Volume 12 Number 1 CLN #67 Jan./Feb. 2016

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.

STATUS OF

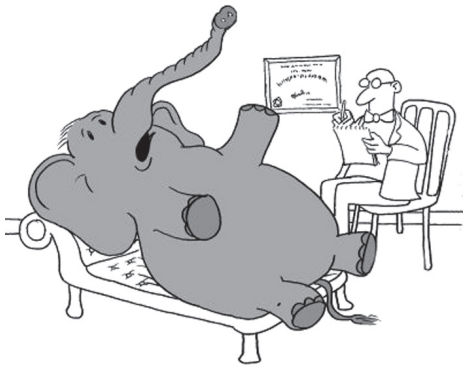
GILMAN V. BROWN

As CALIFORNIA LIFER NEWSLETTER went to press...
***GILMAN V. BROWN* DECISION IS HANDED DOWN**
February 22, 2016
(Please see pages 39- 40 for ruling)

GOVERNOR REVERSED BECAUSE HIS DECISION WAS IMPROPERLY BASED ON "SOME EVIDENCE" OF FACTS IN THE CASE, RATHER THAN ON "SOME EVIDENCE" OF THE LIFER'S CURRENT DANGEROUSNESS

In re Kevin Henriques
Orange County Superior Ct.
M-16475
February 8, 2016

Kevin Henriques was convicted at trial of first degree murder. However, the trial court reduced the conviction to second degree, based on insufficient evidence of premeditation and deliberation. The Board found him suitable at an October 2014 parole hearing. Governor Brown later reversed the Board's decision, citing three reasons: (1) The cruel and callous nature of the murder; (2) Petitioner's unconvincing, belated explanation for why he committed the murder reflecting insufficient insight into the causative factors which led to the commission of the offense; and (3) an unfavorable 2011 psychological assessment deeming petitioner a moderate risk to engage in violent recidivism if released on parole based in part on petitioner's personality traits, lack of insight, and unrealistic parole plans.



"Whenever I walk in a room, everyone ignores me."

Reviewing all three reasons, the Court concluded that there was "some evidence" of the cruel and callous nature of the murder, but that there was not "some evidence" supporting his other two reasons. While, hypothetically, if one reason held up under judicial scrutiny, the Governor's decision might be upheld, here, the Court declined to uphold the Governor's decision based solely on the nature of the crime.

While there is evidentiary support for one of the Governor's three principal findings, his decision to reverse the Board of Parole Hearings' grant of parole is nevertheless flawed and cannot be upheld. The Governor's decision does not clearly articulate why petitioner's 25 year old crime alone remains relevant to the question of parole suitability and supports his determination that petitioner continues to pose an unreasonable risk of danger to society if

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In re Kevin Henriques
In re William Hays
Sherman-Bey v. Shaffer

Prop. 36 Cases

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P. v. Gregory Young
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***Henriques* from pg 1**

released on parole in view of petitioner's favorable record of reform and rehabilitation developed during his term of imprisonment.

The Court cited to the record of Henriques' clean record and substantial self-help.

The now 45 year old petitioner does not have a criminal record aside from the commitment offense and has not engaged in violence while imprisoned. Petitioner has developed multiple marketable skills from satisfactory to excellent work reports as well as from his completion of four different vocational certifications. He has participated in extensive institutional and self-help programming including but not limited to AA/ NA, the CALM and SAP programs, Victim Awareness, Domestic Violence, Conflict Resolution, and Bible Studies. Petitioner has developed realistic parole plans that include multiple housing options, multiple job offers and substance abuse and domestic violence prevention plans. Petitioner further has the support of family and friends who support his release on parole.

But the Court drew a line in the sand as to "the crime" reason equating to "some evidence" of *current* dangerousness.

In reviewing the Governor's determination, the Court's inquiry necessarily focuses on whether some evidence supports the Governor's decision that petitioner constitutes a current unreasonable threat to public safety and not merely whether some evidence supports the existence of certain factual findings . The decision before this Court does not meet this standard.

The Governor "may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance only if those facts support the ultimate conclusion that an inmate continues to pose an unreasonable risk to public safety." (*In re Lawrence, supra,* 44 Cal.4th at 1221.) Under the some evidence standard, a reviewing court reviews the merits of the Governor's decision, and is not bound to affirm a parole decision merely because the Governor has adhered to all procedural safeguards. "This standard is unquestionably deferential, but certainly is not toothless and due consideration of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision-the determination of current dangerousness." (*In re Lawrence, supra*, 44 Cal.4th at 1210.)

The Court therefore granted the writ.

There is no reliable evidence supporting the Governor's decision to overrule the Board's grant of parole. The record also fails to disclose any material information warranting a determination different than the one reached by the Board of Parole Hearings. Under these circumstances, further consideration by the Governor of petitioner's suitability for parole is unwarranted. When "there is not some evidence in the record to support the Governor's decision to overrule the Board's grant of parole, the proper remedy is to vacate the Governor's decision and to reinstate that of the Board." (*In re Rodriguez, supra*, 193 Cal.App.4th at 101; *In re Dannenberg* (2009) 173 Cal. App.4th 237, 256; *In re Burdan* (2008) 169 Cal.App.4th 18, 39.) The petition for writ of habeas corpus is GRANTED. The Governor's March 20, 2015 decision reversing the Board of Parole Hearings' grant of parole is vacated. The Board's October 4, 2014 decision finding petitioner suitable for release on parole is hereby reinstated. It is so ordered.

However, the Court declined to order Henriques' immediate release. Rather, it left the final decision to the Board, which still retained jurisdiction to amend its grant if circumstances following the grant might warrant a different ending.

The Court denies petitioner's request for an order providing for his immediate release on parole. "Even when a court determines that a gubernatorial reversal of a parole decision is unsupported, the remedy is not an order for the inmate's immediate release; rather, the court vacates the Governor's reversal, reinstates the Board's grant of parole, and directs the Board to conduct its usual proceedings for a release on parole. This allows the Board to account for any recent developments reflecting on the inmate's suitability for parole, and to rescind its grant if appropriate." (*In re Lira* (2014) 58 Cal.4th 573, 582.)

Henriques was successfully represented in this action by San Jose lifer/ criminal/civil attorney Steve Defilippis.

ALLEGED FAILURE

PUBLISHER'S NOTE

***

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

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

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

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

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***CASES* from pg. 2**

TO DEAL WITH "COMBINATION" OF STRESSORS LEADING TO LIFE CRIME WAS NOT CAUSE TO DENY PAROLE

In re William Hays
CA 1(3); A142316
December 14, 2015

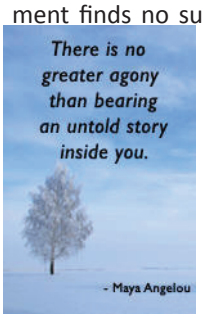
In May 1981, William Hays was convicted of two counts of second degree murder following a court trial in Napa County. The court sentenced Hays to serve consecutive terms for each of the murder counts, resulting in a sentence of 30 years to life in state prison.

> In May 2013, the Board found Hays unsuitable for parole at his sixth parole suitability hearing. The Board began by noting that the commitment offense was "especially atrocious" but also acknowledged that after a significant passage of time the life crime, by itself, may not support a continued denial of parole absent other factors demonstrating a lack of suitability for parole. The Board noted that Hays understood the magnitude of the crime and was remorseful but believed he had "not fully addressed the causative factors[] which led to the life crime." More specifically, the Board stated: "You have identified posttraumatic stress syndrome, PTSD. You've identified factors of your divorce and your loss of your family and children. You've identified factors of your drug and alcohol use. And what was lacking to this Panel was your fully understanding of the *combination of those.*" The Board went on to note that Hays had addressed "pieces of it" with drug and alcohol counseling as well as self-help programming, but that with respect to PTSD, which was identified as a significant causative factor, Hays indicated to the Board that he "didn't necessarily need further treatment[] in that area," although he agreed to pursue such treatment if necessary. The Board concluded that Hays remained a threat to public safety because of his continued "lack [of] insight into those causative factors."
>
> (Italics added.)

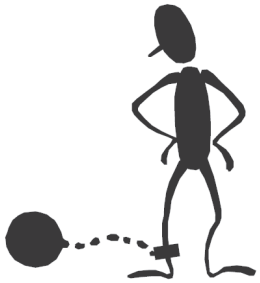
Hays filed a petition for a writ of habeas corpus in the Napa County Superior Court challenging the Board's May 2013 parole denial. The court denied the petition, reasoning that "at least some evidence" supports the Board's decision that releasing Hays on parole "would unreasonably endanger public safety." The court cited the Board's rationale that Hays had "only addressed pieces" of the causative factors that led him to commit the life offense.

> In this case, the Board based its parole denial on Hays's lack of insight into the causative factors that led him to commit the life offense. The Board expressed concern that, although Hays was remorseful and had identified the factors that led him to commit the life offense, he failed to understand the "combination" of those factors. Taken in isolation, this explanation offers little to justify a conclusion that Hays remains a danger to public safety. However, when the statement is considered in context, it is apparent that the Board's concern was that Hays had not assigned enough significance to PTSD as a causative factor. More specifically, the Board stated it was "troubling to the panel" that Hays indicated he did not necessarily need further treatment for PTSD but acknowledged he would pursue it if necessary. As we explain, the Board's stated concern does not provide the required nexus to establish that Hays remains a threat to public safety.

The Board's denial revolved around the "combination" effect of Hays' Post-Traumatic-Stress-Syndrome diagnosis from his Vietnam War service. The Board both recognized this PTSD condition, but also waffled on how it would make Hays a continuing danger to society.



As an initial matter, the Board's statement finds no support in the record to the extent it suggests Hays would not be amenable to further therapy that might include treatment for PTSD. During the course of the parole suitability hearing, Hays repeatedly acknowledged the role that PTSD played in the antisocial behavior that led up to him committing the life offense. He worked on PTSD issues in a veterans' group as well as in PTSD and life prisoner therapy groups. He was specifically asked what type of therapy he would pursue if released. He responded: "I have two different places here in Sacramento, the Sacramento Resource Center and the Vet Center, which is psychiatrist/psychologist, Sandra Merino. I've talked to her a couple of times.



Or any other – wherever I'm located, I will seek out a Veterans Service Center." A Board member later asked Hays whether he thought he would need any assistance with PTSD. Hays stated: "I don't believe so, but I will be working with Sandra [Merino], if I'm paroled here to Sacramento. So, I'd have direct contact with her PTSD Group." (Italics added.)

There is nothing in the record to suggest that Hays discounted the significance of PTSD as a causative factor for his antisocial behavior or that he would fail to pursue appropriate therapy that might include further treatment for PTSD. Further, Hays's belief that he does not necessarily require further therapy for PTSD is not indicative of a lack of insight into the causative factors that led to the life crime. The Board's conclusion that Hays lacks insight rests upon the premise that he requires further PTSD therapy and has failed to accept that fact. But there is no recent psychological evidence in the record supporting a conclusion that Hays requires further therapy for PTSD. In the most recent comprehensive risk assessment, Dr. Caoile stated that Hays's PTSD is in remission and that "specialized intervention or risk reduction strategies appear unwarranted."

The Court went on to reason:

> Of course, the Board was not obligated to accept Dr. Caoile's conclusion that Hays would present a low risk of violent recidivism if released. (Cf. *In re Rozzo* (2009) 172 Cal.App.4th 40, 62 [parole authority has broad discretion to disagree with forensic psychologists].) However, while the Board had broad authority to assess for itself whether Hays remains a danger to the public, it was not competent or empowered to decide what type of therapy Hays requires in the absence of psychological evidence supporting its conclusion. Because there is no competent, recent evidence establishing that Hays requires ongoing treatment for PTSD, the record does not support a conclusion that Hays lacks insight due to his failure to acknowledge the need for such

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EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility
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WHAT YOU CAN DO TO HELP

Our mission here at LSA/CLN is to do all we can to help lifers in every way we can. And there are some things you, as prisoners, can do to help us in that mission.

First, don't believe rumors—we spend considerable time, paper, ink and postage answering letters about rumors that should, on their face, be obviously false. That old adage about *if it sounds too good to be true, it probably isn't*… is real. If someone tells you all those over 60 or 65 years old, or with more than 25 years in, or all A, B and C numbers are going home….no.

Remember, there are only a few ways home for lifers: pardon (pretty unlikely) writ (possible, but not assured) and parole (the way most get home). No other way. The legislature hasn't and won't pass any law opening the doors to all lifers, and no federal law or proclamation will affect state prisoners.

So take a moment and consider both the rumor and the source. If anything earth shattering and game changing happens you can be sure the news channels, papers and radio will be ablaze with that information…. it won't have to come from the next building.

Second, make your correspondence short, to the point and tell us what we can help you with. No generalities—'what are my chances,' 'I'm being held illegally,' 'I deserve to go home.' If you have an issue you think we can help resolve, spell it out, details and all. Nothing will surprise us.

Don't try to con us. When we offer to help with RVRs for prescribed meds, don't ask us to help you beat a 115 for over familiarity. Don't offer to make us a beneficiary when you get out and sue the state for wrongful imprisonment. Yeah, we've been around and we're pretty quick to recognize a scam of any sort, and we've seen several. Please, don't waste our time.

Third, support us. We're all volunteers here and the help and support of you and your families makes our work possible. Stamps are a great help to us—we're answering 200 letters or more a month, that's $100 in postage costs alone. If you have an extra stamp or two—we really appreciate them.

And you can help support us financially via food sales and other group activities. We're a non-profit 501 (c) (3) organization, just like many of those prison groups you already donate to. We've been very fortunate to have been the beneficiary of food sales from several prisons in the past and we hope that will continue.

If the administration at your institution feels they should be the ones to designate who gets those donations, let us know. Even if it isn't LSA that benefits from those sales, it should be the decision of the prisoners, not the warden, et al, about where those funds go. And we can help make that point.

We're here to inform and help you. Help us continue on that mission.

Hays **from pg. 3**

treatment. Moreover, Hays's belief concerning the need for further PTSD treatment does not reflect a lack of insight into the role PTSD played as a causative factor. Not only has he consistently acknowledged that PTSD played a significant role in the antisocial behavior that led him to commit the life offense, but he has also indicated he will pursue appropriate therapy upon release that may include treatment for PTSD. The stated basis for denying parole does not rest on even a modicum of evidence suggesting that Hays will present a danger to public safety if released.

The State then tried an end run – proffering reasons for denial that the Board did not even suggest. This is a truly outrageous, if not unethical, approach: asking the habeas Court to take on the evidence-weighing task of the Board, and find Hays unsuitable for reasons that the Board did not! At the very least, the State's requested transgression by the Court into the Board's turf would be a violation of the constitutional Separation of Powers doctrine.

As for the contention that Hays lacks insight because he could not recall the circumstances of the murders themselves, we are not convinced that his claimed lack of recall amounts to "some evidence" that he would present an unreasonable risk to public safety if released. Hays explained that he had been drinking heavily and had no specific recall of events after he left the van and jumped into some bushes. Even if the Board had some concern about Hays's failure to recall the circumstances of the murders—a concern the Board did not articulate when it announced its decision—that concern would not necessarily reveal that Hays lacks insight into the causative factors leading to the commitment offense. Hays has accepted full responsibility for the murders, and he has accepted as true the statements made by various witnesses about his behavior on the night of the murders. There is no reason to believe his inability to recall the commission of the life offense impairs his understanding of the factors that caused him to commit the crime. (See *In re Stoneroad* (2013) 215 Cal. App.4th 596, 630.) "No evidence in the record supports the purely speculative proposition—i.e., 'guesswork'—that a person who does not remember committing a crime cannot understand the factors that caused him to commit the offense regardless of whether he accepts full responsibility and is genuinely remorseful." (*Id*. at p. 629.) While we can easily conceive of a situation in which a prisoner's claimed inability to recall the circumstances of the life crime raises valid questions about whether the prisoner lacks insight or is trying to evade responsibility for his crimes, we are not presented with such a scenario on the record before us now.

The Court appropriately found in Hays' favor, and granted the relief of a new hearing, consistent with its findings in this case.

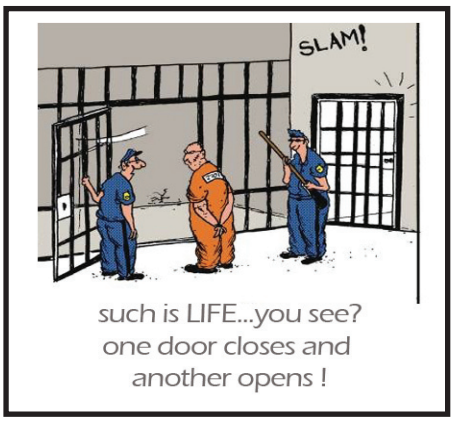
We conclude that, even under the deferential "some evidence" standard of review, the Board's decision denying parole cannot withstand scrutiny. The life offense was undoubtedly an "atrocious" crime, as the Board recognized. But it was also committed over three decades ago, and Hays was first eligible to be considered for parole in 1999. By itself, the aggravated nature of the crime does not provide evidence of current dangerousness unless there is some evidence to believe Hays remains a threat to public safety. (*In re Lawrence, supra*, 44 Cal.4th at p. 1214.) That evidence is lacking here.

Hays **cont. pg. 6**

***Hays* from pg. 5**

As explained more fully in *In re Prather* (2010) 50 Cal.4th 238, 244, the Board must conduct a new parole suitability hearing on remand in accordance with due process principles and this court's decision. The Board is not limited to the evidence it may consider but is bound by this court's findings and conclusions with respect to the evidence presented in this proceeding. (*Id.* at pp. 257–258.)

Notably, Hays filed his petition in pro per. Upon issuing an order to show cause, the Court appointed counsel to continue the litigation.



