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CALIFORNIA LIFER NEWSLETTER™

HAPPY HOLIDAYS from California Lifer Newsletter!

State and Federal Court Cases
by John E. Dannenberg

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

LIFER'S SUCCESSFUL WRIT CHALLENGE OF BOARD DENIAL REVERSED BY APPELLATE COURT

In re Rudy Santos Rodriguez
CA6; Case No. H038623
October 23, 2013

Rudy Rodriguez, 40, doing 26-life for fatally stabbing one man in his intoxicated attempt in 1989 to rob a man of $89, has been down 24 years. Following his denial of parole at his initial parole hearing in May 2011, Rodriguez petitioned the Santa Clara County Superior Court for relief.

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Rodriguez had a history of addiction. His weekend use of alcohol and drugs progressed to daily usage, sometimes 10 to 15 beers an evening. He fluctuated between cocaine and PCP, then switched to PCP while continuing his use of alcohol and marijuana. He experienced depression and anxiety as a result of his drug use and spent a lot of time trying to obtain drugs.

His juvenile history includes arrests for vandalism, theft, possession of marijuana, possession of marijuana for sale, escape from custody, minor in possession of alcohol, receipt of stolen property, being under the influence of PCP, and burglary. He spent time in juvenile hall and at a boys' camp. He was placed in the Sunflower House residential drug treatment program in Watsonville as a juvenile ward of the court in 1989, but soon ran away. He committed the murder a month later.

Typical of juveniles when he entered prison, he received 19 CDC form 115 serious rules violations since 1992, many involving violence. His most recent "115" was in 2005.

But Rodriguez worked to turn his checkered past around while in prison. He earned his G.E.D. in 1993 and completed a few Coastline Community College courses. He earned vocational certificates in graphic communications and landscape maintenance. He received certificates in professional financial planning and landscape design from Ashworth College. He has also participated in vocational courses in silkscreen, auto mechanics, graphic arts, and bakery.

Rodriguez' prison job performance ratings ranging from satisfactory to exceptional. He spends his free time reading, exercising, developing a curriculum for at-risk youth with his cousin, and practicing his Native American spiritual beliefs. He is devoted to his wife, whom he married in 2008, and has frequent phone calls and visits with family.

Importantly, Rodriguez invested himself in considerable self-help programming, participating in groups teaching self esteem, anger management, and stress management. He is currently involved in CGA, NA, and Houses of Healing, and he continues to volunteer with the Juvenile Diversion Program.

In his psychological assessments, Rodriguez' PCL-R score placed him in the low range for psychopathy compared to other male offenders. The doctor noted that he had also shown "notable improvement" in

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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 non-profit, tax-exempt organization located in Sacramento, California. We are not attorneys and nothing in CLN is offered as or should be construed as legal advice.

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

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

LATEST FROM THE JUDGES

As CLN was headed to press word was received that the 3 judge panel overseeing the prison population reduction had once again, and perhaps for the last time, extended the deadline facing the state to meet that population cap. On Dec. 11 the judges, in a brief and succinct one paragraph notice,

gave the Brown administration until April 18 to bring the population of California inmates to 137.5% of design capacity.

The judges further indicated that, "absent extraordinary circumstances," they would countenance no further delays or allow any further extensions. They also ordered the state to continue negotiations with prisoner advocates and representatives until Jan. 10, 2014, on ways to accomplish the population reduction, short of releasing prisoners prior to the completion of their sentence.

Prison Law Office Director and attorney Don Spector commented, "The court is bending over backward to accommodate the state. We're anxious to either complete the negotiation process, or if that's not successful, to resume litigation at the earliest possible time." Despite realignment, delays and shipping thousands of inmates out of state there are still about 4,400 inmates over the number the judges say they will allow.

Although as part of their initial time extension the judges ordered the state not to send additional prisoners to out state prisons there have been numerous reports of new 'deportees' to private prisons in Arizona and Oklahoma. LSA/CLN queried several senate and CDC sources on this and were told that so long as the total of prisoners out of state does not exceed that when the decree was issued the state remains in compliance. In other words, as determinant sentenced prisoners housed out of state complete their terms and are released bed space is opened up. The state has begun shipping out new prisoners to fill those beds, thus using a cunning mathematical trick to keep the actual number of out-state inmates at the same level as when the judges issues their order, yet still subjecting new inmates and families to out of state housing.

In other court actions, US District Court Judge Lawrence Karlton ordered CDCR to work with a special master overseeing prisoner mental health care and to consider opening a health care facility for condemned prisoners at San Quentin, CMF or possibly the new medical facility in Stockton.

Karlton found the state has still not met the requirements of the Eighth Amendment in its treatment of seriously mentally ill prisoners. He noted improvements and the difficulty in finding solutions, commenting, "The solution is not, however, clear from the record before the court." Prisoner attorney Michael Bein said "The most important thing is the judge found there remains a constitutional violation, and the state has to do a better job."

PLATA COURT GIVES STATE MORE TIME TO COMPLY WITH DEPOPULATION ORDER

Plata v. Brown
USDC (N.D. Cal.) Case No. C01-1351 TEH
October 21, 2013

While lifers continue to dream that they will be released pursuant to the depopulation order in Plata, CLN is not aware of any such plans on the State's plate for solutions to the overcrowding. Recently, the Federal Court gave the State a bit more time (one month) to come up with its response to the earlier depopulation order. We reported that Order in the last issue. Today we give the Court's October 21, 2013 update, extending that time period until February 24, 2014.

On September 24, 2013, this Court ordered the parties to participate in a meet-and- confer process facilitated by the Honorable Peter Siggins. Based on Justice Siggins's confidential report and recommendations, the Court now extends the meet-and-confer process to November 18, 2013. On or before that date, Justice Siggins will provide a further informal report to this Court as to the status of the discussions and provide his recommendations for future actions by this Court or the parties. The deadline to achieve the ordered reduction in population is extended accordingly, to February 24, 2014, again without prejudice to the parties' filing a joint request for a further extension or the Court so ordering.

IT IS SO ORDERED

GOV SAYS POPULATION DEAL IN SIGHT

DOES HE NEED GLASSES?

Governor Jerry Brown, speaking at an education event in Los Angeles recently, told reporters he was "reasonably optimistic that we will come to agreement on something we can make work." The Governor also reported he had personally met with Judge Peter Siggens, named by the federal panel as an arbitrator of sorts, between the administration/CDCR and prisoner attorneys.

Brown also indicated he would be speaking to wardens at all California prisons for more information on the healthcare situation in the institutions. The deadline for the state to reach a maximum of 137% of design capacity for California prisons, was pushed to late February, the result, apparently, of progress in talks between the state and prisoners' attorneys and reported to the federal judges in October.

Although no details have been announced, as part of the deadline extension, the state has been barred from sending additional prisoners to out of state prisons. As the negations continue, there remains no indication that lifers will be included in any possible 'early release' of prisoners.

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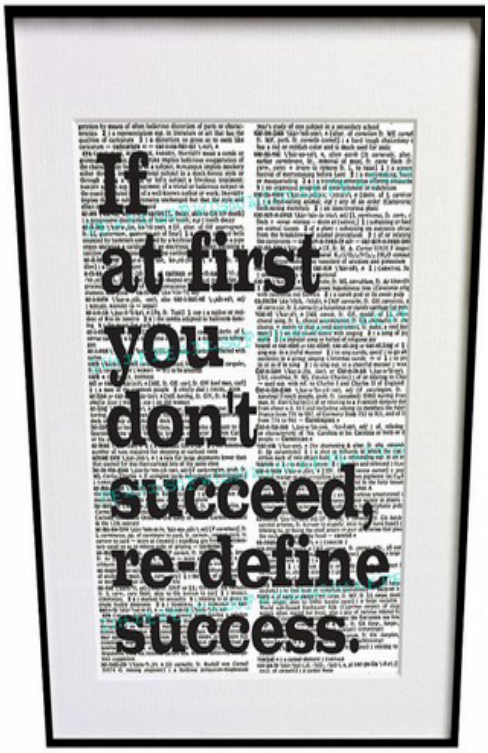
impulse and behavioral control and demonstrated an ability to establish and accomplish long term goals. Similarly, Rodriguez's overall score on the HCR-20 placed him in the low risk category for violent recidivism. His clinical factors were all positive. Rodriguez's overall score on the LS/CMI, which focuses on the risk of general rather than violent recidivism, placed him in the medium risk category, based on his numerous arrests before he turned 16, his institutional misconduct, and his supervision failures. Overall, the doctor assessed Rodriguez' risk of violence in the free community as "relatively Low/Moderate."

At his 2011 hearing, the Board reviewed Rodriguez's social history, his juvenile arrest record, his parole plans, his post incarceration record, his educational and vocational upgrading, his prison work assignments, and his self-help programming. The Board noted his "extensive" work on anger management, emotional management, advanced stress issues, and victim awareness programming. It reviewed his serious rules violations, noting that "even though the last one was 2005," many involved fighting. He attributed his violations to irresponsibility and defiance, telling the Board he was "young" and "just trying to fit in." [Rodriguez was 16 at the time of his crime.]



The Board denied Rodriguez for three years. It placed great weight on his institutional misconduct, noting "the extent and magnitude and seriousness" of his rules violations. It expressed concern that his most recent counseling chrono was linked to a controlled substance [medication], and controlled substances were a "significant factor" in the commitment offense.

The Board praised Rodriguez's parole plans and his focus, encouraged him to continue with self-help, and advised him not to get any write-ups. "The good news," the Board told him, "is that you probably will be getting out of prison if you stay on the present course . . . ."

Rodriguez challenged the Board's decision in the superior court, which granted his habeas corpus petition and ordered the Board to conduct a new hearing within 100 days. The court first faulted the Board for focusing on static factors, "the commitment offense, prior juvenile criminality, and social instability," to support its finding of current dangerousness. Noting that Rodriguez was a minor when he committed the life crime, the court also faulted the Board for giving "this central and defining fact no consideration whatsoever." This error, the court wrote, "infect[ed] the entirety of [the Board's] decision and compel[led] the conclusion that [Rodriguez] did not receive individualized due process." Finally, the court concluded that Rodriguez's 2005 rules violation for hoarding Benadryl was "too distant, and the nexus . . . too speculative, to support a finding of dangerousness in 2011."

The Court of Appeal reversed, agreeing with the Warden that "some evidence" supported the Board's decision, which must for that reason be upheld. The Court noted that "under the 'some evidence' standard of review, the parole authority's interpretation of the evidence must be upheld if it is reasonable, in the sense that it is not arbitrary, and reflects due consideration of the relevant factors." (*Shaputis II, supra*, 53 Cal.4th at p. 212.) "The courts' function is . . . limited to ensuring that the Board's [decision] is based on a modicum of evidence, not mere guesswork." (Id. at p. 219.) The standard is satisfied here.

Specifically the Court found from the hearing transcript that the Board considered his social history, his juvenile record, his institutional record, and his parole plans. The Board also considered the egregiousness of the life crime, Rodriguez's serious

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abuse of alcohol and drugs, and the role that his addiction played in the life crime. Its decision thus "reflected due consideration of the relevant statutory and regulatory factors." (See Regs., § 2402.)

Quoting the superior court's order, Rodriguez argued that the Board "failed to give any consideration [to Rodriguez's] age at the time of his offense and its impact on the question of insight." The Court of Appeal held that the record belies this assertion. "The Board was plainly aware that Rodriguez was 16 when he committed the life crime, and it expressly noted that fact in its decision. It did so, moreover, in the context of listing the factors it considered in reaching its decision, telling Rodriguez that "[t]he Panel considered your behavior before the offense. . . . We considered the prior criminality, all of it obviously being as a juvenile . . . . [T]he Panel noted the issue of substance abuse . . . . You were 16 years of age. . . . We went to the past and present mental state, past and present attitude toward the crime." Accordingly, the Court flatly rejected Rodriguez's contention that Board violated his due process rights by failing to consider that he was a juvenile when he committed the murder.

The Court also rejected Rodriguez' argument that there was "no nexus between [his] 2005 possession of Benadryl and the finding he would be a risk to the public if released," noting that Rodriguez began experimenting with alcohol and drugs at 10, had several substance-related arrests as a juvenile and was eventually sent to Sunflower House, from which he absconded. He acknowledged that his substance abuse "affected every area of his life." He told the Board's psychologist that "if I hadn't been an addict, I wouldn't have done the things I did . . . wouldn't have robbed the man. My addiction motivated all my criminal behavior." The Court accepted the doctor's conclusion that Rodriguez' risk of violence in the free community "would likely increase if he . . . returned to drug and alcohol abuse."

The Court went on to categorically reject all of Rodriguez' contentions, faulting the superior court for having improperly "reweighed the evidence."

> Against this background, we cannot conclude that the Board's concern about Rodriguez's hoarding of 98 Benadryl pills was "arbitrary." (*Shaputis II, supra*, 53 Cal.4th at p. 212; *In re Montgomery* (2012) 208 Cal.App.4th 149, 163 (*Montgomery*).) The superior court erred in concluding otherwise. The court was "not empowered to reweigh the evidence." (*Shaputis II*, at p. 221.) It was not the superior court's role to determine that Rodriguez's then six-year-old rules violation was "too distant" or that the nexus between that violation and his current dangerousness was "too speculative." "The 'some evidence' standard does not permit a reviewing court to reject the Board's reasonable evaluation of the evidence and impose its own judgment." (*Shaputis II*, at p. 199.) Here, the Board could reasonably have concluded that Rodriguez put the hoarded pills in the vitamin bottle to conceal them for later use, either to get high or to trade with other inmates.

Rodriguez contends that the PCL-R, HCR-20, and LS/CMI test results and his "past history" of lawbreaking provide "no support" for the Board's conclusion that he is currently dangerous. Immutable historical factors are only probative of current dangerousness, he argues, if other evidence supports the conclusion that an inmate remains a continuing threat to public safety. "In this case," he asserts, "there is no such current evidence." We cannot agree.

Rodriguez's argument overlooks his 2010 counseling chrono for attempting to introduce contraband items into a state prison. He cannot dispute that the violation constituted "current evidence." He acknowledged that the materials he ordered were contraband. The Board could reasonably have concluded that the 2010 counseling chrono showed that Rodriguez was unwilling to abide by rules that he found inconvenient. (See *In re Reed* (2009) 171 Cal.App.4th 1071, 1082 (*Reed*) [parole denial based on life prisoner's recent receipt of a single counseling chrono].)

We do not find Rodriguez's effort to distinguish Reed persuasive. He argues that in Reed, unlike here, the inmate

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had been expressly warned to " 'remain disciplinary free, not even a 128.' " (*Reed, supra*, 171 Cal. App.4th at p. 1084.) But the warning Reed received was only one of three reasons the Reed court cited as supporting its decision. The court also noted that "the incident was not stale," nor was it "an isolated incident; instead, it was part of an extensive history of institutional misconduct, including 11 CDC 115's and 19 CDC 128-A's." (*Id*. at. p. 1085.) Those reasons are applicable here. Rodriguez's 2010 rules violation was certainly not stale, and it was part of a much larger history of institutional misconduct.

Perhaps the best news in this story is that the Board recognized Rodriguez' steady efforts to turn himself around, and stated that he will, if he continues this program, eventually gain parole. Rodriguez is an excellent example of an immature juvenile committing a life offense before he reached majority age. Although the Court did consider his juvenile status, under the newest court decisions and laws, his youth should figure more prominently in future Board decisions.

COURT ORDERS SHOW CAUSE FOR LIFER SEEKING RETROACTIVE APPLICATION OF SB260 JUVENILE OFFENDER STATUTE (PC § 4801(C))

In re Andrew Silva
Santa Clara County Superior Ct.
Case No. CC583671
November 20, 2013

In a potential new twist on SB 260, the Santa Clara County Superior Court issued an order to show case in the habeas petition of Andrew Silva, requesting the respondent to answer whether new Penal Code § 4801(c), requiring "great weight" to be given to parole suitability for life crimes committed by juveniles, should be accorded retroactive effect.

Andrew Silva was denied parole by the Board, but avers that he was not accorded proper consideration of his juvenile age at the time of his offense. He seeks habeas relief to have a new hearing conducted, where the youth-offender provisions of PC § 4801(c) would be applied. In its order to show cause, the court set out its consideration of this question.

