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CALIFORNIA LIFER NEWSLETTER™

State and Federal Court Cases by John E. Dannenberg

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

STATUS OF *GILMAN V. BROWN*

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

This case, of continuing interest to all lifers whose crimes predated Nov. 8, 1988, but whose BPH grants of parole were reviewed by the Governor, is still in the briefing stage. On 1/28/15, the Court extended the due dates for the next briefs.

Filed clerk order (Deputy Clerk: WL): The Appellants'/Cross-Appellees' unopposed request for an extension of time to and including March 13, 2015, to file their third brief on cross-appeal is GRANTED. The optional reply brief is due 14 days after service of the third brief on cross-appeal. [9398881] [14-15613, 14-15680] (WL) [Entered: 01/28/2015 09:09 AM]

FRUSTRATED COURT ORDERS BOARD TO GRANT PAROLE, RATHER THAN REMAND FOR A THIRD HEARING

In re Andrew Young [II]
___Cal.App.4th___;
CA1(2); A138266
January 13, 2015

Andrew Young was convicted of second degree murder in 1993, and was sentenced to 15-life. He was previously denied parole on five occasions. In 2012, the court concluded (*In re Young* (2012) 204 Cal.App.4th 288) that the Board's denial of parole violated Young's due process rights because it failed to consider his insight into the commitment offense and other relevant factors demonstrating his suitability for parole; relied on mischaracterizations of the evidence; and failed to consider the lack of evidence of current dangerousness. The 2012 court ordered the Board to conduct a new parole hearing, but the Board again denied parole, failing to remedy its earlier errors.

Young now petitioned for a writ of mandate, which was granted. The Court was frustrated that the Board twice denied his due process right to a decision based on evidence rather than conjecture, and to have the Board consider all suitability factors. Instead, the Board woodenly focused on the heinousness of the murder, which, standing alone, is insufficient to deny parole. The Court ordered the Board to vacate its denial and immediately grant parole, subject to review by the Governor.

Table of Contents

CALIFORNIA LIFER NEWSLETTER

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COURT CASES (in order)
Reviewed in this Issue:

***Young* from pg 1**

Indeed, the main significance of this published decision is to demonstrate the alternative to just a remand for a new hearing consistent with due process that was announced by our state Supreme Court in *In re Prather* (2010) 50 Cal.4th 238. In his concurring opinion there, Justice Moreno noted, at p. 262,

> Second, the majority opinion addresses the first remand after a parole denial. Should the Board on remand again deny parole, and the court again rule that the parole denial is unjustified, then a more drastic intervention, such as an outright order that the Board grant parole, may well be warranted. Of course even then, the Governor would still have the prerogative, pursuant to article V, section 8, subdivision (b) of the California Constitution, to review the decision. The extent to which courts' prior rulings would limit the Governor's authority is beyond the scope of the present opinion.

The Court expressed its frustration with the failure of the Board to follow its prior orders and the law, and summarized its action in granting this writ of mandate.

> We uphold the Board's decision to deny parole if it reflects due consideration of all relevant statutory factors and is supported by at least a "modicum of evidence, not mere guesswork," that is rationally indicative of current dangerousness. (*In re Shaputis* (2011) 53 Cal.4th 192, 212, 219, 221 (*Shaputis II*).) *In In re Young* (2012) 204 Cal.App.4th 288 (*Young I*), we concluded the Board's October 2009 denial of parole to petitioner violated his due process rights because the Board: (1) did not duly consider his insights into the murder and several other relevant factors that demonstrated his suitability for parole, including the stressful circumstances petitioner experienced leading up to the crime and his exemplary postconviction conduct, (2) relied on mischaracterizations of evidence and conjecture, and (3) stated reasons for denial that were not supported by evidence rationally indicative of current dangerousness. We ordered the Board to conduct a new suitability hearing consistent with our decision.

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NO,NO,NO, AND **HELL** NO

Unfortunately, the Board has not done so. In July 2012, it held another hearing and arbitrarily denied petitioner parole again by committing the same errors as those we pointed out in *Young I*. Most significantly, the Board again did not duly consider petitioner's considerable insights into why he committed the murder or the extraordinary and prolonged stresses he experienced leading up to it. The Board's failure to do so is lamentable, not only in light of our discussion in *Young I*, but because the Board is required to duly consider these matters. Each is expressly defined by the governing regulation to be a relevant factor demonstrating suitability for parole.

Nonetheless, the Board mischaracterized petitioner's considerable insights and stresses as being about "other areas" of his life. This is patently incorrect, and impossible to conclude from even a cursory review of petitioner's statements. Petitioner repeatedly said that he killed Harvey because he was extremely overwhelmed with sadness, rejection, shame, and frustration from his prolonged,

PUBLISHER'S NOTE

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

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

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

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

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***Young* from pg. 2**

unsuccessful battle for custody of his son, his father's abandonment of him as a child, Harvey's refusal to resume their relationship, and his inability to seek help for his increasing emotional difficulties. As a result, a cycle of anger developed in him until he exploded into an uncontrollable rage towards Harvey. And petitioner unquestionably meant what he said; his postconviction conduct, including his efforts to seek help for, and address, his emotional difficulties and his uniformly exemplary prison behavior for almost two decades, is impressive. We can only conclude that the Board's vision was entirely obscured by the heinous nature of the crime itself. However, our Supreme Court has made clear that in such a circumstance, the heinous nature of the crime by itself is not sufficient to deny parole. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1213-1214 (*Lawrence*).)

The Board also concluded that petitioner was a "domestic abuser" who had "relational dynamics" problems with intimate partners in general. There is no question that petitioner's murder of Harvey, by definition, was an act of domestic violence. But there is no evidence that petitioner ever engaged in any domestic or other abuse before or after the stressful circumstances that led up to the murder, or that he lacked relevant insights into his intimate relationships. An act of domestic violence does not make one a serial domestic abuser or establish a propensity to commit acts of domestic violence. Nonetheless, the Board, having speculated that petitioner was such an abuser, concluded that he lacked insight into this purported attribute as well.

Finally, the Board, based on this conjectural attribute, dismissed without good reason petitioner's exemplary postconviction conduct. The Board reasoned that, because the danger petitioner might present to an intimate partner could not be assessed in prison, nothing he had done and nothing he could do in a prison setting would disprove his purported general tendency towards domestic violence. Thus, the Board, although also expressly required by regulation to duly consider petitioner's postconviction conduct as a suitability factor, disregarded it altogether.

EXCUSE ME MR. COMMISSIONER, WHAT ABOUT "NO YOU CAN'T DO THAT!" DIDN'T YOU UNDERSTAND?

In short, the Board's decision violated petitioner's due process rights to a decision based on the evidence, not conjecture, and on consideration of all relevant suitability factors. There is no evidence in the record rationally indicative of current dangerousness. To the contrary, all of the evidence, other than the heinous nature of the crime itself, indicates petitioner was suitable for parole. Accordingly, we grant the petition.

In *Young I*, we ordered the Board to conduct another hearing consistent with our opinion and with *In re Prather* (2010) 50 Cal.4th 238 (*Prather*). That remedy is insufficient here. The Board has failed to afford petitioner the hearing to which he is entitled, even after being ordered to do so. It has twice denied him parole by disregarding ample evidence of highly relevant suitability factors in favor of conjecture. Its latest reasoning leaves petitioner with little, if any, opportunity to establish that he is worthy of parole. Ordering it to conduct yet another hearing with the attendant delay will only prolong the denial of petitioner's constitutional rights. Therefore, we order the Board to vacate its denial and immediately grant petitioner parole, which grant shall be subject to review by the Governor.

As of this writing, no petition for rehearing or review has been filed. Remittitur will issue on March 16, 2015, if no appeal is filed, and the Governor's 30 day review process will commence then, unless the Board opts to not wait for the remittitur, and passes the ball to the Governor sooner.