CALIFORNIA CODE OF REGULATIONS, TITLE 15, SECTION 2240, PERTAINING TO BPH PSYCH EVALUATION SCHEDULING, HELD INVALID

Sherman-Bey v. Shaffer
CA 3; C077499
January 14, 2016

A pro per inmate petitioned the Superior Court for a writ of mandate barring the BPH from continuing to use 15 CCR § 2240, a regulation that pertains to scheduling of lifer psych evaluations. The trial court had granted in part Sherman-Bey's petition for writ of mandate challenging section 2240 because that section failed to comply with the Administrative Procedure Act's clarity standard. On appeal, the Court of Appeal chided both Sherman-Bey and BPH respondent Jennifer Shaffer for failing to provide needed parts of the administrative record that was before the superior court when it made its ruling below. As a result, the appellate court could not rule otherwise, and affirmed the superior court's writ by default.

The appellate court laid out the history of this litigation in detail.

Life inmate Sherman-Bey filed a petition for writ of mandate in the trial court challenging section 2240, which provides as follows: Before a life inmate's initial parole consideration hearing, and every five years thereafter, a comprehensive risk assessment will be performed by a Board of Parole Hearings psychologist. (§ 2240, subds. (a), (b).) That comprehensive risk assessment "will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. *Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence."* (§ 2240, subd. (b), italics added.)

Section 2240 was adopted by the California Board of Parole Hearings in 2011 in response to a 2010 determination by the California Office of Administrative Law that the process by which the Board of Parole Hearings conducted psychological evaluations was an underground regulation. That underground regulation had been in place since January 2009 and included a forensic assessment division to oversee preparing psychological evaluations for parole suitability hearings. Those psychological evaluations included use of several enumerated risk assessment tools to assess the inmate's potential for future violence.

Sherman-Bey's challenge to section 2240 in the trial court was based on contentions that he again raises here, namely, that the Board of Parole Hearings failed to substantially comply with the requirements of the Administrative Procedure Act because the board did not adequately respond to public comments, the board misrepresented facts, and the board improperly mandated the use of specific risk assessment tools. Sherman-Bey also argued, as he does here, that section 2240 conflicts with other laws and that psychological evaluations completed by the board from the time the underground regulation was in effect are invalid and should be removed from inmates' files.

Sherman-Bey's challenge to section 2240 in the trial court was also based on his contention that the Board of Parole Hearings failed to substantially comply with the Administrative Procedure Act's clarity standard. With regard to this contention, the trial court ruled "the regulation substantially fails to comply with the [Administrative Procedure Act's] clarity standard, both because the regulation uses terms that do not have meanings generally familiar to those directly affected by the regulation, and because the language of the regulation conflicts with the agency's description of the effect of the regulation." "This language lacks clarity because the terms 'actuarially derived and structured professional judgment' are not 'easily understood' by or 'generally familiar' to life inmates, who are directly affected by the regulation." "In addition, the regulation is unclear because the language of the regulation conflicts with the agency's description of the effect of the regulation. By using the word 'may,' the regulation suggests Board psychologists have discretion to decide not only whether to incorporate 'actuarially derived and structured professional judgment approaches' in evaluating an inmate's potential for future violence, but what, if any, 'approaches' to use." "In contrast, the Board's description of the regulation in the Statement of Reasons refers to a 'battery' of risk assessment tools 'selected' by the Board, and the Statement of Reasons assumes the risk assessment tools will be 'administered' to inmates to determine their risk of future violence. [Citations.] As a result, the regulation is unclear with respect to the responsibilities of the Board psychologists who will implement it."

As to the remedy, the trial court granted in part Sherman-Bey's petition for writ of mandate, "allow[ing] Respondent Board eight months to correct the identified deficiencies in [section 2240] by adopting a new or amended regulation, in compliance with the requirements of the [Administrative Procedure Act]." "If the regulation is not amended or replaced within eight months after entry of judgment, the portion of the regulation providing that 'Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence,' which is severable, shall be invalidated as of that date, and the Board shall be permanently enjoined from enforcing that provision after that date." The trial court entered judgment on September 9, 2014.

In this court now, the board challenges the trial court's partial grant of Sherman-Bey's petition for writ of mandate.

The Court of Appeal stuck to the rules of court requiring designation of portions of the record for the appellate court. It repeatedly found that both Sherman-Bey and Shaffer failed in this regard. As a result, the Court of Appeal could not disagree with the superior court's finding below, and affirmed it by default.

First, the court found that the board failed to carry its burden as appellant both to persuade the court that the trial court erred in finding section 2240 lacked clarity and to provide an adequate record on review

The board contended the trial court erred in finding that section 2240 did not comply with the Administrative Procedure Act's clarity requirement because in its view (a) the term " 'actuarially derived and structured professional judgment' " approaches is clear; and (b) the term does not conflict with the board's description of the effect of the regulation.

As the Court explained, as to (a), the board's one-line argument that the term " 'actuarially derived and structured professional judgment' " approaches is clear ignores statutory language and fails to carry its burden as appellant to persuade us that the trial court erred in finding the term unclear. As to (b), the board has failed to provide the Court an adequate record to review its contention.

The Board fumbled on its second contention, as well. The Court found that the board has not carried its burden to provide an adequate record to assess its claim that the court erred in finding that the term "actuarially derived and structured professional judgment approaches" conflicts with the board of parole hearings' description of the effect of the regulation.

> "A regulation shall be presumed not to comply with the 'clarity' standard if," among other things, "the language of the regulation conflicts with the agency's description of the effect of the regulation." (Cal. Code Regs., tit. 1, § 16, subd. (a) (2).)

> The trial court ruled that in addition to section 2240 lacking clarity because the terms "actuarially derived and structured professional judgment" are not easily understood by or generally familiar to life inmates, "the regulation is unclear because the language of the regulation conflicts with the agency's description of the effect of the regulation. By using the word 'may,' the regulation suggests Board psychologists have discretion to decide not only whether to incorporate 'actuarially derived and structured professional judgment approaches' in evaluating an inmate's potential for future violence, but what, if any, 'approaches' to use." "In contrast, the Board's description of the regulation in the Statement of Reasons refers to a 'battery' of risk assessment tools 'selected' by the Board, and the Statement of Reasons assumes the risk assessment tools will be 'administered' to inmates to determine their risk of future violence. [Citations.] As a result, the regulation is unclear with respect to the responsibilities of the Board psychologists who will implement it."

> The board contends the trial court erred in this finding because section 2240 does not conflict with its description of the effect of the regulation. As we explain, the board again fails to carry its burden as the appellant to demonstrate error, but this time because it has failed to have the administrative record transmitted to our court, which is necessary for us to resolve its contention.

Sherman-Bey didn't fare any better, in the appellate court's eyes.

> As To Sherman-Bey's Appellate Contentions Regarding Public Comments And Alleged Misrepresentation Of Facts, He Has Failed To Carry His Burden To Show Error Because He Has Failed To Provide An Adequate Record,

> Sherman-Bey contends the Board of Parole Hearings failed to substantially comply with the Administrative Procedure Act because: (a) the board did not adequately respond to public comments; and (b) the board misrepresented facts, namely the findings of an expert panel of psychologists concerning various risk assessment instruments that were to be used as part of the psychological risk assessment process.

> Regarding the public comments, Sherman-Bey "urge[s] this court to review the record and arguments," which he claims will lead us to the conclusion that the Board of Parole Hearings did not substantially respond to the substance of the public comments. However, as we noted with the board, appellant Sherman-Bey has also failed to provide us with the entire rulemaking record that the trial court reviewed to make its decision. Specifically, the trial court based its ruling on review of the rulemaking record containing, among other things, the public comments and the Board of Parole Hearings' responses, noting the portions of the record it reviewed. It then made a factual finding that the Board of Parole Hearings adequately responded to the public comments. On appeal, we cannot reverse the trial court's factual finding unless the appellant has provided us with a record demonstrating that the finding is not supported by substantial evidence. Without providing us with the rulemaking record, we cannot fully assess the evidence. Sherman-Bey has failed to provide us with such a record.

Finally, the Court declined to grant Sherman-Bey's request to remove older psych evaluations from his Board file.

Sherman-Bey **cont. pg. 8**

Sherman-Bey **from pg. 7**

The Board Of Parole Hearings Was Not Required To Remove Psychological Evaluations Performed Before The Enactment Of Section 2240 From Sherman-Bey's File.

Sherman-Bey contends, as he did in the trial court, that all psychological evaluations completed by the Board of Parole Hearings conducted pursuant to the underground regulation are invalid and should be removed from his and other inmates' files.

Sherman-Bey has standing to challenge only his own psychological evaluations. "As a general rule, legal standing to petition for a writ of mandate requires the petitioner to have a beneficial interest in the writ's issuance." (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 913.) " 'The requirement that a petitioner be "beneficially interested" has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' " (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165.) Here, Sherman-Bey has a beneficial interest in only his own psychological evaluations. Thus, he does not have standing to argue that all the psychological evaluations of other inmates during the relevant time period be declared invalid.

Turning to his own evaluations, Sherman-Bey has still not demonstrated that the Board of Parole Hearings had a duty to remove from his prison central file the psychological evaluations completed pursuant to the underground regulation. The California Supreme Court has addressed what happens when a petitioner challenges an agency's decision made pursuant to a policy determined to be an underground regulation. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576-577.) "[T]he . . . policy may be void, but the underlying . . . orders are not void." (*Id.* at p. 577.) If the underlying orders were void, it would undermine the controlling law. (Ibid.) Here, since the evaluations themselves are not void, Sherman-Bey has no right to have them removed from his file simply because they were promulgated pursuant to an underground regulation.

We note one final point. The law provides Sherman-Bey with an adequate remedy if he believes there is a basis for questioning a psychological evaluation in his file. "In every case where the hearing panel considers a psychological report, the inmate and his/her attorney, at the hearing, will have an opportunity to rebut or challenge the psychological report and its findings on the record. The hearing panel will determine, at its discretion, what evidentiary weight to give psychological reports." (§ 2240, subd. (d).)

The upshot of this case is that the Board has a fixed time to remedy the defects in § 2240.

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PROP. 36 CASES

PROP. 36 RESENTENCING DENIAL REVERSED AND REMANDED FOR TRIAL COURT TO DETERMINE "RATIONAL NEXUS TO CURRENT DANGEROUSNESS," AS IN *LAWRENCE* STANDARD

P. v. Gary Valentine

CA1(2); A140133
January 22, 2016

Gary Valentine, serving a three strikes sentence of 26-life imposed in 1999, appealed from the denial of his petition for resentencing under Prop. 36. He made three arguments: (1) that the constitutional guarantee of equal protection of the law is violated by the requirement that a person whose third strike term was imposed for a nonviolent felony be granted resentencing only if he or she does not pose an unreasonable risk of danger to public safety, while a person newly sentenced for a nonviolent felony is entitled to a second strike sentence regardless of current dangerousness; (2) that the definition of "unreasonable risk of danger to public safety" set forth in Prop. 47, enacted while his appeal was pending, must be applied to his case; and (3) that the trial court erroneously denied his petition based on immutable facts of his past record which had no rational nexus to current dangerousness.

The same division of the Court of Appeal that recently decided *In re Stoneroad* and *In re Butler* denied Valentine relief on claims (1) and (2), but reversed and remanded for reconsideration of whether he currently poses an unreasonable risk of danger.

Valentine was no angel in his earlier time on the streets. Before he received his current third strike arson conviction, the appellate court noted, his record was replete with dangerous behavior.

"Appellant's crimes involved extremely dangerous conduct. For instance, appellant accomplished the 1986 robbery by threatening the clerk at a toy store with a handgun. In the 1986 bank robbery, appellant threaten[ed] the teller by telling her that he had a ' "magnum" ' in his pocket, and that a bomb was in place that would blow the bank apart. The 1987 conviction for voluntary manslaughter occurred after appellant's gun went off and killed his girlfriend during a drunken fight. In the 1999 drunk driving incident, appellant was driving with a blood alcohol level of .31 percent, and caused collisions involving three different vehicles." We noted that appellant was incarcerated for the majority of the 10 years between his 1986 and 1987 convictions and the 1998 burning of the cottage, meaning the remoteness of the earlier convictions was "no indication of appellant's ability to refrain from criminal conduct," and we commented that he was "a recidivist offender who is extremely dangerous to the public." ...

Appellant spent about eight years in federal custody. While there, he earned 62 college credit hours, many of which were for drug and alcohol counseling. When released from federal custody, appellant spent three months in a halfway house in Arizona and then was on parole. In 1995, appellant turned himself into his parole officer after drinking for about three weeks. He served another nine months in federal prison for this violation and was released to a halfway house in San Francisco. He then remained sober from the time of his release until his marriage to his fourth wife, Carol. He worked as a fundraiser.
Appellant started drinking again a couple of months before the fire incident that led to his state prison term.

If Valentine were released via resentencing, he would not be immediately free.

Appellant testified that if his resentencing request was granted and he was released from state prison, due to his federal parole hold, he would go into federal custody for between one and three years, followed by three months in a halfway house and then supervision by the federal probation department. Be-

cause he would have "drug and alcohol aftercare," he would have to call every day and would be required to come for drug testing two or three times a week and to participate in counseling.

The record before the resentencing judge also included extensive reports on Valentine's considerable medical problems and frailty. Also in the record were psychological reports from prison doctors who found him a "low" risk of dangerousness.

The appellate court examined at length all of the factors in Valentine's record and determined that the trial court, in denying Valentine's resentencing petition, based its determination on his extensive, old, criminal history – not on anything that was indicative of *current* dangerousness. To be sure, the appellate court analogized Valentine's situation with that of the famous *In re Lawrence* decision, wherein it was determined that to deny parole, there must be demonstrated a "rational nexus to current dangerousness" from record evidence. It referred to the trial court's decision.

The trial court denied the petition for resentencing, acknowledging that in general a person is less dangerous as he or she ages and to the extent he or she has a deteriorating physical condition, but nevertheless finding that releasing appellant would pose an unreasonable risk to public safety. The court expressly disagreed with Subia's [State psychologist] assessment that appellant would not pose an unreasonable risk, stating that it questioned Subia's conclusions "in light of the factors that he didn't know about [appellant] and the fact that they had no effect on his opinions." The court was "not reassured" by the fact that appellant would be under federal parole supervision because he had previously violated federal parole by drinking heavily. Accepting that appellant's prior offenses were committed "a long time ago," the court noted their seriousness, then stated that "it's not just youthful criminality," as appellant set fire to the cottage, threatened his wife and "went at arresting officers" with a screwdriver when he was nearly 50 years old. The court referred to appellant's last wife describing appellant threatening to kill her and trying to kill her pets in order to torment her, apparently a reference to events related to the other charges against appellant in 1998. Rejecting defense counsel's characterization of appellant as a "poster

child" for resentencing, the court quoted at length the comments of the judge who, at sentencing in 1999, emphasized the severity of appellant's substance abuse problem and failure to deal with it and as the seriousness of the priors, as well as this court's description of appellant as "extremely dangerous to the public" in our opinion affirming the three strikes sentence. Stating that appellant was "a man who with very little at his disposal can threaten, and does threaten, and follows through with those threats," and agreeing with the prosecutor's observation that all it would take for appellant to repeat his crime is "lighter fluid and a match," the court concluded that appellant posed an unreasonable risk of danger to public safety "notwithstanding his age and his physical condition."

Valentine argued for use of the Lawrence "rational nexus" standard.

Appellant argues that the trial court improperly relied upon immutable facts in his past record with no evidence of a rational nexus to current dangerousness. He draws an analogy to the context of inmates sentenced to indeterminate life term sentences being considered for parole after completion of their minimum terms. Under section 3041, subdivision (b), "a release date must be set 'unless [the Board] determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.' " (*In re Lawrence* (2008) 44 Cal.4th 1181, 1202, quoting § 3041, subd. (b), emphasis in *Lawrence*.)

The appellate court then related the applicable law.

In the parole context, "the paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently poses a threat to public safety and thus may not be released on parole." (*In re Lawrence, supra*, 44 Cal.4th at p. 1210.) The seriousness of the inmate's offenses does not alone constitute evidence of "current dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*Id*. at p. 1214.)

As we explained in *In re Stoneroad* (2013) 215 Cal.App.4th 596, 621 (*Stoneroad*), "the commitment offense is an immutable factor that would almost always mandate upholding the denial of parole. Furthermore, after a period of time the commitment offense loses much of its usefulness in predicting the likelihood of future offenses. [Citation.] 'At some point,' Lawrence reasons, 'when there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness.' [Citation.) The result of *Lawrence* and its progeny is that the aggravating nature of a crime can no longer provide evidence of current dangerousness 'unless there is also evidence that there is something about the commitment offense which suggests the inmate still presents a threat to public safety.' (*In re Denham* (2012) 211 Cal.App.4th 702, 715, citing *Lawrence*, at p. 1214.)" (*Stoneroad*, at p. 621.) "[T]he Board may not base a parole denial upon the circumstances of the offense, or other immutable facts, unless those facts support the ultimate conclusion that the inmate continues to pose an unreasonable risk of safety if released on parole." (*In re Criscione* (2009) 180 Cal.App.4th 1446, 1459.)

The Court of Appeal found the trial court's assessment of dangerousness was too closely tied to Valentine's *old* behavior, and that the trial court did not actually assess his *current* dangerousness based on any *recent* behavior having a rational nexus to *current* dangerousness.

Valentine **cont. pg. 10**

Valentine from pg. 9

Here, the court did specifically mention appellant's age and infirmity as factors that would normally weigh against a finding of dangerousness, finding that he posed an unreasonable risk of danger "notwithstanding his age and his physical condition." The court did not refer to any other postoffense factor, such as appellant's positive work reports, the absence of significant violations of prison rules in his records or his refraining from substance abuse during the 14 years of his state confinement. By describing appellant's past offenses and threats, and quoting the remarks of the trial judge who sentenced him in 1999 and this court, in affirming that judgment, the trial court here made clear that it found appellant's conduct and substance abuse issues 15 and 25 years before more dispositive of his current dangerousness than his age and physical infirmity. But it did not explain why it reached this conclusion, and its remarks gave no indication it even considered appellant's conduct in the years since his last conviction. The court's view that appellant is "a man who with very little at his disposal can threaten, and does threaten, and follows through with those threats" was stated in the present tense, but the only explanation of this view was the description of conduct 15 to 25 years in the past.