[CLN readers please note: this is NOT a decision by a court, let alone a citable (published) one. It is reported here only for informational purposes to help readers understand the applicability of SB 260 to juvenile lifers.]

ANDREW SILVA, hereinafter Petitioner, has submitted a habeas corpus petition challenging the Board's decision to deny him parole. Petitioner principally relies upon the recent case of *Miller v. Alabama* (2012) 183 L.Ed.2d 407. In *Miller* the United State Supreme Court held that, even in a murder case, "children are constitutionally different from adults." (*Miller v. Alabama, supra*, 183 L.Ed.2d at p. 418.) After a thorough examination of scientific studies establishing that juveniles are underdeveloped psychologically and emotionally, the high court recognized that this often means that their minds and personalities are not completely formed or fixed, such that they are too young to appreciate the full ramifications and consequences of their conduct. Furthermore, in addition to not being able to deliberate with the thoughtfulness of an adult, when a minor does become an adult and thus gains this ability, they are consequently less likely to engage in the high risk behavior and "impetuosity" of their youth.

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Simply put, at the time of their life crime, they have a "'lessened culpability' and greater 'capacity for change.'" (*Miller* at p. 414, quoting *Graham v. Florida* (2010) 176 L.Ed.2d 825.

Accordingly, the high court declared any sentencing scheme "making youth, and all that accompanies it, irrelevant to imposition of that harshest prison sentence" is unconstitutional. (*Miller* at p. 424.) The *Miller* court had before it a sentence of life without the possibility of parole (LWOP) which was imposed on a juvenile. LWOP is what the court was referring to when describing "that harshest prison sentence." After *Miller and Graham, supra*, an LWOP imposed on someone who was a juvenile at the time of their crime must be reviewed in light of the individual defendant's "youth, and all that accompanies it." While there may be extreme cases in which, even after consideration of a defendant's minority and its associated factors, a juvenile should still be sentenced to LWOP, the Supreme Court invalidated as unconstitutional any sentencing scheme that made such a sentence mandatory or presumptive without an analysis of those considerations.

In the present case Petitioner was 17 when he committed attempted murder. However, unlike *Miller and Graham*, *supra*, Petitioner was not given LWOP. He was sentenced to life with the possibility of parole. While the reasoning and holdings of *Miller and Graham*, therefore, do not apply to Petitioner's initial sentence, they do apply to actions of the Parole Board when the Board considers his parole suitability. This conclusions inexorably flows from the *Miller* court's holding that "fundamentally, [ ] youth matters in determining the appropriateness of a lifetime of incarceration." (*Miller* at p. 413.) For an inmate who was a youth at the time of their crime, periodic parole consideration hearings

would be rendered largely futile if their crime was analyzed as though they were an adult when they committed it. If a Parole Board were to deny an inmate parole without considering how "youth matters" then they would be perpetuating a "life of incarceration" in violate[sic] of *Miller* and *Graham*, *supra*.

Confirming this view is the California Supreme Court's decision in *People v. Caballero* (2012) 55 Cal.4th 262, 269, implementing *Graham, supra*. Our state Superior [sic[Court held that after converting an LWOP into a life **with** the possibility of parole sentence: "The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison 'based on demonstrated maturity and rehabilitation.'" (*People v. Caballero* (2012) 55 Cal.4th 262, 269, quoting *Graham v. Florida*, supra, 176 L.Ed.2d at p. 846.) The Parole Board cannot overlook the fact that a crime was committed by a minor because any meaningful consideration of their present dangerousness necessitates an examination of the factors of their past dangerousness. When their past dangerousness is in some part a function of their chronological age the fact that they have matured necessarily becomes a significant consideration. Because the *Caballero* holding applies to those originally sentenced to life without the possibility of parole for non-homicide, a fortiori it applies to those who were originally given a chance of parole. Furthermore, because *Miller v. Alabama* extended *Graham v . Florida* to homicide, the *Caballero* rule now applies to all persons coming before the Parole Board.

To sum up, the recent authority of *Miller v. Alabama* and *People v. Caballero* now require that the Board and Governor consider "demonstrated maturity and rehabilitation" when making any parole suitability decision in a case involving the crime of a youth. Failure to do so can not be salvaged by application of the lenient 'some evidence' rule because the mandate to consider youth is of independent constitutional dimension. When such youths are eligible for parole consideration, any applicable facts or factor flowing directly from their youth must figure prominently in the analysis of their suitability.

Further removing all doubt on this point, the Legislature has recently enrolled Senate bill 260 in order to make explicit the Board's duty to comply with *Miller, supra* and *Cabal-*

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lero, supra. (See *In re Alatriste* (2013) ___ Cal.App.4th ___ [B248072].) As amended for the year 2014, section 4801 of the Penal Code will include:

(c) when a prisoner committed his or he controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 18 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.

While subdivision (c) did not exist at the time of Petitioner's hearing, the case law which it is based upon, and effectuates, did. Accordingly, Respondent is ordered to show cause why Petitioner is not entitled to a new hearing at which the Board 'shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.'

Counsel shall be appointed for Petitioner. (*In re Clark* (1993) 5 Cal.4th 750, 779. CRC 4.551(c)(2). Appointed counsel shall file a notice of appearance forthwith.

[The Order to Show Cause was signed by the Honorable Ronald Toff, Judge of the Santa Clara County Superior Court.]

JUVENILES' PETITIONS FOR RESENTENCING, POST- SB260, DENIED IN LIGHT OF THEIR ELIGIBIITY FOR ADVANCED SUITABILITY HEARINGS

In re Jose Alatriste
CA 2(2) ___Cal.App.4th ___;
Case No. B248072
October 29, 2013

In re Joseph Bonilla
CA 2(2) ___Cal.App.4th ___;
Case No. B248199
October 29, 2013

Jose Armando Alatriste and Joseph Bonilla committed homicides as juveniles and were sentenced to lengthy state prison terms *with* the possibility of parole (77 years to life and 50 years to life, respectively). Their convictions were affirmed on appeal in 2009 and 2011. Now, the Court of Appeal denied their habeas petitions seeking retroactive resentencing, based on their youth, pursuant to recently enacted SB260.

In April 2013, Alatriste and Bonilla each filed a habeas corpus petition, alleging that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment. We summarily denied both petitions.

On July 17, 2013, the California Supreme Court granted each petitioner's petition for review. In each case, the court directed us to issue an order to the Director of the Department of Corrections and Rehabilitation to show cause why the petitioner was not entitled to relief based on his claim that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment because it offered no meaningful opportunity for release on parole, and why Miller should not be accorded retroactive effect.

The Court of Appeal now held that with newly enacted SB260, they would be eligible for a much earlier parole suitability hearing than their otherwise lengthy sentences would dictate, and that this was all the consideration of their youth that they were entitled to. [As of December 3, 2013, both petitioners filed petitions for review of this appellate ruling in the California Supreme Court.] The Court of Appeal explained:

These cases concern a recurring issue in juvenile sentencing. A juvenile is charged with committing one or more serious or violent felonies, with various sentence enhancement allegations. The juvenile is tried as an adult, convicted, and sentenced to a lengthy term that, while authorized by statute, is the functional equivalent of a life sentence because the defendant has no meaningful chance of being released on parole in his or her lifetime. The United States Supreme Court has held that a sentence of life in prison without the possibility of parole, when imposed upon a defendant who was under the age of 18 at the time of his or her crime, violates the Eighth Amendment prohibition against cruel and unusual punishment. (*Miller v. Alabama* (2012) ___ U.S. ___, [132 S.Ct. 2455] (*Miller*) [prohibiting mandatory sentence of life in prison without the pos-

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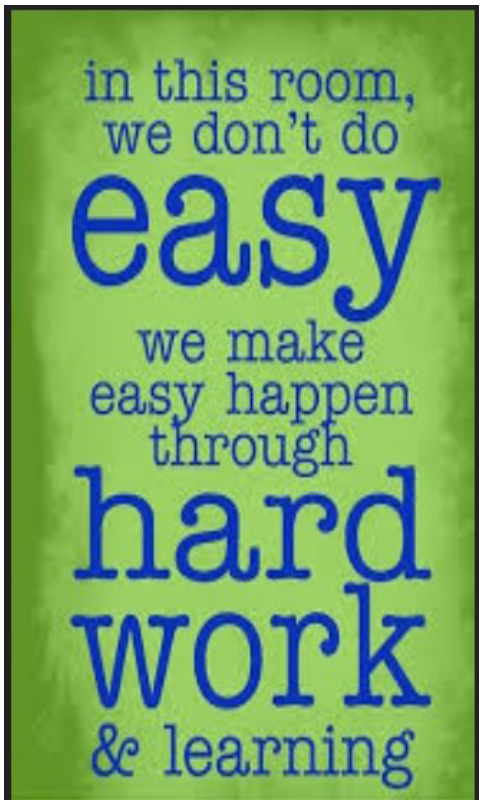
sibility of parole for defendant who committed capital murder at age 14]; *Graham v. Florida* (2010) 560 U.S. 48, [130 S.Ct. 2011] (*Graham*) [prohibiting life without parole sentence for juvenile who did not commit homicide].) In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court, citing Graham, held that a sentence of 110 years to life for a juvenile convicted of attempted murder violated the Eighth Amendment because the defendant's parole eligibility date would fall outside his natural life expectancy and was therefore the "functional equivalent" of a life without parole sentence.

The Court of Appeal reviewed recent applicable U.S. Supreme Court case law.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.' [Citation.] That right . . . 'flows from the basic "precept of justice that punishment for crime should be graduated and proportioned"' to both the offender and the offense." (*Miller, supra*, 132 S.Ct. at p. 2463, citing *Roper v. Simmons* (2005) 543 U.S. 551, 560, 125 S.Ct. 1183, 161 L.Ed.2d 1 [barring capital punishment for children].) *Miller, Roper* and *Graham* express the Supreme Court's view that "children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, . . . 'they are less deserving of the most severe punishments.' [Citation.] [*Roper* and *Graham*] relied on three significant gaps between juveniles and adults. First, children have a '"lack of maturity and an underdeveloped sense of responsibility,"' leading to recklessness, impulsivity, and heedless risk-taking. *Roper,* 543 U.S., at 569, 125 S.Ct. 1183. Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from



horrific, crime-producing settings. *Ibid*. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' *Id.*, at 570, 125 S.Ct. 1183." (*Miller, supra*, 132 S.Ct. at p. 2464.)

Citing *Graham*, the court in *Caballero* remanded the case for resentencing and directed the sentencing court to "consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison 'based on demonstrated maturity and rehabilitation.'" (*Caballero, supra*, 55 Cal.4th at pp. 268–269.) The court did not give any further guidance, because "every case will be different." (*Id*. at p. 269.)

In practice, the directives of *Graham, Miller* and *Caballero* have proved challenging for trial courts. The Legislature has enacted statutes designed to ensure lengthy prison sentences for defendants who commit serious and/or violent felonies. These sentencing statutes, particularly those requiring trial courts to impose certain sentence enhancements, limit a trial court's sentencing options. When sentencing a juvenile defendant, a trial court, while accommodating this statutory framework, must consider objective factors such as the defendant's age, level of participation in the crime and, to a certain extent, life experiences. However, the court must also evaluate subjective factors, such as the defendant's "physical and mental development," (*Caballero, supra*, 55 Cal.4th at p. 269) in order to determine when the defendant might attain a sufficient level of maturity to warrant release on parole. The court must then fashion a sentence that gives the

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defendant a meaningful opportunity for release on parole during his or her lifetime, and must utilize actuarial skills to determine how long the defendant's lifetime might be.

The Court then reviewed SB 260's application.

As *Graham, Miller* and *Caballero* tell us, a state prison sentence that does not provide a juvenile defendant with a meaningful opportunity to obtain release on parole within his or her lifetime constitutes cruel and unusual punishment under the Eighth Amendment. SB 260 was a direct response to those cases.

Section 1 of SB 260 states in pertinent part: "The Legislature finds and declares that, as stated by the United States Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407, 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control.' The Legislature recognizes that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48, and *Miller v. Alabama* (2012) 183 L.Ed.2d 407. . . ." (Legis. Counsel's Dig., SB 260 (2013-2014 Reg. Sess.) § 1, p. 2.)

New section 3051, subdivision (a)(1), provides that "any prisoner who was under 18 years of age at the time of his or her controlling offense" shall be afforded a "youth offender parole hearing." Juvenile offenders with determinate sentences of any length shall receive a hearing during the 15th year of incarceration. (New § 3051, subd. (b)(l).) Juvenile offenders sentenced to life terms of less than 25 years to life shall receive a hearing during the 20th year of incarceration. (New § 3051, subd. (b)(2).) Juveniles sentenced to an indeterminate base term of 25 years to life will receive a hearing during the 25th year of incarceration. (New § 3051, subd. (b)(3).) The youth offender parole hearing "shall provide for a meaningful opportunity to obtain release." (New § 3051, subd. (e).) Any psychological evaluations and risk assessments used by the Board of Parole Hearings "shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (New § 3051, subd. (f)(1).)

The new procedures created by SB 260 insure that prisoners such as petitioners, who were juveniles at the time they committed their life crimes, will have the benefit of the type of evaluation compelled by *Miller, Graham* and *Caballero* at a point in time that gives them a meaningful opportunity to "obtain release based on demon-

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strated maturity and rehabilitation." (*Graham, supra*, 560 U.S. at p. ___, [130 S.Ct. at p. 2030].)

The Court then reasoned why the two petitioners were not entitled to resentencing hearings.

Both petitioners contend that SB 260 notwithstanding, they are entitled to new sentencing hearings because the courts that sentenced them were unable to consider the "individualized sentencing factors mandated by *Miller,*" and therefore their sentences were unconstitutional at the outset. Each petitioner contends he is entitled to a new sentencing hearing at which the trial court can consider the *Miller* factors and resentence petitioners accordingly.

Graham, Miller and *Caballero* merely hold that a juvenile defendant may not be incarcerated for life or its functional equivalent without some meaningful opportunity for release on parole during his or her lifetime. These cases do not require that the time when that meaningful opportunity might occur should be determined at the time of sentencing.

While a case-by-case approach to this issue may seem fair on its face, as a practical matter it has resulted in inconsistent sentences among trial courts and, consequently, unfairness to juvenile defendants. SB 260 levels the playing field. It insures that juvenile offenders such as petitioners will be afforded a meaningful opportunity for release on parole after a set number of years based on fixed criteria applied to each prisoner individually.

The petitioners in these cases used firearms to commit senseless crimes on behalf of criminal street gangs. We do not see any constitutional infirmity in requiring petitioners to serve 20 or 25 years before they have the opportunity to demonstrate that they have been rehabilitated and have attained sufficient maturity to become contributing members of society.

CLN readers should note that this ruling is still pending review in the California Supreme Court, and therefore is not final.

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110 YEARS TO LIFE SENTENCE IMPOSED ON A JUVENILE CONVICTED OF NONHOMICIDE OFFENSES CONTRAVENES GRAHAM'S MANDATE AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT

People v. Rodrigo Caballero
In re Rodrigo Caballero
CA S.Ct. 55 Cal.4th 262; Case No. S190647
August 16, 2012

Underlying the above three cases in this issue of CLN is the courts' reliance upon a ruling by the California Supreme Court in Caballero. CLN recounts here the principal findings of that landmark case.

On the afternoon of June 6, 2007, 16–year–old defendant, Rodrigo Caballero, opened fire on three teenage boys who were members of a rival gang. ... A jury convicted Caballero of three counts of attempted murder (Pen.Code, §§ 664, 187, subd. (a)).2, with enhancements that he personally and intentionally discharged a firearm (§ 12022 .53, subds.(c)-(d)) and inflicted great bodily harm on one victim (§ 12022.7), and that defendant committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). Defendant, a diagnosed schizophrenic, testified in his own behalf after he was treated with antipsychotic medication. He told the jury both that he "was straight trying to kill somebody" and that he did not intend to kill anyone. The trial court sentenced defendant to 15 years to life for the first attempted murder count, plus a consecutive 25 years to life for the firearm enhancement. (§ 12022.53, subd. (d).) For the second attempted murder, the court imposed an additional consecutive term of 15 years to life, plus 20 years for the firearm enhancement on that count. (§ 12022.53, subd. (c).) On the third attempted murder count, the court sentenced defendant to another consecutive term of 15 years to life, plus 20 years for the corresponding firearm enhancement. (§ 12022.53, subd. (c)). Defendant's total sentence was 110 years to life. The Court of Appeal affirmed the trial court's judgment in its entirety.