GOVERNOR'S USE OF CONFIDENTIAL FILE INFORMATION UNDER ATTACK IN TWO COURTS

In re Pedro Carrillo

CA2(7); B259811
January 21, 2015

In re Brennan McNeese

Los Angeles Superior Ct., Case #BH009680
December 9, 2014

A highly questionable practice of the Governor to use confidential information from a prisoner's C-file

***see Carrillo/McNeese* pg. 6**

EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility
www.lifesupportalliance.org

'DEAR AMY'

The original letter to Dear Amy was printed in several newspapers of the Tribune Syndicate. We felt it deserved a more knowledgeable answer, and so we responded."

DEAR AMY:

My mother-in-law, who lives with my husband and me and our 18-month old daughter, has reconnected with an ex-boyfriend from more than 30 years ago. She kept the relationship a secret. Her boyfriend is an ex-con who was in prison for more than 25 years. He was released and is now working full time and spending time with my MIL and occasionally coming over to our apartment to see her. We were happy for her and encouraged the relationship because he seemed like a nice guy. Today, though, after he had spent some time here yesterday, my husband found a pocketknife that had fallen in between our couch cushions.

We asked and found out that it was in fact his knife.

I am upset that he felt the need to bring a weapon into our home when we have a young child. Amy, I am not judging him — I am simply making a statement about the safety of our child and how I'm not comfortable with this. I refuse to compromise when it comes to our daughter's safety and my husband is treating it as if nothing is wrong. I am uncomfortable talking about this with my MIL because I know that she will see this as me attacking her man. What should I do?

Safety First Mom

DEAR MOM: I don't consider a pocket knife a "weapon," but I do consider an ex-con with a 25-year sentence a definite risk to your household. When it comes to baby-proofing your house, I would put access to ex-cons at the top of the list.

You and your husband have every right -- and the duty as parents -- to choose who will come into your home. If your mother-in-law wants to maintain this relationship, it is her business, but you should be extra-vigilant about who spends time in your household, and that includes relatives, neighbors and any men she chooses to associate with.
You should make this abundantly clear, without worrying too much about her reaction. With her as a part of your household, her choices have consequences for all of you.

* * * * * *

Dear Amy,
I read with interest your reply to the family concerned because the mother-in-law was dating a former prisoner. You were right, a pocket knife is not a weapon. But neither is a former prisoner.

As the director of a California non-profit agency dedicated to helping prisoners successfully parole, and the wife a of a former life-term prisoner, I know more than a little about former prisoners. And I can tell you that attitudes such as yours are one of the reasons recidivism rates are high.

If Mom was dating someone who had overcome a mental breakdown, substance addiction or similar malady would you spout the same shun-them, bar the doors and windows response? Probably not. You'd probably applaud their work to change their life; and rightfully so.

Many prisoners, especially lifers or others who have served long sentences and have made the life changes necessary to attain release, are more introspective, self-aware and giving than the average citizen on the street. Most want nothing more than to establish a life and give back to society. In short, they are safer than the stranger behind you in the grocery store line.

Editorial Cont. pg. 42

***Carrillo/McNeese from* pg. 3**

when denying that prisoner his liberty onto parole, without disclosing the information to the prisoner's attorney, is under attack in two courts.

Recently, orders to show cause were issued in the Los Angeles Superior Court (*McNeese*) and in the second district Court of Appeal (*Carrillo*). McNeese's case involves a rescission hearing requested by the Governor in a non-murder lifer referral to the Board. Carrillo's case involves a reversal of parole from a murder conviction.

While it is too early to predict the outcomes of these two cases, the fundamental unfairness attaching to the use of "secret" information to deny one his liberty, with no adversarial judicial review process, is an injustice that screams for court review. Similarly affected CLN readers should be aware of this pending litigation, and its potential outcome for their own case situations.

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LIFER RESIDENCY RESTRICTION OVERTURNED

In re Terrance David
202 Cal.App.4th 675, 2012 WL

CA2(5) No. B236792
(Jan. 6, 2012)

[Recently, with more lifers being paroled, parole agents have "slipped" back into the practice of restricting where lifers can live, based on proximity to victims' next of kin. In 2012, the Court of Appeal ruled such practice was illegal; the decision, now final, was published and remains binding. Because LSA is aware of numerous such recent transgressions, CLN is reprinting below the article on this case from CLN #43. Any parolee affected by such restrictions should file a 602 appeal, citing this authority.]

In a divided decision, the Court of Appeal interpreted PC § 3003(f) to not include, as a "victim" for keep-away purposes, the *sister* of one of lifer-parolee Terrance David's murder victims.

David, convicted of two counts of second degree murder in 1989 involving his driving under the influence of PCP (*People v. David* (1991) 230 Cal.App.3rd 1109), was paroled in 2010. He desired to live with his ailing mother, but was restricted from doing so by CDCR's parole division (DAPO), on grounds that, pursuant to PC § 3003(f), he would be living within 35 miles of the sister of one of the victims. His conditions of parole specifically stated that he should have no contact with [victims' relatives] Mr. Hunter or Ms. Coral or their immediate families. The sequence of events was chronicled by the appellate court:

> Petitioner was released from prison custody and filed a habeas corpus petition in the Los Angeles Superior Court challenging the 35–mile residence restriction. The Board later rescinded the 35–miles restriction, but noted, "If a written request to impose the residency restriction is submitted by the victim's next of kin, the special condition may be imposed if it meets the criteria in Penal Code section 3003(f)."
> Petitioner received notification from his parole agent that the Board had rescinded the 35–mile restriction of parole and that he was free to move in with his family. Thereafter, petitioner received notice that the 35–mile residence restriction had been reinstated by the Department. The victim's sister, Ms. Coral, had requested in writing that petitioner not be allowed to reside within 35 miles of her residence. According to a parole agent, "The victim's next of kin's request was honored in order to protect her well-being, and to protect her from living in fear and under the stress of knowing that [petitioner] lives in her community." The parole agent said, "[the Department] has traditionally honored the 35–mile residence restriction when requested by victims of violent crimes." The parties agree that petitioner was residing within 35 miles of Ms. Coral. Petitioner attached to his petition an Office of Victim and Survivor Rights and Services form, that specifies that the restriction request "applies to victims and witnesses only."
>
> Petitioner filed a new habeas corpus petition, challenging the Board's reinstatement of the 35–mile residence restriction. The Superior Court ordered a stay of the residence restriction, issued an order to show cause, and reappointed counsel for petitioner. The Superior Court then denied habeas corpus relief, determining that the word "victim" in section 3003, subdivision (f) is defined in the California Constitution and therefore includes Ms. Coral as the next of kin of the decedent victim.

The Court noted the provisions in the relevant laws.

> Section 3003, subdivision (f) is a California's residence restriction statute, which limits a parolee convicted of certain enumerated felonies from living within 35 miles of the victim or witness to the crime, if certain criteria are met. The

***David* from pg. 6**

statute provides: "Notwithstanding any other provision of law, an inmate who is released on parole shall not be returned to a location within 35 miles of the actual residence of a victim of, or a witness to, a violent felony as defined in paragraphs (1) to (7), inclusive, and paragraph (16) of subdivision (c) of Section 667.5 or a felony in which the defendant inflicts great bodily injury on any person other than an accomplice that has been charged and proved as provided for in Section 12022.53, 12022.7, or 12022.9, if the victim or witness has requested additional distance in the placement of the inmate on parole, and if the Board of Parole Hearings or the Department of Corrections and Rehabilitation finds that there is a need to protect the life, safety, or well-being of a victim or witness."

Article 1, section 28, subdivision (b) of the California Constitution5 provides certain "rights" to victims of crime, including, inter alia, the rights of privacy, notice of proceedings, and restitution. Subdivision (e) provides: "As used in this section, a 'victim' is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term 'victim' also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated. The term 'victim' does not include a person in custody for an offense, the accused, or a person whom the court finds would not act in the best interests of a minor victim." Section 3053, subdivision (a) provides, "The Board of Prison Terms [succeeded by Board of Parole Hearings6] upon granting any parole to any prisoner may also impose on the parole any conditions that it may deem proper."