The closest the trial court came to explaining its dismissal of appellant's physical frailty as a factor weighing against finding him unreasonably dangerous was its statement that "it did not disagree" with the prosecutor's comment that "a can of lighter fluid and a match" is "all it would take." The obvious point is that appellant's burning of the cottage did not require any significant effort or mobility. The court made no effort, however, to explain why appellant posed an unreasonable danger of repeating such conduct 15 years later. Similarly, taking the court's reference to appellant's conduct at age 50 as its explanation for rejecting his advancing age as a factor mitigating his dangerousness, the court made no effort to explain its conclusion that nothing would have changed with the passage of an additional 15 years. The court obviously believed that appellant would relapse into alcohol abuse if released, but offered no evaluation of the impact of appellant's 14 years of abstinence; the only apparent explanation for its belief was its statement that it was not reassured by the fact appellant would be supervised by federal probation officers because he had returned to drinking while on federal parole in 1995.

The essence of the trial court's determination on dangerousness appears to have been that appellant committed dangerous offenses and threatened violence 15 to 25-plus years ago and was not able to gain control over his alcohol and substance abuse at those times, and therefore would relapse and pose an unreasonable risk of danger if released. In other words, the decision was based on the immutable factors of appellant's past conduct.

Summing up its opinion of the trial court's rejection process, the court concluded:

In short, based on the trial court's lengthy explanation of its ruling, it found that appellant would pose an unreasonable risk of danger if released due to his history of substance and alcohol abuse, the seriousness of his offenses and the fact that he relapsed into alcohol abuse while on federal parole, despite undisputed evidence that appellant had not committed a serious or violent felony for over 25 years, had not consumed alcohol for 14 years, suffered from numerous medical conditions that severely impacted his mobility and life expectancy; had no significant disciplinary record in prison, had consistently positive work evaluations, and had been assessed as low-risk for violent re-offense by the Department of Corrections, a former Department official with many years expertise in inmate risk evaluation, and a psychologist retained by the defense to evaluate this question. The court said nothing to explain its rejection of the evidence favorable to appellant. ...

The record in the present case does contain "affirmative evidence of a change in the prisoner's demeanor and mental state," yet the trial court failed to explain how the immutable facts of appellant's past conduct and threats "realistically constitute . . . reliable or accurate indicator[s]" of his current dangerousness. (*In re Lawrence, supra*, 44 Cal.4th at p.1219.) The point is not that the trial court is required to expressly discuss each piece of evidence before it, but that what the trial court said here fails to demonstrate a reasoned analysis articulating "a rational nexus between [appellant's past conduct] and current dangerousness." (*Id*. at p. 1227; see *In re Young*, supra, 204 Cal.App.4th at p. 305.) As a result, we cannot find that the court " 'balanced the relevant facts and reached an impartial decision in conformity with the law.' " (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 961.) Remand is required for the trial court to reconsider its decision.

Importantly, it should be noted that this is *not* a published decision, and therefore has no precedential value. But it is a *beginning* of reliance on the established *Lawrence* standard for requiring evidence in the record of a "rational nexus to current dangerousness" in order to deny a Prop. 36 resentencing petition in the trial court.

PROBATION REPORT INADMISSIBLE TO DETERMINE "ARMED" ALLEGATION IN PROP. 36 RESENTENCING

People v. William Burnes
--- Cal.App.4th ---; CA 6;
H040102
December 14, 2015

In 2010, William Burnes pled no contest to possession of a firearm by a felon, evading a peace officer, possession of ammunition by a prohibited person, possession of a deadly weapon, possession of burglary tools, driving under the influence, resisting a public officer, intercepting and divulging police radio communication, hit and run driving resulting in property damage, possession of a hypodermic needle or syringe, and driving with a suspended license. He also admitted two strike priors and five prior prison terms, and received a 30-life sentence. In 2013, he filed a Prop. 36 petition for resentencing, but was denied based on the court's finding that he was armed with a deadly weapon during the commission of the commitment offenses.

In reaching this finding, the trial court relied on the probation report, which quoted portions of a police report. Burnes appealed that this was not reliable evidence, and the Court of Appeal reversed.

Under Prop. 36, an inmate is disqualified from resentencing if he was armed during the commission of the offense. However, mere possession of a firearm does not mean a defendant was armed during the offense; the gun must be available for offensive or defensive use. A trial court determining a defendant's eligibility for resentencing may examine admissible, reliable portions of the record of conviction to determine if there are disqualifying factors. A probation report is not part of the record of conviction. The trial court therefore erred in relying solely on the probation report to deny Burnes' petition for resentencing.

The Court went on to find that even if the probation report were part of the record of conviction, the trial court erred in relying on unreliable facts described in that document. The probation report was neither reliable nor admissible. The portions of the report that describe the "facts" of the offense were taken from a police report and are therefore at least double hearsay. Nothing in the probation report established the reliability of these "facts." The police report was not attached to the probation report; it was unclear whether the police report was being quoted or paraphrased, or whether it included all of the facts from the police report; the date and author of the police report were not provided; and it was unclear whether the police report was a first-hand account of the "facts" or was based on hearsay.

On September 12, 2013, after the Act went into effect, defendant filed a petition for recall of sentence and request for resentencing under the Act. At the time defendant filed a petition for resentencing, defendant was serving a term of 25 years to life for two felony convictions for driving under the influence of alcohol (DUI) with three or more prior convictions for DUI (Veh. Code, § 23152, subds. (a), (b)). DUI with three or more prior convictions for DUI is neither a violent felony as defined by section 667.5, subdivision (c), nor a serious felony as defined by section 1192.7, subdivision (c).

Ultimately, on January 16, 2014, after a hearing at which defendant's brother testified, the court denied the recall and resentencing petition. Defendant filed a timely notice of appeal.

On appeal, defendant claims that because the trial court applied the wrong definition of unreasonable risk of danger to public safety, this court must reverse the denial of his recall and resentencing petition. Further, he asserts that because the trial court placed the burden of proof on him, his due process rights were violated. In addition, defendant maintains that he had a right to a jury trial. Alternatively, if his request for a jury trial was not preserved for appeal, his due process rights were violated since the court denied his request for a continuance, which resulted in the dismissal of his petition. Finally, defendant argues that along with his right to a jury trial he was entitled to a standard of proof beyond a reasonable doubt and his attorney's failure to assert that standard deprived him of the effective assistance of counsel.

It was key to the State's case that Burnes "had possession" of the gun in his crimes. But mere possession is not the guiding rule of law. More is required.

> A defendant's "mere possession" of a firearm or deadly weapon does not establish that the defendant was armed with the firearm or deadly weapon. (*People v. Blakely* (2014) 225 Cal. App.4th 1042, 1057 (*Blakely*).) Rather, the defendant was armed, and thus ineligible for resentencing, if he or she had the firearm or deadly weapon "available for offensive or defensive use." (*Id.* at p. 1048.) "[A] person convicted of being a felon in possession of a firearm is not automatically disqualified from resentencing by virtue of that conviction; such a person is disqualified only if he or she had the firearm available for offensive or defensive use." (Ibid.)

The Court went on to review the law on what is admissible, and what is not.

> "[A] trial court determining eligibility for resentencing under the Act is not limited to a consideration of the elements of the current offense and the evidence that was presented at the trial (or plea proceedings) at which the defendant was convicted. Rather, the court may examine relevant, reliable, admissible

Burnes **cont. pg. 12**

***Burnes* from pg. 11**

portions of the record of conviction to determine the existence or nonexistence of disqualifying factors." (*Blakely, supra*, 225 Cal.App.4th at p. 1063.) "[T]he trial court must determine the facts needed to adjudicate eligibility based on evidence obtained solely from the record of conviction." (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1327, italics added.)

A probation report "ordinarily is not part of the record of conviction." (*People v. Oehmigen* (2015) 232 Cal.App.4th 1, 5 (*Oehmigen*).) Thus, when determining eligibility for resentencing, a probation report "cannot supply facts involving circumstances of the offense itself." (*Id*. at p. 10.)

The Court of Appeal held that trial court erred in relying solely on the probation report in finding defendant ineligible for resentencing.

Here, the parties disagree as to whether the probation report was a document within the record of conviction that could be considered when determining defendant's eligibility for resentencing. Defendant contends that the probation report was not part of the record of conviction, and the Attorney General contends that the probation report was part of the record of conviction that could be considered in finding defendant ineligible for resentencing. The Attorney General's argument ignores case law specifying that probation reports are not part of the record of conviction. (See *Oehmigen, supra*, 232 Cal.App.4th at pp. 5, 10; see also, *In re Brown* (2013) 218 Cal.App.4th 1216, 1226.) In any event, even if we assume that the probation report here was part of the record of conviction, we still must conclude that the trial court erred in relying on the facts described in the probation report.

The flaws in the probation report were legion.

The probation report here was neither admissible nor reliable. The portion of the probation report that described the circumstances of defendant's offenses was derived from a police report. The probation report thus constituted double hearsay or multiple hearsay, and the People never attempted to show that the probation report was admissible under an exception to the hearsay rule. Moreover, nothing in the probation report established the reliability of the asserted circumstances of the offenses: the probation report did not include a copy of the police report; the probation report did not state whether it was directly quoting from the police report or summarizing the police report; the probation report did not specify whether it contained all of the facts included in the police report; the probation report did not state when the police report was prepared; the probation report did not identify the person who prepared the police report; and the probation report did not specify whether the facts in the police report were based on first-hand knowledge or hearsay. Given these circumstances, it is impossible to conclude that the probation report reliably described the circumstances of defendant's offenses. Because the probation report was neither admissible nor reliable, the trial court erred in relying upon it in determining that defendant was ineligible for resentencing. (See generally *People v. Reed* (1996) 13 Cal.4th 217, 220, 230 [holding that a probation report, which was admitted to prove weapon use during a prior offense, should have been excluded as multiple hearsay].)

The Court of Appeal did not prevent a trial court from denying Burnes' Prop. 36 resentencing petition, so long as the facts relied upon to prove the 'armed' allegation came from admissible sources.

Finally, we note that if the same facts described in the probation report had appeared in a relevant, reliable, admissible portion of the record of conviction, the trial court would not have erred in considering such facts. We emphasize that the trial court may consider only relevant, reliable, admissible portions of the record of conviction when determining whether a defendant is eligible for Proposition 36 resentencing.

Accordingly, the appellate court reversed and remanded to the trial court for a redetermination "not inconsistent with these proceedings."

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PRELIMINARY HEARING TRANSCRIPT IS ADMISSIBLE TO DETERMINE "ARMED" ALLEGATION IN PROP. 36 RESENTENCING

People v. Estrada
--- Cal.App.4th ---; CA 2(8); B260573
December 23, 2015

In contrast with the Burnes case above, the Court of Appeal held that use of the preliminary hearing transcript is admissible as evidence of use of a gun, in a Prop. 36 resentencing hearing, because it is part of the trial record.

In 1995, Estrada was charged with four counts of robbery and other offenses, gun use, and two strike priors. He pled guilty to one count of grand theft person and admitted two strike priors, following which he received a Three Strikes life sentence.

In November 2012, he filed a Prop. 36 resentencing petition. He claimed that Proposition 36 requires a court to make an eligibility determination based only on the counts of conviction (in his case the grand theft conviction, which is not a strike offense) and any enhancements found true, and that any disqualifying factor must be pled and proved. The trial court reviewed the preliminary hearing transcript, and found that Estrada was armed with a gun during the offense and was thus disqualified from resentencing.

Estrada appealed, but the appellate court upheld the trial court. Prop. 36 amended the Three Strikes law so that a defendant with two or more strike priors is subject to a life sentence only if the current felony is serious or violent, or the prosecution pleads and proves a disqualifying factor. It created a postconviction proceeding whereby a qualified defendant serving a Three Strikes life sentence may petition the trial court for resentencing. In determining a defendant's eligibility for resentencing the trial court may examine admissible, reliable portions of the record of conviction to determine if there are disqualifying factors. The preliminary hearing transcript is part of the record of con-

viction. In this case, the transcript reflected that Estrada used a gun during the offense. The trial court properly relied upon the transcript in denying the petition.

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BURDEN OF PROOF IS ON STATE IN PROP. 36 RESENTENCING HEARING

People v. Esparza
--- Cal.App.4th ---; CA 6;
H042725
November 25, 2015

The Sixth District Court of Appeal held that Esparza is entitled to a new Prop. 36 resentencing hearing because the trial court improperly placed the burden of proof on him during his first hearing.

Esparza was serving a 25-life sentence under the Three Strikes law for two felony convictions for driving under the influence (DUI) with three or more prior DUI's. After the Prop. 36 passed, he petitioned for resentencing. While he met the statutory criteria for resentencing, the issue at his hearing was whether he posed an unreasonable risk of danger to public safety.

The trial court had Esparza present his evidence and argument before the prosecution. Esparza had been in prison for 16 years and the court found his record to be "the most stellar" it had seen. Nevertheless, the court found that Esparza was currently dangerous based on his extensive criminal record and its inference that Esparza had only started AA meetings in anticipation of filing a resentencing petition.

On appeal, Esparza raised a number of arguments, including that the trial court implicitly imposed the burden of proof on him to prove he had rehabilitated in violation of his due process rights. The appellate court agreed, and reversed and remanded for a new resentencing hearing. During Prop. 36 resentencing proceedings, the People have the burden of establishing "dangerousness" by a preponderance of the evidence. Here, the trial court placed the burden on defendant to prove that he would not be a danger to public safety if he was released back into the community. The error was prejudicial because the prosecution did not actually prove the facts on which the court based its dangerousness determination. Although the prosecution presented evidence of Esparza's criminal history, it did not prove that Esparza's commitment to AA was recent and insincere. Instead, the record showed that Esparza began attending AA classes several months before Prop. 36 passed.

This published case is of great importance to those who survive the Prop. 36 disqualification test and make it to superior court for a resentencing hearing. YOU don't have to prove that you *are not* a danger if released; rather, the STATE must prove, by a preponderance of the evidence, that you *are* a current danger if released.

Cases **from pg. 13**

RELIEF GRANTED UNDER PROP. 36 DOES NOT ENTITLE YOU TO A FINDING OF INNOCENCE

People v. Etheridge
--- Cal.App.4th ---; CA2(1);
B261512
October 26, 2015

In a novel twist, a successful Prop. 36 petitioner tried for a second bite of the apple – a declaration of innocence for the greater crime he was no longer guilty of, following resentencing. In a published opinion, the Court of Appeal found his reasoning unavailing, and denied relief.

Under the law, a finding of actual innocence (PC § 1485.55(b)) requires the defendant to show they did not perform the acts that characterize the crime or are elements of the crime, and was therefore wrongfully convicted and unlawfully imprisoned.

In 1996, Etheridge's third strike was taking a steak from a grocery store. As he was pursued by and struggled with security guards, he tossed the steak, but still caught the beef. He was convicted of robbery; his serious priors were found true, and he received a Three Strikes life sentence.

In 2012 Etheridge filed a writ petition challenging the sufficiency of the evidence of robbery, as well as the robbery instructions. The Court of Appeal granted the petition and reduced the robbery conviction to petty theft with a prior. On remand for resentencing, he received a two-strike term per Prop 36. He then moved for a finding of actual innocence under PC § 1485.55, which was denied. He appealed.

The Court of Appeal upheld that denial. PC § 1485.55 allows a person wrongfully convicted to move for a finding of actual innocence by a preponderance of the evidence "that the crime with which he or she was charged was either not committed at all" or was committed by someone else. The Legislature had previously used the same language in similar statutes regarding compensation for exonerated inmates, and it has been interpreted to mean that the person "did not do the acts which characterize the crime." (See *Ebberts v. State Board of Contro*l (1978) 84 Cal.App.3d 329.) The court here concluded that the Legislature intended the language in § 1485.55 to be construed in the same manner. The court also concluded it was more consistent with legislative intent to construe this language "as pertaining to the specific charge," rather than the underlying criminal activity, "with the significantly limiting requirement that the claimant have been unlawfully imprisoned."

Moreover, the appellate court held that Etheridge is not entitled to a finding of innocence. Etheridge was wrongfully convicted of robbery but *did* commit petty theft with a prior. When he was convicted, the Three Strikes law still authorized a life sentence for the modified offense, which was a non-serious felony, although the prior serious felony enhancements (PC § 667(a)) would not have applied. When Prop. 36 passed, Etheridge could have petitioned for resentencing, but his request could have been denied if the trial court found resentencing would pose an unreasonable risk to public safety. Thus, if he had been convicted of the correct offense, he could still have been imprisoned for 25-life under the Three Strikes law. As it turns out, he was incarcerated for 18 years, which is less than the mandatory 25-year term. *Because he was not unlawfully imprisoned, he was not entitled to a finding of innocence* (PC § 1485.55(b).) He may nonetheless initiate a claim under § 4900, et seq., which provides the procedure for wrongful conviction claims.

WHERE AT LEAST ONE OF A THIRD STRIKE DEFENDANT'S OFFENSES IS SUBJECT TO PROP. 36 RESENTENCING, THE TRIAL COURT SHOULD CONSIDER WHETHER THE NONVIOLENT, NONSERIOUS OFFENSE SHOULD BE REDUCED

People v. Lynn
--- Cal.App.4th ---; CA2(3);
B260407
November 23, 2015

In 1996 Lynn was convicted of second degree robbery (PC § 211) and attempted grand theft from the person (PC §§ 664, 487(c)). The court found four strike priors true and imposed a life sentence under the Three Strikes law. After the Three Strikes law was amended by Prop. 36 in 2012, Lynn petitioned for resentencing.