The Court granted Caballero's petition for review to determine

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whether Graham prohibits imposition of the sentence here.

> In Graham, the 16–year–old defendant, Terrance Graham, committed armed burglary and attempted armed robbery, was sentenced to probation, and subsequently violated the terms of his probation when he committed other crimes. (Graham, supra, 560 U.S. at p. ––– [130 S.Ct. at p.2020].) The trial court revoked his probation and sentenced him to life in prison for the burglary. (Ibid.) Graham's sentence amounted to a life sentence without the possibility of parole because Florida had abolished its parole system, leaving Graham with no possibility of release unless he was granted executive clemency. (Id. at p. ––– [130 S.Ct. at p.2015].) The high court stated that nonhomicide crimes differ from homicide crimes in a "moral sense" and that a juvenile nonhomicide offender has a "twice diminished moral culpability" as opposed to an adult convicted of murder—both because of his crime and because of his undeveloped moral sense. (Graham, supra, 560 U.S. at p. ––– [130 S.Ct. at p.2027].) The court relied on studies showing that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. [Citations.] Juveniles are [also] more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." (Id. at p. ––– [130 S.Ct. at p.2026], quoting Roper v. Simmons (2005) 543 U.S. 551, 570.) No legitimate penological interest, the court concluded, justifies a life without parole sentence for juvenile nonhomicide offenders. (Id. at p. ––– [130 S.Ct. at p.2030].) Although the state is by no means required to guarantee eventual freedom to a juvenile convicted of a nonhomicide offense, Graham holds that the Eighth Amendment requires the state to afford the juvenile offender a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," and that "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." (Graham, supra, 560 U.S. at p. ––– [130 S.Ct. at pp.2029–2030].) The court observed that a life without parole sentence is particularly harsh for a juvenile offender who "will on average serve more years and a greater percentage of his life in prison than an adult offender." (Id. at p. ––– [130 S.Ct. at p.2028].) Graham likened a life without parole sentence for nonhomicide offenders to the death penalty itself, given their youth and the prospect that, as the years progress, juveniles can reform their deficiencies and become contributing members of society. (Ibid.)

The Court then recounted the applicability of the recent case of Miller v. Florida (2012) 132 S.Ct. 2465.

> In Miller, the United States Supreme Court extended Graham's reasoning (but not its categorical ban) to homicide cases, and, in so doing, made it clear that Graham's "flat ban" on life without parole sentences for juvenile offenders in nonhomicide cases applies to their sentencing equation regardless of intent in the crime's commission, or how a sentencing court structures the life without parole sentence. (Miller, supra, 567 U.S. ––– [132 S.Ct. at pp. 2465, 2469].) The high court was careful to emphasize that Graham's "categorical bar" on life without parole applied "only to nonhomicide crimes." (Id. at p. ––– [132 S.Ct. at p. 2465].) But the court also observed that "none of what [Graham] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when ... a botched robbery turns into a killing. So Graham's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses." (Miller, supra, 567 U.S. ––– [132 S.Ct. at p. 2465].) Miller therefore made it clear that Graham's "flat ban" on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the functional equivalent of a life without parole sentence imposed in this case.

Defendant in the present matter [Caballero] will become parole eligible over 100 years from now. (§ 3046, subd. (b) [requiring defendant serve a minimum of 110 years before becoming parole eligible].) Consequently, he would have no opportunity to "demonstrate growth and maturity" to try to secure his release, in contravention of Graham's dictate. (Graham, supra, 560 U.S. at p. ––– [130 S.Ct. at p.2029]; see People v. Mendez

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(2010) 188 Cal.App.4th 47, 50–51 [holding that a sentence of 84 years to life was the equivalent of life without parole under Graham, and therefore cruel and unusual punishment].) Graham's analysis does not focus on the precise sentence meted out. Instead, as noted above, it holds that a state must provide a juvenile offender "with some realistic opportunity to obtain release" from prison during his or her expected lifetime. (Graham, supra, 560 U.S. at p. ––– [130 S.Ct. at p.2034]

In reversing the Court of Appeal below, the high court summarized:

Consistent with the high court's holding in Graham, supra, 560 U.S. ––– [130 S.Ct. 2011], we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment. Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under Graham's nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison "based on demonstrated maturity and rehabilitation." (Id. at p. ––– [130 S.Ct. at p.2030].) Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent defacto sentences already imposed may file petitions for a writ of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings. Because every case will be different, we will not provide trial courts with a precise time frame for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a "meaning parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" under Graham's mandate.

3-STRIKE LIFERS ATTEMPTING TO GAIN RESENTENCING PER PROP. 36 CONTINUE TO BE REJECTED FOR FAILURE TO QUALIFY UNDER PC § 1170.126

There is no diminishment, apparently, to the fervent hopes of many ineligible three-strikers to gain early re-

set up a single court to handle nothing but these applications, and the LA District Attorney has assembled a team of attorneys to respond to them. Due to the large number of applications, delays of up to a year to get into that court have been experienced, even by those who do qualify.

One of the delaying factors is the large number of applications from non-qualifying prisoners who hope that because their third strike was so petty, their earlier serious or violent strikes will somehow be "forgiven." This is not happening. In the cases below, CLN recounts some of the recent rulings in this regard. But beyond those reported below, there have been dozens of futile attempts by 3-strikers to appeal summary denials of applications

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for resentencing solely because the earlier strikes, being either serious or violent, create an absolute bar to Prop. 36 relief under Penal Code 1170.126.

People v. Eddy Artola

CA2(3) ; Case No. B249561
November 14, 2013

In January 1966, Eddy Artola, was sentenced to a Three-Strikes term of 30 years to life in prison based upon his conviction of the serious and/or violent felony of second degree robbery (Pen. Code, § 211) and his prior convictions of the serious and/or violent felony of second degree robbery (§ 211) and the serious felony of attempted robbery (§§ 664, 211). He appealed from the trial court's denial of his post-judgment petition to recall his life sentence and resentence him to a determinate term pursuant to section 1170.126. The Court of Appeal denied his appeal. [Note: many courts of appeal are accepting such appeals in the interest of justice, although the question of the appealability of denial of such applications by the superior court is still an open question on review before the California Supreme Court: see *Teal v. Superior Court* (2013) 158 Cal.Rptr.3d 446, review granted July 31, 2013, S211708; *People v. Hurtado* (2013) 216 Cal.App.4th 941, review granted with hold pending consideration of Teal July 31, 2013, S212017.]

Artola's conviction history is as follows. He had been convicted of, then granted probation for, reckless driving in 1983, driving under the influence in 1986, the sale of marijuana in 1987 and exhibiting a deadly weapon in 1988. In 1989, he was found guilty of being under the influence of a controlled substance and sentenced to state prison, and was paroled in January 1990. Later that year, Artola was convicted of armed robbery and attempted armed robbery and was sentenced to six years in prison. He was convicted in 1995 of robbery. In January 1996, the trial court sentenced Artola pursuant to the Three Strikes law to 25

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years to life with the possibility of parole for his conviction of robbery and imposed a five-year enhancement for his conviction of a serious felony pursuant to section 667, subdivision (a)(1), for a total sentence of 30 years to life in state prison.

In February 2013, Artola, filed *pro per* in the Los Angeles Superior Court a "Petition for a Recall of Sentence and Resentencing Pursuant to . . . Section 1170.126." He asserted he met the criteria "for a recall of sentence, in accordance with . . . [s]ection 1170.126, subdivision (e), as that statu[t]e has been added by Prop[osition] 36" in that, on December 22, 1975, the date the jury found him guilty of second degree robbery, the crime was not considered to be a "serious" or "violent" felony. In addition, he argued "a recall of [his] sentence and resentencing would not pose an unreasonable risk of danger to public safety."

In a Memorandum of Decision filed March 26, 2013, the trial court denied Artola's motion with prejudice. With regard to Artola's argument the offense of which he had been found guilty, second degree robbery, had not been considered a "serious" or "violent" felony on December 22, 1995, the date of his conviction of the offense, the trial court noted that pursuant to section 667, subdivision (h), "all references to existing statutes in subdivisions (c) to (g), the Three Strikes law, are to statu[t]es as they existed on November 7, 2012." On that date, subdivision (c) of section 667.5 provided that " 'violent felony' shall mean any of the following: [¶] . . . [¶] (9) Any robbery." In addition, section 1192.7, subdivision (c) indicated that " 'serious felony' means any of the following: [¶] . . . (19) robbery or bank robbery; . . . [and] (39) any attempt to commit a crime listed in this subdivision other than an assault[.]" Since subdivision (e) of section 1170.126 provides that an inmate is eligible for resentencing if he or she is serving an indeterminate term of life imprisonment for a conviction of a felony or felonies which are *not* defined as serious and/or violent felonies by subdivision (c) of section 667.5 or subdivision (c) of section 1192.7, the trial court determined Artola was ineligible for resentencing.

On appeal, Artola first asserted his prior convictions for robbery and attempted robbery should have constituted a single strike. He indicates both convictions stemmed from a single incident which occurred on September 10, 1990 and the trial court's failure to strike one of them amounted to an abuse of discretion. The appellate court, however, had already considered that contention and rejected it on his direct appeal of his conviction. In *People v. Artola, supra*, B099782, the court held:

> Section 667, subdivision (d), defines 'a prior conviction of a felony' for . . . purposes of the Three Strikes law. Nothing in that subdivision restricts prior convictions to charges brought and tried separately. [Citation.] Because the Three Strikes law adopts a comparable restriction with respect to current charges in section 667, subdivision (c)(6), the omission of that restriction in the definition of a prior serious or violent felony conviction must be seen as intentional. [Citation.] Thus, the Three Strikes law does not require otherwise qualifying prior convictions to be based on charges brought and tried separately.

Artola next contended the trial court erred when it failed to strike one of his prior convictions in the interests of justice. The appellate court rejected this claim, citing its prior opinion in *People v. Artola, supra*, where it noted the trial court had denied Artola's motion to strike one or both of his 1990 prior convictions because, although they had been part of a single incident, Artola had used a firearm and had been sentenced to six years in state prison for the offenses. Moreover, the trial court had " 'not see[n] a mitigation sufficient to strike a prior.' " After finding "no abuse of the trial court's discretion in this case," the appellate court indicated:

Although a trial court must state its reasons in support of an order dismissing a prior conviction in the interests of justice (§ 1385, subd. (a)), there is no similar requirement that a trial court explain its decision not to exercise its power to dismiss or strike [a prior]. [Citation.] . . . The record reveals the trial court heard the argument of counsel, indicated it was aware of its discretion to strike the prior convictions, and then concluded Artola was the type of individual targeted by the Three Strikes law and . . . it would be inappropriate to impose any-

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thing other than a third strike term in this case. . . . [¶] In light of the nature and circumstances of Artola's present felony of robbery, his prior conviction[] of robbery, and also in light of the particulars of his background, character, and prospects, which were not positive, the trial court committed no abuse of discretion in concluding . . . Artola '[could not] be deemed outside the spirit of the Three Strikes law in any part, and hence [could] not be treated as though he had not previously been convicted of those serious and/or violent felonies.' (*People v. Williams* (1998) 17 Cal.4th 148, 161, 163.)

Artola also requested the appellate court look at his "record of self rehabilitation" while serving his sentence in prison as a reason for finding the trial court abused its discretion when it denied his motion to strike one or both of his priors. However, as indicated above, subdivision (f) of section 1170.126 provides that "[u]pon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e)" in that he or she is serving an indeterminate sentence for a crime considered to be neither serious nor violent. If the petitioner satisfies the criteria, he or she shall be resentenced unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. Subdivision (g) of Section 1170.126 provides in relevant part: "In exercising its discretion in subdivision (f), the court may consider: [¶] . . . [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated . . . ." However, here Artola does not satisfy the criteria of section 1170.126, subdivision (e). He is serving an indeterminate sentence of life imprisonment for felonies defined as "serious" and/or "violent." Thus, although Artola has provided a number of documents indicating he has, during his incarceration, completed programs in education, vocational education, religious education, anger management and prevention techniques with regard to his substance abuse,

the trial court was under no obligation to consider them. Since Artola does not satisfy the requirements of subdivision (e), he is ineligible for resentencing pursuant to section 1170.126.

This was a valiant attempt by Artola to resolve issues that arguably might have dissolved the underlying grounds for his 3-strikes sentence and/or his eligibility for resentencing under Prop. 36. The detailed thinking of the Court of Appeal above is provided here to give other 3-strikers some insight into how these applications are analyzed by the courts, in strict deference to PC § 1170.126's preclusion provisions as a prefatory matter.

INMATE SERVING 3-STRIKES LIFE SENTENCE THAT WAS NOT FINAL WHEN PROP. 36 WAS ENACTED IS NOT ENTITLED TO AN AUTOMATIC SENTENCE REDUCTION UNDER THE NEW LAW

People v. Nicholas Lester

___Cal.App.4th___ ; CA4(2) Case No. E055009
October 7, 2013

Nicholas Lester was convicted of possessing drugs for sale with enhancements, plus three strike priors. On October 28, 2011, he was sentenced to 25 years to life, plus six years. He appealed, arguing that his sentence should automatically be reduced based on Prop. 36 and *In re Estrada* (1965) 63 Cal.2d 740.

The appellate court, in a 2-1 decision, rejected Lester's claim for retroactive application of Prop. 36 as to him, which it explained in detail. A statutory amendment mitigating punishment applies retroactively unless there is a savings clause, which bars retroactive application. Based on the analysis and arguments in the Ballot Pamphlet and the mechanism for obtaining a reduced sentence under section 1170.126, the court found section 1170.126

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is the functional equivalent of a savings clause.

The detailed explanation of the appellate court is replicated below, because as a published decision, it is both controlling and instructive to 3-strikers trying to make sense out of this complex law.

> On October 28, 2011, defendant was sentenced to a 25-years-to-life term for his conviction of possessing cocaine for sale, according to the terms of Penal Code section 667, subdivision (e)(2)(A)—the Three Strikes Law—as it then provided. On November 6, 2012, when defendant's judgment was not yet final, the voters of California enacted, by initiative measure, changes to several provisions of the Three Strikes Law. As is pertinent here, had defendant been sentenced under the new version of the law, he would have received a sentence of double the determinate term for his conviction. (Pen. Code, § 667, subds. (e)(1) & (e)(2)(C).) Amongst the changes enacted in November, 2012 was also the creation of Penal Code section 1170.126, which provides that a prison inmate serving an indeterminate term pursuant to Penal Code section 667, subdivision (e)(2) whose sentence under the new act would not have been indeterminate, may petition the trial court that sentenced the inmate for a recall of his or her sentence. (Pen. Code, § 1170.126, subds. (a) & (b).) The trial court would then resentence the inmate according to the new version of Penal Code section 667, subdivision (e), unless it determined that a resentencing would "pose an unreasonable risk of danger to public safety." (Pen. Code, § 1170.126, subd. (f).) Defendant here contends that under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), he is entitled to have his sentence automatically reduced to double the determinate term for possessing cocaine for sale. The People argue that defendant is not entitled to have the new version of Penal Code section 667, subdivision (e) retroactively applied to him and his only recourse is to petition the trial court for recall of his sentence pursuant to Penal Code section 1170.126.
>
> In *Estrada, supra*, 63 Cal.2d at pages 740, 744, the California Supreme Court said of a law that reduced the punishment for a crime which became effective after the crime was committed but before the defendant's trial, conviction and sentencing, "The problem . . . is one of trying to ascertain the legislative intent—did the Legislature intend the old or new statute to apply? Had the Legislature expressly stated which statute should apply, its determination, either way, would have been legal and constitutional." (*Estrada* at p. 744.) Because, in the case of the statute in Estrada, the Legislature had not, it fell to the California Supreme Court to determine the Legislature's intent. (*Ibid.*) The court was guided in its effort by the following concept: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of

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the prohibited act." (*Id*. at p. 745) The court went on to note, "[W]here the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed." (*Id*. at p. 748.)