The Court then went on to find this language "clear and unambiguous" as to the limitation of the application of § 3003(f) to only a "victim" or "witness." After analyzing related laws, the majority held that § 3003(f) did not apply here, as a matter of law, and that in any event, such a restriction should not have been applied because it

> has no relationship to the crime for which petitioner was convicted, is not related to the deterrence of future criminality, and is not reasonably related to the life, safety, or well being of anyone entitled to the application of such a restriction.

A vigorous dissent claimed that the majority "rewrote" § 3003(f), and that the term "victim" necessarily includes *survivors of murder victims*, because otherwise there would be no restrictions available in murder cases. The dissent suggested that the term "victim" is properly described in Proposition 9 ("Marsy's Law"), and that that definition should attach here.

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The judge always wore a crown when he made rulings that could only be overturned by the "abuse of discretion" standard to let everyone know... "This is it, baby."

PROP. 36 CHALLENGES CONTINUE TO DOMINATE THE LEGAL LANDSCAPE

"ABUSE OF DISCRETION" STANDARD APPLIES FOR APPELLATE REVIEW OF DENIAL OF PROP. 36 RESENTENCING, BUT PETITION FOR RECALL UNDER PC § 1170.18 REQUIRED FIRST

People v. Aparicio

___Cal.4th ___;
CA 4(1); No. D064995
January 5, 2015, on rehearing

In CLN #57, we reported on *Aparicio,* which held, in a published decision, that the "abuse of discretion" standard applies for appellate review of denial of Prop. 36 resentencing. On rehearing, the petitioner raised a new issue, which resulted in this new, superseding opinion.

> In this case, we hold that the abuse of discretion standard applies when reviewing an appeal from a trial court's denial of a petition for resentencing under Penal Code section 1170.126 based on the trial court's finding that release of the petitioner would present an unreasonable risk of danger to public safety. (Undesignated statutory references are to the Penal Code.) We found no abuse of discretion and affirmed the order.

Appellant subsequently sought rehearing arguing section 1170.18, effective November 5, 2014, as part of Proposition 47 (the Safe Neighborhoods and Schools Act) changed the definition of "unreasonable risk of danger to public safety" as it applies to inmates pe-

***Aparicio* from pg. 7**

titioning for recall of their third-strike life sentence under section 1170.126. (See Cal. Const., art. II, § 10, subd. (a) ["An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise."].) We decline to address this new issue and affirm the order without prejudice to appellant petitioning for relief from the superior court under section 1170.18.

The gist of the new decision is that a Third strike offender seeking to have Proposition 47 retroactively applied in his appeal from the denial of his petition for resentencing under the Three Strikes Reform Act (Pen. Code, § 1170.126) must first file a petition for recall in the superior court under PC § 1170.18.

In 1997, Luis Aparicio was sentenced to a life term under the Three Strikes law for a burglary. In 2013, the trial court denied his petition for recall of the sentence under Prop. 36, after finding that Aparicio would present an unreasonable risk of danger to public safety. Aparicio appealed and, in its original published opinion, the Court of Appeal held that the abuse of discretion standard applies when reviewing an appeal from a trial court's denial of a Proposition 36 resentencing petition based on the trial court's finding that petitioner's release would present an unreasonable risk of danger to public safety.

In his petition for rehearing, Aparicio argued that the definition of "unreasonable risk of danger to public safety" in Penal Code section 1170.18 (enacted by Prop. 47) applies to inmates petitioning for recall of their third-strike life sentence. On rehearing, the court's order was affirmed without prejudice to Aparicio petitioning for relief from the superior court under section 1170.18. The Court of Appeal declined to decide Aparicio's Proposition 47 issues, instead concluding that "Proposition 47 requires the filing of a petition for recall under section 1170.18, subdivision (a)." Aparicio may file the appropriate petition and the superior court must decide the threshold question of whether he is eligible for resentencing.

In all other respects, the Court of Appeal reissued its original opinion addressing the standard of review.

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***Cases* from pg. 8**

REVIEW GRANTED SOLICITATION OF MURDER SATIFIES "GREAT BODILY INJURY" DISQUALIFICATION CRITERION OF PROP. 36

Schinkel v. Superior Court

___Cal.App.4th ___;
CA 3; No. C073404
September 12, 2014

___Cal.4th ___;
CA Supreme Ct.; No. S221665
October 15, 2014

On October 14, 2014, the California Supreme Court granted review and hold on *Schinkel v. Superior Court* (2014) 229 Cal.App.4th 935 that we reported in CLN #59.

Briefing deferred pending decision in *Braziel v. Superior Court* (2014) 225 Cal.App.4th 933, review granted 7/30/2014 (S218503/B249830) and *People v. Machado* (2014) 226 Cal.App.4th 1044, mod. 226 Cal. App.4th 1376a, review granted 7/30/2014 (S219819/B249557), which present the following issue: Is an inmate serving an indeterminate term of life imprisonment under the Three Strikes Law (Pen. Code, §§ 667, subds. (b)-(j), 1170.12), which was imposed for a conviction of an offense that is not a serious or violent felony, eligible for resentencing on that conviction under the Three Strikes Reform Act if the inmate is also serving an indeterminate term of life imprisonment under the Three Strikes Law for a conviction of an offense that is a serious or violent felony?

BEING ARMED-WITH-A-FIREARM DURING DRUG OFFENSE PRECLUDES PROP. 36 RELIEF

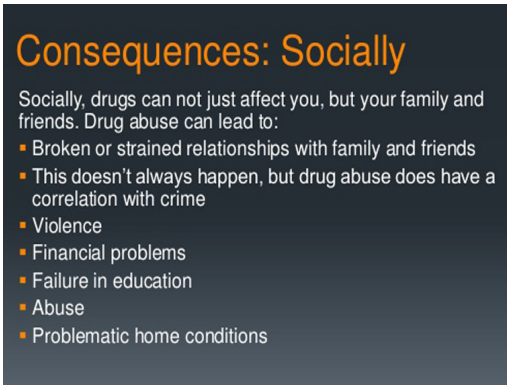
People v. Michael Ayala

CA 4(2); Case No. E061057
January 14, 2015

Michael Ayala raised on appeal the question of whether a conviction for possession of a controlled substance while armed with a firearm can be classified as a violent felony. The answer was yes.

On July 23, 1995, the People charged defendant by information with sale of a controlled substance, methamphetamine (count 1; Health & Saf. Code, § 11379, subd. (a)); possession of a controlled substance, methamphetamine (count 2; § 11377, subd. (a)); carrying a dirk or dagger (count 3; Pen. Code, § 12020, subd. (a)); possession of a firearm by a felon, a .38 revolver (count 4; Pen. Code, § 12021, subd. (a)); possession of a controlled substance, methamphetamine, with a firearm, a colt revolver (count 5; § 11370.1, subd. (a)); cultivating marijuana (count 6; § 11358); possession for sale of a controlled substance, heroin (count 7; § 11351); possession of a controlled substance, heroin (count 8; § 11350, subd. (a)); being under the influence of a controlled substance, heroin (count 9; § 11350, subd. (a)); possession of a controlled substance, heroin (count 10; § 11350, subd. (a)); and possession of a controlled substance, methamphetamine (count 11; § 11377, subd. (a)). The People additionally alleged that with respect to counts 1 and 7, defendant was personally armed with a firearm (Pen. Code, § 12022, subd. (c)). It was additionally alleged defendant had suffered two prior strike convictions (Pen. Code, § 667, subds. (b)-(i)) and two prior prison terms (§ 667.5, subd. (b)).

Defendant's plea agreement reflected he faced a total aggregate term of 260 years to life if convicted of all the charged offenses and allegations. Defendant pled guilty to count 5, possession of a controlled substance, methamphetamine, while armed with a colt revolver. Defendant admitted all alleged prior convictions. In return, all remaining counts, allegations, and enhancements were dismissed. As provided in the plea agreement, the court sentenced defendant to an indeterminate term of 25 years to life.



On January 14, 2014, defendant filed a Penal Code section 1170.126 petition seeking resentencing. On March 24, 2014, the court denied the petition finding that defendant's conviction for possession of drugs while armed with a firearm made him statutorily ineligible for resentencing pursuant to Penal Code section 1170.126.

Upon Ayala's *Wende* appeal, the Fourth District Court of Appeal found no appealable issues and affirmed the superior court ruling below.