The trial court found he was ineligible for resentencing based on his robbery conviction. On appeal, in a published opinion, the court reversed and remanded. In *People v. Johnson* (2015) 61 Cal.4th 674, the California Supreme Court recently held that a third strike defendant is eligible for resentencing under section 1170.126 on a current conviction that is *neither* serious nor violent, even though he has *another* current conviction that is serious or violent. The *Johnson* court "reasoned that historically, sentencing under the Three Strikes law has focused on the sentence to be imposed with respect to each count." Nothing in the Prop. 36 ballot materials suggests an intent to employ a different approach with respect to section 1170.126 resentencing. Evaluating resentencing on a count-by-count basis promotes sentencing that fits the crime, effectuating the voters' intent to protect public safety while making room in prison for more dangerous offenders. Although

second degree robbery is a serious and violent felony, attempted grand theft is not (absent additional circumstances). The fact that Lynn was convicted of robbery does not make him ineligible as a matter of law for resentencing on the attempted grand theft count, unless the attempted grand theft itself qualified as a serious or violent felony.

THE OPERATIVE DATE FOR DETERMINING WHETHER A DEFENDANT HAS BEEN CONVICTED OF A "SEXUALLY VIOLENT OFFENSE," THEREBY DISQUALIFYING HIM FROM RESENTENCING UNDER THE THREE STRIKES REFORM ACT, IS THE EFFECTIVE DATE OF PROP. 36, NOT THE DATE OF THE PRIOR CONVICTION

P. v. ------
--- Cal.App.4th ---; CA3;
C073336
September 11, 2015

A prisoner who is serving an indeterminate Three Strikes life sentence for felonies that are not serious or violent, petitioned for resentencing under the Reform Act (Prop. 36). The trial court found him disqualified from resentencing because he had two prior convictions for assault with intent to commit rape (PC § 220), which is currently a "sexually violent offense." (See Welf. & Inst. Code, § 6600(b).)

He appealed, arguing that he should be eligible for resentencing because assault with intent to commit rape was not classified as a sexually violent offense in 1998 when he received his life term. The Court of Appeal upheld the lower court's ineligibility finding.

A prisoner who has a prior conviction for a sexually violent offense as defined in section 6600(b) is disqualified from resentencing under Prop. 36. (See Pen. Code, §§ 1170.126(e)(3), 667(e)(2)(C)(iv)(I), 1170.12(c)(2)(C)(iv)(I).) Based on the use of the present tense in § 1170.126 (e)(3), the Court of Appeal concluded that the determinative date for assessing whether a prior offense was a sexually violent felony is the effective date of Proposition 36. This conclusion is bolstered by the California Supreme Court's decision in *People v. Johnson* (2015) 61 Cal.4th 674, which reached a similar conclusion regarding the determinative date for classification of the current offense as a serious or violent felony. Because assault with intent to commit rape was listed as a sexually violent offense in section 6600 on the date Proposition 36 became effective, the petitioner was disqualified from resentencing.

*****

"ARMED" ALLEGATIONS CONTINUE TO BAR PROP. 36 RELIEF

Possessing a firearm when committing a crime has never been a way to win a popularity contest. And if you are a repeat offender, it can salt you away for life. Nonetheless, Third-Strike lifers continue to ply the courts with claims that the gun involved didn't amount to an "armed" allegation. With almost no exceptions, if there was a gun available when you committed your crime, you were "armed," in the eyes of the law. If your third strike was for picking your nose in public, but you were picking your nose with a gun, you are ineligible for Prop. 36 relief. The following recent cases illustrate applications of the "armed allegation" law.

*****

SHOOTING AT SOMEONE MEANS "ARMED"

P. v. William Hearn
CA4(1); D067193
December 17, 2015

William Hearn is serving a third strike sentence of 25 years to life imposed in 2008, which predated the enactment of Prop. 36. Hearn's four felony firearm-related offenses for which he is serving his life sentence are: (1) possession of a firearm by a felon, (2) carrying a concealed firearm in a vehicle, (3) carrying a loaded firearm in public, and (4) possession of ammunition by a felon.

Hearn admitted he had suffered a prison prior, and the court found he had suffered two strike priors. He was sentenced to 25-life for possession of a firearm by a felon. For carrying a concealed firearm in a vehicle and carrying a loaded firearm in public, the court issued stayed terms of 25-life. And he received a concurrent term of 25-life for possession of ammunition by a felon.

In November 2012, Hearn took advantage of the newly enacted Prop. 36 and filed a petition asking that his life sentence be recalled and that he be resentenced as a second strike offender. The court denied the petition, finding the record of conviction showed he was armed with a firearm when he committed his latest offenses, and, thus, was ineligible for relief based on the statutory exclusion - if "[d]uring the commission of the current offense, the defendant . . . *was armed with a firearm* . . . ." (§§ 667(e)(2)(C)(iii), 1170.12(c)(2)(C)(iii), italics added.)

Hearn appealed the denial order, contending (1) the court's finding that he was ineligible for a recall of his sentence under the Reform Act was not supported by substantial evidence and violated his right to due process under the Fourteenth Amendment, and (2) he was entitled under the Sixth and Fourteenth Amendments "to have a jury determine beyond a reasonable doubt whether . . . he had been armed with a firearm."

> As this court explained in *White*, a person is "armed with a firearm" within the meaning of the armed-with-a-firearm exclusion if he personally carries a firearm or otherwise has ready access to a firearm. (*White, supra*, 223 Cal.App.4th at pp. 524-525, citing *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*) ["'[i]t is the availability–the ready access–of

***Hearn* cont. pg. 16**

Hearn **from pg. 15**

> the weapon that constitutes arming'"].) ...
>
> Specifically, the court must consider whether, during the commission of an offense that has been [most-recently adjudicated], 'the defendant used a firearm, was *armed with a firearm* or deadly weapon, or intended to cause great bodily injury to another person.'" *(Id*. at pp. 1338-1339, italics added.)

A brief summary of the underlying offenses was drawn from the record of the appeal of Hearn's convictions.

> The court and the parties discussed Hearn's current offenses. As pertinent here, the prosecutor argued that "[w]e've got four counts, all of which included *using a pistol, either shooting somebody or shooting at somebody."* (Italics added.) Indicating that the court had presided over the trial, the prosecutor stated that during the trial she "proved through ballistics that that gun had just been fired, so you can consider everything you heard in the course of this trial. [¶] So the entire criminal history includes both possessing, using guns, shooting at people . . . ."
>
> The court responded, "I recall part of the evidence was that it went through a wall and into a bedroom where there was [a] child?" The prosecutor indicated that the court was correct.

Hearn's attorney argued that the People had not submitted any response to his petition, and that they had thereby failed to sustain their burden of proof. But the trial court asked the People's attorney if they had anything to offer, she responded, "The People adopt and incorporate by reference the underlying record of conviction and the court's analysis and submit."

The Court of Appeal found that

> by the plain, express terms of the two statutes under which Hearn was convicted of counts 2 and 3 by proof beyond a reasonable doubt in this case–sections 12025 (a)(1) and 12031(a)(1)–he was "armed with a firearm," as under both statutes he "carried" the firearm.

Accordingly, Hearn's denial of Prop. 36 relief below, was affirmed on appeal.

*****

GUN UNDER THE MATTRESS MEANS "ARMED"

P. v. Jerry Miranda
CA2(4); B261306
January 8, 2016

Jerry Miranda appealed from an order denying his petition for resentencing under Prop. 36. The trial court found him ineligible for resentencing because the current offenses were committed while armed with a firearm. Miranda's appeal centered on his argument that because the gun was under a mattress, he distanced himself from it, so that as a matter of law, he was not "armed."

In 2003, Miranda pled guilty to one count of possession of a firearm by a felon, two counts of possession of a controlled substance while armed with a firearm, and one count of possession of narcotics paraphernalia; he also admitted allegations that he had suffered four prior strike convictions and served three prior prison terms. He was sentenced to 25-life.

At his Prop. 36 hearing, the People submitted transcripts of the preliminary hearing, guilty plea hearing, and sentencing hearing. The transcripts showed that during the search of his apartment, defendant admitted he had narcotics in his pants which were in his bedroom; upon recovering the narcotics from defendant's pants, police also found, within an arm's span of the pants, a loaded semi-automatic handgun hidden under a mattress.

> Miranda argued that he was not armed during the commission of the current offenses because the handgun was not within his dominion and control. The trial court disagreed. It found that he was armed with a firearm during the commission of the current offenses, and therefore was ineligible for resentencing (citing *People v. Elder* (2014) 227 Cal. App.4th 1308; *People v. Hicks* (2014) 231 Cal.App.4th 275).

The appellate court rejected Miranda's arguments that there was not sufficient evidence to prove he was armed.

> Defendant does not expressly challenge the sufficiency of the evidence to support the finding that he was armed with a firearm during the commission of the current offenses. Instead, he challenges the definition of the term "armed with a firearm," and argues that the record does not support the conclusion that he was "armed with a firearm" as provided in the disqualification provision of Proposition 36. We disagree.
>
> The term "armed with a firearm" has been "judicially construed to mean having a firearm available for use, either offensively or defensively. [Citations.]" (*People v. Osuna* (2014) 225 Cal.App4th 1020, 1029.) The fact that the firearm was hidden in a mattress in his bedroom does not preclude a finding that defendant was armed with a firearm during the commission of the present offenses. "A firearm can be under a person's dominion and control without it being available for use. For example, suppose a parolee's residence (in which only he lives) is searched [while the parolee is present] and a firearm is found next to his bed. The parolee is in possession of the firearm, because it is under his dominion and control." (*Id*. at p. 1030.) Defendant claims that in order to be armed with a firearm, there must be an underlying felony to which the arming is tethered. He argues that because there is no underlying felony with respect to the crimes of possessing a firearm and possessing drugs in conjunction with a firearm, the trial court erred in finding that he was armed during the commission of the current offenses.
>
> Defendant has not provided any controlling authority for his position. The appellate court considered and rejected a similar argument in *People v. Hicks,* supra, 231 Cal.App.4th 275. In that case, the defendant argued he was not armed during the commission of the offense because there was no "underlying felony to which the arming is 'tethered.'" (Id. at p. 283.) The appellate court rejected his argument, and noted that although sentencing enhancements under section 12022 require a "facilitative nexus" between the arming and the possession, Proposition 36 does not. (*Ibid*.) The court explained that under Proposition 36, a defendant is deemed to have been "armed with a firearm" if the firearm was available "'[d]uring the commission of' the current offense (italics added). 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' (Webster's 3d New Internat. Dict. (1993) p. 703.) Thus, there must be a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]" (*Hicks*, 231 Cal.App.4th at pp. 283–284.)

Applying the temporal definition of the term "armed with a firearm" to the record of conviction in this case, we conclude there is substantial evidence to support the finding that defendant was armed with a firearm during the commission of the current offenses. We therefore conclude he is ineligible for resentencing under Proposition 36.

*****

FELON-IN-POSSESSION MEANS "ARMED"

P. v. Daniel Ortiz
CA4(2); E062295
January 20, 2016

Daniel Ortiz appealed the trial court's order denying his petition for recall and resentencing as a second strike offender under the Prop. 36. The trial court had denied defendant's petition, because it found that defendant was armed with a firearm during the commission of his relevant conviction offense: being a felon in possession of a firearm. Based on that finding, the trial court concluded defendant was ineligible for relief under the Act.

On March 1, 2007, an Indio police officer noticed defendant sitting in his truck in the driveway of a residence where suspicious activity had been reported the prior day. Defendant looked out of his side view mirror and then slumped down in his seat. The officer parked his car and started walking toward defendant's truck. Defendant got out of his truck and walked around it. The officer briefly spoke with defendant, discovered that defendant had an outstanding warrant, and arrested defendant. The officer then walked up to the passenger side of the truck and looked inside. On the passenger seat in plain view was a loaded .32-caliber revolver within arm's reach of the driver's seat.

On October 18, 2007, a jury convicted defendant, in relevant part, of being a felon in possession of a firearm under former section 12021, subdivision (a)(1). Defendant was found to suffer two prior strikes.

On January 23, 2008, the trial court imposed a third strike sentence of 25 years to life.

Against this factual record of the crime and his conviction, Ortiz had no valid argument to support his claim under Prop. 36 that he "was not armed" during the commission of his third strike offenses, and the appellate court denied relief.

THROWING GUN IN THE TRASH MEANS "ARMED"

P. v. Todd White
--- Cal.App.4th ---; CA4(3); G050478
January 15, 2016

Todd White appealed from an order denying his petition for recall of his indeterminate life sentence under Prop. 36. White contended the trial court erred in determining the record of his underlying conviction demonstrated he was "armed" during the commission of the offense of being a felon in possession of a firearm because (1) the case it relied upon, *People v. White* (2014) 223 Cal.App.4th 512 (*White*), is inapposite; and (2) the disqualifying factor of being "armed" during the commission of the offense for which the indeterminate life sentence was imposed cannot apply to a mere possessory offense.

White attempted to distinguish *White* on the basis the evidence in that case "inexorably established" the defendant *actually*, rather than *constructively,* possessed the gun in question because he was *observed* throwing the gun away – whereas here, the police *did not* observe defendant discard his gun into the trash can where it was later found. But it is nonetheless clear defendant's conviction was based on either the inference he discarded the gun into the trash can on that occasion or he had placed it there earlier. Either way, his possession amounts to being armed. Consequently, *White* is not materially distinguishable.

The appellate court drew an important distinction between the law regarding the underlying offense itself, and the law of Prop. 36.

And while it may be true that case law has established one cannot be armed "in" the commission of a firearm possession – which is the wording used in the statute governing a firearm enhancement – the wording of the "armed" disqualification incorporated into section 1170.126 [Prop. 36] is somewhat different. It applies to offenders who were armed with a firearm "during" the commission of their offense. That states a different rule which would not exclude possessory offenses.

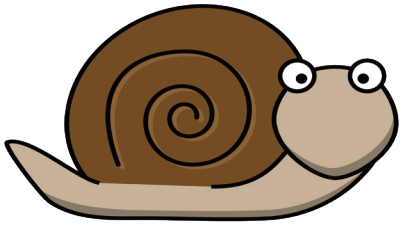
Finally, the appellate court observed that neither version of the facts of White's case could save him.

There were two versions of defendant's relationship with the gun that were presented at trial. The first version, offered by the prosecution, was that defendant had the loaded gun in his fanny pack when he veered into the motel premises after the police officer drove up next to him. He then disposed of the gun in the trash can located on the motel's north stairwell, leaving two extra bullets in the fanny pack. When he was summoned back downstairs to speak with the officer, his fanny pack appeared lighter because it no longer had the gun in it. The second version, offered by defendant, was that he had no gun in his possession when he entered the motel premises, passed right by the trash can on the north stairwell as he made his way to the second level corridor, and found on the ground two bullets of the same make and caliber as those in the gun.

But even under defendant's scenario, the jury's determination that he possessed the gun would lead to the conclusion he was legally armed. The jury's finding that defendant possessed the gun found in the trash can necessarily implies he was at least aware it was hidden there. "A conviction for possession of a gun must be based on intentional actual or constructive possession of the gun [citation], not merely walking nearby." (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1313.) When defendant was first approached by the police officer in the

White **cont. pg. 18**

NEW ADDRESS?
Let us KNOW!!



***White* from pg. 17**

street, he turned directly into the motel, and assuming he did not have the gun in his fanny pack, he went straight for the trash can where he knew it was already hidden. And as he walked by that trash can – as he conceded he did – that gun was readily accessible to him. That qualifies defendant as being "armed." As our Supreme Court has explained, "'[i]t is the availability – the ready access – of the weapon that constitutes arming.'" (*People v. Bland* (1995) 10 Cal.4th 991, 997.)

It is well settled that a defendant is armed with a weapon even though it is not carried on his person, when he is aware it is hidden in a place readily accessible to him. (*People v. Elder, supra*, 227 Cal. App.4th 1308 [the defendant was encountered outside of his residence, and the gun was found inside on a shelf]; *People v. Vang* (2010) 184 Cal.App.4th 912 [the defendant was encountered on the driveway of his residence, and the gun was found in his locked bedroom]; *People v. Searle* (1989) 213 Cal.App.3d 1091 [the defendant was encountered selling drugs from his car, and the gun was found in an unlocked compartment in the back of the car].)

So even if the jury believed defendant's testimony that he did not bring the gun into the motel on the occasion in question, its finding that he had possession of the gun located in the trash can, combined with his admission he walked right by it immediately after the police officer drove alongside him, demonstrates he qualified as armed during that possession. Consequently, *White* is not materially distinguishable.

*****

SIMPLE POSSESSION, WITHOUT BEING 'TETHERED' TO ANOTHER FELONY, MEANS "ARMED"

P. v. Gregory Young

CA1(2); A142000

January 26, 2016

Gregory Young appealed from the order denying his petition for reduction of his Three Strike sentence Prop. 36. In 2001, he was convicted of assault with a firearm and being a felon in possession of a firearm. Because three of his five felony convictions qualified as serious or violent, he was sentenced under the Three Strikes statutes to 25-life. In 2002, on direct appeal, the court of appeal reversed the assault conviction, but affirmed the possession count.

The trial court denied the petition as follows: "The court has taken judicial notice of the court file in this matter, which includes the unpublished opinion by the First Appellate District, Division Two regarding Mr. Young's conviction, which indicates [in a] factual recitation of the case that '[a]ppellant retrieved a loaded firearm from the attic and put it in his pocket.' . . . 'Appellant drew his gun and shot Reeves in the hand,' which is use of a firearm. . . . [T]he court has [also] taken judicial notice of the probation report, and in that report on page 4, the defendant, Mr. Young, indicates that he did, in fact, get a gun and pulled the gun and shot the victim. [¶] Therefore, I think there's ample evidence under the case law to show that he was armed with a firearm and actually, in fact, used a firearm in the commission, but for the 12021, it's definitely arming, that would exclude him from re-sentencing under the statute."

