LIFE SUPPORT ALLIANCE
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*Public Safety and Fiscal Responsibility*

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## WE'RE STILL WAITING

*The end of September and SB 261 still not signed*

As Lifer-Line is being printed, at the very end of September, SB 261, which would expand eligibility for Youth Offender Parole Hearings to those under 23 years of age at the time of their crime, has not yet been signed by the Governor. With a multitude of activists, prisoners and family members holding our collective breath, we can but hope that by the time the newsletter winds its way through the US postal service, to say nothing of prison mail rooms, Brown will have seen the light and signed the bill.

Not that we're waiting idly. We're pushing everyone we can contact to reach out to the Governor's office in letters, emails, and calls, any form of communication, to urge the Governor to sign SB 261 into law before the Oct. 11, 2015 deadline for all bills to be signed.

Also hanging in the balance is companion legislation that would impact the manner in which SB 261 is implemented, basically giving BPH up to 3 more years to fully bring to hearing all those, both ISL and DSL inmates, who would come under the umbrella considerations of SB 261. This delay will primarily affect DSL inmates, who will be the last group to see the inside of a hearing room because of SB 261.

This delay, in itself, may not be all bad, as the grant rate for DSL inmates (who, in many cases, never thought they'd go to a hearing and were therefore unprepared) considered under SB 260 was a dismal 5-6%. Thus the delay will give DSL prisoners, some of whom received virtual toe-tag sentences such as 150 years, time to begin programming in earnest.

So everyone, try to hold on a bit longer, the (successful, we hope) end is in sight.

# THAT OTHER JOHNSON CASE

*Settlement reached in Johnson v Shaffer; re: FAD*

Hopes were raised in early 2012, when attorney Keith Wattley of Uncommon Law undertook a suit, *Johnson v Shaffer*, that set out to challenge the performance and findings of the (to our minds) infamous Forensic Assessment Division, not so fondly known as the FAD. These are the folks (they like the term clinicians) who perform the none-too-delicate and in many cases arguable 'risk assessment' (Comprehensive Risk Assessment or CRAs) colloquially known as the 'psych eval.'

Inmate Sam Johnson, representing what later became a class of prisoners (lifers, subject to parole hearings) of inmates, challenged "constitutionality of the protocol adopted by the Board of Parole Hearings (BPH) for the preparation of psychological risk assessment reports to be considered in determining prisoners' suitability for parole. Plaintiffs claim that they are entitled to declaratory and injunctive relief to address their claims." While the original complaint was dismissed, an Amended Complaint, filed in late 2012, found traction and was accepted as a class action in March, 2013.

LSA, which had been collecting information, complaints and issues regarding the FAD for some time, was among the individuals and organizations who provided Uncommon Law with information. The case eventually boiled down to two contentions: that the FAD process amounted to a systemic bias against parole and as such presented a due process violation. That was in December, 2014. In early September, 2015 a settlement was announced.

Under terms of that settlement, agreed to by both plaintiff and defendant, through their attorneys, the defendants (basically the BPH, in the person of Executive Director Jennifer Shaffer) "without any admission or concession by Defendants of any past or present and ongoing violations of a federal right" agreed to certain changes in the FAD/CRA process. Those changes are outlined below.

It is worth noting the original complaint alleged the BPH "deliberately adopted a protocol requiring inter alia the use of three risk assessment tools that they knew to be unreliable" and "[T]he primary purpose of establishing the FAD and implementing the new protocol was to prejudice lifers appearing before the Board by making it harder for them to obtain a favorable psychological evaluation, harder to obtain a favorable parole determination and harder to establish a favorable administrative record for challenging parole decisions in court."

The original suit also noted the FAD was supposedly formed after experts were invited to consider options and recommend assessment tools. However, regarding the three tools (the PCL-R, LS/CMI and HCR-20) selected for use, "the invited experts advised against use of these tools, on grounds they are scientifically unreliable and have not been validated for predicting violence among long-term prisoners like California lifers. BPH mandated the use of these tools despite this expert advice, knowing and intending that the tools the tools would result in unreliable findings of dangerousness and thus provide a basis for denial of parole." This allegation LSA was able to personally and independently document in 2010.