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***Cases* from pg. 9**

PROP. 47'S NEW DEFINITION OF "UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY" (PC § 1170.18(C)) DOES NOT APPLY RETROACTIVELY TO AN APPEAL FROM A PROP. 36 RESENTENCING DENIAL

People v. Chaney

___Cal.App.4th ___; CA 3; No. C073949

December 1, 2014

Clifford Chaney was sentenced under the Three Strikes Law to 25 years to life. After the Three Strikes Reform Act (Prop. 36) passed, he petitioned for resentencing, but the superior court denied relief on the basis that he posed an unreasonable risk of danger to public safety. (PC § 1170.126(g).) Chaney appealed and the Court of Appeal affirmed. Soon thereafter, Prop. 47 was enacted, which included a new definition of "unreasonable risk of danger to public safety." (PC § 1170.18(c). That statute provides that "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [Penal Code section 667, subdivision (e)(2)(C)(iv)]." Chaney petitioned for rehearing, arguing that he did not pose an unreasonable risk of danger to public safety under the new definition of that term contained in Prop. 47, which should retroactively apply in his case pursuant to *In re Estrada* (1965) 63 Cal.2d 740.

The appellate court held that PC § 3 provides that "[n]o part of [the Penal Code] is retroactive, unless expressly so declared" and Proposition 47 does not expressly declare that its new definition of unreasonable risk of danger is retroactive. Although *Estrada* recognizes an exception to this rule for statutes that "lessen punishment," the court held that the new definition of unreasonable risk of danger did not lessen punishment because it only "changes the lens through which the dangerousness determinations under the Act are made."

The court left open the question as to *prospective* relief, noting that it was not deciding whether Prop. 47's definition of "unreasonable risk of danger to public safety" applies prospectively to petitions for resentencing under Prop. 36.]

The court began by summarizing the history of Chaney's cases and his current appeal of Prop. 36 resentencing relief denial.

> Chaney has eight strikes: six robberies with arming enhancements and two first degree burglaries. These eight strikes arose from two separate incidents in which defendant and two others robbed the same chemical laboratory and imprisoned 20 employees.
>
> Defendant's current offense for which he was sentenced to prison for 25 years to life in 2005 was driving under the influence of alcohol (DUI) with prior convictions for three other DUI's, two of which resulted in injuries. When he committed the current DUI, he was on two grants of probation. Following his current DUI conviction, defendant explained he "drinks too much" and is "emotionally weak."

In this appeal, defendant challenges the trial court's denial of his petition for resentencing under the Three Strikes Reform Act of 2012 (the Act). Under the Act, "prisoners currently serving sentences of 25 years to life for a third felony conviction which was not a serious or violent felony may seek court review of their indeterminate sentences and, under certain circumstances, obtain resentencing as if they had only one prior serious or violent felony conviction." (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1286 (*Kaulick*).) If a defendant such as the one here satisfies certain criteria, "the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (Pen. Code, § 1170.126, subd. (f).)

The court based the denial on its finding that "[t]he [c]ourt cannot in good conscience say that you do not pose an unreasonable risk to the public safety if released. The [c]ourt is not convinced that you would not re-engage in alcohol use and place the public at risk." The court cited defendant's numerous DUI's that caused injuries, stating drinking was the root of his criminality.

On appeal, defendant contends: (1) the court erred by allowing his petition to be heard by a different judge than the one who originally sentenced him; (2) the court erred by not obtaining a supplemental

***Chaney* from pg. 10**

probation report; and (3) the court abused its discretion in denying the petition.

We hold: (1) defendant forfeited his right to have the original sentencing judge hear his petition; (2) no supplemental probation report was required; and (3) the court acted well within its discretion in denying the petition.

As to Chaney's statutory right to have the original sentencing judge hear his Prop. 36 petition, the appellate court held that he had forfeited that right when brought before a different judge, but failed to object.

In a similar context, our court has held that where a defendant does not object to sentencing by a judge other than the one who accepted his plea, the defendant has forfeited his right to later contend he was entitled to have the original judge sentence him. (*People v. Serrato* (1988) 201 Cal.App.3d 761, 764-765 [defendant waives his right to have the same judge who accepted the plea also sentence him when he fails to object to a different judge as the sentencing judge in the trial court]; *In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1 ["correct term is 'forfeiture' rather than 'waiver' "].)

As to Chaney's claim on appeal that he had been entitled to a supplementary probation report prior to resentencing, the appellate court held that by failing to request it at the time, he had forfeited that "right." However, in any event, the issue was moot because the trial judge declined to resentence Chaney.

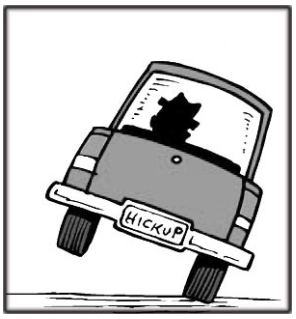
Defendant contends the court erred in failing to obtain a supplemental probation report before denying his petition. He acknowledges that this subject "was not raised by the prosecutor, defense counsel, or the court at any time."

The People contend defendant forfeited any right to such a report, citing *People v. Johnson* (1999) 70 Cal.App.4th 1429. In Johnson, the Fourth District Court of Appeal held that a "defendant has waived his right to object to the absence of a supplemental [probation] report by failing to do so in the trial court." (Johnson, at p. 1433.) ...

Here, because the preparation of a supplemental probation report was not required, there did not have to be a written or oral stipulation of waiver. California Rules of Court, rule 4.411(c) provides: "The court shall order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared." The hearing here was not a "sentencing proceeding[]." "There are . . . three . . . determinations at issue under Penal Code section 1170.126, subdivision (f): First, the court must determine whether the prisoner is eligible for resentencing; second, the court must determine whether resentencing would pose an unreasonable risk of danger to public safety; and third, if the prisoner is eligible and resentencing would not pose an unreasonable risk of danger, the court must actually resentence the prisoner." (Kaulick, supra, 215 Cal. App.4th at p. 1299.)

The trial court found that defendant's release would pose an unreasonable risk of danger to public safety, so it never reached the third step of resentencing him. Thus, the court was not required to obtain a supplemental probation report, and the rule of forfeiture in Johnson applies here. (People v. Johnson, supra, 70 Cal.App.4th at p. 1433....)

Finally, the appellate court found that the superior court's refusal to resentence was "well within its discretion."



Defendant contends the court abused its discretion in denying his petition. Included in this contention are defendant's arguments that: (a) the court shifted the burden of proof to him and did not make the required finding; (b) there was no substantial evidence that resentencing him posed an unreasonable risk of danger to public safety; and (c) the court failed to consider conditions of resentencing to reduce his risk upon release.

The burden of proof does fall to the People, and the court found that the People had properly propounded its evidence in support of that proof.

Consistent with this position (and fixing the standard of proof at preponderance of evidence), at the hearing that took place after defendant established he was eligible for resentencing, the court began by asking the People to present evidence and their witnesses. At the conclusion of their evidence and witnesses, the People argued to the court that defendant "poses an unreasonable risk of danger to the public if he's released" and then the "People rest[ed]." Thus, contrary to defendant's contention, the court placed the burden of proof on the People.

Finally, regarding Chaney's complaint that the superior court simply abused its discretion in denying him resentencing relief, the appellate court

***Chaney* from pg. 11**

found that the lower court had supported its decision with adequate rationale.

> Defendant's argument is based on his belief that the court should not have found that his prior alcohol abuse made him a current danger to public safety. The problem with defendant's argument is a rational basis existed for the court to believe that defendant's prior alcohol abuse and current state was predictive of his current dangerousness. Although defendant points out that there was no evidence he had used alcohol for the last eight years, there was also no evidence presented that defendant completed any alcohol abuse programs or otherwise rehabilitated himself from his alcoholism. And, as the court noted, alcoholism was the root of his criminality.
>
> When defendant was released from prison following his sentence for the laboratory robberies in April 1995, only four months later, in August 1995, defendant drove his car under the influence of alcohol, colliding head-on with another car, injuring three people in that car. He was sentenced to prison for four years. Within a few years of his release from prison, in October 2002, he again drove his car under the influence of alcohol into the wall of a restaurant causing the partial collapse of a wall, injuries to the restaurant cook, and destruction of property. Two years later, in March 2004, he drove his car under the influence of alcohol yet again. Despite spending time in jail and having his license revoked, in June 2005, only months after being released on his last DUI and while still on probation with a revoked license, defendant committed his current DUI offense, which landed him in prison for 25 years to life. Thus, defendant's pattern is a return to alcoholism when free in society with dangerous consequences. Defendant has not shown the court's exercise of its discretion was an abuse.