Nonetheless, Young argued that his conviction of mere 'possession,' absent some *other* felony "tethered" to this possession, was not enough to make him ineligible for resentencing under Prop. 36.

His approach is to urge what has become known as the "tethered" argument. Briefly, this argument, which was first rejected by the Fifth District in 2014 (*People v. Osuna, supra*, 225 Cal.App.4th 1020 (rev. den. July 9, 2014); *People v. White, supra*, 223 Cal.App.4th 512 (rev. den. Apr. 30, 2014)), posits that a defendant cannot be "armed" with a firearm during the commission of possessing that same firearm. The "armed with a firearm" exclusions of section 667, subdivision (e)(2)(C)(iii), or section 1170.12, subdivision (c)(2)(C)(iii), do not include mere possession—particularly if it is constructive possession—but requires that the arming be "tethered" to another, different offense that does not penalize mere possession.

But the Court of Appeal found that the precedent in a litany of other cases quashed Young's argument, and denied his appeal.

Defendant's experienced counsel cannot deny the rejection of this argument going back to its first appearance in *People v. White, supra,* 223 Cal.App.4th 512. Counsel tacitly concedes that not a single reported decision accepts the argument, while a mountain of finalized authority opposes it—and supports the trial court's ruling. (*People v. Hicks* (2014) 231 Cal.App.4th 275, rev. den. Feb. 25, 2015; *People v. Brimmer* (2014) 230 Cal. App.4th 782, rev. den. Jan. 14, 2015; *People v. Quinones* (2014) 228 Cal.App.4th 1040, rev. den. Nov. 12, 2014; *People v. Elder* (2014) 227 Cal.App.4th 1308, rev. den. Oct. 15, 2014; *People v. Blakely, supra*, 225 Cal.App.4th 1042, rev. den. July 9, 2014; *People v. Superior Court* (*Cervantes*) (2014) 225 Cal.App.4th 1007, rev. den. July 9, 2014; *People v. Superior Court* (*Martinez*) (2014) 225 Cal.App.4th 979, rev. den. July 9, 2014.) And we decline counsel's invitation to become the first court to deviate from this settled line of decisions that our Supreme Court has undeviatingly declined to review.

*****

"INTENT" TO CAUSE GREAT BODILY INJURY, SUFFICES TO BAR ELIGIBILITY FOR PROP. 36 RESENTENCING

Schinkel v. Superior Court

CA3; C073404

January 22, 2016

The Court of Appeal held that just the intent to commit great bodily injury (GBI) in an underlying offense was sufficient to bar Prop. 36 resentencing eligiblity.

Larry Schinkel, Jr., serving a Third Strike life term, filed a petition for resentencing under Prop. 36. The trial court denied the petition without a hearing because defendant's current conviction for solicitation of murder necessarily included an intent to cause great bodily injury, which is a disqualifying factor for resentencing under Prop. 36. Defendant appealed.

The Court of Appeal explained in detail how, because solicitation of murder necessarily involves GBI, he was disqualified from Prop. 36 resentencing on that conviction. [Note: the present case also concerned other life sentences imposed on Schinkel for other crimes, that were not excluded from resentencing consideration; he was granted Johnson relief to have those other life sentences reconsidered. This report deals exclusively

with the "intent to commit GBI" element.]

The resentencing provisions of the Three Strikes Reform Act require the trial court, in determining the defendant's eligibility for resentencing, to consider both the prior convictions that justified the Three Strikes sentencing in the first place (here, the six prior burglary convictions), as well as the current convictions, meaning the convictions for which the defendant is serving an indeterminate life term under the Three Strikes law (here, solicitation of murder and four [other counts]).

A defendant is not eligible for resentencing under the Three Strikes Reform Act if any of the prior convictions on which the Three Strikes sentence was based are among the offenses listed in section 667, subdivision (e)(2)(C)(iv) or section 1170.12, subdivision (c)(2)(C)(iv)(V), which list includes solicitation of murder (§ 653f). (§ 1170.126, subd. (e)(3).) Here, defendant's prior burglary convictions did not disqualify him from resentencing.

A defendant also is not eligible for resentencing under the Three Strikes Reform Act if the defendant's current conviction is for a serious or violent felony listed in section 667.5, subdivision (c), or section 1192.7, subdivision (c). (§ 1170.126, subd. (e)(1).) Solicitation of murder is not one of the listed felonies.

Finally, a defendant is not eligible for resentencing under the Three Strikes Reform Act if the defendant's current conviction involved any of the circumstances listed in section 667, subdivision (e)(2)(C)(i)-(iii)) or section 1170.12, subdivision (c)(2)(C)(i)-(iii)). (§ 1170.126, subd. (e)(2).) The circumstance in those lists that is relevant to this case is that "[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).) The question presented here is whether, by virtue of his conviction for solicitation of murder, defendant necessarily intended to cause great bodily injury and is therefore not eligible for resentencing under the Act.

The trial court based its denial of the petition for resentencing on the fact that defendant's current conviction for solicitation of murder necessarily included an intent to cause great bodily injury. On appeal, defendant contends this conclusion was error because: (1) solicitation of murder is not one of the enumerated current offenses that disqualifies a defendant from resentencing, (2) any intended injury must be (a) personally inflicted and (b) contemporaneous with the crime, and (3) the Three Strikes Reform Act requires that the disqualifying circumstance be pleaded and proved at trial.

A. Solicitation of Murder Necessarily Includes Intent to Cause Great Bodily Injury
On appeal, defendant contends that his current conviction for solicitation of murder does not disqualify him from resentencing under the Three Strikes Reform Act. He relies on the fact that, while the offense is listed as a disqualifying prior conviction, it is not listed as a disqualifying current conviction. His argument carries some logic – if solicitation of murder is listed as a disqualifying prior conviction but not as a disqualifying current conviction, then the Legislature must have intended to allow resentencing under the Act for a current solicitation of murder conviction. However, the argument is ultimately untenable because it would require us to ignore the voters' express desire to exclude from resentencing all defendants who have a current conviction involving an intent to cause great bodily injury. (See Copley Press, Inc. v. Superior Court (2006) 39 Cal.4th 1272, 1284 [we must give effect and significance to every word and phrase].)

Solicitation of murder is committed when a person "with the intent that the crime be committed, solicits another to commit or join in the commission of murder . . . ." (§ 653f, subd. (b).) Express malice, a specific intent to kill, is an element of solicitation of murder. (People v. Bottger (1983) 142 Cal.App.3d 974, 980.) Certainly, intending to kill someone involves intending to cause that person great bodily injury. Therefore, intent to cause great bodily injury is necessarily included in solicitation of murder.

B. No Personal Infliction or Contemporaneous Infliction Requirement
Defendant argues that "there is an indication that the necessary intent is to inflict great bodily injury personally and concurrently or contemporaneously with the crime." To the contrary, neither personal infliction nor contemporaneous infliction is a part of the Three Strikes Reform Act exclusion from resentencing of offenses committed with intent to cause great bodily injury.

Concerning a personal infliction element of the great-bodily-injury provision of the Three Strikes Reform Act, defendant argues that "the electorate meant to refer to the elements of the sentence enhancement provision of section 12022.7, including the element of personal infliction of great bodily injury." Section 12022.7 provides for a sentence enhancement if the defendant "personally inflicts great bodily injury on any person . . . in the commission of a felony." (§ 12022.7, subd. (a).) While this sentence enhancement for actual infliction of great bodily injury expressly requires personal infliction of such injury, there is no indication the voters intended to adopt that express provision when they excluded from resentencing those who intended to cause great bodily injury. The Act neither refers to section 12022.7 nor adopts the personal infliction language.

Concerning contemporaneous infliction of great bodily injury, there is also no authority for imputing an additional element. The provision of the Three Strikes Reform Act states that "[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).) This language does not imply that the injury had to occur during the commission of the offense; instead, it states only that, during the commission of the offense, the defendant intended to cause the injury. Here, defendant necessarily intended to cause great bodily injury to the witness when he solicited her murder.

TRIAL EVIDENCE OF "INTENT" TO CAUSE GREAT BODILY INJURY, EVEN WHEN THERE WAS NO JURY FINDING OF GBI, SUFFICES TO BAR ELIGIBILITY FOR PROP. 36 RESENTENCING

P. v. Stanfield
CA2(2); B260318
November 2, 2015

In another case involving "intent" to commit GBI, the Court of Appeal held that even though the jury never made a finding of GBI in the underlying conviction, the trial court properly reviewed evidence from the trial that inferred intent to commit GBI, when

Stanfield **cont. pg. 20**

Stanfield **from pg. 19**

that trial court was petitioned for a Prop. 36 resentencing of the life term it had imposed.

In 1999, Stanfield was convicted of willful infliction of corporal injury on a cohabitant in violation of section 273.5(a). The jury found "not true" the allegation that he personally inflicted great bodily injury on the victim within the meaning of former section 12022.7(d).

Briefly summarized, the facts supporting the corporal injury conviction, taken from the record on appeal, were that Stanfield fought with the victim, punching her in the nose, lip, and head. As a result, she had a chipped tooth, received five stitches to her lip, and has scars on her nose and lip.

> [*Stanfield*] contends that under the principles established in *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*), a trial court cannot consider disputed evidence in a defendant's prior conviction and make an independent finding of a mental state that was not encompassed within the elements of the crime charged. [*Stanfield*] maintains that the trial court's finding must be reversed.

Reviewing the applicable law, the appellate court related

> If the underlying conviction does not involve a sustained allegation that the defendant has actually inflicted great bodily injury, the trial court determines from the entire record of the conviction whether the defendant intended to inflict great bodily injury. (*Guilford, supra*, 228 Cal.App.4th 651, 659-660.) We review the trial court's finding of intent under the deferential sufficiency of the evidence standard. (*Id.* at p. 661.)

It then related its reasoning that intent to commit GBI did not have to be separately proven, given the obvious facts from the acts Stanfield was convicted of having committed.

> Here, the trial court named certain facts in support of its ruling that were admitted as evidence at his trial and uncontroverted, citing to the trial record .... These bare facts were undisputed at the underlying trial, and the jury was not asked to make a finding of intent.
>
> We see no evidence here that the trial court's ruling, which relied solely on trial testimony, was not in accord with the holdings or reasoning of Guerrero and Bradford. The court's finding on defendant's intent was based on the circumstantial evidence in the trial transcript, a document that defendant concedes was properly considered by the trial court, and not on "brand-new" evidence outside the record or disputed facts. It is well established that a defendant's "[m]ental state and intent are rarely susceptible of direct proof and must therefore be proven circumstantially." (*People v. Thomas* (2011) 52 Cal.4th 336, 355; *People v. Smith* (2005) 37 Cal.4th 733, 741; *People v. Phillips* (1989) 208 Cal.App.3d 1120, 1124 [" . . . the intent with which an act is done may be inferred from the circumstances attending the act, including the manner in which the act was done and the means used"].)

Accordingly, the court affirmed the denial of Stanfield's resentencing petition in the superior court.

Board of Parole

BOARD BUSINESS

The last Executive Board Meeting of 2015 and the first of 2016 shared a common theme; brevity. The December meeting took only slightly over 3 hours to conclude, and the January gathering was completely over in just over 2 hours.

The biggest news at the December meeting was the announcement of the departure of now-former Commissioner Amarit Singh and Chief Legal Counsel Howard Moseley. Singh, now ensconced at the Office of the Inspector General, has been replaced by Governor Brown who appointed former San Quentin Warden Kevin Chappell (see story elsewhere in this issue). Moseley's spot remains empty of a permanent replacement.

Both months also featured updates and reports from FAD head Dr. Cliff Kusaj, who reported to the board on the hiring of new clinicians and the efforts of the FAD to both catch up and remain current in assessments, especially in light of the impact of SB 261. Kusaj's monthly reports appear now to be a permanent feature of the Board's meeting, most likely as part of the settlement in the Johnson v. Shaffer litigation.

January's Executive Board meeting was brief, with the exception of an hour-long presentation regarding the relationship between mental illness and tendency to violence. To cut to the chase: those who are mentally ill, including prisoners, are more likely to be victimized both when they were in society and within the prison system, than to promulgate violence on others. Additional information on this subject is detailed elsewhere in this issue.

The other notable announcement from the January meeting was Executive Officer Jennifer Shaffer's remarks noting the repeated concerns expressed by all stakeholders in the parole equation, from District Attorneys and inmate attorneys to advocates (that would be LSA), regarding the lack of information provided when parole grants are referred to the board for en banc consideration. It is one of the rare subjects on which all parties agree: not enough information is provided as to the reasons any given parole grant is referred to en banc.

BPH

Though there may be many reasons for such referral, from doubts by the Governor to 'alleged institutional misconduct,' those bare-bones statements do not provide any real information as to the reasons for the referrals, nor what issues those speaking in support or opposition to the grant should address. Shaffer noted the concerns and indicated Board staff would be exploring ways to provide more information to all concerned.

EN BANC HEARINGS

As with the rest of the Executive Board meetings in December and January, the en banc hearing slate in those two months was relatively short. Just over a dozen inmates combined for the two months were considered by the commissioners, including **Robert Gomez**, who will have a new hearing due to the failure of recording equipment to provide a transcript of the proceedings.

Compassionate release for **Guadalupe Alvarez** was denied, in line with the urgings of the Sacramento County District Attorney, who theorized Alvarez might never be ready for release. Alvarez had proposed to spend his last months living with his daughter. The board concluded the inmate's condition was not sufficiently debilitating, as he could still perform the activities of daily living on his own.

The denial of parole for **Bernal Jacobson** was vacated, and a new hearing will be scheduled, to be consistent with In re Lawrence. However, a grant of parole for **Vincent Paseri** was vacated and a new hearing held, due to the panel's non-compliance with the requirements of Marsy's Law, allowing victims' family members to participate in the proceedings.

Apparently through a series of slip-ups the VNOK in this instance were not able to participate via teleconference in the hearing, despite assurances that participation would be facilitated. An attorney from the Victim of Crime Resource Center as well as a second attorney appealed to the board to vacate the decision.

Merril Richards, referred by the Governor to en banc and accused of institutional misconduct after his July, 2015 parole grant, saw that grant referred to a rescission hearing. Brown expressed concerns about the CRA report and cited confidential information in his referral. True to form, the LA County DA opposed the grant, despite complaining the office had little information regarding the alleged misconduct.

Also facing a rescission hearing will be **Milton McClain**, who was also referred back to the board by the Governor, citing McClain's alleged lack of explanation for his actions. Also opposing his release was the LA County DA's office and relatives of the victim.

Yet another rescission hearing, for **Miguel Torres**, was also ordered, again due to the victims' family members not being able to participate in the hearing. The LA County DA, in the persona of Alexis De La Garza, always a proponent for keeping lifers locked up, recited the usual factors of the crime as a reason for opposing, but, in a new twist, said that despite Torres' qualifying for consideration under youth factors, he was making adult decisions at the time of the crime.

How De La Garza was able to determine this, she failed to explain. She also claimed an unnamed 'court recognized expert on gangs' maintained the inmate would reoffend. There was also a failure to notify VNOK of the hearing in this situation.

The bad news in December kept coming, with the commissioners voting to refer for rescission consideration the grant to **Gary White**, following yet another Governor's referral, this time based

***En Banc* cont. pg. 22**

***En Banc* from pg. 21**

on confidential information alleging 'possible serious misconduct' in 2009. Once again, the district attorney, this time from Tuolumne County, opposed his release.

The final downer in December was the decision to refer for rescission hearing the grant to **Voltaire Williams**. In this instance the Governor, in referring for reconsideration, claimed Williams showed a limited understanding of reasons for and minimization of his participation in the crime, as well as lack of understanding of the impact of the crime on the community.

The case against Williams was pretty well stacked; since his victim was a police officer, several members of the LAPD (all in full uniform, several of whom obviously hadn't worn said uniform in some time) as well as the LA DA's office showed up to oppose. Also there to add to the drama was Christine Ward of Crime Victims United, who provided an emotional reading of a letter from the victim's widow, who reported she feared for her family, should Williams be released.

The January en banc considerations offered a little more joy for inmates, with at least mixed results for those up for scrutiny. Inmate **Owen Lyle's** request for compassionate release referral was granted, the board concluding that his plans to live out his life under the care of a cousin would not endanger public safety.

Jumping back on the rescission band wagon from the previous month, commissioners sent **Paul Belmontez** to reconsideration, based on 'new information regarding institutional misconduct' following his grant of parole. Be careful out there.

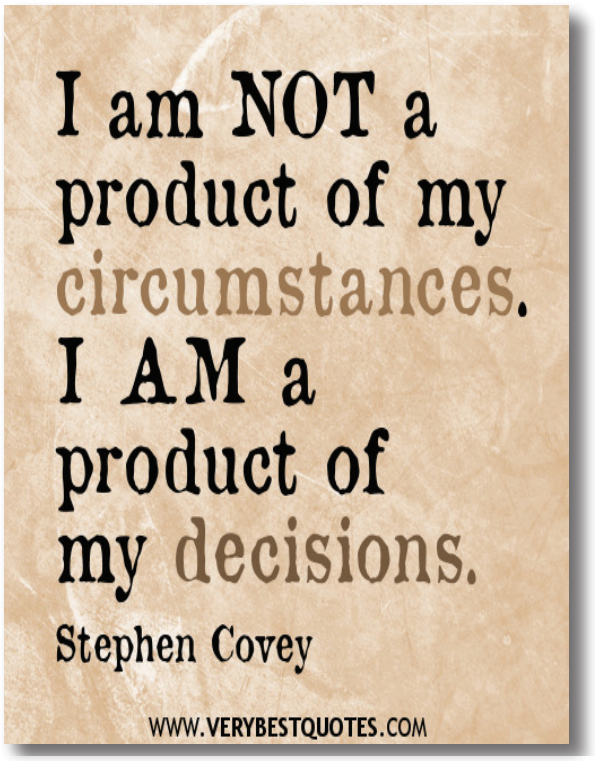
However, the grant for **Mauricio Funes** was affirmed, the commissioners concluding the 'new information regarding institutional misconduct' did not show Funes to be an unreasonable risk of danger. Two tie votes up for full board evaluation split down the middle, with **Antoine Bailey** being judged still a danger and denied parole, but **James Stevenson** granted parole, the majority of the board agreeing with the panel member who voted for parole. As in all cases of a tie vote (split decision), no speakers were allowed.