As in *Estrada*, we must ascertain the intent of the voters in passing the amendments pertinent here to the Three Strikes Law. (*Citizens Assn. of Sunset Beach v. Orange County Local Agency Formation Comm.* (2012) 209 Cal.App.4th 1182, 1189.) "To determine intent, courts look first to the language of the provision, giving its words their ordinary meaning. If that language is clear in relation to the problem at hand, there is no need to go further. [Citation.] If, on the other hand, the language is ambiguous, we turn to extrinsic indicia of voter intent, particularly what the ballot pamphlet said about the initiative. [Citation.]" (*Ibid.*) Likewise, ballot pamphlet arguments have been recognized as a proper extrinsic aid. (*People v. Floyd* (2003) 31 Cal.4th 179, 187-188.)

Penal Code section 1170.126, which provides for the recalling of sentences and possible resentencing states, "The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 . . . whose sentences under this act would not have been an indeterminate life sentence." If, as defendant argues, he, and all other inmates with Three Strike Law indeterminate terms whose judgments are not yet final, are entitled to the retroactive application of amendments to the Three Strikes Law that reduced indeterminate terms to determinate ones, and, thus, to have his sentence automatically reduced, there would be no purpose served by the existence of Penal Code section 1170.126, except for inmates whose sentences were final as of November 6, 2012. However, looking at the information conveyed to voters, that was clearly not the intent of the initiative.

The ballot pamphlet for the initiative stated, "This measure reduces prison sentences served under the three strikes law by certain third strikers whose *current offenses* are non-serious, non-violent felonies. The measure also allows resentencing of certain third strikers who are *currently serving life sentences* for specified non-serious, non-violent felonies. . . . [¶] [It] requires that an offender who has two or more prior serious or nonviolent felony convictions and whose new offense is a nonserious, nonviolent felony receive a prison sentence that is twice the usual term for the new offense, rather than a minimum sentence of 25-years–to-life as is currently required. . . . [¶] [It] allows certain third strikers to apply to be resentenced by the courts. . . . The court would be required to resentence eligible offenders unless it determines that resentencing the offenders would pose an unreasonable risk to public safety. In determining whether an offender poses such a risk, the court could consider any evidence it determines is relevant, such as the offender's criminal history, behavior in prison, and participation in rehabilitation programs. [It] requires resentenced offenders to receive twice the usual term for their *most recent offense* instead of the sentence previously imposed. Offenders whose requests for resentencing are denied by the courts would continue to serve out their life terms as they were originally sentenced." (*Ballot Pamp., Gen. Elec.* (Nov. 6, 2012) (*Ballot Pamp.*) analysis by the

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Legislative Analyst, pp. 49-50, italics added.) In describing the correctional savings engendered by the initiative, the analysis stated, "[It] would reduce state prison costs in two ways. First, fewer inmates would be incarcerated for life sentences under the three strikes law because of the measure's provisions requiring that such sentences be applied only to third strikers whose *current offense* is serious or violent. This would reduce the sentences of some *future felony offenders*. Second, the resentencing of third strikers could result in many existing inmates receiving shorter prison sentences." (*Ibid.*) We note the distinction clearly drawn in the analysis between the *new offense* committed by *future felony offenders* who are subject to the new twice-the-base-term sentence and the *most recent offense* committed by *existing* inmates who have already been sentenced to a 25-years-to-life term under the old law. The analysis could not have been more clear in its distinction between the two and nowhere is there a reference to the possibility that some existing inmates would automatically receive a twice-the-base-term sentence merely because their judgments are not yet final.

An argument in favor of the initiative in the ballot pamphlet was the following, "Criminal justice experts and law enforcement leaders carefully crafted [it] so that truly dangerous criminals will receive no benefits whatsoever from the reform." (*Ballot Pamp.*, argument in favor of Prop. 36, p. 52) In their opposition to this particular aspect of the initiative, the rebuttal to the argument in favor of it and the argument against it both stated that it would result in "thousands of dangerous criminals . . . get[ting] their prison sentence[s] reduced and then released from prison early." (*Ballot Pamp.*, rebuttal to argument in favor of Prop. 36, p. 52; *Ballot Pamp.*, argument against Prop. 36, p. 53.) In fact, the provisions of the initiative allowing inmates already serving Three Strike Law indeterminate sentences to be resentenced was the only objection to the initiative stated in the argument against it in the Ballot pamphlet. (*Ballot Pamp.*, argument against Prop. 36, p. 53.)

Given the information supplied to the voters, we view Penal Code section 1170.126 as the functional equivalent of a saving clause. "The rule in Estrada . . . is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause *or its equivalent*. In *Pedro T.* [(1994) 8 Cal.4th 1041, 1049], we determined the absence of an express saving clause, emphasized in *Estrada* [citation] . . . , does not end 'our quest for legislative intent.' 'Rather, what is required is that the Legislature demonstrates its intention with sufficient clarity that a reviewing court can discern and effectuate it.' [Citation.]" (*People v. Nasalga* (1996) 12 Cal.4th 784, 793, italics added, fn. omitted.) The existence of the mechanism set forth in Penal Code section 1170.126 and the analysis and arguments in the Ballot Pamphlet for the initiative persuade us that the voters did not intend that every inmate serving a Three Strike Law indeterminate term whose judgment is not yet final automatically have his or her sentence reduced to twice the determinate term for his or her conviction and completely bypass the safeguards provided by Penal Code section 1170.126.

Defendant asserts that subdivision (k) of Penal Code section 1170.126 suggests that the existence of the mechanism provided by that section was not intended to be the sole relief available to an inmate sentenced to a Three Strike Law indeterminate term. That subdivision provides, "Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the [inmate]." However, we do not see this as dictating that the reduction in terms for third strikers be applied retroactively—rather, we see it as a pronouncement that inmates included in the provisions of Penal Code section 1170.126 still retained their ability to file petitions for habeas corpus and various other remedies.

The People point to language in the post November 6, 2012 version of Penal Code section 667, subdivision (e) itself, which suggests that its reduced sentence provisions were not intended to apply to those who are already convicted and serving Third Strike Law determinate terms. Specifically, it states that a defendant who has two or more

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> strike priors, but the current offense is not a strike, will receive a term of twice the sentence for the convicted offense unless the "prosecution pleads and proves" a current conviction or a past conviction of specified crimes. (§ 667, subds. (e)(2)(c)(i)-(iv).) As the People correctly point out, an inmate serving a Three Strikes Law determinate term is long past the pleading and proof stage of proceedings.

Finally, we cannot ignore the possibility that, under the old law, in more than one case, a prosecutor has elected not to retry a defendant on one or more counts on which the jury hung because the defendant was to receive a 25 years to life term on another count. To have such a defendant now have his or her sentence automatically reduced, without the safeguards of 1170.126, would undermine the purpose of the initiative.

Accordingly, we decline defendant's request to reduce his sentence or to direct the trial court to impose a reduced sentence. Defendant retains his ability, under section 1170.126, to petition the trial court to recall his indeterminate sentence and to possibly resentence him to a determinate term.

Justice Hollenhorst dissented. A petition for review is pending before the California Supreme Court (S214648), so this appellate decision is not final. CLN will report on any update to this important case for 3-strikers.

I respectfully part company with the majority's conclusion that defendant is not entitled to a reduction in his sentence or resentencing because he retains the ability, under section 1170.126, to petition the trial court to recall his indeterminate sentence and to possibly resentence him to a determinate term. I conclude that in passing the Three Strikes Reform Act of 2012, the electorate intended the mandatory sentencing provision of sections 667, subdivision (e)(2)(C) and 1170.12, subdivision (c)(2)(C) to apply to qualifying defendants whose judgments were not yet final on the effective date of the act. Hence, I would vacate defendant's sentence and remand the matter to the trial court for resentencing.

A 3-STRIKER CAN FILE A PETITION FOR RESENTENCING, BUT THAT DOES NOT THEREBY MAKE HIM ELIGIBLE

People v. Kenneth Morgan
CA4(1) Case No. D063442
November 1, 2013

As reported elsewhere in this issue, many 3-striker lifers are filing petitions for resentencing under Prop. 36, even though they are not eligible for resentencing. In this stereotypical case, the court of appeal made the distinction loud and clear.

In 1998, Morgan was convicted of selling a narcotic substance (Health & Saf. Code, § 11352, subd. (a)) (count 1) and possession of marijuana (Health & Saf. Code, § 11357, subd. (b) (count 2), neither of which is a violent or serious felony. The jury also found true that he had three prior strike convictions, including a 1989 conviction for a crime force and violence. The trial court sentenced Morgan under the Three Strikes law to a term of 25 years to life in prison.

In December 2012, Morgan's petition pursuant to PC § 1170.126 to recall his sentence was denied by the trial court on the ground that he was ineligible for resentencing under subdivision (e) (3) of that statute because he had suffered a prior conviction involving force and violence.

On appeal, the Court of Appeal affirmed the trial court, but made the issue of law excruciatingly clear.

Although individuals serving indeterminate life sentences under the Three Strikes law whose current conviction is not based on a serious or violent felony may file a petition for recall under section 1170.126, subdivision (b)), only certain individuals who are authorized to file such petitions are also eligible for resentencing under section 1170.126, subdivision (e). Stated differently, the statute creates a class of persons authorized to file petitions for recall of sentence (id, subd. (b)) and a

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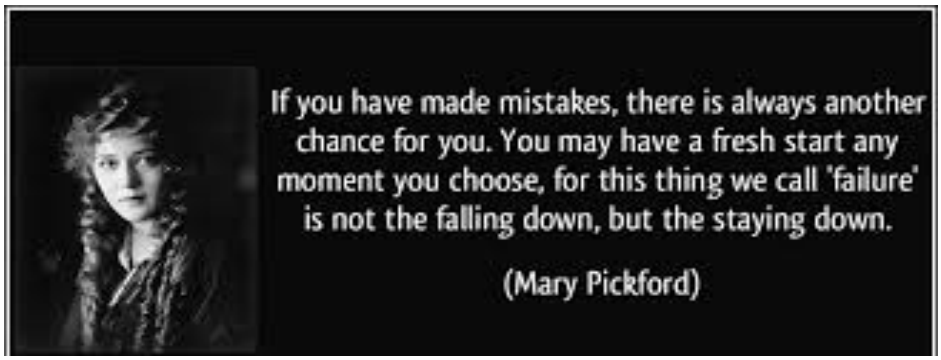
subclass of persons who are eligible for resentencing pursuant to such petitions (id., subd. (e)).

CLN readers who file petitions in the desperate hope that their earlier violent or serious strike(s) will somehow be disregarded are contributing to clogging of courts in high population counties (e.g., Los Angeles) with their predictably barred applications, thereby unwittingly delaying lawful relief for those relatively few 3-strikers who are eligible under Prop. 36 for resentencing.



PREVIOUSLY DISMISSED JUVENILE DELINQUENCY ADJUDICATION CANNOT BE USED AS A STRIKE IN A SUBSEQUENT ADULT CONVICTION

People v. Marcos Haro
___Cal.App.4th___ ; CA3 Case No. C071328
November 21, 2013

In a published decision, the 3rd District Court of Appeal held that a juvenile delinquency adjudication, which had been earlier dismissed by the trial court, could not be later used as a strike when that individual, now an adult, suffered a new felony conviction.

Defendant Marcos Haro appeals from the judgment entered following his plea of no contest to the crime of stalking (Pen. Code, § 646.9, subd. (a)) and admission to having a prior juvenile adjudication for robbery, a serious felony within the meaning of the three strikes law (Pen. Code, §§ 1170.12, subd. (a)-(d); 667, subd. (b)-(i)). Prior to the plea, the trial court denied defendant's motion to dismiss the strike allegation based on the fact that the delinquency petition supporting the allegation was dismissed by the juvenile court pursuant to Welfare and Institutions Code, section 782. This juvenile adjudication was used to double his sentence for the stalking conviction.

On appeal, defendant renews his argument that the dismissal under section 782 of the petition underlying his robbery adjudication precludes the use of that adjudication as a strike under the three strikes law. We agree. As we explain, section 782 "is a general dismissal statute" that is similar in its operation to Penal Code section 1385. (*Derek L. v. Superior Court* (1982) 137 Cal.App.3d 228, 232-233 (*Derek L.*).) "[D]ismissal under [Penal Code] section 1385 of the charge underlying a prior conviction operates, as a matter of law, to erase the prior conviction as if the defendant had never suffered the conviction in the initial instance." (*People v. Barro* (2001) 93 Cal.App.4th 62, 66 (*Barro*).) Thus, "dismissal under [Penal Code] section 1385 of the charge underlying a prior conviction which would otherwise qualify as a strike precludes the use of that prior conviction as a strike under the Three Strikes law." (Id. at p. 64.) We conclude a dismissal under section 782 of the petition underlying a juvenile adjudication has the same effect. We therefore modify the judgment to dismiss the strike finding, vacate defendant's four-year sentence, substitute the two-year middle term, and affirm the modified judgment.

In reaching its conclusion, the court distinguished the language of Welfare and Institutions Code sections 782 and 1772.

Section 782 provides in relevant part: "A judge of the juvenile court in which a petition was filed, at any time before the minor reaches the age of 21, may dismiss the petition or may set aside the findings and dismiss the petition if the court finds that the interests of justice and the welfare of the minor require such dismissal, or if it finds that the minor is not in need of treatment or rehabilitation."

Section 1772, subdivision (a), provides: "Subject to subdivision (b), every person honorably discharged from control of the Youth Authority Board who has not, during the period of control by the authority, been placed by the authority in a state prison shall thereafter be released from all penalties and disabilities resulting from the

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> offense or crime for which he or she was committed, and every person discharged may petition the court which committed him or her, and the court may upon that petition set aside the verdict of guilty and dismiss the accusation or information against the petitioner who shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed, including, but not limited to, any disqualification for any employment or occupational license, or both, created by any other provision of law." Subdivision (b)(4) provides that, notwithstanding subdivision (a), "[t]he conviction of a person described by subdivision (a) may be used to enhance the punishment for a subsequent offense." (§ 1772, subd. (b)(4).)

The court observed that "Unlike section 1772, section 782 does not address whether or not the dismissal of a juvenile petition may be used to enhance the punishment for a subsequent offense." But it didn't matter.

> [Here], the petition was dismissed pursuant to section 782, a provision that does not have the same prospective adverse consequences as section 1772. We conclude the juvenile court's dismissal under section 782 of the petition underlying defendant's robbery adjudication precluded the use of that adjudication as a strike under the three strikes law.

This is a very narrow holding, but as a published case, it could help someone gain resentencing if they were "struck out" by use of a dismissed juvenile adjudication.

"USING A FIREARM" IN VIOLATION OF H&S § 11370.1 (a), IS A "STRIKE" THAT PRECLUDES PROP. 36 RESENTENCING ACTION

People v. Joey Salazar
CA4(2) Case No. E058098
November 27, 2013

In yet another challenge to denial of a resentencing application by a 3-striker, the Court of Appeal upheld the trial court's determination that being armed with a firearm constitutes "using a firearm" to make a violation of Health and Safety Code section 11370.1, subdivision (a), into a "strike" so as to preclude recall and reconsideration of defendant's sentence pursuant to Penal Code section 1170.126(f).

The Court explained how this enhancement, while not expressly enumerated in PC §§ 667.5 or 1192.7, nonetheless qualifies to be counted as a strike. Because this is likely to be a recurring theme in many 3-strikers' applications, the Court's analysis is reproduced below .

> Defendant argues that the trial court's denial of his petition to recall his sentence was erroneous as a matter of law because being armed with a firearm when committing an offense is not a serious or violent felony under Penal Code sections 667.5, subdivision (c), or 1192.7. Although possession of a controlled substance while armed with a firearm in violation of Health and Safety Code section 11370.1 is not a serious or violent felony as defined in Penal Code sections 667.5, subdivision (c), and 1192.7, defendant was still ineligible for resentencing under Penal Code section 1170.126, subdivision (e)(2).

Proposition 36 amended the three strikes statutes (§§ 667, 1170.12) to require that before a defendant may be sentenced to an indeterminate life term in prison under the three strikes law, the new felony (the commitment offense) must generally qualify as a serious or violent felony. (§§ 667, subd. (e)(2)(A), (C), 1170.12, subd. (c)(2), (C).) An exception to this general rule exists, among others, where the prosecution has pled and proved the defendant used a firearm in the commission of the current offense, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) If the prosecution pleads and proves this exception exists, the defendant must be sentenced under the three strikes law.