Accordingly, the superior court's denial of Prop. 36 sentencing relief was affirmed.

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***Cases* from pg. 12**

DEFINITION OF "UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY" CONTAINED IN PROP. 47 DOES NOT APPLY TO RESENTENCING PROCEEDINGS UNDER THE THREE STRIKES REFORM ACT (PROP. 36)

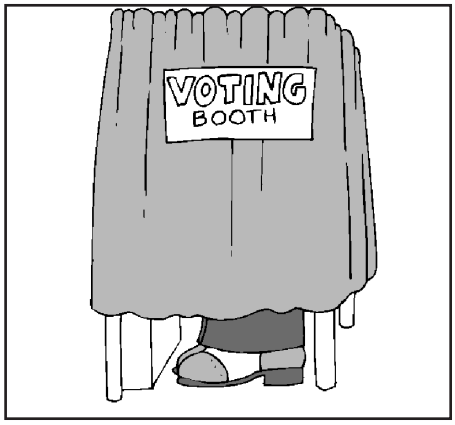
People v. Valencia

___ Cal.App.4th ___; CA 5, Case No. F067946
December 16, 2014

David Valencia, who was serving 25-life sentence under the Three Strikes law, petitioned for Prop. 36 resentencing after passage. Although the trial court found that his current conviction was not a serious or violent felony, the court denied his petition after concluding that Valencia posed an unreasonable risk of danger to public safety.

While Valencia's appeal was pending, the voters enacted Proposition 47. Among other things, Proposition 47 added Penal Code section 1170.18, subdivision (c), which provides: "As used throughout *this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of [Penal Code section 667, subdivision (e)(2)(C)(iv)]." Valencia argued that the new definition of unreasonable risk of danger to public safety contained in Proposition 47 should apply to him and that under that narrower definition his petition should be granted.

The appellate court disagreed. Although the "As used throughout *this Code* " language unambiguously refers to the entire Penal Code, the Court of Appeal concluded, after applying rules of statutory construction, that voters did not intend the new definition of "unreasonable risk of danger to public safety" in section 1170.18 to apply to that phrase as it appears in the Reform Act (Pen. Code, § 1170.126, subd. (f).) The ballot materials for Proposition 47 did not alert voters that the new definition in section 1170.18, subdivision (c) would apply to resentencing proceedings under the Reform Act, or otherwise indicate that Proposition 47 had any impact on the Reform Act. "Voters cannot intend something of which they are unaware."



TRIAL COURT IS NOT REQUIRED TO OBTAIN A SUPPLEMENTAL PROBATION REPORT PRIOR TO DETERMINING THAT RESENTENCING A THIRD STRIKE OFFENDER WOULD POSE AN UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY

People v. Franco

___Cal.App.4th ___; CA 5; No. F067223
December 22, 2014

Robert Franco, serving a life Three Strikes sentence for possession of heroin, petitioned for resentencing under Prop. 36. Although he qualified for a hearing, the trial court denied the petition, finding Franco's release posed a risk of danger to the public. He appealed, arguing the trial court erred in not obtaining a supplemental probation report prior to denying his petition.

Notably, Franco did not *request* a supplemental probation report prior to the hearing on his petition or object to proceeding without one. Where a defendant is not eligible for probation, his failure to request a supplemental probation report forfeits his right to raise the absence of such a report on appeal (but see *People v. Dobbins* (2005) 127 Cal.App.4th 176). Even so, referral of the matter to the probation officer is discretionary where the defendant is ineligible for probation, unless restitution must be determined (see, e.g., PC § 1203 (g); Cal. Rules Court, rule 4.411(b).) Franco was ineligible for probation even as a *second* strike offender (PC §§ 667(c)(2), 1170.12(a)(2)). Therefore, the trial court had no statutory duty to obtain a supplemental probation report.

In 1997, Franco was convicted of possession of heroin and was found to have suffered two prior strike convictions. He was sentenced to 25 years to life. In what is reminiscent of a lifer parole board hearing, Franco was denied resentencing relief by the superior court.

***Franco* from pg. 13**

On February 25, 2013, defendant filed a petition to recall his sentence and be resentenced pursuant to the Act. He represented that his strike record consisted of two 1990 convictions for first degree burglary and a 1992 conviction for attempted robbery, and asked to be resentenced to a total term of 96 months (the upper term for his commitment offense, doubled pursuant to § 667, subd. (e)(1), plus one year for each of his prior prison terms pursuant to § 667.5, subd. (b)).

The People opposed the petition. They argued defendant's release would pose an unreasonable risk of danger to public safety. They pointed to defendant's nine adult convictions, three of which were strikes (defendant also had two juvenile adjudications for strike offenses); the facts of defendant's strike offenses; the "continuous life of crime" defendant led before and after his strike convictions; and defendant's disciplinary record and record of rehabilitation while incarcerated. The People represented defendant had a rules violation report from July 2000, in which he and another inmate were engaged in mutual combat; a rules violation report from October 2009, in which defendant was involved in a fight with his cellmate, during which defendant stabbed the cellmate with a pencil and then a pen; and a rules violation report from January 2012, in which defendant was involved in a fight with another inmate. The People also pointed to a prison record in which defendant admitted he had used heroin since the age of 14 and considered himself a drug addict, yet no record showed he attended any drug or alcohol classes. The People located prison "chronos" showing defendant participated in adult basic education, GED, and graphic arts classes, but found no record for vocational or job training or any work history. The People also pointed to defendant's lack of parole plans.

The superior court concerned itself with whether Franco's in-prison violent disciplinaries, which were not referred for prosecution, nonetheless amounted to sufficient evidence to deny resentencing.

The court noted it was allowed to consider the inmate's current position, and whether he presented an "extended" danger to society. It stated: "If we look at [defendant's] current criminal history, there is an indication that there was a … rule violation in the year of 2000 related to physical violence and confrontation in the institution. There was an additional [rules violation report] in 2009 that causes the Court some grave concern in that that was an assault where he actually inflicted injury on another individual using a pen or a pencil. [¶] My concern about that is that even after that assault on someone else, there appeared to have been a … rule violation, but there is not any indication that the institution felt it was sufficiently significant to warrant criminal prosecution." After a discussion between the court and prosecutor about why some in-prison offenses were referred for prosecution and others were not, the court stated:

"[I]n light of the fact that there is the indication from his … file that he actually stabbed a person with a pencil or a pen, I am going to at this point deny the petition under 1170.126.

"[Defense counsel], at this point, without further foundation for making a determination as to future inappropriate or unnecessary risk or danger that he represents, since this incident occurred in 2009, the Court has some concerns and will deny the petition at this time based on those concerns."

In the unpublished portion of the decision, the appellate court ruled that the proper standard of proof was "abuse of discretion," and that the trial court in fact did not abuse its discretion. The appellate court further noted that the burden of proof by the preponderance of the evidence applies to *proof of the facts*, not of the trial court's ultimate determination

The appellate court also ruled that section 1170.18, subdivision (c), enacted pursuant to Prop. 47, does not modify section 1170.126, subdivision (f). This is the Prop. 47 section creating a new resentencing provision — section 1170.18 — by which a person currently serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Prop. 47. (§ 1170.18(a).) A person who satisfies the criteria in subdivision (a) of section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor … unless the court, in its discretion, determines that resentencing the petitioner would pose an

Franco **from pg. 14**

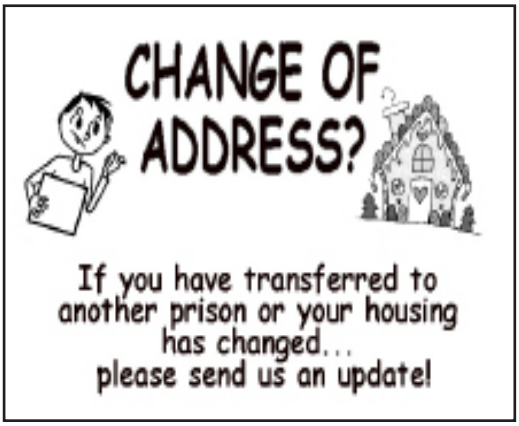
unreasonable risk of danger to public safety." (*Id*., subd. (b).