BPH

CONSULTATION? CONSIDERATION? MOSTLY CONFUSION

If the many letters we continue to receive at the LSA offices are any gauge, it appears that there is still considerable confusion among many prisoners, on the difference between a Consultation Hearing and a Consideration Hearing. And it appears the BPH is aware of the confusion, as the board has posted on their webpage an explanation of consultation hearings. Not much help to prisoners, unable to access the internet.

So, one more time, here's a compare and contrast of Consultation versus Consideration, accompanied by a reprint of the BPH information sheet.



Consultation hearings are being held about 6 years BEFORE the date for a prisoner's first parole hearing, whether that parole hearing (the Consideration hearing) is generated by an MEPD, YPED or EPED. MEPD; Minimum Eligible Parole Date. YPED: Youth Parole Eligibility Date. EPED: Elderly Parole Eligibility Date.

And while about 6 years prior to an initial hearing is the goal for Consultation Hearings, the BPH is in a bit of a scramble now to provide Consultation Hearings to all those prisoners whose actual parole hearings, their Consideration Hearings, are being advanced somewhat through new legislation time frames. So if you'll be going to a Consideration Hearing under one of the recently passed legislative directives, you may be getting a Consultation Hearing in the near future and a Consideration Hearing less than 6 years later. LSA/CLN often hears from prisoners who are told by their counselors they're 'going to board' with relatively little notice, no other information provided, no attorney appointed or seen. It appears some correctional counselors may also be a bit confused on what kind of hearing is in the wings.

The Consultation hearing is less a hearing than a meeting, where a parole commissioner or deputy commissioner meets with an inmate, no attorney needed or present, reviews the inmate's file and offers advice on what the individual prisoner should do in the next 6 or so years to have the best chance of gaining parole.

A Parole Consideration hearing is the real deal—where the suitability of the inmate is assessed by a parole panel, the inmate has legal representation and a decision will be made whether the prisoner will be granted or denied parole. This is what lifers are working toward, and, what the Consultation hearing is to assist them in preparing for.

Consultation hearings are usually conducted with a single parole commissioner or deputy commissioner and the inmate. You may have short notice and may not have received a psych evaluation prior to the Consultation Hearing. A Consideration Hearing has several players—a parole panel of commissioner (or two) and a deputy commissioner, inmate, inmate attorney, DA (in person or by teleconference) and possibly victims representatives. Prior to the Consideration Hearing you'll be appointed counsel (or have the opportunity to hire private representation) and should have an attorney visit at least 45 days prior to the actual hearing.

The two are not the same. At a Consultation you'll be given advice. At a Consideration Hearing, you may be given your freedom.

STATE OF CALIFORNIA EDMUND G. BROWN JR., GOVERNOR

BOARD OF PAROLE HEARINGS
P. O. Box 4036
Sacramento, CA 95812-4036

CONSULTATION FACT SHEET

This sheet provides clarification regarding the Board of Parole Hearings' (board's) requirements to conduct consultations.

1. Timing of Consultations

Consultations are held during the sixth year prior to the inmate's minimum eligible parole date (MEPD), youth parole eligibility date (YPED), or elderly parole eligibility date (EPED), whichever occurs first. (Pen. Code § 3041(a).)

2. Consultation Requirements

The board is required to provide the inmate information about the parole hearing process, legal factors relevant to his or her suitability or unsuitability for parole, and individualized recommendations for the inmate regarding his or her work assignments, rehabilitative programs, and institutional behavior. (Pen. Code § 3041(a).)

3. Written Positive and Negative Findings

The board is required to issue written positive and negative findings and recommendations to the inmate within 30 days of the consultation. (Pen. Code § 3041(a).)

4. Consultations for Qualified Youth Offenders

Qualified Youth Offenders whose controlling offenses resulted in either a life sentence or a determinate sentence will receive consultations as amended in Penal Code section 3041. (Pen. Code § 3051(c).)

Board's Information Technology System

Commissioners Summary
All Institutions
November 01, 2015 to November 30, 2015

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FRITZ	GARNER	LABAHN	MINOR	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**19**	**19**	**9**	**14**	**25**	**22**	**21**	**20**	**18**	**23**	**10**	**21**	**96**	**317**	**1**	**316**
Grants	5	5	3	2	8	2	2	5	6	1	3	7	0	49	1	48
Denials	13	10	3	12	14	10	10	8	6	15	6	11	0	118	0	118
Stipulations	0	1	1	0	0	2	2	1	0	1	0	0	0	8	0	8
Waivers	0	2	1	0	1	6	3	6	5	1	1	1	22	49	0	49
Postponements	1	1	1	0	1	1	2	0	1	5	0	1	66	80	0	80
Continuances	0	0	0	0	1	1	2	0	0	0	0	0	0	4	0	4
Tie Vote	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	8	8	0	8

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

Subtotal (Deny+Stip)	**13**	**11**	**4**	**12**	**14**	**12**	**12**	**9**	**6**	**16**	**6**	**11**	**0**	**126**	**0**	**126**
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	7	6	4	9	9	5	7	8	5	14	5	10	0	89	0	89
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	4	3	0	3	5	6	3	1	1	2	1	1	0	30	0	30
7 years	2	1	0	0	0	1	1	0	0	0	0	0	0	5	0	5
10 years	0	1	0	0	0	0	1	0	0	0	0	0	0	2	0	2
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**	**2**	**1**	**0**	**1**	**6**	**3**	**6**	**5**	**1**	**1**	**1**	**22**	**49**	**0**	**49**
1 year	0	2	1	0	1	6	3	5	5	1	1	1	11	37	0	37
2 years	0	0	0	0	0	0	0	1	0	0	0	0	7	8	0	8
3 years	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0	3
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	**1**	**1**	**1**	**0**	**1**	**1**	**2**	**0**	**1**	**5**	**0**	**1**	**66**	**80**	**0**	**80**
Within State Control	0	0	0	0	0	0	0	0	1	1	0	0	10	12	0	12
Exigent Circumstance	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Prisoner Postpone	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Board's Information Technology System

Commissioners Summary
All Institutions
December 01, 2015 to December 31, 2015

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FRITZ	GARNER	LABAHN	MINOR	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**20**	**23**	**21**	**29**	**21**	**15**	**21**	**13**	**25**	**11**	**25**	**24**	**117**	**365**	**0**	**365**
Grants	2	7	2	5	6	3	4	0	5	0	10	6	0	50	0	50
Denials	14	12	13	16	13	8	9	7	8	5	9	13	0	127	0	127
Stipulations	0	1	2	6	0	0	1	3	7	2	0	1	0	23	0	23
Waivers	1	2	2	0	0	2	0	2	4	2	4	2	35	56	0	56
Postponements	3	1	1	2	1	2	7	1	1	2	1	2	69	93	0	93
Continuances	0	0	1	0	0	0	0	0	0	0	1	0	0	2	0	2
Tie Vote	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	13	13	0	13

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

Subtotal (Deny+Stip)	**14**	**13**	**15**	**22**	**13**	**8**	**10**	**10**	**15**	**7**	**9**	**14**	**0**	**150**	**0**	**150**
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	4	7	7	17	10	6	8	5	5	3	6	7	0	85	0	85
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	4	4	6	2	2	1	2	2	8	2	3	4	0	40	0	40
7 years	4	1	1	2	1	0	0	2	2	2	0	0	0	15	0	15
10 years	0	1	1	1	0	1	0	1	0	0	0	3	0	8	0	8
15 years	2	0	0	0	0	0	0	0	0	0	0	0	0	2	0	2

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**2**	**2**	**0**	**0**	**2**	**0**	**2**	**4**	**2**	**4**	**2**	**35**	**56**	**0**	**56**
1 year	1	2	2	0	0	2	0	2	4	2	4	2	24	45	0	45
2 years	0	0	0	0	0	0	0	0	0	0	0	0	8	8	0	8
3 years	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0	3
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**3**	**1**	**1**	**2**	**1**	**2**	**7**	**1**	**1**	**2**	**1**	**2**	**69**	**93**	**0**	**93**
Within State Control	1	0	1	0	0	0	3	0	0	1	0	0	57	63	0	63
Exigent Circumstance	1	0	0	2	0	2	2	0	0	0	0	0	9	16	0	16
Prisoner Postpone	1	1	0	0	1	0	2	1	1	1	1	2	3	14	0	14

Board's Information Technology System

Commissioners Summary
All Institutions
January 01, 2015 to December 31, 2015

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FRITZ	GARNER	LABAHN	MINOR	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**304**	**304**	**314**	**272**	**316**	**327**	**343**	**310**	**319**	**326**	**322**	**350**	**1504**	**5311**	**11**	**5300**
Grants	87	93	68	66	72	59	79	58	66	59	105	92	2	906	4	902
Denials	168	167	151	172	181	189	192	182	153	204	157	175	3	2094	4	2090
Stipulations	20	21	25	21	32	26	24	45	39	27	25	40	0	345	1	344
Waivers	2	9	12	0	3	20	5	15	16	6	9	17	422	536	0	536
Postponements	26	12	39	10	19	29	32	9	38	25	21	23	848	1131	0	1131
Continuances	1	1	19	1	7	2	10	0	6	2	4	1	0	54	2	52
Tie Vote	0	0	0	0	2	1	1	0	0	2	0	1	0	7	0	7
Cancellations	0	1	0	2	0	1	0	1	1	1	1	1	229	238	0	238

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

Subtotal (Deny+Stip)	**188**	**188**	**176**	**193**	**213**	**215**	**216**	**227**	**192**	**231**	**182**	**215**	**3**	**2439**	**5**	**2434**
1 year	0	1	0	0	0	0	0	0	0	0	0	0	0	1	0	1
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	110	115	125	147	128	124	137	114	95	126	115	132	1	1469	3	1466
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	55	47	34	29	64	62	57	67	76	61	47	57	2	658	2	656
7 years	19	18	10	13	17	14	15	22	15	29	14	13	0	199	0	199
10 years	2	5	6	4	3	15	5	24	6	14	5	12	0	101	0	101
15 years	2	2	1	0	1	0	2	0	0	1	1	1	0	11	0	11

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**2**	**9**	**12**	**0**	**3**	**20**	**5**	**15**	**16**	**6**	**9**	**17**	**422**	**536**	**0**	**536**
1 year	2	7	6	0	3	18	5	14	16	5	8	17	268	369	0	369
2 years	0	0	5	0	0	1	0	1	0	1	1	0	95	104	0	104
3 years	0	2	1	0	0	1	0	0	0	0	0	0	47	51	0	51
4 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
5 years	0	0	0	0	0	0	0	0	0	0	0	0	11	11	0	11

Postponement Analysis per Commissioner

Subtotal (Postpone)	**26**	**12**	**39**	**10**	**19**	**29**	**32**	**9**	**38**	**25**	**21**	**23**	**848**	**1131**	**0**	**1131**
Within State Control	7	5	16	5	8	9	16	3	24	14	9	5	768	889	0	889
Exigent Circumstance	15	5	18	5	5	9	11	1	6	4	4	14	29	126	0	126
Prisoner Postpone	4	2	5	0	6	11	5	5	8	7	8	4	51	116	0	116

BPH

THOMPSON TERMS VS. FUTURE DATES: NOT THE SAME

With the start of the New Year and the implementation of many bills affecting lifers, including SB 230, dealing with release dates and future parole, there is much confusion (as evidenced by the upsurge in mail on the subject) on those lifers found suitable for parole, but not subject to 'immediate release.' The difference between those who receive a date and go home 'immediately' and those who are released from their life term but not custody is sometimes the difference between future release dates and Thompson terms.

In the past, those lifers found suitable and having their term calculated to show a release date more than 6 months from the time of their hearing were give a release date after completion of those remaining months, a future date. According to a December, 2015 report to the Board by former Chief Counsel Howard Moseley, the January 1,2016 implementation of SB 230 "allows for the immediate release of inmates found suitable for parole by the Board of Parole Hearings upon reaching their minimum eligible parole date, subject to the board's decision-review process and the Governor's review. Going forward, inmates who reach the earliest of their minimum eligible parole date, youth parole eligibility date or elderly parole or elderly parole release date and who have been granted parole will be eligible for release." Thus no more future dates.

The so-called 'Thompson terms,' however, differ from a future release date. A Thompson term, for those lucky enough not to be under one, is a determinate sentence imposed on an inmate for a crime committed while in prison. This can be for anything from possession of drugs, to assault, to possession of a weapon or worse. Prisoners, including lifers, can come afoul of various laws, be tried, convicted and sentenced while serving their life terms. And when that occurs, the resultant sentence, 2, 5, 7 or more years, is called a Thompson term, in honor of a prisoner who attempted to litigate the matter.

Thompson terms are assessed for another crime, not the life crime. So while you may have done your time on that instant offense, you must still answer for whatever caused you to receive the Thompson term.

For those lifers found suitable, and who make it through the review periods, the BPH issues a memo to the prison, which authorizes the "immediate release" of the named inmate---but specifically limits that release to 'from their life term.' And that order applies only to the life term; it does not impact the Thompson term.

Double jeopardy? Not so. You are serving a life term for one crime, the Thompson term is imposed for yet another crime, this one after the life crime. So you aren't a victim of double jeopardy. The BPH has determined they (the Board) have no authority over determinate terms, other than those specifically outlined under elder, youth or medical parole considerations.

The BPH and CDCR have agreed that Thompson terms are to be served AFTER conclusion of the life term, and are not concurrent. This is supported by case law including IN RE Damien Coleman, published in May 2015. Many lifer attorneys are in disagreement with the board on this matter, and there has been some preliminary talk of filing on the issue, most especially for those long-serving lifers who have been incarcerated well past their MEPD—do those years of 'extra' time not provide sufficient incarceration to cover the Thompson term?

Apparently not, at least in the CDCR's view. And for now, there it remains. If you have a Thompson term, you'll stay in the tender care of CDCR until that determinate term runs its course. The good news—you are eligible for good time credits, which may shorten the actual time you'll be in custody.

As to the old 'future date' decisions, those, have indeed gone away via the enactment of SB 230, for those who have consecutive sentences or were found suitable before the final date of their calculated term---you'll be going home 'immediately' after being found suitable and prevailing through the review period. But remember, 'immediate' is a relative term for CDCR.

Once the memo to release from the life term is received by the institution, it usually takes another 7-10 days for all the doors to open. So be patient and glad you don't have a Thompson term to lengthen you stay.

BPH

YOPH WITH A 'STANDARD' HEARING

There are many 'moving parts' in the implementation of SB 261, which is turning out to be significantly different than the roll out of SB 260. Among those differences is the scheduling of inmates who are eligible under the criteria of SB 261 to receive a Youth Offender Parole Hearing (YOPH), but who will receive notice that their hearing will be conducted under 'standard' parole hearing format. What's up? Scheduling and CRA backup, that's what.

Part of the consideration of YOPH procedure is a Comprehensive Risk Assessment (CRA) done to reflect the hallmarks of youth consideration outlines under the youth bills. Some inmates who have not received a CRA from the Forensic Assessment Division (FAD) that takes these youthful factors into account, but who have a parole hearing already in the Board's schedule, will not be able to receive those new CRAs in time to meet the scheduled hearing.

Rather than postpone several already scheduled hearings the Board has opted to forge ahead with those scheduled proceedings, which, because these is no appropriate CRA, cannot be considered to be held under the full scope of YOPH. Should the prisoner be granted a date at those 'standard' hearings, all well and good.

If there is a denial at those proceedings, "Qualified youth offenders whose hearings are conducted as standard parole consideration hearings will be eligible to receive a separate youth offender hearing on or before January 1, 2018." In other words, if a YOPH eligible inmate receives a standard parole hearing and is denied parole, he/she will receive yet another hearing, this time under the full scope of YOPH, including a CRA that reflects youthful factors, before beginning of 2018. Thus, the potential for two bites of the apple within a 2 year period, regardless of the length of denial articulated at the hearing.

In the intervening time the FAD has assured the Board those lagging CRAs will be complete and delivered to both inmate and inmate counsel in a time frame that allows for full comprehension and possible appeal of any errors in said CRAs (perish the thought). In such situations the

denied lifer need not file a PTA, as the Board will automatically reschedule a YOPH hearing as the CRAs are completed and delivered.

This practice will continue for those hearings already calendared for the first 6 months of 2016, by which time the FAD is expected to have caught up with the YOPH process. For those inmates whose hearings had already been slotted in the complex BPH scheduling process to have a hearing that would fulfill the requirement of CRA that addresses youthful factors the Board was faced with two choices, neither of them good or logistically easy.

Either all hearings already scheduled for YOPH inmates lacking appropriate CRAs would be postponed in mass, or the hearings could proceed, with the caveat of a new hearing, with the proper CRA, if the decision was a denial. The Board decided on the latter solution, in order to prevent chaos in the hearing scheduling process and protect the legal requirements for timely hearings. Just how big a logistical nightmare would it have been to postpone and reschedule all the hearings affected by the lack of YOPH-related CRAs?

A quick count of information posted on the Board's website of hearings slated in the first four months of 2016 indicated that anywhere from 30 to over 40 percent of hearings in those months were/will be standard hearings for inmates eligible for YOPH consideration. A scheduling nightmare indeed.

So if you are a YOPH eligible prisoner who goes to your next hearing in the by the end of June, 2016 and have not received a YOPH-oriented CRA, consider that upcoming hearing your first shot, maybe a bit of a dress rehearsal. If you're found suitable, great! You made it.