Under terms of the recent settlement the BPH agreed to the following changes:

- The Board will institute a policy of providing new CRAs every three years, instead of every 5 years.
- If granted an advanced hearing a new CRA will be provided if the current report will be older than 3 years at the time of the advanced hearing.
- The Board will no longer perform Subsequent Risk Assessments

- If the Board proposes any change in the test instruments to be used (at this point those include the aforementioned PCL-R, the HCR-20 and the Static 99) class counsel (Uncommon Law) may present an expert to discuss the proposed changes.
- The Board's chief psychologist (Dr. Cliff Kusaj) will, again, provide a 'presentation' to the commissioners "regarding the recidivism rate for long term offenders," and "how and when the Board uses the Static 99…tool to predict an offender's risk of sexual recidivism."
- The board agrees to "formalize a process for prisoners or their counsel to lodge timely written objections asserting factual errors in the CRA," and "will provide a written response with a reasonable period of time."
- "All future CRAs will clarify that the Overall Risk Rating is relative to other lifer prisoners," and "the CRAs will inform….that, generally speaking, the current recidivism rates for long term offenders are lower than those of other prisoners released from shorter sentences."
- "Defendants will not oppose a motion for reasonable attorney's fees and costs that does not exceed $120,000."

Many of the items delineated in the settlement agreement had been previously discussed or announced by the Board, including the change from 5 years to 3 year shelf life for CRAs and additional training for commissioners. So, it appears, both the FAD and CRAs will remain with us, in relatively unchanged fashion, for the foreseeable future. Insert expletive of choice here.


## SUNSET ON SHU SOLITARY?

A settlement reached Sept. 1, 2015 between CDCR and plaintiffs in a long-running suit against the Draconian conditions in Pelican Bay State Prison's infamous SHU unit may, at last, mark the end of indeterminate solitary confinement in California. First filed in December, 2009, *Asker v Brown* became a class action suit in 2012 and with the settlement announced recently will affect over 2,000 California inmates currently held in SHU locations.

Most significant portions of the settlement will mean prisoners will no longer be placed in SHU housing simply for alleged gang affiliation and, for those whose conduct warrants SHU confinement, that placement will not be for an indefinite term. Simply being in possession of names, artwork or bearing tattoos that might be considered 'gang-related' are no longer 'validation' for SHU terms. Inmates must commit a violent act, such as assaulting a correctional officer or another inmate, to be placed in SHU.

And if such placement deemed appropriate, SHU terms cannot exceed more than five consecutive years. Inmates who have served 10 years in an SHU will removed to newly created, less restrictive but still secure settings. The settlement terms also impact the 'step-down' program instituted by CDCR in 2013 which allowed those in SHU for alleged gang affiliation to begin a gradual process of 'stepping down' to inclusion in the general population. What had been a 4 year transition will now take only 2 years.

Secretary of Corrections Jeffrey Beard called the change promulgated under the settlement "a real sea change. We don't believe that it's good for anybody to keep them locked up for 10, 20, 30 years," he continued. A statement from the named plaintiffs and their attorneys hailed the change as "a monumental victory for prisoners and an important step toward our goal of ending solitary confinement in California and across the country."

While nearly every voice heard on the settlement agreed it was time for a change in the decades-old practice, CCPOA, which was blocked by the courts from intervening in the case, was, predictably, negative. A spokesperson for CCPOA, which had not seen the agreement prior to announcement of the terms, said the union was disappointed that "the practitioners who are actually doing the work are just now seeing the settlement."

The state has a year to fully implement the changes that will require speedy reviews of all prisoners currently held in SHUs based solely on gang affiliation. Those who have not been found guilty of a SHU-eligible offense within the last two years will be 'immediately' released to general-population. Estimates are that only a small number of those currently in SHU housing for gang affiliation have a recent SHU-eligible offense, which would mean the majority of prisoners would be released into general population under this settlement.

Beard estimates there are currently about 2,800 prisoners who are SHU housed and that as many as 1,800 were expected to be in general population status within 2 years. Lawyers for the nonprofit Center for Constitutional Rights acted as attorneys for the plaintiffs.

## OIG RE: FALSE POSITIVE UA

What started out as a trickle, then became a flood, is still something of a rainstorm, as we continue to be contacted by inmates in various prisons (though some institutions seem worse than others) about the issue of being issued a RVR for a positive UA test caused by prescribed drugs. We've accumulated quite a file, and have reached out, over the past many months, to several contacts for assistance.

Since LSA is not a legal firm and can provide no legal representation, nor are we related to the many inmates who contact us, we have, in CDCR parlance, 'no standing' with these inmates and therefore can't be notified (for privacy, HIPPA and, that old favorite, security, reasons) we don't always know the outcome of the issue. And while we appreciate the assistance of various individuals in many divisions/departments of CDCR, well, frankly we're never sure just how diligent some of these matters are pursued.