The court went to analyze the statutory language.

> Hidden in the lengthy, fairly abstruse text of the proposed law, as presented in the official ballot pamphlet — and nowhere called to voters' attention — is the provision at issue in the present appeal. Subdivision (c) of section 1170.18 provides: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." Section 667, subdivision (e)(2)(C)(iv) lists the following felonies, sometimes called "super strike" offenses. ...
>
> The question is whether section 1170.18, subdivision (c) now limits a trial court's discretion to deny resentencing under the Act to those cases in which resentencing the defendant would pose an unreasonable risk he or she will commit a new "super strike" offense. Defendant says it does. The People disagree. We agree with the People. ...
>
> Proposition 47 and the Act address related, but not identical, subjects. As we explain, reading them together, and considering section 1170.18, subdivision (c) in the context of the statutory framework as a whole (see *People v. Acosta,* supra, 29 Cal.4th at p. 112; *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659; *In re Cindy B.* (1987) 192 Cal.App.3d 771, 781), we conclude its literal meaning does not comport with the purpose of the Act, and applying it to resentencing proceedings under the Act would frustrate, rather than promote, that purpose and the intent of the electorate in enacting both initiative measures (see *People v. Disibio* (1992) 7 Cal. App.4th Supp. 1, 5). ...
>
> In light of the foregoing, we cannot reasonably conclude voters intended the definition of "'unreasonable risk of danger to public safety'" contained in section 1170.18, subdivision (c) to apply to that phrase as it appears in section 1170.126, subdivision (f), despite the former section's preamble, "As used throughout this Code …." Voters cannot intend something of which they are unaware. ...
>
> Accordingly, Proposition 47 has no effect on defendant's petition for resentencing under the Act. Defendant is not entitled to a remand so the trial court can redetermine defendant's entitlement to resentencing under the Act utilizing the definition of "'unreasonable risk of danger to public safety'" contained in section 1170.18, subdivision (c)

Finally, as to his claim to the *right* to have a supplemental probation report (which Franco felt might ameliorate his prior record and enhance his chances for resentencing), the appellate court concluded:

> On the merits, however, we do not find a trial court has a duty to obtain a supplemental probation report. Referral of the matter to the probation officer for investigation and report is mandatory when a defendant convicted of a felony is eligible for probation (§ 1203, subd. (b)(1); Cal. Rules of Court, rule 4.411(a)), but discretionary when the defendant is ineligible for probation, except where the amount of a restitution fine must be determined (§ 1203, subd. (g); rule 4.411(b).



***Cases* from pg. 15**

3-STRIKER'S EXTENSIVE RECORD OF PRIORS DOOMS RESENTENCING DECISION

People v. Douglas Hall

CA 2(6) Case No. B252482
January 5, 2015

Douglass Hall was convicted of drug possession in 1999, and, based on his strike history, was sentenced to 25-life. (He had prior strike convictions forburglary (§ 459), involuntary manslaughter (former § 192.2, now § 192, subd. (b)), and robbery (Or. Rev. Stats., § 164.405).) In December 2012, he petitioned for resentencing under Prop. 36, because his third strike was not serious or violent. However, when it came to his resentencing hearing, he was turned down by the superior court, based on his extensive priors. He appealed, but the appellate court affirmed the superior court.

The superior court first looked at negative factors that portended danger to society.

The court found that numerous factors weighed in favor of a finding that resentencing appellant would pose an unreasonable risk of danger to public safety. In 1979, appellant was charged with attempted murder and was convicted of second degree robbery. He was accompanied by others, yet was the only one who possessed a gun and fired it. Although appellant testified at the hearing that he only meant to frighten his victims, the court found this did not diminish the fact that he actually fired the gun.

In 1983, appellant was convicted of involuntary manslaughter pursuant to a plea bargain. The court found the circumstances of the crime were "particularly disturbing and implicate serious public safety concerns," in that appellant escalated the situation that led to his victim's death by arming himself with a large butcher knife. Although appellant testified at the hearing that he had acted in self-defense, the evidence indicated that appellant had inflicted five stab wounds to the front of the victim's body and six to the back, three of which were lethal.

Appellant committed additional theft and drug-related crimes in 1983 and 1993. In 1997, he was convicted of committing battery on a law enforcement officer. The following year, he was convicted of carrying a concealed dirk or dagger (former § 12020). Less than a year later, he was convicted of unlawful possession of a controlled substance (Health & Saf. Code, § 11350). The court noted that "while any one of the crimes may seem 'remote' to the year 2013, what is striking to the court is the continuous criminal conduct from 1978 up through the conviction on April 12, 1999."

The superior court was also entitled to consider Hall's prison disciplinary history.

The court found appellant's disciplinary record while in custody also weighed heavily in favor of a finding that he posed an unreasonable risk of danger to public safety. Appellant had a total of 19 disciplinary incidents, three of which involved violence. In 1999 and 2006, he committed battery on other inmates. In 2009, he threw a cup at a correctional officer. Two months later, he challenged a correctional officer to a fight and had to be forcibly immobilized.

Hall from pg. 16

Finally, the superior court weighed factor favoring resentencing.

> The court also considered various factors that weighed against a finding that appellant posed an unreasonable risk of danger to public safety. The court noted that appellant had taken positive steps toward rehabilitation and had obtained certificates of completion in math and reading courses. The court also noted appellant's receipt of satisfactory reviews, and the time gaps between his disciplinary incidents. Appellant's family support and lack of gang affiliation were additional mitigating factors.

On balance, the superior court concluded that negative factors outweighed positive factors, and that the People had met their burden of proof.

> The court ultimately found, however, that the People had met their burden of proving by a preponderance of the evidence that resentencing appellant would pose an unreasonable risk of danger to public safety.

In its legal analysis, the appellate court was quite succinct.

> Appellant contends the trial court erred in denying his petition for resentencing under the Act. He claims the court incorrectly found that resentencing him under the Act would pose an unreasonable risk of danger to public safety, as contemplated in subdivision (f) of the statute. We disagree.
>
> The Act, adopted by the voters pursuant to Proposition 36, changed the three strikes law by reserving a life sentence for cases in which the current crime is a serious or violent felony or the prosecution has pleaded and proved an enumerated disqualifying factor. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) The Act also allows an inmate to file a petition for recall of sentence, and request resentencing, if the inmate is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony. (§ 1170.126, subd. (b).) If the inmate is eligible for resentencing (id. at subds. (e), (f)), the trial court shall resentence the inmate unless it determines, in its discretion, that resentencing would pose an unreasonable risk of danger to public safety. (Id. at subd. (f).)
>
> "In exercising its discretion in subdivision (f), the court may consider: (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)
>
> The People bear the burden of showing by a preponderance of the evidence that resentencing a defendant under the Act would pose an unreasonable risk of danger to public safety. (*People v. Superior Court* (Kaulick) (2013) 215 Cal.App.4th 1279, 1305.) We review the ruling for an abuse of discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony,* at pp. 376-377.)
>
> Appellant's opening brief ignores this standard of review. He instead urges us to do exactly what we cannot do – substitute our judgment for that of the trial court. He argues that certain factors support findings that are contrary to those of the trial court, yet fails to demonstrate that the court failed to consider these factors in reaching its decision. He also fails to establish that these factors effectively compel the opposite finding, such that the court's ruling is "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra*, 33 Cal.4th at p. 377.) Because appellant fails to meet this burden, the order must be affirmed. (*Ibid.*)
>
> The judgment (order denying petition for resentencing) is affirmed.