And if denied, contemplate the results, address the points outlined, study your new CRA and get ready for a return engagement in a quick turnaround time.

BPH

SIX WAYS TO BOOST YOUR CONFIDENCE

If you are confident in yourself, it will show at your board appearance.

Self-confidence can be a two-edged sword. On one side, the Parole Board likes to see prisoners who are confident in their ability to maintain the gains and changes they have accomplished in prison as they reenter society. On the other hand, being overconfident can make the inmate appear manipulative and disingenuous. So, how to strike a balance?

The appearance of over-confidence often comes, surprisingly, from a lack of real confidence. Real confidence is reflected by a quiet assurance in demeanor and remarks, not braggadocio and overly ambitious promises.

Real confidence develops over time, as you come to understand that you are capable, worthwhile and self-reliant. There are ways to instill this confidence in yourself, so that it comes naturally and is expressed easily. Here are some suggestions, small things that can be done every day to help build that basic self confidence that will help you appear before the board as a well-rounded, assured individual.

1. **Wake up with gratitude.** This may be a bit counter-intuitive in a prison setting, but there is always something that you can appreciate. This could be as meaningful as, "I'm grateful I'm alive" or as simple as, "I'm thankful for coffee."

2. **Accept compliments**. Allow someone to compliment you without dismissing it. Take in the compliment and let yourself celebrate what was said, whether it is your athletic ability, your musical skills or your efforts to be of help to others.

3. **Take on a challenge**. Yes, being in prison is challenging, but achievements can play a big part in boosting your self-esteem. Challenge yourself to do something new and productive: finish a challenging book, complete a new educational area or vocation or learn a new language.

4. **Take care of your body**. Again, challenging in prison, but this can be combined with the suggestions above. Regular exercise can reduce stress and improve your mood. If you haven't worked out before, start with slow but begin something that will improve your physical condition.

5. **Surround yourself with positive people.** This one's pretty much self-explanatory. Nix the negative Neds and Nellies in your life and only spend time with people who are also intent on being productive and improving themselves.

6. **Be positively affirming.** Every day, give yourself a positive affirmation pep talk. I am doing awesome. I am brave. I am smart enough to figure this out.
I will go home.

A LITTLE INSIGHT INTO INSIGHT

Among the most often cited reasons for denial of parole is a ''lack of insight' into the causative factors of the crime, the impact of the crime and often, it seems, into life and behavior in general. Just what is insight? We've speculated, not entirely in jest, that it falls somewhere between hindsight and second sight. There is little dispute, however, that the accomplishment of insight is a highly subjective measure of suitability.

By simple definition insight is:"the true virtue of a thing especially through intuitive understanding; penetrating mental vision or discernment, facility of seeing into inner character or underlying truth." It is perhaps that last definition that is most applicable to parole…recognizing the underlying truth and inner character of who you were and why you did what you did at the time of your crime.

Psychologists, who rarely speak in a direct manner, define insight as "the recognition of sources of emotional difficulty" and "an understanding of the motivational factors behind one's actions, thoughts or behavior." In short, what caused you to believe your best option was to commit a crime; what happened in your life that changed your thought process to believe breaking the law was the right path.

And perhaps more telling, psychologists equate insight with self-knowledge, and an understanding of cause and effect based on identifying relationships and behaviors in any given situation. Understanding those relationships sheds light on, and helps solve, problems.

So if you have insight, you've been able to identify events in your life that caused you to be who you were when you committed a crime. That isn't as simple as losing a job and needing money. When you have insight you have a feeling, an emotion or a thought that helps you know and understand something essential about yourself.

It may come gradually, as the result of a long period of thought and reflection or in a flash, as an epiphany or sudden understanding. But once you've achieved insight, you'll understand the reasons, the motivations behind your behaviors and, with understanding, comes the ability to change those attitudes and actions.

BOARD OF PAROLE

NON-VIOLENT, NON-SEX-REGISTRANT, SECOND-STRIKE (NVSS)

NVSS OVERVIEW

On February 10, 2014, the Three Judge Panel in the Plata/Coleman class action lawsuit ordered the California Department of Corrections and Rehabilitation (CDCR) to create and implement "a new parole determination process through which non-violent second-strikers will be eligible for parole consideration by the Board of Parole Hearings (board) once they have served 50% of their sentence." The new process will begin January 1, 2015.

Eligibility

Inmates whose terms doubled pursuant to Penal Code section 667(b)-(i) or Penal Code section 1170.12 and who have served 50 percent of their actual sentence, or who are within 12 months of having served 50 percent of their actual sentence are eligible for review for possible release. Inmates are not eligible if they are required to register as sex offenders pursuant to Penal Code section 290 based on a current or prior conviction. Inmates are also not eligible if they have a current violent offense pursuant to Penal Code section 667.5(c). In addition, certain inmates will be ineligible based on specified negative institutional behavior.

Inmates will be screened for eligibility at their annual unit classification committee review once they have served 50 percent of their actual sentence or are within 12 months of having served 50 percent of their actual sentence, as determined by case records personnel.

Inmates may request to review their central file prior to their annual classification committee review, consistent with existing policies and procedures for requesting review of central files (DOM section13030.16 et seq.) If an inmate is deemed eligible, the inmate will be referred to the board for review for possible release.

At the conclusion of the unit classification committee, the chairperson of the classification committee will inform the inmate whether or not he or she has been deemed eligible for referral to the board. If eligible, they will also be informed that they may submit a written statement to the board regarding his or her release, if he or she wishes to do so.

Input from Inmates, District Attorneys, Victims, and the Public

Inmates will have 30 days from the date of the referral to submit a written statement. The board will notify the District Attorney of the inmate's county of commitment and any victims registered with CDCR's Office of Victim and Survivor Rights and Services about the referral and request that they submit any written statement they wish to have the board consider within 30 days.

Access to Inmate Central Files

The Division of Adult Institutions has authorized District Attorneys to review inmate central files, with advanced notice, at any institution regardless of where the inmate is housed for purposes of the non-violent, non-sex registrant, second strike inmate parole process. Also, as mentioned above, inmates may request to review their central file prior to their annual classification committee review, consistent with existing policies and procedures for requesting review of central files (DOM section 13030.16 et seq.)

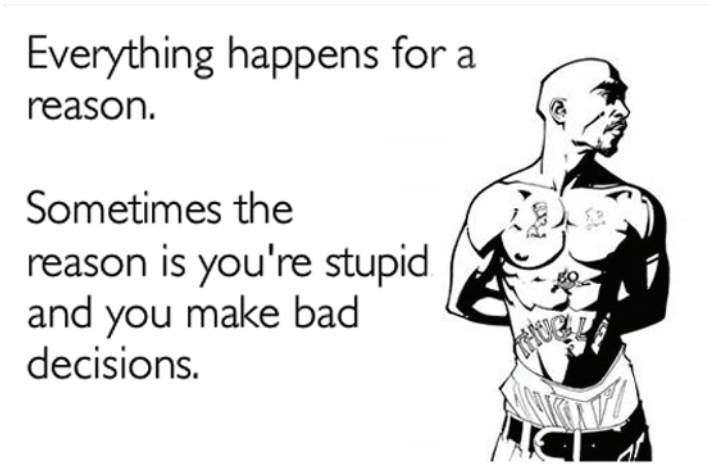
Risk Assessments

The board will not prepare risk assessments for non-violent, non-sex-registrant, second-strike inmates being considered for release.

Hearing Officers and Procedure

A deputy commissioner will conduct an administrative review to determine if the inmate's release would pose an unreasonable risk to public safety. There will be no hearing. The review will occur within 50 days from the date the unit classification committee referred the inmate to the board, or if the inmate has not yet served 50 percent of his or her sentence, the board will conduct the review

BPH



once the inmate is within 60 days of serving 50 percent of his or her sentence.

The deputy commissioner will review all relevant and reliable information, including the inmate's criminal history, institutional behavior, rehabilitation efforts, and any written statements received. The deputy commissioner will document his or her decision on a Non-Violent Second Striker Decision Form (BPH Form 1047(C)), a copy of which will be provided to the inmate by institutional staff. In addition, the board will send a letter to the District Attorney from the inmate's county of commitment and any victims registered with CDCR's Office of Victim and Survivor Rights and Services informing them of the outcome of the board's review.

A referral to the board may be rescinded by a classification committee at any time prior to the inmate's release if the inmate's case factors change such that he or she is no longer eligible for release as a non-violent, non-sex-registrant, second-strike inmate. For example, if an inmate is found guilty of a rules violation that makes them ineligible for referral to the board, the inmate will be scheduled for a classification committee review to determine if the referral to the board remains appropriate. If the committee determines the referral is no longer appropriate, the referral will be rescinded. If the board has already rendered a decision, it will be vacated and the inmate, District Attorney, and registered victims will be notified.

In addition, the board will be notified of any disciplinary action taken against an inmate who has been referred to the board for consideration for release. If a decision has already been rendered, the board may affirm or vacate the decision based on the information provided. If the decision is vacated, the inmate, District Attorney, and registered victims will be notified.

If the board decides not to release an inmate, the inmate will be reviewed again for possible referral at his or her next annual unit classification committee review.

Decision Review

The board's decisions concerning the release of non-violent, non-sex-registrant, second-strike inmates are subject to review, upon request, within 20 days of the date of the board's decision. Persons requesting review should identify why they believe the board's decision was in error and submit their request in writing to:

Attention: Non-Violent Second Strikers
Board of Parole Hearings
Correspondence – NVSS
P.O. Box 4036
Sacramento, CA 95812-4036

Reviews will be conducted by an Associate Chief Deputy Commissioner. The board will process a request to review a decision and issue a decision upholding or vacating the original decision. The person requesting decision review will be notified of the outcome of the review. In addition, the District Attorney and registered victims will be notified if the review results in a reversal of the original decision.

Release of Inmate

An inmate who is approved for release by the board will be released to state parole or post release community supervision as required by statute no later than 50 days after the board's decision. All notifications to law enforcement and victims required by statute will be prepared by the institution's case records staff. No inmate will be released prior to serving 50 percent of his or her actual term as determined by case records staff.

Reprinted from California Department of Corrections and Rehabilitation- Website/Board of Parole

***BPH* cont. pg. 32**

BPH

MENTAL HEALTH TREATMENT DOES NOT MEAN DENIAL

Receiving any sort of treatment for mental health issues has long been considered, at least by the inmate population, a sure fire way to be denied parole suitability. From being prescribed stabilizing medications to obtaining therapy from prison clinicians, the word on the yard is usually that engaging in these activities will kill any chance of suitability before the parole board.

So here's a news flash we want to make very clear:
Not True.

In fact, after a recent report on mental health and violence risk presented to the board the January Executive Board meeting, more than one commissioner sought out LSA/CLN to ask that we specifically let our prison readers know: if you have a history of or currently are engaging in mental health treatment, and indicate your willingness to continue such treatment if released including ways to do so in your parole plans, commissioners actually consider those plans a sign of understanding and responsibility. Whatever treatment is appropriate to your situation, medications, counseling, both, either in the past or ongoing, the Board wants inmates to know such treatments are not, in and of themselves, a sign of automatic dangerousness and a reason to deny parole.

Commissioners listening to the presentation on the connections between mental health and violence, and being assured that one does not directly lead to the other, expressed their concern that they have often seen prisoners who end their mental health treatments either by ceasing to take prescribed medications or leaving therapy provided via CCCMS, in the months before a parole hearing in the hope that being able to say they are not participating in mental health treatment will give them a better shot at suitability. Often, however, the opposite is the case.

"I remember what I did, but I don't remember why. Is that sort of like remorse?"

Appropriate medications for treating such on-going issues as bi-polar concerns or depression can in fact be stabilizing and those prisoners who exhibit this understanding and express their intent to continue this regimen, often make a favorable impression on the parole panel. And those who are receiving counseling, individual or group, through CCCMS, should not be concerned that such sessions will put a damper on their parole consideration. The commissioners noted that those granted parole are routinely directed to attend POC, Parolee Outpatient Clinic, at the local parole office, in the first few months after release, whether or not they have received mental health treatment while incarcerated.

Yes, of course, there are those inmates whose mental illness is so pronounced as to render then unsuitable for parole and it was obvious from the Commissioners' comments at the January meeting that this situation, while not new to them, is troubling. They acknowledged that while denying parole to such individuals, who would have trouble coping in society, is sometimes necessitated by the need to protect public safety, such denials do not provide adequate treatment for those in this category.

Clearly, a Catch-22 situation for both commissioners and inmates. And as yet, no clear solution on the horizon. At the close of the January presentation on mental health issues and treatment Commissioner Montes, noting the panel members can suggest prisoners seek counseling or therapy, asked that at a future meeting the Board the California Correctional Health Care Services present information to the board on panel's direct referral of inmates for assessment to the state's mental health program.

So the message from the commissioners was clear: whatever is working, continue doing it. If your treatment regimen is proving beneficial and you recognize those benefits and plan to continue what's working, that fact should be a positive indicator for parole suitability.

BPH /LSA

THE AMENDS PROJECT-- CONTINUED

Since the announcement last month (see December, 2015 issue of CLN) of LSA's Amends Project to assist lifers in writing letters of apology and amends to their victims, our mail volunteers have been kept busy answering the response. To date, prisoners and/or staff at more than 17 institutions have expressed their interest in being included in the project.

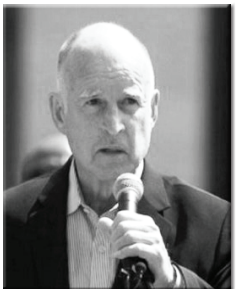
For those who have already requested inclusion, we're working with individual institutions and CDCR on clearance and passes and expect to begin first sessions in early March. As noted in the original announcement, currently LSA is not able to accommodate individual prisoners, but will work through ILTAG or other self-help groups to present the curriculum and project to as many inmates as possible.

If you're interested, send us the information on your group, including the name and/or contact information for your sponsor or staff facilitator so that we can begin the gate clearance process. As with all things CDCR, it is a process and does take some time to secure the proper authorization to enter the prison, as well as provide the administration with samples of the collateral material we will provide to inmates.

However, please understand, that as of now, we are not set up to present the material to individual prisoners, nor can we, with present staff, critique and respond to individual apology letters sent to us by individuals. As The Amends Project develops and evolves, this may be in the future, but the future is not now.

If you have received a response, then you know we've registered the interest of your group and institution and you're on our list—we WILL be seeing you.

POLITICS



Gov. Jerry Brown

BROWN'S 2016 SENTENCING INITIATIVE

Don't pack your bags yet.

In late January Gov. Jerry Brown, backed by a phalanx of law enforcement and faith leaders, announced his support for ""Public Safety and Rehabilitation Act of 2016," a ballot initiative that, according to the Governor, will "protect and enhance public safety, reduce wasteful spending on prisons, improve rehabilitation and prevent federal courts from ordering the release of prisoners." It's that last part that we think may have really prompted Brown to throw his political weight behind the proposal.

And of course, the rumors about everybody going home have already started. But hold up folks. Before anyone packs their bags, disposes of their property and fills out a postal change of address form, there are a couple of things to consider.

First, this is a ballot initiative. That means it has to go before the vote of the people. All the people, supporters, haters and the "I don't give a gosh darn so long as it doesn't cost me any more taxes." A majority of the voting populace must say yes before any changes are made. Just what those proposed changes are we'll get to in a minute. Secondly, even if Brown et al prevail, the impact on lifers will be second hand, at best. In a nutshell, and right off the Governor's announcement about the initiative, here's what the measure would do:

- Authorize parole consideration for nonviolent inmates who complete the full sentence for their primary offense.
- Allow inmates to earn credits for good behavior, education and rehabilitative achievement.
- Require judges rather than prosecutors to decide whether juveniles as young as 14-years-old should be tried as adults.

POLITICS

If you're paying attention, you'll notice that term "nonviolent inmates." That, in itself, precludes most lifers from consideration under these proposed changes. And while the measure's official language says it is to be "broadly" and "liberally" construed to accomplish its goals, it does not, in fact, state that there is a retroactive component to the initiative, were it to pass. And we've had conflicting information as to whether the initiative will impact lifers via application of shorter time required before initial parole hearings.

Overall, while the proposal will, according to some sources, reduce the length of time some individuals convicted of felonies spend in prison and address juvenile sentencing, the impact on the existing lifer population is seen as relatively minimal. The initiative comes at a time when mandatory minimum sentencing, the prosecution and incarceration of juveniles as adults and long-term isolation and solitary confinement practices are all under attack and scrutiny on both the national and state level.

It's an interesting about face for Brown, who, in his first stint as California Governor in the 1970s, signed into law mandatory term fixing laws. At the time the state's few prisons held less than 20,000 inmates, but over the next few decades a building boom created 22 new institutions that were promptly overflowing with inmates. When Brown returned to state government, first as Attorney General and lately as Governor, he had come to the realization that the determinate sentence and tough on crime laws had been counterproductive. Welcome to reality. But at least the Governor is honest enough to admit he was wrong.

In acknowledging that his support of the determinate sentencing practices during his first incarnation as governor was a mistake, Brown noted during the launch of the initiative, "We see now that the determinate sentence, which I signed, needs substantial revision. [B]efore we keep going down this road, I think we should pause and reflect on how our system of criminal justice could be made more human, more just and more cost-effective."

During Brown's most recent tenure in the top spot things have changed, with Realignment, the passage of Prop. 47 and a new emphasis on following the law in lifer parole matters, not to mention the intervention of the 3 federal judges in the prison population issue. The results of all these factors has been a decreasing prison population and an increasing debate on what impact that has had on crime statistics.

So far the initiative has the support of an interesting mix of officials and high profile individuals, including Los Angeles Police Department Chief Charlie Beck, San Diego County District Attorney Bonnie Dumanis, Amador County Chief Probation Officer Mark Bonini, Napa County Chief Probation Officer Mary Butler and California Catholic Conference of Bishops Deacon Clyde Davis. Also expressing support were such organizations as Californians for Safety and Justice and several public defenders. And it appears the Governor is ready to put left over funds from his last gubernatorial campaign, an estimated $24 million, to help finance the initiative.