Proposition 36 also added section 1170.126, which applies exclusively to those "persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126, subd. (a).) Section 1170.126 sets forth a

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procedure through which certain prisoners can petition the court for resentencing. Such a person may file a petition to recall his or her sentence and be sentenced as a second strike offender. (§ 1170.126, subd. (b).) An inmate is eligible for such resentencing if none of his or her commitment offenses constitute serious or violent felonies and none of enumerated factors disqualifying a defendant for resentencing under Proposition 36 apply. (§ 1170.126, subd. (e).)

Section 1170.126, subdivision (e)(1), provides that a defendant is eligible for resentencing if he or she is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 "for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7." (§ 1170.126, subd. (e)(1).) We agree with defendant that his current commitment felony offense of possession of a controlled substance while armed with a loaded, operable firearm is not a serious or violent felony under sections 667.5, subdivision (c), or 1192.7, subdivision (c). However, the inquiry does not end with whether or not the current conviction is a serious or violent felony.

Section 1170.126, subdivision (e)(2), provides, as pertinent here, that a defendant is eligible for resentencing if "[t]he inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(2), italics added.) Being armed with a firearm during the commission of a current offense is listed in section 667, subdivision (e)(2)(C)(iii), and section 1170.12, subdivision (c)(2)(C)(iii). It is undisputed here that defendant was armed with a loaded, operable firearm during the commission of his current commitment offense of possession of methamphetamine. As such, under section 1170.126, subdivision (e)(2), defendant was ineligible for resentencing based on the fact that defendant was armed with a firearm during the commission of the current felony offense.

Defendant, however, argues that possession of a controlled substance while armed with a firearm under Health and Safety Code section 11370.1, subdivision (a), is not a violent felony listed in section 667.5 or a serious felony enumerated in section 1192.7 and, therefore, the trial court erred as a matter of law in concluding he was ineligible to have his three strikes sentence recalled. He asserts that because his petition to recall his sentence complied with section 1170.126, subdivision (e)(1), and his current offense was neither a serious nor violent felony, the trial court's conclusion that he was ineligible "for recall of the sentence based upon a violation of Health and Safety Code section 11370.1 because he had been armed with a firearm was erroneous as a matter of law." Defendant's argument lacks merit and fails to take into account the criteria set forth in section 1170.126, subdivision (e)(2). An inmate is eligible for such resentencing if none of his or her commitment offenses constitute serious or violent felonies and none of the enumerated factors disqualifying a defendant for resentencing under Proposition 36 apply. (§ 1170.126, subd. (e).)

The threshold eligibility determination is made by applying express objective criteria to information set forth in the petition filed by the inmate: Is the inmate currently serving a third strike life term? Is that life term for conviction of a felony or felonies that are not defined as serious or violent felonies by sections 667.5, subdivision (c), or 1192.7, subdivision (c)? If the current felony is not a serious or violent offense, was the current sentence imposed for any of the offenses listed in sections 667, subdivision (e)(2)(C)(i)–(iii), or 1170.12, subdivision (c)(2)(C)(i)–(iii)? Are any of the inmate's prior convictions for felonies listed in sections 667, subdivision (e)(2)(C)(iv), or 1170.12, subdivision (c)(2)(C)(iv)?

Hence, even if a defendant can show that his or her current felony is not a serious or violent offense, as in this case, defendant still needs to satisfy the criteria set forth in subdivision (e)(2) of section 1170.126. Here, defendant's current sentence was imposed under sections 667, subdivision (e)(2)(C)(iii), and 1170.12, subdivision (c)(2)(C)(iii), because the prosecution pled and proved defendant was armed with a firearm when he committed the crime of possession of methamphetamine. And, as previously explained, Proposition 36's amendment

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to the three strikes statutes to require the commitment offense be a serious or violent felony does not apply in cases where the prosecution has pled and proved the defendant was armed with a firearm or deadly weapon. (§§ 667, subds. (e)(2)(A), (C)(iii), 1170.12, subds. (c)(2), (C)(iii).)

Accordingly, we find the trial court did not err in finding defendant was ineligible for resentencing under section 1170.126.

PC § 288(a) SEX OFFENDER WINS CERTIFICATE OF REHABILITATION AND RELIEF FROM REGISTERING UNDER PC § 290

People v. Tirey

___Cal.App.4th___; CA 4(3)
Case No. G048369
November 15, 2013

Many CLN readers also suffer lifetime sex offender registration requirements under PC § 290 because of sexual aspects of their commitment offense(s). Under that statute, even when you have been discharged from parole, you are still required to register – unless you obtain a Certificate of Rehabilitation (PC § 4852.01). However, in a very narrow ruling, a parole discharged sex offender convinced the Court of Appeal that *his* being denied a Certificate of Rehabilitation violated equal protection principles because another statute defining a similar offense is *not* barred from such a Certificate.

In this appeal, the court affirmed the superior court.

> We conclude plaintiff's allegations do not state a cause of action because defendants are entitled to statutory immunity as to all claims except the one for false imprisonment. The false imprisonment claim also fails because lawfully incarcerated prison inmates have no legal grounds on which to state such a claim. We therefore affirm the judgment.

In 1998, Tirey was convicted of two counts of violation of PC § 288, subdivision (a), sentenced to six years in prison, and ordered to register as a sex offender under PC § 290. He was discharged from parole in 2004. In 2013, he filed a petition for a certificate of rehabilitation and sought to be relieved of the sex offender registration requirement. The trial court denied the petition solely on the ground it is barred by the express statutory exclusions set forth in PC § 4852.01(d) and PC § 290.5(a)(2).

Tirey contended that the denial of his petition for a certificate of rehabilitation and relief from the sex offender registration requirement violated the equal protection clauses of the state and federal Constitutions. The Court agreed, noting that persons convicted of violating PC § 288.7 are eligible to obtain a certificate of rehabilitation under PC § 4852.01 and relief from the registration requirement under PC § 290.5, while persons like Tirey convicted of violating PC § 288(a) are not. [PC § 288.7 prohibits sexual intercourse, sodomy, oral copulation or sexual penetration with a child 10 years of age or younger, while PC § 288(a) prohibits lewd or lascivious acts with a child who is under the age of 14 years.] The Court recounted the relevant statutes here, to explain the equal protection violation basis.

> Section 4852.01 and section 290.5 together provide a means by which some sex offenders, including section 288.7 offenders but excluding section 288(a) offenders, may obtain a certificate of rehabilitation and relief from the sex offender registration requirement. (*Tuck, supra*, 204 Cal.App.4th at pp. 739-740 (conc. opn.).)

Specifically, section 4852.01, subdivision (a) provides: "Any person convicted of a felony who has been released from a state prison . . . may file the petition [for a certificate of rehabilitation] pursuant to the provisions of this chapter." But section 4852.01, subdivision (d) (section 4852.01(d)) provides: "This chapter shall not apply to persons . . . convicted of a violation of . . . Section 288 . . . ."

Similarly, section 290.5, subdivision (a)(1) provides: "A person required to register under Section 290 for an offense not listed in paragraph (2), upon obtaining a certificate of rehabilitation . . ., shall be relieved of any further duty to register under Section 290 . . . ." The list of offenses for which relief from registration is not permitted, includes section 288(a) but not section 288.7. (§ 290.5, subd. (a)(2) (section 290.5(a)(2).)

So, the provisions of section 4852.01 and section 290.5 treat section 288.7 offenders and section 288(a) offenders differently

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for purposes of eligibility to obtain a certificate of rehabilitation and relief from the sex offender registration requirement.

The Court relied on precedent to distinguish the two sex crime statutes.

> ""The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times. . . ."" [Citation.] „In recent years, section 290 registration has acquired a second purpose: to notify members of the public of the existence and location of sex offenders so they can take protective measures." [Citation.] The purpose behind section 290.5 quite obviously is to relieve former sex offenders of the onerous registration requirement when they have demonstrated their rehabilitation and convinced the court that they no longer pose a threat to others necessitating the protective measure of registration." (*Tuck, supra*, 204 Cal.App.4th at pp. 740-741 (conc. opn.).)

"Given these purposes, no rational explanation is apparent for permitting a person previously convicted [under section 288.7] of sexual relations with a minor 10 years or younger to obtain a certificate of rehabilitation and be relieved of the registration requirement while denying this right to one previously convicted [under section 288(a)] of similar conduct with a minor who is 11, 12 or 13 years of age. These persons would seem „"sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment."" [Citation.]" (*Tuck, supra*, 204 Cal.App.4th at p. 741 (conc. opn.).)

Accordingly, the Court concluded:

> Therefore, we hold section 4852.01(d) and section 290.5(a)(2) violate the equal protection clauses of the state and federal Constitutions, to the extent they exclude persons convicted of violating section 288(a) from obtaining a certificate of rehabilitation and relief from the section 290 registration requirement. This statutory classification results in a "„rather startling statutory preferential treatment" " for persons convicted of a more serious crime as contrasted with persons convicted of a less serious crime, all of 7
> which denies the latter persons of the equal protection of the laws. (*Tuck, supra*, 204 Cal. App.4th at p. 741 (conc. opn.), quoting *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 708, 712.)

As to what remedy should apply, the Court, after weighing three hypothetical options, held:

> We conclude, for the reasons discussed above, the Legislature would probably find the third option preferable to either of the other two options. Hence, we believe the appropriate remedy is to delete section 288(a) from section 4852.01(d) and section 290.5(a)(2), and permit Tirey to renew his application for a certificate of rehabilitation pursuant to section 4852.01, subdivision (a), all so he might be relieved of the lifetime registration requirement as provided in section 290.5, subdivision (a)(1).
>
> We note the trial court did not determine whether Tirey satisfies the specified criteria. So our reversal of the order on appeal merely revives Tirey's right to pursue his petition on the merits. If Tirey satisfies the specified criteria, then requiring him to register as a sex offender for the remainder of his life based on his section 288(a) offenses would serve no useful purpose, because again the court will have necessarily determined he no longer presents a continuing threat to minors.

The Court was sensitive to the fact that the equal protection problem arose from poorly drafted legislation, and "suggested" that the Legislature fix this problem that it created.

> Finally, we observe the Legislature may wish to consider amending section 4852.01(d) and section 290.5(a)(2), to treat section 288(a) offenders and section 288.7 offenders equally for these purposes, and to ensure the overall certificate of rehabilitation and relief from sex offender registration scheme reflects the public policy objectives it was intended to accomplish.

Overall, Tirey might prevail in his renewed application in the trial court and escape the dreaded lifetime registration stigma.

COURTS

WHEN INNOCENCE IS REAL

Nearly every parole hearing begins with the commissioner announcing that the hearing will "not be a retrial", that the panel accepts as fact the determination of the court in finding the prisoner before them guilty of a crime that resulted in a life sentence. And the majority of lifers accept that fact as well, have come to terms with their past lives and actions and worked to become the changed person who can be found suitable for parole.

But for those prisoners who steadfastly maintain their innocence of the crime, the board is often unrelenting in its denial of parole, often based on 'lack of insight,' 'failure to accept responsibility,' and 'minimizing.' And the Governor is even harsher, often overturning parole grants by saying the law does not require him to accept the prisoner's claim of innocence, and he does not.

But there are cases, not a multitude, but enough to be of concern, when innocence is real. Those prisoners face a Sophie's choice dilemma; continue to tell the truth, maintain their innocence and be denied parole time and again, or admit to a lie, take responsibility for something they did not do and possibly increase their chances of going home.

For 34 years Kash Register, identified by two eye witnesses in 1979 as the shooter in a fatal robbery gone bad, maintained his innocence. Though the two witnesses were of sketchy reliability even then, the depth of their lack of credibility was withheld from Register's original defense team. Other legal shortcomings by the arresting jurisdiction (LA County) included improperly seized and processed evidence, information on the alleged witnesses withheld from the defense counsel, perjury on the part of several witnesses during the trial and the implausibility of the original witnesses' statements.

No matter. In 1979 the righteous prosecution methods that made the LA County DA's office [in] famous were enough to convict a black man of first degree murder. First sentenced to life without parole, Kash's sentence was later converted to life with chance of parole.

And for the next 34 years he remained constant in his claim of innocence. Through 11 parole hearings and denials, he never wavered.

Then in late 2011 new evidence arose, first in the form of a relative of one of the 'eye witnesses,'

who contacted Keith Chandler, former lifer and now paralegal, with evidence that her relative had lied to convict Kash in return for consideration in legal troubles of her own—a tried and true LAPD tactic. Armed with this new information Chandler and fellow former lifer/paralegal Gary Eccher filed a habeas petition that resulted in a show cause order and the appointment of attorney Herb Barish, who in turn enlisted the Loyola University Law School Project for the Innocent.

A year and a half of work and research later a two week evidentiary hearing brought out all the good (very little), the bad (lots of that) and the ugly (multitudes there) of Kash's original prosecution and conviction. Both so-called 'eye witnesses' were found to have lied in the trial, one of the officers involved in the case admitted to perjury, which caused the judge in the case, Judge Katherine Mader, to react with what some have characterized as "stunned amazement."

On Nov. 7 Judge Mader (having found the prosecution in the original trial had committed no less than six individual Brady violations), in reading her decision from the bench, exonerated Kash Register of a murder that had kept him in prison for over three decades. He was released the next day, but it took over a month for the LA County DA's office to acknowledge they would not, again, seek to prosecute him for the crime which he had no part in committing.

Chandler, in recounting the long process, gives praise to attorney Barish and the Loyola law students for their diligent and intuitive work in finding all the hidden lies and piecing together the puzzle of how the frame for Kash was built. Chandler and Kash acknowledge the continuing pain of the victim's family, who now must know the real killer of their family member was never found.

And in one of the more agreeable presentations we have witnessed at the monthly Executive Meeting of the parole board lifer attorney Marc Norton, who

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represented Kash at his latest (2011) parole hearing, where he was once again denied because he continued to declare his innocence, recounted Kash's story to the board. Norton made a point of calling to task LA DA Alexis de la Garza, always an opponent of any parole, for her opposition and expressions of disdain at Kash's last hearing. And he pointedly reminded the commissioners that a claim of innocence is NOT a reason to deny parole. Kudos to Norton for his eloquent and impassioned presentation of Kash's long struggle.

While the law says a prisoner need not admit guilt to be found suitable, in reality those who continue to profess their innocence have an uphill battle in achieving parole. While the board continues to look for remorse, acceptance of responsibility, and insight into why a prisoner committed a crime, panel members, when faced with as assertion of innocence, often fail to remember the overriding concern and the stated basis on which their determinations should be made is whether or not the potential parolee is a CURRENT DANGER TO SOCIETY. Not guilt or innocence of that long-ago crime, but their present circumstances and condition.

Sometimes, innocence is real; as real today as it was 34 years ago.

IN MEMORY OF GARY WILLIAMS

A founder of Prison Outreach Program, rehabilitated in spite of CDCR

When Gary Williams began a 25 to life sentence in 1978 he was, by his own admission, responsible for what the parole board likes to refer to as heinous crimes. Thirty-four years later, when he died in December, 2012, Gary had, through his own initiative, insight, and care for humanity become what some have described as "the Mother Teresa of inmates." But in spite of his changed character, his continual giving back and work with teens as well as other inmates, the parole board never recognized those changes and continued to view him as a danger to society.

One of Gary's outside friends shared his memories of the man he knew. "His passion for helping others was best exemplified in the Prisoner Outreach Program (POP) which he helped create. Working with prison staff sponsors, he and his colleagues invited groups working with "at risk youth" to the prison and gave them a tough love reality check tour of life behind bars and some very valuable time talking with the guys who were living that reality. Needless to say some kids walked away from it shell shocked. I'm sure that some young people are walking the streets today and not behind bars as a result of that experience.
"The POP also raised money through food sales and recycling. They would vote each month on which youth groups to support. They sent money to the local Boy Scouts, Girl scouts, Irene Larson After School Center, Pace Jam, etc., etc. The Solano visiting room was wallpapered with drawings from kids in these groups thanking the POP for its support. Gary took great pride in giving his visitors a tour of these "works of thanks". [My wife] and I were two of the people who had the pleasure of getting that tour."