"Mine was a 'Crime of Passion' I stole a load of chocolate!"

***Cases* from pg 17**

FELON-IN-POSSESSION IS AN OFFENSE THAT BARS PROP. 36 RELIEF

People v. Hicks

CA 3 Case No. C073357
November 6, 2014

Tyrea Hicks was convicted of felon-in-possession of a firearm in 2008 and sentenced to 25-life. He later petitioned under Prop. 36 for resentencing, arguing that this was not a disqualifying offense, or, even if it were, that it had not been adequately factually proven. On appeal of the sentencing court's determination that the crime precluded any application of Prop. 36 relief, the appellate court held that felon-in-possession *was* a preclusive crime and that facts in the Court of Appeal opinion below appealing the conviction more than adequately supported this finding.

The facts underlying defendant's current sentence, as summarized by this court in its opinion in defendant's appeal from his conviction, were as follows:

"When parole agents and Sacramento police officers went to an apartment complex to look for . . . a parolee at large, they saw defendant, his half brother Edward . . . and friend Joseph . . . by the front gate . . . . As the agents and officers approached, defendant took a clear plastic bag from his sweatpants and threw it away. Defendant was frisked and found in possession of five .380-caliber bullets. An officer then retrieved the bag and discovered it contained rock cocaine.

"The apartment complex manager told [the parole agent] and [the officer] that defendant and the two men with him were there to visit the resident in apartment 6. Going up to the apartment, officers found another baggie containing rock cocaine at the top of the stairs.

"The tenant in apartment 6 . . . consented to a search of the apartment. Inside, officers found a backpack containing a black sweatshirt and a loaded .380 pistol.

"Valencia Brooks, who had been in apartment 6 . . . , told [the officer] that defendant had brought the backpack into the apartment and set it down. At trial, Brooks denied making this statement, testifying instead that she did not know who brought the backpack into the apartment and did not even see defendant enter the apartment.

***Hicks*-from pg. 18**

"Defendant's friend . . . testified defendant's half brother, Edward, had the backpack all day and carried it into apartment 6. . . . But a prosecution investigator testified that . . . [defendant's friend] told the investigator that the backpack belonged to defendant, who wore it during the day and then left it in [the tenant's] apartment the day it was seized by agents and officers. . . .

"Defendant's half brother, Edward, testified . . . [he] was wearing a hooded sweatshirt and carrying the backpack, gun, and bullets. As they approached the complex, Edward took off the sweatshirt and put it in his backpack. Defendant told Edward that some ammunition had dropped from the sweatshirt, but Edward continued into the apartment complex. When Edward entered [the tenant's] apartment, the sweatshirt and gun were inside the backpack, which he left in the apartment . . . [I]t was defendant's friend . . . who threw the plastic baggie . . . .

"Defendant testified that, when the five bullets fell from his half brother's sweatshirt, defendant picked them up. He meant to return the bullets to Edward . . . . [T]he backpack with the gun belonged to Edward and that defendant never entered [the] apartment . . . . " (*People v. Hicks* (Dec. 17, 2009, C060383) [nonpub. opn., pp. 2-4].)

The appellate court, after thorough consideration, found that being armed in the commission of an offense was a disqualifying factor for Prop. 36 relief.

Defendant argues that a court considering a petition for resentencing is precluded from finding the defendant was armed during the commission of the offense if the only current felony conviction was being a felon in possession. He claims there must be an underlying felony to which the arming is "tethered."

Defendant would be correct if we were concerned with imposing an arming enhancement -- an additional term of imprisonment added to the base term, for which a defendant cannot be punished until and unless convicted of a related substantive offense. (*People v. Dennis* (1998) 17 Cal.4th 468, 500.) In *People v. Bland* (1995) 10 Cal.4th 991, on which defendant relies, the California Supreme Court held that the arming enhancement under section 12022 "requires both that the 'arming' take place during the underlying crime and that it have some 'facilitative nexus' to that offense." (*Bland*, at p. 1002.) The court concluded that "a defendant convicted of a possessory drug offense [is] subject to this 'arming' enhancement when the defendant possesses both drugs and a gun, and keeps them together, but is not present when the police seize them from the defendant's house." (*Id*. at p. 995.) Under the reasoning in Bland, for a defendant to be "armed" for purposes of section 12022's additional penalties, he or she must have a firearm "available for use *to further the commission of the underlying felony.*" (*Bland*, at p. 999, italics added.) "[W]hen the underlying felony is a continuing offense, it is sufficient if the defendant has a gun available at any time during the felony to aid in its commission." (*People v. Becker* (2000) 83 Cal.App.4th 294, 297.)

Having a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon. Thus, a defendant convicted of violating former section 12021 does not, regardless of the facts of the offense, risk imposition of additional punishment pursuant to section 12022, because there is no "facilitative nexus" between the arming and the possession. However, unlike section 12022, which requires that a defendant be armed "in the commission of" a felony for additional punishment to be imposed (italics added), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm "during 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. (*People v. Bland*, *supra,* 10 Cal.4th at p. 1002 [" 'in the commission' of" requires both that " 'arming' " occur during underlying crime and that it have facilitative nexus to offense].)

Following this reasoning, defendant was armed with a firearm

***Hicks*- from pg 19**

during his possession of the gun, but not "in the commission" of his crime of possession. There was no facilitative nexus; his having the firearm available for use did not further his illegal possession of it. There was, however, a temporal nexus. Since the Act uses the phrase "[d]uring the commission of the current offense," and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the plain language of the Act disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm.

Here, the trial court stated it found beyond a reasonable doubt that defendant was personally armed with the firearm he was convicted of possessing. There was sufficient evidence to support this finding based on the initial statements of the two recanting witnesses (Valencia Brooks and defendant's friend) that it was defendant who had the backpack with the gun inside and put it in the tenant's apartment.

The appellate court concluded that its own prior Opinion on direct appeal was part of the record the superior court could rely on when making its disqualification decision. In addition, the appellate court concluded that Hick's possession of the gun easily met "felon-in-possession" requirements, even though he did not use the gun in the underlying offense.

CLN readers should take note of the harsh treatment they can expect to receive if, after having been paroled from an earlier felony, they subsequently choose to merely "possess" a deadly weapon.

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NEGATIVE PRISON DISPLINARY RECORD DOOMS PROP. 36 RESENTENCING RELIEF

People v. Khrone

CA 3 Case No. C075881
January 27, 2015

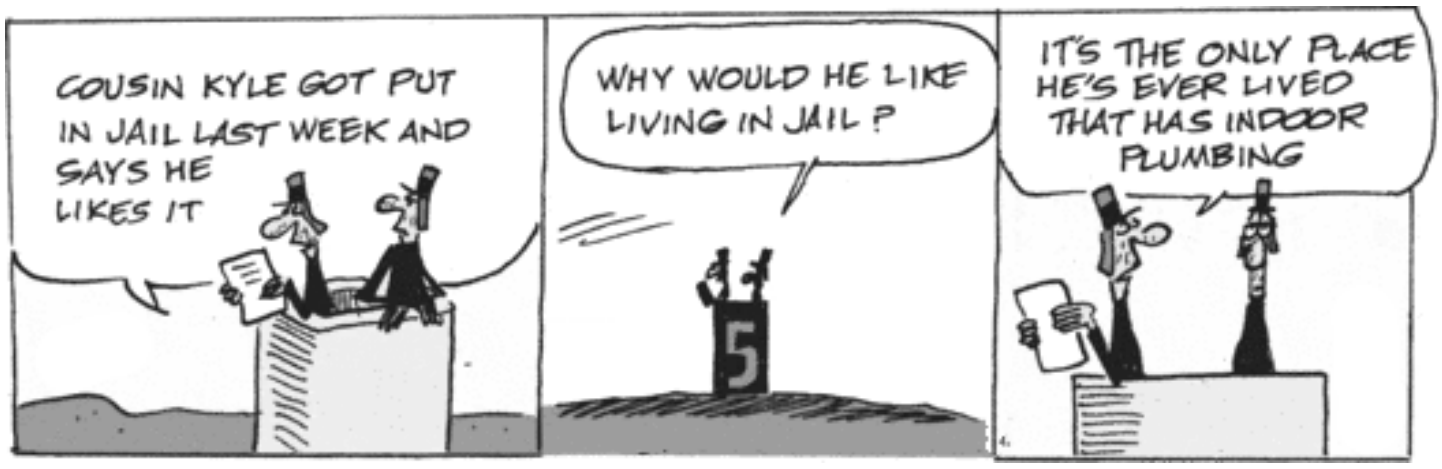
This case informs Third-Strikers seeking Prop. 36 resentencing that a bad prison disciplinary record can influence a resentencing denial.