Well, it's a thought. And a good one. But it isn't the all-clear for lifers.

It is expected, however, that the proposal will find opposition among the state's District Attorneys and law enforcement organizations, victim's rights groups and Republicans in the legislature have already voiced their opposition. Republican State Sen. Jim Nielsen, always a dependable prisoner opponent, has already voiced his never-in-doubt opinion.

Along the same vein, the recently signed order by President Barack Obama banning solitary confinement for juveniles in federal institutions will have no effect on prisoners, juvenile or adult in the California state prison system. In fact, while the President's order is a step forward and will hopefully be a North Star for other corrections authorities, there are only a few dozen juveniles in federal custody and only about a dozen in solitary confinement who will be affected by the order. And, again, no one in a California state-run prison comes under the federal order.

POLITICS

CCPOA FILLING ELECTION WARCHEST

CCPOA
California Correctional Peace Officers Association

Although the prison guards' union, California Correctional Peace Officer's Association, better known as the CCPOA, has, in recent years, lost some of its political clout from its heyday when contributions from the union virtually ran the prison system, it appears the union is once again gearing up to maximize its political impact. In a recent financial statement filed by the union's political action committee (PAC), the union reported some $8.2 million was collected from union members in the last six months of 2015.

The report, at more than 11,000 pages, is large and complex enough to discourage idle reading, and may be the largest report, in sheer volume, filed by a PAC. The PAC, obliquely named "The California Correctional Peace Officers Truth in American Government Fund," (which would be amusing if it wasn't so breathtakingly long), reported over 28,000 of its members contributed an identical amount, $287.08, during the period from July through December, 2015.

CCPOA spokesperson Nicole Gomez-Pryde, said the political war chest shows the union "is in a position to react to any political issue that affects our numbers." Read, we'll back anything that will keep jobs for guards. She particularly noted two initiatives headed for the November ballot on opposite sides of the death penalty issue.
One proposal would eliminate the death penalty in California. The other would speed up the legal process to allow executions to happen more quickly. Gomez-Pryde didn't specify which measure CCPOA 'Truth in American Government' fund would back; but we don't think it takes much insight to figure that one out.

CDCR


Scott Kernan

EVERYTHING OLD IS NEW AGAIN

Newly appointed Secretary of Corrections, Parole Board Commissioner are no strangers.

As noted in the December, 2015 issue of Lifer-Line, changes are afoot at CDCR, with late 2015 resignations and reappointments opening slots in CDCR and BPH administration and on the parole board itself. The vacancies left the way open for Governor Brown to appoint new faces to leadership positions. And so he did. Sort of.

Dr. Jeffrey Beard, late of the top spot at CDCR, made a quick exit from both the post and the state in December, announcing on December 3 that he was resigning, effective January 1, 2016, though we suspect he was in actuality 'gone' long before that Jan. 1 date. Tapped to succeed Beard, who was viewed by many as an outsider brought in to oversee solution to the state's prison overcrowding, was anything but an outsider. Scott Kernan, long a familiar name in both institutions and at CDCR headquarters, and since March of 2015, an undersecretary within the department.

Kernan's mother, Peggy Kernan, was also a California prison warden, and Kernan himself spent several childhood years living on the grounds of San Quentin. He began his first career with CDCR as a correctional officer in 1983, following the usual path 'through the ranks,' to eventually, in 2004, becoming Warden at Mule Creek State Prison in Ione. Prior to becoming a correctional officer Kernan had served in the US Navy.

He continued what was to be a 30 year career with CDCR be becoming deputy director of adult institutions and chief deputy secretary of adult operations in 2007. In 2008 then-Governor Arnold Schwarzenegger made Kernan chief deputy secretary of adult operations. He retired from that post in 2011.

It hasn't been all smooth sailing for Kernan, however. In 2009 he was arrested for DUI, a charge to which he plead guilty, receiving a $2,000 fine, 48 hours community service and 6 weeks unpaid suspension from his number two post in CDCR. Following his retirement—Kernan has always been careful to note he retired and did not resign--he operated a consulting firm, working with some of CDCR's largest contractors in the electronic ankle bracelet business.

In March, 2014, some 4 years after his initial retirement, Kernan began his second career at CDCR, when he was tapped by Brown to return to CDCR administration as the Undersecretary of Operations. Now, pending Senate confirmation, Kernan will head the department, a post that includes a salary of $243,360.

As to what the new Secretary's plans are for the department going forward, given the continued supervision of the federal judges, continued issues with medical and mental health care, drug interdiction strategies, realignment and rehabilitation proposals, we hope to find out. Kernan is no stranger to LSA principles either; we have history dealing with him in his previous tenure at headquarters. And we have secured a meeting with him in late February, when we hope to ask the Secretary what he foresees for CDCR and California prisoners in coming months. Stay tuned.

Another familiar face appearing in a new seat was Kevin Chappell, former Warden (SQ) and custody staff and administrator at CDCR headquarters in Sacramento. Chappell is the newest Parole Commissioner, appointed Jan. 4 by the Governor. Chappell began as a custody officer in 1987 at Folsom and retired as a Warden in 2014.


Kevin Chappell

Chappell did not, however, leave corrections. Since leaving SQ in 2014 he has been a correctional administrator retired annuitant at California Correctional Health Care Services since 2015. Chappell, a Democrat, filled the commissioner's seat formerly held by Amarit Singh, who resigned in late December. The position provides a salary of $137,956.

Both Kernan and Chappell, as Governor appointees, must be confirmed by the Senate, a process that begins with hearings held before the Senate Rules Committee, where the public and stakeholders (that would be LSA) are permitted to speak in favor or opposition to the confirmation. And speak we shall. Our recommendation on each appointee is currently under review.

The one major position not filled as CLN goes to print, is that of Chief Legal Counsel to the BPH. In December former parole commissioner Howard Moseley, who had served as the Board's head attorney since mid-2012, left BPH to assume a similar position with CDCR. The position, subject to Governor's appointment, remains officially unfilled. Unlike the two previous vacancies, the Chief Legal Counsel position does not require Senate confirmation.


Howard Moseley

DOING LIFE AS A FAMILY

Upcoming Seminars

Sacramento	March 19
San Diego	May TBA
Bay Area	July TBA
Los Angeles	Sept. TBA
Fresno/Bakersfield	Oct. TBA

Lifer Families

A DAY OF LEARNING AND SUPPORT

Education on Parole Process,Grants/Denials Attorneys, Self-Help, getting 'ready' for Board and more...

Pre-Registration Encouraged.

Send request to be placed on email notifications at lifesupportalliance@ gmail.com (916) 402-3750

GILMAN V. BROWN

DISTRICT COURT DECISION REVERSED: GOVERNOR'S REVIEW POWER AND MARSY'S LAW EXTENDED DENIALS RULED NOT TO BE EX POST FACTO LAWS

State and Federal Court Cases
by John E. Dannenberg

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

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

In a disappointing decision for all lifers, a unanimous three judge panel of the Ninth Circuit U.S. Court of Appeals reversed the late Judge Lawrence K. Karlton's 2014 district court ruling which had held that both Prop. 9 (Marsy's Law), which increased the maximum parole denial interval from 5 years to 15 years, and Prop. 89, which granted the Governor power to review Board lifer parole decisions, violated life prisoners' civil rights because they were unconstitutional ex post facto laws. The effect of this new February 22, 2016 ruling is that there will be no change in either the maximum lengths of lifer parole denials or in the Governor's power to review Board lifer decisions. The Court of Appeals ordered the district court to issue a new ruling against the plaintiffs (lifer class) and for the State defendants.

Richard Gilman was the class representative of lifers in a 42 USC § 1983 federal civil rights lawsuit litigated by the Federal Public Defender's office in Sacramento. Class counsel conducted extensive reviews of lifer parole denial cases and presented a statistically compelling showing in a bench trial in the district court, which the court agreed demonstrated that Propositions 89 and 9 violated the Ex Post Facto Clause by creating a significant risk that the prisoners' periods of incarceration would be longer than they would have been before the passage of the Propositions.

But the Ninth Circuit disagreed.

Addressing the constitutionality of Proposition 89 as applied to plaintiffs, the panel held that *Johnson v. Gomez*, 92 F.3d 964, 965 (9th Cir. 1996), controlled the outcome. The panel determined that there was no evidence that governors had reversed the Board other than on the basis of the same factors which the parole authority is required to consider. Nor did plaintiffs offer evidence showing that they would have received parole before the enactment of Proposition 89, and that Proposition 89 changed that result. Therefore, the panel concluded that Proposition 89 remained only a transfer of decisionmaking power, which does not violate the Ex Post Facto Clause.

Addressing plaintiffs' as-applied challenge to Proposition 9, the panel held that the district court committed legal error by basing its findings principally on speculation and inference, rather than on concrete evidence. The panel concluded that the district court erred by finding that the Penal Code's petition to advance process, Cal. Penal Code § 3041.5(d)(1), by which inmates can request that the Board advance the date of their next parole hearing, failed to afford relief from the classwide risk of lengthened incarceration posed by Proposition 9. The panel held that the district court's findings, viewed under the correct legal standard, were insufficient to support a conclusion that, on this record, an as-applied Ex Post Facto Clause violation had occurred.

The Court of Appeal reviewed precedent. In Johnson v. Gomez, it had already ruled that the Governor's review power was not an ex post facto law.

> Because we cannot say with any similar certainty that the retroactive application of Proposition 89 in Johnson's case resulted in an actual increase in punishment called for under prior law, the application did not violate ex post facto principles and the district court correctly denied relief.

And in *Gilman v. Schwarzenegger* (*Gilman I*), 638 F.3d 1101, 1111 (9th Cir. 2011), it had already ruled that the Governor's review power was not an ex post facto law.

> "... on the current record Proposition 9 does not create a significant risk of prolonging [Gilman's] incarceration on any of the theories [he] assert[s], [and] [Gilman] ha[s] not established that [he is] likely to succeed on the merits of [his] *ex post facto* claim."

At trial, Plaintiffs presented evidence showing that the Governor was reversing 70% of Board parole grants, and *not* reviewing *any* parole *denials*, which they claimed demonstrated the increased risk of extended incarceration necessary to prove an *ex post facto* violation.

However, the State defendants argued that the law's safety valve, the Petition to Advance, ameliorated any potentially extended sentence, by allowing for changes in a prisoner's parole suitability record that occurred prior to the full denial interval to become the basis for an administrative decision to advance the next hearing to a period shorter than the denial interval.

The district court had found that the Petition to Advance only offered potential relief, but in practice did not eliminate the significant risk that Prop. 9 and Prop. 89 would actually extend one's time in prison, beyond what one would suffer solely because of their *prior* dangerousness determination.

Problems the district court found with the PTA process included that it did not countervene the 5 year hiatus attached to an old psych eval; that it did not consider the fact of one's becoming suitable in the interim as a reason to advance; and that PTA reviewers could not read PTAs written in Spanish.

The litmus test set out by the Panel was that:

> respondent must show that *as applied* to his own sentence, the law created *a significant risk of increasing his punishment.*

Against this standard, the Panel found the district court's conclusions speculative. As to the question of the Governor's power under Prop. 89, the Court expressly found

> The district court did not point to evidence that Governors had reversed the Board other than "on the basis of the same factors which the parole authority is required to consider." Cal. Const. art. V, § 8(b). Nor did Gilman offer evidence showing that he would have received parole before the enactment of Proposition 89, and that Proposition 89 changed that result. Therefore, Proposition 89 remains only a transfer of decision making power, which does not violate the Ex Post Facto Clause.

The Panel then turned to the Prop. 9 question. It noted Gilman's data.

> To accomplish this task, Gilman marshaled evidence of grants and denials of PTAs. This evidence included cases in which (1) the PTA was granted and, at the consequent advance hearing, parole was granted; (2) the PTA was granted, but parole was ultimately denied; and (3) the PTA was denied, resulting in no advance hearing. Based on this evidence, the district court concluded that "[t]he PTA process is structured such that it fails, in many cases, to afford inmates a fair opportunity to obtain an advance hearing," and it "is not sufficient to protect inmates from the ex post facto problems inherent in Proposition 9."
>
> To reach this conclusion, the district court first reviewed the PTA process and decided for itself that "the advance hearing process sometimes works and sometimes does not work," because it "appears to deny advance hearings . . . to those who facially appear to deserve them." It then found that certain structural features of the PTA process created impediments to its proper functioning, rendering the PTA process illusory for some class members. However, the district court based these findings largely on speculation and inference from anecdotal evidence, rather than evidence drawn from Cal. Penal Code § 3041.5(d)(1)'s practical implementation proving that the PTA process failed to alleviate the classwide risk of lengthened incarceration posed by Proposition 9. [Cite omitted]. Because the district court applied the wrong standard, it committed legal error, and the resulting factual findings are clearly erroneous.

Accordingly, the Panel found that the district court's conclusions were wrong both as to Prop. 89 and Prop. 9 violating the plaintiff class' civil rights, and reversed the district court's ruling in its entirety and remanded for that court to issue an order in favor of the State defendants.

LIVING REAL LIFE

LSA/CLN celebrates Lifers on the outside

Richard Phinney

Went inside 1979 … resided at CMF, Old Folsom, Soledad & DVI
Came out January 18th, 2016 after 9 hearings, 1 grant, 1 Gov. reversal, out on 2nd grant

Q. Why do you think you were finally found suitable?

I wasn't ready to talk about the crime before. Embarrassed…ashamed. But I decided I wanted to unload… It helped to talk to the prison psychologist, Dr. Mann, as I had met her in groups there, trusted her & she helped me open up and get real, which in turn made it easier to tell the Board the truth.

Q. What was your first day out like?

It was dreamlike…very surreal. My brother picked me up and we drove to his house in nice quiet rural area. Stopped at Wal-Mart to buy a few clothes and if he hadn't been with me…I would have had to walk out! It was really overwhelming. My family was there at the house; my mom, son, cousins and 2 friends. We had a wonderful meal, not sure what everyone else had but my brother grilled a big fat juicy steak just for me.

Q. Did you go to transitional housing?

I am there now, yes. The first night out though was at my brothers and I don't think I slept at all...the room was too dark, too quiet, too big and the bed too soft! But now I am at Restoration House in Sacramento and with all Lifers. There is a curfew and some rules there that are all very reasonable. The Director has bent over backwards to help us get the services we need like medical, Social Security, I.D. through DMV (I got my drivers permit). I keep a log of my activities, and if I go somewhere I sign out and expected time back in. The food here is outstanding, as a guy comes and cooks for us that used to work in restaurants. Great food! Haven't had the same meal twice!

Q. How about fun stuff…are you going places?

Yes, my son took me to IMAX and we saw Star Wars new movie in 3D…that was fun, I took him bowling this week. He was only 3 when I went to prison so he's enjoying getting his dad back and I'm enjoying my adult son. I loved the Crab Shack in Old Sacramento, and lunch with longtime friend Jenny at her workplace. I also had the best steak ever with my friend Jon. And since I have my driver's permit my brother let me drive his truck a little… that was pretty fun.

Q. Challenges?

Getting all the services I needed lined up…my medical was important as I am diabetic, so that couldn't wait… also applying for Cal Fresh (food stamps we turn over to the transitional house), Cal Cash (they provided 1 'emergency' payment), SSI, Medi-cal & Medi-care (found out I was too old for just the Medi-cal, so at my age I qualified for Medi-care, which then allows Medi-cal to also help due to low or no income)

Q. Surprises?

Everyone's support has blown me away… people at my brothers' church helping, and just acceptance and love of everyone I didn't expect

Q. How about parole … any comments?

My agent is good. I have to report in sometimes and have 'accomplishments' I need to do like 20 hours family time, 20 of life skills and 20 of drug treatment. Because alcohol was never a problem I can go into a bar to hear live music and that was really a treat. But to tell the truth, even though I am allowed to have a drink, I don't have any desire…I'm just happy to be out and high on life!

Q. Advice?

You HAVE to be honest, sincere and humble in your Board hearing

1st day on the outside (& still in a dream!)

Celebrity Real Names

What's In a NAME?

50 Cent	Curtis Jackson
Judy Garland	Frances Gumm
Ahmad Rashad	Bobby Moore
Alan Alda	Alphonso D'Abruzzo
Alice Cooper	Vincent Furnier
Axl Rose	William Bailey
Billie Holiday	Eleanora Fagan
Bono	Paul Hewson
Bruno Mars	Peter Gene Hernández
Busta Rhymes	Trevor Smith
Chaka Khan	Yvette Stevens
Chubby Checker	Ernest Evans
Conway Twitty	Harold Lloyd Jenkins
Coolio	Artis Leon Ivey Jr
Demi Moore	Demetria Guynes
Elton John	Reginald Kenneth Dwight
Engelbert Humperdinck	Gerry Dorsey
Flavor Flav	William Johnathon Drayton Jr.
Jamie Foxx	Eric Bishop
Jay-Z	Shawn Corey Carter
Kareem Abdul-Jabbar	Ferdinand Lewis Alcindor, Jr.
Katy Perry	Katheryn Hudson
Lady Gaga	Stefani Joanne Angelina Germanotta
Larry the Cable Guy	Daniel Lawrence Whitney
Meatloaf	Marvin Lee Aday
Queen Latifah	Dana Elaine Owens
Sinbad	David Atkins
Sid Vicious	John Simon Ritchie
Vin Diesal	Mark Vincent
Whoopie Goldberg	Caryn Johnson

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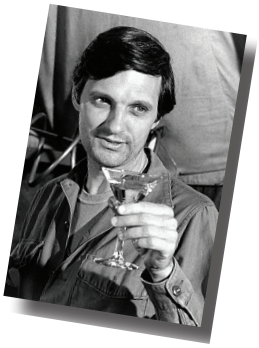
LSA Staff



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