Like most lifers, Gary spent time in several institutions, most recently at Solano and CMC. In 2012 he was denied parole again, this time by now former Commissioner Ferguson, now departed from the board. Around the same time Gary's health began to fail, the result of the resurgence of a previous ailment. He was transferred to CMF, where he passed away last year on Dec. 8, 2012. Gary was fortunate in one respect; his long-time free world friend was able to visit him the day before he died, so Gary knew he was valued and would be missed.

LSA is fortunate to be the beneficiary of Gary's legacy. We have received an anonymous donation of just over $400 in Gary Williams' memory. There are many, many more Lifers still in prison who, like Gary Williams, have changed their lives and outlook over the decades, not because of the help of CDCR, but in spite the hindrances, lack of substantive programming and repeated rebuffs by the parole board. We will continue to work for these and all Lifers, to make sure they have a real opportunity to change their lives and have that change acknowledged through parole, as stated and intended in the law.

BPH

PROPOSED BPH DIRECTIVE BRINGS STRANGE UNITY

An Administrative Directive first proposed a few months ago by the staff at the BPH has run into a strangely unified opposition, coming from both District Attorneys and prisoner attorneys. The proposed Administrative Directive, 2013-06, would delineate a prisoner's ability to submit documents during a parole hearing.

Under Title 15 inmates are granted the right to present 'relevant' documents to the panel. Section 2249 also provides that said documents should be "brief, pertinent and clearly written" and cover "mitigating circumstances, disputed facts or release planning." In addition to being submitted at a hearing, such prisoner generated documents are also placed in the prisoner's C-file.

The key area of concern for the BPH is "brief." Citing instances where ponderous amounts of documents are submitted at a hearing, taxing the commissioners' ability to sufficiently read and assimilate the information, the proposed directive would allow panel members to follow a trio of remedies when faced with documentation in amounts too large to fully cogitate.

If commissioners find the documents submitted are not clearly written, and are brief and pertinent, they may choose one of the following actions in an effort to expedite the hearings:

1. "Allow the prisoner to summarize the pertinent contents of the documents in his or her closing statement.

2. Allow the prisoner's attorney to summarize the pertinent contents of the documents in his or her (attorney's) closing statement, or

3. Advise the prisoner that an attempt will be made to review the documents during the recesses and deliberations."

District Attorneys object to the proposed directive on the basis that the proposed alternatives could provide grounds for inmates denied parole to petition the court on the basis of not receiving a full and impartial review of their case. Prisoner attorneys also object on somewhat the same basis, that a summary of the documents presented might not give commissioners all pertinent information and could negatively influence their decision.

Given the concerns expressed from both sides of the fence the BPH legal department requested and received consent from the board to table the proposed directive, to return it to the legal department for further study and reconsideration at the December meeting.

No matter what form this directive eventually takes, it would behoove prisoners bringing new documents to their hearings to be certain those documents fall under the brief, relevant and clearly written guidelines.

Lifer Scheduling and Tracking System

Commissioners Summary

All Institutions

September 01, 2013 to September 30, 2013

	ANDERSON, JR	FERGUSON	FRITZ	GARNER	GUERRERO	LABAHN	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	ZARRINNAM	BPH HO	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Hearing Totals*	22	0	17	26	0	21	23	30	0	13	21	17	24	318	531	22**	509
Summary of Suitability Hearing Results per Commissioner																	
Suitability Hrg Total	22	0	15	26	0	21	21	28	0	12	20	15	20	95	294	20	274
Grants	5	0	5	6	0	6	2	8	0	1	5	5	5	0	48	5	43
Denials	9	0	7	16	0	9	13	16	0	6	10	6	8	0	99	10	89
Stipulations	2	0	1	0	0	6	0	0	0	1	1	1	6	4	22	2	20
Waivers	0	0	2	0	0	0	5	1	0	2	0	1	1	46	58	2	56
Postponements	6	0	0	3	0	0	1	4	0	2	4	2	0	31	53	1	52
Continuances	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Split	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	14	14	0	14
Denial Length Analysis per Commissioner (Summary of Denials and Stipulations)																	
Subtotal (Deny+Stip)	11	0	8	16	0	15	13	16	0	7	11	7	14	4	121	12	109
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	7	0	5	6	0	7	8	11	0	3	2	3	8	4	64	5	59
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	3	0	1	9	0	4	4	4	0	3	8	2	4	0	42	6	36
7 years	1	0	2	1	0	3	0	0	0	1	1	1	1	0	11	1	10
10 years	0	0	0	0	0	1	1	0	0	0	0	0	1	0	3	0	3
15 years	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1	0	1
Waiver Length Analysis per Commissioner																	
Subtotal (Waiver)	0	0	2	0	0	0	5	1	0	2	0	1	1	46	58	2	56
1 year	0	0	1	0	0	0	4	1	0	2	0	1	0	23	32	1	31
2 years	0	0	1	0	0	0	1	0	0	0	0	0	1	10	13	1	12
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	10	10	0	10
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	3	3	0	3
Postponement Analysis per Commissioner																	
Subtotal (Postpone)	6	0	0	3	0	0	1	4	0	2	4	2	0	31	53	1	52
Within State Control	4	0	0	1	0	0	1	1	0	1	0	1	0	27	36	1	35
Exigent Circumstance	1	0	0	2	0	0	0	3	0	0	4	0	0	0	10	0	10
Prisoner Postpone	1	0	0	0	0	0	0	0	0	1	0	1	0	4	7	0	7

*Hearing Totals include other actions such as Rescission, Progress, PC 3000.1, Documentation, 3 year Review for 5 year Denials, EnBanc Reviews, PC 1170, Term Calcs, and Inmate Petition (PTA/PR).

** Hearings Conducted with more than one "Commissioner" column count on the Hearing Total* line does not include En Banc Reviews.

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LIFER

Lifer Scheduling and Tracking System

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

	ANDERSON, JR	FRITZ	GARNER	GUERRERO	LABAHN	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	ZARRINNAM	SPEC HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Hearing Totals*	24	32	31	23	22	38	21	12	30	16	30	26	281	558	60**	498
Summary of Suitability Hearing Results per Commissioner																
Suitability Hrg Total	22	30	28	22	22	37	21	11	29	16	30	20	129	417	58	359
Grants	5	9	6	7	6	12	3	3	6	5	10	6	0	78	19	59
Denials	13	18	14	14	11	16	10	7	19	11	14	12	0	159	32	127
Stipulations	1	2	2	0	2	2	3	0	0	0	1	0	4	17	0	17
Waivers	0	0	1	0	0	2	1	0	0	0	3	0	50	57	1	56
Postponements	3	1	4	1	2	4	3	1	4	0	1	2	54	80	5	75
Continuances	0	0	1	0	1	1	1	0	0	0	1	0	0	5	1	4
Split	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	21	21	0	21
Denial Length Analysis per Commissioner (Summary of Denials and Stipulations)																
Subtotal (Deny+Stip)	14	20	16	14	13	18	13	7	19	11	15	12	4	176	32	144
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	10	13	12	10	8	8	5	2	12	6	8	9	3	104	19	85
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	2	4	2	4	4	6	3	2	4	4	5	3	1	44	9	35
7 years	2	3	1	0	1	4	2	2	2	1	2	0	0	20	3	17
10 years	0	0	1	0	0	0	3	1	1	0	2	0	0	8	1	7
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Waiver Length Analysis per Commissioner																
Subtotal (Waiver)	0	0	1	0	0	2	1	0	0	0	3	0	50	57	1	56
1 year	0	0	1	0	0	2	1	0	0	0	3	0	29	36	1	35
2 years	0	0	0	0	0	0	0	0	0	0	0	0	11	11	0	11
3 years	0	0	0	0	0	0	0	0	0	0	0	0	6	6	0	6
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	4	4	0	4
Postponement Analysis per Commissioner																
Subtotal (Postpone)	3	1	4	1	2	4	3	1	4	0	1	2	54	80	5	75
Within State Control	1	1	1	1	1	0	2	0	2	0	0	1	43	53	2	51
Exigent Circumstance	2	0	3	0	0	3	0	0	0	0	1	0	0	9	1	8
Prisoner Postpone	0	0	0	0	1	1	1	1	2	0	0	1	11	18	2	16

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

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EN BANC RESULTS

OCTOBER

Salvador Aceves, H 73423. Aceves' was scheduled for a recession hearing, due to an event in May which the board concluded could, if true, "strongly indicates the prisoner is not ready for release."

James Olson, D11191. The board declined to refer Olson for recall of sentence (compassionate release) due to disciplinary chronos, one for possession of marijuana. The board concluded "the prisoner will continue his pattern of self-administering illegal substances and thus pose a risk to public safety."

Dennis Pratt, C23010. The board voted to reschedule a hearing for Pratt, before the same panel, "due to the Board's failure to comply with Penal Code section 3041.5 (a) (4).

Karl Princic, K28046. Affirmed the grant of parole made in June, 2013.

Jesse Rugge, T69730. Affirm the July, 2013 grant of parole.

Jason Santabanez, J53181. Affirm grant of parole made in August, 2013 but schedule a new hearing for the sole purpose of term re-calculation.

NOVEMBER

Antonio Alegre, H 78404. Affirm August, 2013 grant of parole but schedule a new hearing for the sole purpose of term re-calculation.

Carlos Alvis, H 15209. Affirm the September, 2013 grant of parole but schedule a new hearing for the sole purpose of term re-calculation.

Sonya Daniels, W 75006. The board voted to vacate the August, 2013 grant of parole and ordered an investigation of Daniels' claim of Intimate Partner Battering (IPB) and "any information not addressed in the board's previous IPB investigation." Daniels' family spoke on her behalf, but the parole was opposed by Sutter County DA, who maintained the IPB claim constituted evidence of a lack of insight and shifting of blame. She urged the board "you've got to look at the photos" of the deceased victim.

Danny Duchene, C 71565. Affirm the September, 2013 grant of parole but schedule a hearing for the sole purpose of term re-calculation.

Maceo Warmack, E 84649. Affirm the grant of parole given in September, 2013, after finding the prisoner had been found not guilty of a rules violation alleged after his hearing.

Donald Dawson, H28536. The board vacated the August, 2013 grant of parole, after a referral by the Governor, who questioned Dawson's sincerity. The board also ordered their own confidential report on alleged misconduct in 2011 to be placed in the confidential file. A new hearing will be scheduled. Dawson's parole was supported by several friends, who attested to his sincerity of change. LA DA de la Garza opposed.

Robert Faltisco T 95747. Referred to the en banc consideration by the Governor, after the victim in the crime wrote to his office, opposing parole, Faltisco's July, 2013 grant of parole was confirmed by the board. The victim expressed to the board her continued fears and a series of 'what ifs,' and LA DA de la Garza echoed the same line, adding that Faltisco, a former actor, had charmed the board into granting parole.

Nicole Garza, W 2-67206. Affirmed the July, 2013 grant of parole.

Steven Hypolite, K 79428. Affirmed the August, 2013 grant of parole. Hypolite's parole had been referred to the board by the Governor, who said he did not believe the prisoner's claim of innocence.

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YOUTH OPPORTUNITY PAROLE HEARINGS- COMING SOON

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

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

The new law has been codified in the California Penal Code as Sections 3041, 3046, 3051, and 4801. Although The YOP hearings will become effective January 1, the BPH has until July 1, 2015, to bring all those entitled to a YOP hearing to their first appearance before the board for a YOPH.

LSA/CLN, following a conference held at the BPH in early December on implementation of SB 260, has been able to construct the following framework for how the hearings will be held, who will be entitled to 260 hearings and when various prisoner cohorts might expect to have those hearings scheduled. We have also included a flow chart, provided by the BPH that details how the determination of qualification for SB 260 is made.

The following is a brief and general summary of how and when the hearings are expected. For more detailed information please contact LSA for a free, multi-page hand out on the whys and wherefores of SB 260, including more detailed information on training for the board and FAD psychs. This is one time we hope those writing

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to us will include an email or SASE, as we anticipate a substantial number of requests. As new or additional information is available we will publish that information in ***Lifer-Line*** and ***California Lifer Newsletter.***

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

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

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

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

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

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

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- **WHAT IS DIFFERENT ABOUT YOPH? :** Parole board commissioners and Forensic Assessment psychologists will be instructed to consider the youthful nature and development of those convicted of crimes before the age of 18 in a different light than those who were adults at the time of the crime. The Board should consider the youthful factors as mitigating circumstances and thus supportive a finding of suitability. This will hopefully increase their chances of being paroled. The new YOPH will also allow family, friends, school personnel, faith leaders, and representatives from community-based organizations who knew the person prior to the crime, or who can attest to growth and maturity since the time of the crime can submit letters in support of parole. While this was always allowed in regular parole hearings, the fact that the law now specifically mentions such letters will hopefully cause commissioners to view such letters with greater attention.

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

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

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

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

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

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

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

- **WHAT IS IMMEDIATE RELEASE?:** Although the new law states some individuals found suitable for parole under SB 260 are subject to 'immediate release,' immediate is a relative term. For any suitability finding the normal review periods, up to 120 days for the BPH legal review and then another 30 days for the governor (in cases of murder convictions) still apply. So someone found suitable under YOPH guidelines will not be released the following day.

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

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

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

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

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

Chapter 312 Youth Offender Sentencing (SB 260)

Consultations (formerly "Documentation Hearings")

Changes three-year "documentation hearings" to "consultations" that are held instead during the sixth year prior to the inmate's minimum eligible parole release date (MEPD). (PC 3041(a))

During consultation: requires board to provide inmate with information about the parole hearing process, legal factors relevant to his/her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his/her work assignments, rehabilitative programs, and institutional behavior. (PC 3041(a))

Within 30 days of consultation: requires board to issue written positive and negative findings and recommendations to the inmate. (PC 3041(a))
Establishes that qualifying Youth Offenders whose controlling offenses have determinate sentence length will also receive consultations as amended in PC 3041. (PC 3051(c))

Youth Offender Parole Hearings

Modifies Existing Suitability Hearings for Qualified Youth Offenders: defined as a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was under 18 years of age at the time of his or her controlling offense. (PC 3051(a))
Disqualifies Certain Youth Offenders: (PC 3051(h))

- o Cases in which sentencing on the controlling offense occurs pursuant to PC § 1170.12, § 667, or § 667.61 (three strikes)
- o Cases in which individual was sentenced to life in prison without the possibility of parole
- o Individuals who, after turning age 18, commit an additional crime for which malice aforethought is a necessary element of the crime.
- o Individuals who, after turning 18, commit an additional crime for which he/she is sentenced to a new term of life in prison.