After receiving word that Connie Gipson, newly confirmed AD at CDCR offices in Sacramento, would take on the issue we reached out to Ms. Gipson. Her secretary suggested we 'send her the names.' Yeah. Not sa much. It's a bit more complex than that, and, having dealt with Ms. Gipson on other issues, we recognize a brush off when we hear one. But, a fallback contact emerged.

Robert Barton, Inspector General of California, whose agency is tasked with oversight of the CDCR (watching the watchers) indicated his office would also take a look at those claims. In past interactions with Barton we have found him to be unbiased, transparent and realistic as well as open to new issues and concerns. And reliable about following up.

And so to Barton's office we trooped, with a pile of documentation of spurious RVRs, issued to nearly 4 dozen men in institutions from RJD to Solano and points in between, plus an additional list of individuals who may have garnered a 115 possibly because of a medical issue. These were just a sampling of the complaints we've received, but the ones where we had not been able to ascertain an outcome.

While those prisoners who continue to receive these egregious and insensate write ups can still contact us, we're happy to provide direct information to send these issues directly to the OIG's office. The one caveat: you must have exhausted the 602 process before Barton's office can step in to review the situation. On the upside, Barton was able to provide us with solid information on continuing efforts to find, as CDCR likes to say, a 'durable solution' to this problem and, should his office conclude the RVR was imprudently issued,they can work to restore such things as lost good time credit, classification status and other long-term disciplinary actions.

As soon as a final solution to the problem is announced, we'll pass it along. In the meantime, if desired, inmates fighting this issue can contact the following (send copies only, OIG will not return original documents:

Office of the Inspector General
Attn: Charles Rufo
10111 Old Placerville Road, Suite 110
Sacramento, CA 95827

## 2015 NORTHERN CALIFORNIA LIFER PICNIC


Great guys (and ladies!), great day, great fun!

## ISL OR DSL AND WHAT DOES IT ALL MEAN?

*It's a maze to most.*

This, as many long-serving lifers know, is a pretty contentious topic. And the information presented herewith is offered without comment or opinion of right or wrong, but simply an explanation of the situation as it presently exists for lifers. In 1977 California adopted the so-called Determinate Sentencing Law and the debate over what law should/does applies to those lifers sentenced prior to that time still continues. In 1992 the US Ninth Circuit Court of Appeals, in the case of *Connor v Estelle,* took on the question with the following results in discussing Indeterminate Sentencing Law (ISL) versus Determinate Sentencing Law (DSL).

The DSL adopted a two-stage approach to parole decisions; first, a prisoner must be found suitable for parole under the DSL guidelines. Once this occurs, a date is set for his release (parole). Many argue that by considering those sentenced prior to 1977 for parole under the DSL guidelines, rather than the ISL guidelines, the Board of Parole Hearings (known in 1992 as the Board of Prison Terms) violates ex post facto considerations. However, in *Connor*, the court held that the DSL guidelines require consideration of the same criteria as did the ISL, and thus the application of the DSL guidelines to a prisoner sentenced under the ISL did not violate the ex post facto clause. The court cited several cases, most often Duarte, 143 Cal.App.3d at 951, 193 Cal.Rptr. 176.

The California Supreme Court has also held that a prisoner sentenced under the ISL is entitled to have his release date calculated under either the ISL or DSL procedures, whichever is more beneficial. In 1977, the DSL became effective, California prisoners became entitled to annual parole suitability hearings. This entitlement, however, was changed by subsequent amendments and new laws, including the implementation of Marsy's Law, with its denial lengths of 3,5,7,10 and 15 years.

The court held that ISL and DSL guidelines apply identical criteria in determining parole suitability. Both the DSL and the ISL require the BPH to consider a variety of factors in deciding whether to release a prisoner on parole, including the prisoner's offense, age, habits, mental state, character, amenability to reform, and potential for recidivism. And both the ISL and DSL allow the BPH to consider a prisoner's rehabilitative efforts while in prison. DSL also allows for consideration of prisoner's expressions of remorse, preparation for life outside prison, and behavior while incarcerated.

And so the situation stands today, until the issue is adjudicated again. For those with a burning interest in the subject, a layman's term explanation of the ruling, with case citations, is available for an SASE to LSA's mailing address PO BOX 277, Rancho Cordova, Ca., 95741. Please note you are seeking *Connor v Estelle*.

While this does not answer the question of whether or not ISL or DSL should be applied to any inmate currently serving a life term in California, it is an overview of the most current court ruling and decision by which the BPH is presently operating.