, Executive Director of the Board of Parole hearings, will be a featured speaker. Other tentative dates and cities include Woodland Hills in May; the Inland Empire in July; Long Beach in September and San Jose in October. And we're still searching for a possible venue in the Fresno/Bakersfield area.

If your family or friends would like to attend, have them contact us at: lifesupportalliance@gmail.com or (916) 402-3750 for details and exact dates. They'll learn a lot, and you'll benefit from their increased knowledge and assistance.

SHORT NOTES

- The new DOM is expected in the next 60 days. Always interesting reading
- While we've already sent too many Kusaj reports to count, those sending 4 stamps can receive their own copy. Also interesting reading. But less justifiable.
- If you receive the other LSA newsletter, Lifer-Line, through the services of our volunteers please be sure we have your housing assignment information. And if you have a friend or relative who can provide this service to you, please ask them to do so.

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