Defines "controlling offense" for purposes of PC 3051 as offense or enhancement for which any sentencing court imposed the longest term of imprisonment. (PC 3051(a))
Establishes maximum timeframes for eligibility for the Suitability Hearing of a Qualified Youth Offender: based on the sentence of the controlling offense as follows: (PC 3051(b)(1)-(3))

- o (1) DSL Sentence: eligible for release during 15th year of incarceration unless previously released
- o (2) Life Term < 25 to life: eligible for release during 20th year of incarceration unless previously released or entitled to earlier hearing
- o (3) Life Term of 25 to life: eligible for release during 25th year of incarceration unless previously released or entitled to earlier hearing

Great Weight Requirement: For qualifying Youth Offenders, panel is required to give "great weight" to diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in determining suitability. (PC 4801) The panel must consider the same factors when imposing denial lengths. (PC 3051(g))
Risk Assessments: For qualifying Youth Offenders, risk assessment must take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual. (PC 3051(f)(1))

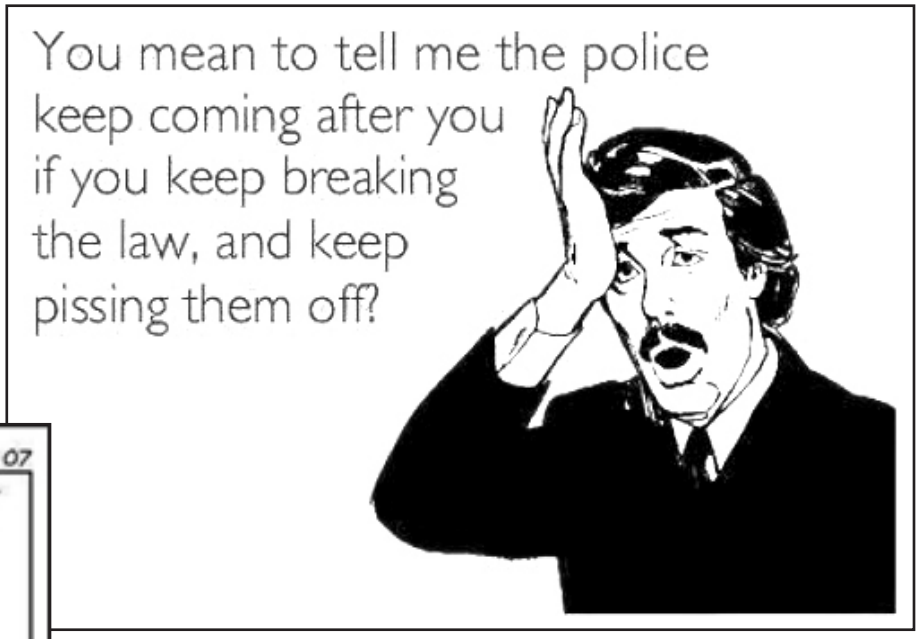
Allows statements to be submitted to the panel from family members, friends, school personnel, faith leaders, and community-based organization representatives who have knowledge about (1) the inmate before the crime or (2) his or her growth and maturity since the time of the crime. (PC 3051(f)(2))

Creates exemption from minimum term requirements, allowing instead for Qualifying Youth Offenders to parole immediately following favorable decision review in PC 3041(b) and Governor review in PC 3041.1 and 3041.2. (PC 3046(c))

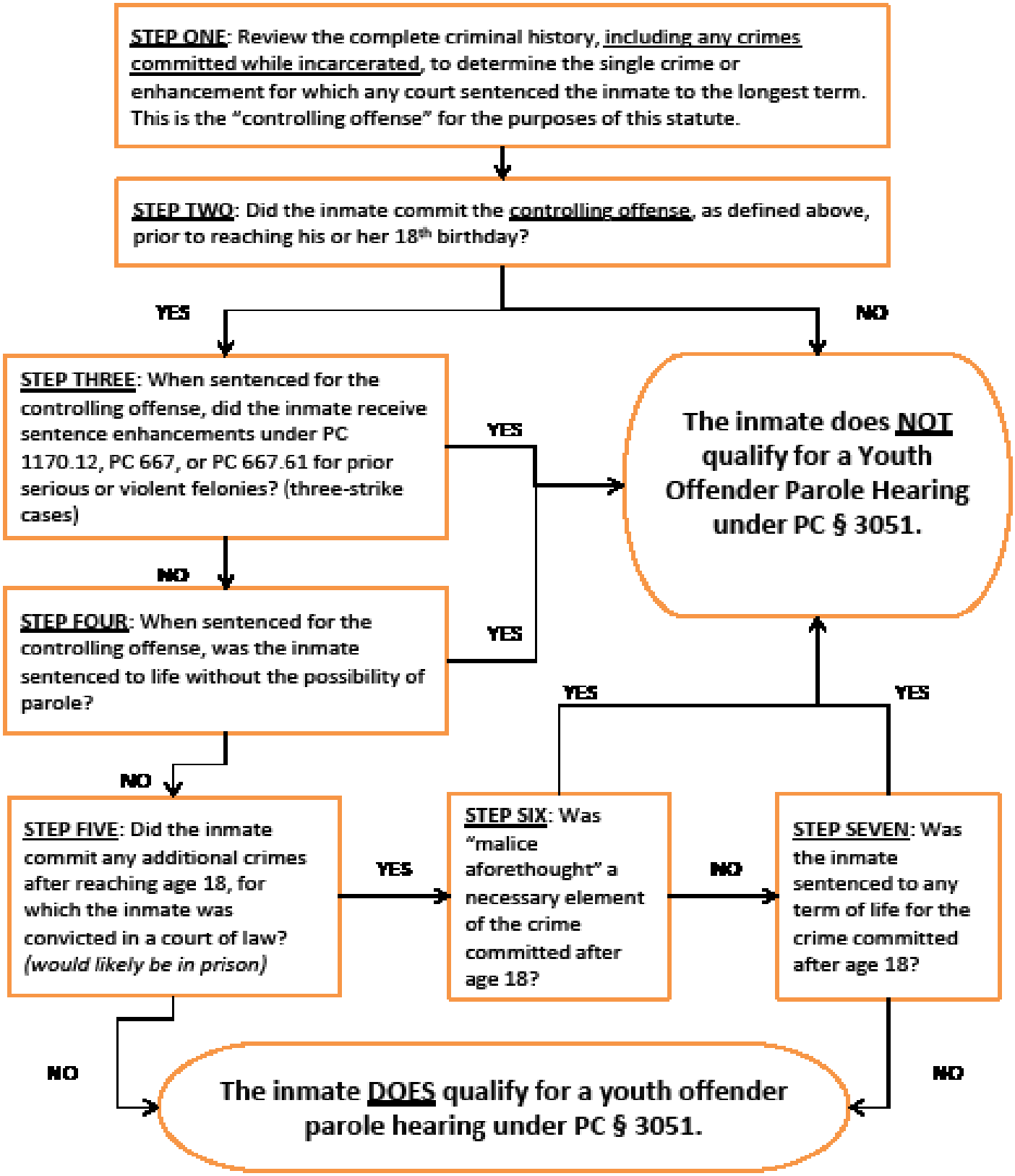
Regulations: Requires board to review/revise existing regulations and adopt new regulations as needed re: determinations of suitability under PC 3051, PC 4801, and case law to provide meaningful opportunity for release. (PC 3051(e))

18-Month Implementation Period: Requires board to complete all youth offender parole hearings for individuals who become entitled to a hearing on the bill's effective date by July 1, 2015. (PC 3051(i))

Victim's Rights: Clarifies that the bill has no effect on Victim's Rights. (PC 3051(f)(3))



How to Determine Whether an Inmate Qualifies as a "Youth Offender" under PC § 3051:



MEDICAL PAROLE or COMPASSIONATE RELEASE

The two medical release methods available to prisoners with on-going medical issues and conditions, medical parole and compassionate release, are often confused, both in the minds of the public and prisoners and families. While both methods offer an opportunity for ailing prisoners to be released from prison custody, each have unique standards and requirements that must be met. For some prisoners both avenues can be pursued simultaneously. And for both, the process can be initiated not only by prison medical personnel, but by prisoners and family members as well.

LSA/CLN met recently with Joyce Hayhoe of the Medical Receiver's office to get the best and most accurate information available on how both medical parole and compassionate release operate, who is eligible and how the processes differ. Ms. Hayhoe provided the attached comparison chart as an easy way differentiate between the two processes and judge which is most suitable for an individual situation.

By way of additional clarification, it should be noted that both medical parole and compassionate release begin with a finding and certification by a CDCR physician that a prisoner's medical condition falls under one of the two considerations. Opinions or conclusions of outside medical personnel, perhaps reached when a prisoner is treated at an outside medical facility, are not sufficient to begin the process; those medical opinions and conclusions must be verified by a CDCR-employed doctor.

Both processes begin with a referral by CDCR medical personnel to the Board of Parole Hearings, which in turn, and after considering all information, including public comments (made at en banc sessions at the board's monthly Executive Meeting), makes a decision as to whether or not to recommend the prisoner for release on medical parole or refer to the sentencing court for recall of sentence under compassionate release. The initial decision by medical personnel can be triggered by their own observations, recommendations of outside medicos, or requests by the family or prisoner to be considered for one of the two medical releases.

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The major differences lie in the medical conditions of the prisoner: medical parole is available to those who are permanently medically incapacitated but are not facing imminent death. They are bed-ridden and released to medical facilities, often skilled nursing homes, where their medical needs are met; if their condition improves to the point they no longer need intensive medical assistance to perform the activities of daily living their parole can be rescinded and they will return to prison. Those being considered for compassionate release are considered to have 6 months or less to live and are released from custody (a recall of sentence). If those individuals experience an unexpected and radical improvement in their conditions, they nonetheless remain free, as they are simply released via sentence recall, not paroled.

If a prisoner applies for consideration of either compassionate released or medical parole or the CDCR doctor denies to affirm such a recommendation, the prisoner can file a medical 602, which is considered by the Medical Receiver's office. Families can also seek assistance from the Receiver, if they feel their prisoner is unfairly being denied consideration for medical release, by either writing the Receiver or by calling the Hot Line with their concerns.

The address for the
Medical Receiver is
PO Box 942883,
Sacramento, Ca. 94283.

The Hot Line number is (916) 691-1404.

DISCHARGE FROM PAROLE —YES, IT HAPPENS!

The discharge from parole process, which for many years, because so few lifers were coming out, was pretty much unknown, has undergone a review of late and become more standardized. It begins with the parole agents, who, at the conclusion of a 3-5-7 year period, depending on the life crime, initiate the review checklist, eventually reaching a recommendation as to whether to discharge or retain on parole and reasons given for a decision to retain. Supervising parole agents will also make a recommendation. If these two recommendations differ, then the District Administrator from Division of Adult Parole (DAPO) will review the case and will make the final recommendation to

BPH.

At the BPH a cadre of Deputy Commissioners, who have been assigned to specialize in discharge decisions, will review the report, DAPO's final recommendation, and will also review the C-file, current rap sheet and any other relevant information in making their decision. The DCs (2 usually) will make a decision. The reasons given to deny discharge must be borne out by particular facts in support of the need for continued supervision; a reason of simply the crime is not, in and of itself, sufficient.

If the decision is to retain on parole the parolee will then have an annual discharge review until discharged by BPH or they reach their maximum discharge date and are discharged by operation of law. This happens seldom for most lifers as the

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change in law now allows lifers to be kept on lifetime parole. While the law allows lifetime parole, in actuality parole will probably seldom be extended a full lifetime, as the state hasn't enough resources in time or manpower to watch paroled lifers for another 20 or 30 years.

If the decision is to retain, the parolee can file an appeal or challenge the decision by submitting a decision review request to BPH Headquarters, attention the Special Processing Unit. No specific form is required but 602 forms would be accepted, stating their reasons for requesting a decision review.

There is a pilot project that is not statewide but in a few parole units throughout the state. In these specific parole units involved in the pilot project, BPH and DAPO are utilizing a Discharge Consideration Committee. This pilot project works like this:

If DAPO's recommendation to BPH (the final recommendation) is to discharge and the BPH decision is to retain, then for that specific case a committee is convened to consider the discharge of the parolee. NOT all cases in these parole units will go to committee. Only when there is a difference of opinion between DAPO and BPH. The committee is scheduled to be held at the parole office. The Deputy Commissioner will take information from:

1. The discharge review report

2. The DCs prior discharge review documentation on the case;

3. Any information from the parole agent and/or the supervising parole agent

4. Any information from the parolee or from the parolee's support persons such as family, employer, or community persons. After all the information is taken, the hearing officer

will make a final decision at the end of the committee.

This process is new and limited and only conducted in these specific circumstances. In operation for only a few months, initial reports are promising and the BPH is working to extend the review process in more areas

One final detail—if someone is denied discharge from parole and, for whatever reason, BPH/DAPO fail to complete their yearly review, (which is supposed to be done by the anniversary date of their parole), 31 days after that date, if they have not received their review and decision as to retain or discharge, they "fall off parole." In these situations, unusual but not rare, because the state failed to exercise its responsibility in the proscribed timely manner, the parolees are automatically off parole. They can then call the BPH and ask for their official, laminated discharge card and there is no recourse for the state.

CDCR

CDCR CREATING NEW LIFER PROGRAMS -WORK IN PROGRESS

Long Term Offender Program

YIKES!..... Another program...just like the other programs No! No! No!

Many lifers may have seen a notice posted in housing units announcing interviews for a new pilot program targeting lifers "to assist long term inmates in addressing their criminogenic needs." The specifics of the program, though not yet finalized, will be tailored to those specific areas of interest to parole panels.

This program will be offered early next year to those lifers who have received a 3 or 5 year denial and, along with a forthcoming companion program for recently released lifers, represents a new effort by CDCR's Division of Rehabilitative Programming (DRP) to provide meaningful and useful curriculum for lifers. Although details are somewhat lacking, Life Support Alliance (LSA) is a part of the Director's Workgroup on Long Term Offender Programming, the body charged with overseeing the program content and implementation.

While the whole project sounds like a positive development, and we at LSA/CLN believe it can become a useful asset for lifers, there are concerns about the content and way in which the new pilot program is being introduced to lifers. Initially configured so that those employed lifers would be required to quit their prison jobs to participate, sources in the DRP now report modifications are underway that would allow participating lifers to either continue working or receive a leave from their jobs to participate in the program modules and once completed return to their former employment positions. But, again, no details are available.

Another concern and potential problem is the manner in which those who will participate in the program will be chosen and how the various aspects of the rehabilitation will be offered to them. One of the major problems in this area, from the prospect of advocates, is the use of a twice-adapted psychological 'test,' our old friend the COMPAS, or at least a somewhat adulterated version of it, created just for DRP. The test, administered by either staff from Sacramento CDCR headquarters or by local correctional counselors, comes in different versions for men and women and purports to identify the "criminogenic needs" of inmates, the better to address areas where they need assistance.

Problem one: to look for 'criminogenic needs' presupposes the inmates seeking parole are still, and will continue to be, *criminals*. It fails to recognize any rehabilitation already accomplished, or even the possibility of any existing rehabilitation.

Problem two: Many of the questions on the DRP version of COMPAS are evocative only of past issues, including alcohol and drug addiction, past associations and problems.

Problem three: Many lifers already interviewed for participation in the pilot (at Solano and CMC for men, CCWF for women)

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report they are being told that declining to participate "won't look good to the board," that they must participate in the program and/or that any previous self- help accomplishments will not count before the board.

We posed that question to sources at DRP, who responded that this was a misrepresentation; non-participation will have no effect on an inmate's chances for parole and any and all self-help programming done outside of the new program will indeed be considered by the BPH.

Those facts were confirmed by the BPH as well.

Problem four: Which modules of rehabilitative programming that will be available to lifers will be decided by their 'score' on the COMPAS test, flawed though it may be. The test is purported to identify the areas, such as domestic violence, anger management, substance abuse, that the inmate should address and provide relevant programming. However, it is unclear how discerning the test will be in identifying which needs are still unmet in potential parolees and which are simply old news. Nor is it clear if participants in the program can request inclusion in other modules, not identified as part of their 'criminogenic needs.'

The pilot project will have a 2 year run, with interviews initially being conducted and slots in the program being offered to those prisoners who received 3 and 5 year denials. At the end of the pilot the assessment of its success will be whether or not a greater percentage of participants were found suitable (no longer a danger to society) than the control population of lifers. The reasoning behind initially looking to 3 and 5 year denials for participants is that these individuals represent those prisoners closest to being found suitable and thus quickest out the door, if their rehabilitation can be completed, in the eyes of the board. LSA has suggested to DRP that those prisoners who have been granted parole and had that date reversed by

continued

Long Term Offender Program Pilot Program CMC, Solano, CCWF

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

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

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

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

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

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

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

form continued on pg 48

CDCR from pg. 47

the Governor, should also be considered.

We are but one voice at the table, but we are there to represent the needs of lifers and provide practical experience and options to balance the myriad of theoretical offerings presented. More information on both the in-custody and the on parole pieces of the program will be published as they become available.

And we look to our readers for comment and reports of their experiences with the process. If you have been interviewed for inclusion in the new lifer project, please send us your impressions, reactions and conclusions in the FORM BELOW. (be sure to fill out both sides).

Tell us who interviewed you, who administered the COMPAS test; were you told the results of COMPAS and/or given a risk assessment based on that test?

Any information about the actual interviews, details and facts, will be immensely useful for us, as we push to make this Long Term Offenders program truly relevant and useful to lifers, not simply a window-dressing for the department. The concept of tailoring special programming for lifers is a good one—but the devil is in the details

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

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

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

General Comments _____

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

CDCR

IS THIS THE MEASURE OF OUR SOCIETY?

*The following article, by LSA Director Vanessa Nelson-Sloane, was printed in Sacramento's **Capitol Weekly** on line newspaper*

This is what it's like to be a mentally ill, delusional prisoner in a California prison.

Already so deranged, paranoid and irrational that you have flooded your concrete prison cell with toilet water and smeared feces, a small, grinning face appears in the window slit of the cell door and tells you to take medication. Whether from paranoia, delusions or just simply not understanding the instructions, you do not verbally respond.

Outside your cell the smiling doctor wearing street clothes tells an unseen force you will not comply. Reading from prepared script a prison guard, wearing a gas mask that resembles an alien face and muffles and obscures his voice, tells you to cuff up or they will come and get you. The food tray slot in the cell door, a small rectangle just large enough for a cafeteria tray to enter or a pair of hands to push through, opens to admit a long hose, which immediately begins to fill that small concrete cell, with no window and no way out, with eye and lung searing chemical spray known as "OC" or pepper spray.

Minutes go by as again and again the hose continually pumps spray into your cell and the muffled aliens in haz mat suits yell what might sound like "cuff up" if you could hear them over the gas mask muffle, the hissing of the hose—and your own screams of agony and confusion as the gas sets skin, eyes and lungs on fire. As you stumble around the cell, crying for help, the demon heads continue to shout and eventually, more through chance than intent, one hand extends through the food port.

That hand is immediately captured by a metal handcuff secured to a long chain and hook and the shouting heads try to pull you toward the door---the source of the agonizing spray. You pull away, more spray is pumped into your already sodden cell.

As you writhe on the floor in searing pain and continue to yell for help, asking 'what's happening to me?' the alien heads at the window slot continue to tug on your cuffed hand, trying to pull you toward the source of the agonizing mist, all the while yelling incomprehensible directions to you. Even asking "Do you want more OC?"

This macabre spectacle continues for nearly 20 minutes, until the white suited tormentors decide on a plan to enter your cell and, as they tell each other, "get him." And so they do, dragging you naked, screaming in fear, pain and confusion, unable to see because of chemical in your eyes, into the hallway where 5 shouting demons throw you to the concrete floor, kneel on your legs, back, arms and hold your head down while they struggle to truss you up like a helpless turkey. The chilling rattle of chains adds to the cacophony of shouted orders, your screams for help and collateral noise as items littering the hallway fall and bounce off the concrete floor and walls.

Finally tossed like a trash bag onto a gurney, hands cuffed behind your back, skin wet from burning pepper spray, eyes streaming, coughing and spitting from inhaled chemical, you're wheeled into another concrete room where 6 or 7 masked goons yank you from

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gurney to concrete cot where you are strapped down, forcibly given an injection. Disoriented, terrified and in pain you shout your feelings—"My skin is falling off," "my wrist is falling off" and "I don't want to be executed." With at least 5 hands pushing down on your neck and throat you cry "I'm strangling." And all the demon heads say, as they tighten the straps holding you down, is "relax."

Satisfied with a job well done, sure you cannot move, the white and green suited demons leave. You remain, naked and covered in pepper spray, on the concrete bed, restrained and confused. One wrist, injured and bloodied in the extraction, is 'documented' on film, but not yet treated.
By now 30 minutes have passed since you first felt the effects of pepper spray. And despite your pleas for help and the protocol for use of pepper spray calling for decontamination to begin immediately, no one has done so much as poor water over your streaming eyes or burning skin.

That protocol also notes, "[A]nxiety, fear and disorientation sometimes to the point of panic are normal reactions." Sounds like an appropriate treatment for delusional, confused and already disoriented individuals.

Welcome to mental health treatment and

NEW RULES FOR PEPPER SPRAYING MENTALLY ILL

Perhaps hoping to get ahead of the outrage CDCR recently announced it is changing the rules for use of pepper spray on mentally ill inmates. The new procedures, still being written and not yet public, will reportedly limit the amount of pepper spray and similar chemicals that can be used on an inmate and how quickly the decision to use the spray is implemented.

All this comes in the midst of a trial in Sacramento where videos of massive amounts of pepper spray used on mentally ill inmates was played in court to a public audience. The trail involves allegations of excessive use of force against the mentally ill in California prisons. Many who have seen the videos have described them as disturbing and sickening to watch.

A CDCR representative said "Obviously, it's our goal to use a minimal amount of force." Inmate attorney Michael Bein called the proposed changes "A big step," and noted, it was "a significant admission that the department needed to reform."

Although the videos showed massive force, both physical and chemical, used to force inmates from their cells or obtain other objectives state psychologist Dr. Ernest Wagner maintained he has not seen any lasting harm to inmates who were pepper sprayed. He told the court large quantities of the chemical are not usually needed, adding, "Most of the time just one spray and they comply."

A decision by Judge Lawrence Karlton is expected in a few weeks.

CDCR

FEWER PRISONERS, BUT CDCR TO HIRE MORE GUARDS

Although the prison population is down by some 25,000 inmates, CDCR recently announced plans to hire up to 7,000 more guards over a three year period to fill what the department says are present and future position vacancies. The state currently has about 28,500 prison and parole officers (that number is a full time equivalent) but is losing officers through retirement and resignation at the rate of about 150 per month.

Qualifications are pretty basic, U.S. citizenship, a high school diploma, at least 21 years of age on appointment. Candidates must also pass a drug-test screening, and be able to legally own and use a firearm. There is also a written test, physical fitness and vision test.

Future guards are also given a medical examination (no infectious diseases or congenital defects) a background investigation, and, wonder of wonders, a psychological examination. Maybe the FAD is giving the last exam; it might explain some of those hired.

But once hired, things start to look up—cadets in training (16 weeks in Galt) earn a bit over $ 3,000 per month and the ante is upped once they graduate, to $3,775 per month. Plus overtime. And benefits. All of the above, however, does not seem to apply to a certain group of wanna-be guards who, because of Gov. Brown's recent contract with Corrections Corporation of America (CCA), the largest private prison slumlord in the country, will be able to become full-fledged state prison guards after just 6 weeks of training. This new class of guard would be full-fledged state prison guards, but remain working in their past, CCA locations. Thus presenting a rather unique situation of a rented prison staffed by blend of state guards (who used to be private guards) and personnel employed by CCA. Confusing? You bet.

According to a CDCR spokesperson the new retreads from the private sector can qualify for less official training because of their previous experience in custodial management. "Upon completion of their training, they will have the same knowledge and skills as all newly hired CDCR correctional officers," said Deborah Hoffman. Well, that's reassuring. The abbreviated training is being conducted in a special quasi-academy in Kern County.

Amazingly, there seems to be a schism in state prison guard ranks as to whether this new 'flash academy' and resultant grads is a good thing or not. Officially, CCPOA is in favor, but many suspect this position is fostered more by the prospect of increased union dues, and in short order, than any real faith in the new recruits. CCPOA mouthpiece JeVaugh Baker noted the rapid retirement rate and the 'challenges' facing guards and the state under the population control order.

But Jeff Doyle, perpetrator of the scantily factual and always vile 'Paco Villa' blog on all matters correctional, widely read by current and retired guards, calls the new groups of fast-tracked officers "Walmart guards" and says the notion of fast tracking "mall security guards" is absurd. Many current and former guards still resent the new private-turned-state guards, who have long been seen as taking jobs away from CCPOA members as the state sent more and more prisoners to private prisons rather than build more state institutions and now seem to be receiving preferential treatment in a shortened training requirement.

Reports of converted CCA staff assuming more senior ranks at the rented prisons than regularly processed recruits also fuels the divide. Curmudgeon Doyle groused in a recent blog post, "Shortening the academy cycle is adverse to 3 decades of progress in improving and refining CO training–It harms the profession."

Thirty years have been spent 'refining' CCPOA training? Who knew? Perhaps, given some of the results of that training that we've seen, shortening that training wouldn't be an entirely bad idea.

A REALIGNMENT CAROL

Sung to the tune of "Up on the Rooftop"

Out at the front gate guards all pause,
Up jump three judges, waving laws
"Too many prisoners, they've got to go
Time and again we've told you so."

Ho, ho, ho! Who wouldn't go!
Ho, ho, ho! Who wouldn't go!
Open the front gates, click, click, click
Out with the inmates, quick, quick, quick

First came the ruling, and failed appeal
Now dear old Jerry wants to deal
Sending more prisoners out of state
That's not the way to end debate.

Ho, ho, ho! Who wouldn't go!
Ho, ho, ho! Who wouldn't go!
Open the front gates, click, click, click
Out with the inmates, quick, quick, quick

Why not just let old lifers go
That saves the state a lot of dough
Just tell the board to send them home
We know they'll make it on their own

Ho, ho, ho! Who wouldn't go!
Ho, ho, ho! Who wouldn't go!
Open the front gates, click, click, click
Out with the inmates, quick, quick, quick

So here's a message to our dear Gov
Get off your high horse and show some love
Release more lifers and you will see
How great an asset they can be

Ho, ho, ho! Who wouldn't go!
Ho, ho, ho! Who wouldn't go!
Open the front gates, click, click, click
Out with the inmates, quick, quick, quick

The Home-Going

We must get home--for we have been away
So long it seems forever and a day!
And O so very homesick we have grown,
The laughter of the world is like a moan
In our tired hearing, and its songs as vain,--
We must get home--we must get home again!

We must get home: It hurts so, staying here,
Where fond hearts must be wept out tear by tear,
And where to wear wet lashes means, at best,
When most our lack, the least our hope of rest
When most our need of joy, the more our pain--
We must get home--we must get home again!

We must get home: All is so quiet there:
The touch of loving hands on brow and hair--
Dim rooms, wherein the sunshine is made mild---

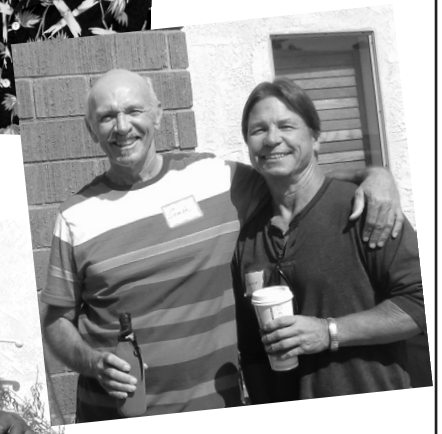
We must get home, where, as we nod and drowse,
Time humors us and tiptoes through the house,
And loves us best when sleeping baby-wise,
With dreams--not tear-drops--brimming our clenched eyes,--
Pure dreams that know nor taint nor earthly stain--
We must get home--we must get home again!

We must get home; and, unremembering there
All gain of all ambitions otherwhere,
Rest--from the feverish victory, and the crown
Of conquest whose waste glory weighs us down.--
Fame's fairest gifts we toss back with disdain--
We must get home--we must get home again!

James Whitcomb Riley

2013 ('ex') LIFER Picnic at- DOC MILLER'S

Saturday
Oct. 12th,
2013



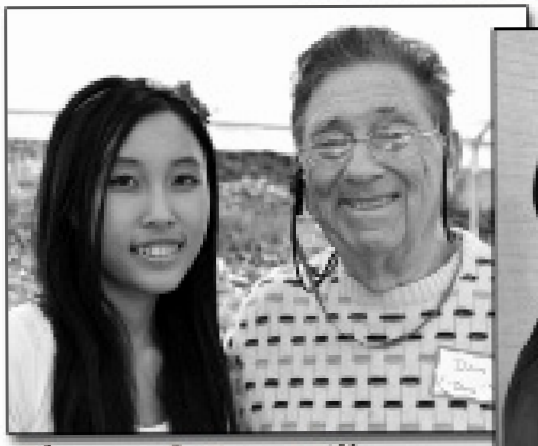
To Get to PRESS On-Time...CLN
was unable to identify every Lifer in PHOTOS.
See who YOU recognize!

(Right to left) Jr., xxx, Lucas, Lefty, Bill, Ron, BB, xxx, Buddy, Clarence "Marshall", Pat

a 'Larry' hug!

Metal Mike

burgers!



Sharon & Doc Miller

Donnie & Brian

Bertha

Bill

Joseph and Fans!

more hugs!

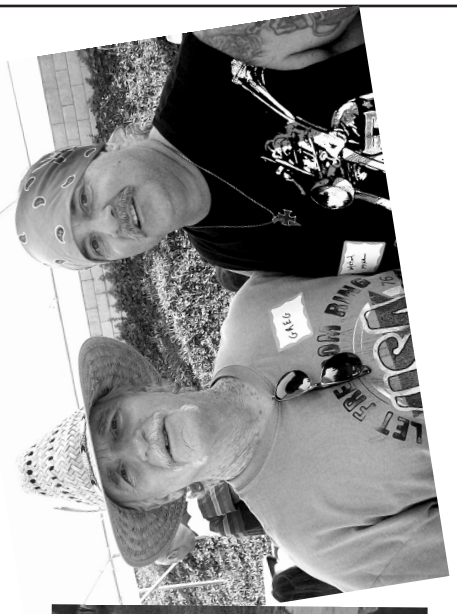
xxx, George, Roger, Ray Ray
Jaime, Rudy, Tony, Michael, Tom F.
Ron. H, Ruben & Tommy

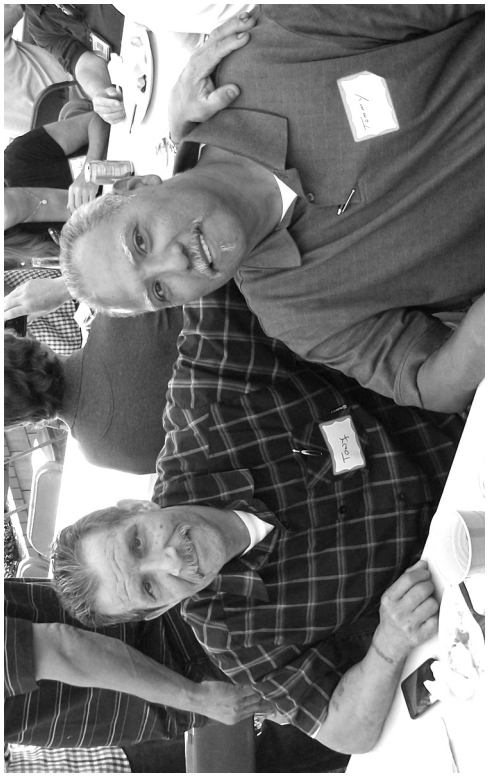
BB, Dianne, Jennifer, xxx, Joan, Sandra, Joy & Tanya

Geno

Ralph

Don't Forget Us!
We haven't
forgotten YOU!
Jimmy
Fred
Carl & David
Dusty
Melanie & Alias
Jimmie, Ugo & Jean
xxx & Rodney
Ernie & Ron
Ron & Rob






we hope you'll
JOIN us
NEXT YEAR!

1. I am fundamentally an optimist. Whether that comes from nature or nurture, I cannot say. Part of being optimistic is keeping one's head pointed toward the sun, one's feet moving forward. There were many dark moments when my faith in humanity was sorely tested, but I would not and could not give myself up to despair. That way lays defeat and death.

2. I learned that courage was not the absence of fear, but the triumph over it. The brave man is not he who does not feel afraid, but he who conquers that fear.

3. Difficulties break some men but make others. No axe is sharp enough to cut the soul of a sinner who keeps on trying, one armed with the hope that he will rise even in the end.

4. It always seems impossible until it's done.

5. When a man has done what he considers to be his duty to his people and his country, he can rest in peace.

6. Real leaders must be ready to sacrifice all for the freedom of their people.

7. A fundamental concern for others in our individual and community lives would go a long way in making the world the better place we so passionately dreamt of.

8. Everyone can rise above their circumstances and achieve success if they are dedicated to and passionate about what they do.

9. Education is the most powerful weapon which you can use to change the world.

10. For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others.

11. Do not judge me by my successes, judge me by how many times I fell down and got back up again.

12. There is no passion to be found playing small – in settling for a life that is less than the one you are capable of living.

13. Money won't create success, the freedom to make it will.

14. We must use time wisely and forever realize that the time is always ripe to do right.

15. Man's goodness is a flame that can be hidden but never extinguished

16. Resentment is like drinking poison and then hoping it will kill your enemies.

17. I like friends who have independent minds because they tend to make you see problems from all angles.

18. A good head and a good heart are always a formidable combination

19. When people are determined they can overcome anything.

Nelson Mandela 1918-2013

CLN SUBSCRIPTION FORM

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

My name, ID, and complete mailing address:

_____

_____

_____

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Other: 1 Year $90; 2 Years $170; 3 Years $250

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

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

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