Theodore Khrone appealed from the trial court's denial of his Prop. 36 petition for resentencing. He contended the trial court abused its discretion when it found that he posed an unreasonable risk of danger to public safety if resentenced.

Khrone is serving 25-life for a 2005 conviction for two counts of battery by a prisoner on a nonconfined person. (PC § 4501.5.) The 2005 sentence runs consecutive to a 2001 sentence of 35 years to life for burglary with two strikes. Defendant's criminal record encompasses 30 years and includes five separate state prison terms for felony convictions and two parole violations.

Because his "current" offense is not a listed disqualifying one, he received a resentencing hearing. At that hearing, the Warden related Khrone's in-prison disciplinary record as well as his record of programming.

At defendant's hearing on his section 1170.126 petition, associate warden Harold Wagner testified to defendant's disciplinary record during his recent incarceration. Defendant had rules violation reports for: delaying a peace officer in 2013; fighting in 2012; threatening staff in 2011; possession of altered personal property in 2010; refusing a cellmate in 2009; battery on a peace officer and refusing a direct order in 2008; two violations for obstructing a peace officer in 2005; battery on a peace officer resulting in the current conviction, destruction of state property, possession of inmate manufactured alcohol, two violations for each refusing a direct order and refusing to obey orders,



Khrone from pg 20

and for over familiarity, all in 2003; refusal to obey orders in 2002; and willfully delaying an officer and refusal to obey orders in 2001.

Defendant was in a level four classification, reserved for the most dangerous inmates. Defendant's classification score was 141; 60 was the minimum score for level four classification. Inmates serving indeterminate life terms are not necessarily classified level four.

Defendant's file also contained documents reflecting positively on his behavior while incarcerated, reflecting his participation in continuing education, anger management courses and therapy, leadership at Narcotics Anonymous, religious groups, work, and trade courses.

The Prosecutor also presented to the Court.

The prosecutor argued that defendant's high security level indicated unreasonable risk, and signaled that defendant continued to commit crimes while in prison, including the current offense of battery on the guards and other rule violations not resulting in convictions, including fighting, inciting, and obstructing. Defense counsel argued that the "unreasonable risk" classification was unconstitutionally vague. The evidence did not contain a "threat assessment" or "psychological testimony," so there was no way of knowing whether defendant was a threat. He added that threat should be measured relatively as to other inmates and that defendant's rule violations (listed ante) were minimal.

After hearing the evidence and argument on the petition, and asking follow-up questions during argument, the trial court ruled:

"Troublesome case and I would make the following findings:

"If I were to look solely at the custody record of the defendant, it might be difficult to define that it's an unreasonable risk, but the issue that has not been seriously in my view argued, which is the most compelling to this court, is the criminal conviction which occurred while the defendant was in custody which is the subject matter of this hearing. It certainly cannot be underestimated that the conviction occurring for a charge of battery on a peace officer is an extremely serious offense while committed by an inmate. And to me, that is a highly probative item for the Court to base [its] ruling upon. Because that crime has been charged and proved beyond any reasonable doubt, it is not subject to any kind of interpretation. It's a very serious offense, in my judgment, to attack a guard if you're an inmate. I can't think of anything that's more serious, really, and based upon that, I'm going to find that the granting of the motion to re-sentence would constitute an unreasonable risk to the public, safety of the public and therefore, the motion to resentence is hereby denied."

Khrone contended on appeal that the trial court abused its discretion when it found that he posed an unreasonable risk of danger to public safety if released, because it relied "solely" on the current offense in finding unreasonable risk. The appellate court disagreed, and affirmed the superior court.

"In exercising its discretion in subdivision (f), the court may consider: (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Defendant notes that the trial court had much information available to it, as we have described at length ante, the consideration of which is contemplated by section 1170.126, subdivision (f), and yet it focused on the nature of the 2005 case. He adds that the court declined to review the probation report prepared in the 2005 case, and argues that it contained evidence of defendant's denial that he hit the guards as well as proof that the guards were not injured.

First, we note that the trial court heard evidence of all the factors described by defendant as well as argument discussing certain points made by counsel. The record shows full consideration of the evidence presented, even though the trial court may have emphasized the 2005 offense in explaining the reasons for its finding of unreasonable risk.

Second, even assuming the record reflects the 2005 case took center stage in the trial court's finding--and resulted in diminished consideration of other appropriate factors--we find no abuse of discretion. Under the plain language section 1170.126, the trial court may consider certain factors, but it is not mandated to consider any of them. It may consider any evidence it "determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g)(3).) On this record, where the relevant statutory considerations were presented as evidence at a hearing and then argued to the trial court, that court was well within its discretion to find the facts surrounding defendant's current offense were the "most compelling" factors to its determination of unreasonable risk.

***Cases*- from pg 21**

PROP. 36 PETITIONER NOT ENTITLED TO JURY TRIAL, OR PROOF BEYOND A REASONABLE DOUBT, ON ISSUE OF WHETHER RESENTENCING POSES AN "UNREASONABLE RISK OF DANGER TO THE PUBLIC"

People v. Losa

___ Cal.App.4th ___; CA 5 Case No. F067279
December 19, 2014

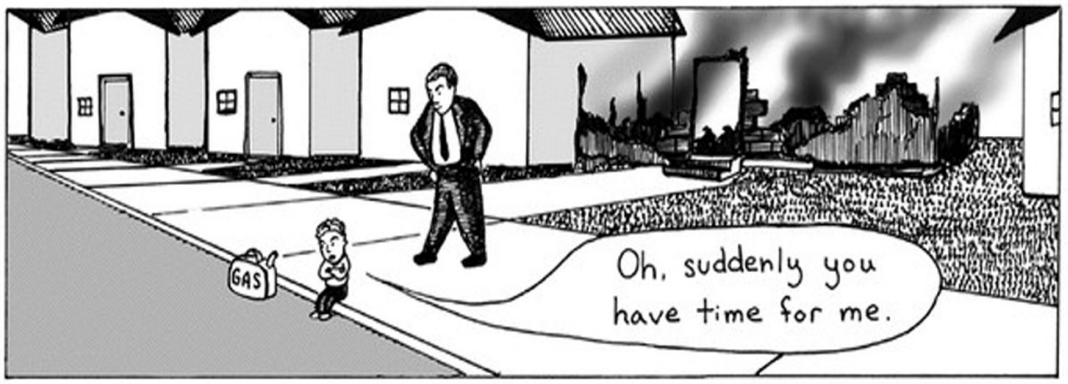
Douglas Losa, who had four prior armed robbery convictions, including reoffenses following earlier paroles, received a 25-life Three Strikes term for felony drug possession, which was not serious or violent. He also had a long laundry list of serious in-prison disciplinaries. He petitioned for Prop. 36 resentencing. The trial court denied his petition, finding he would be an unreasonable risk of danger to the public if resentenced.

Losa argued unsuccessfully on appeal that equal protection requires he be afforded a jury trial and application of a beyond a reasonable doubt standard for a "risk of danger" finding, as these rights are applied to defendants who are being initially sentenced. However, the court found that Losa is not similarly situated to defendants entering the prison system or to those who have completed their terms but are being subjected to additional confinement, such as sexually violent predators. He was properly convicted and sentenced under the Three Strikes law in effect at that time. Although he may seek a reduction of his sentence, the court may deny resentencing based on a "risk of danger" finding under a preponderance of the evidence standard. Losa is not subject to indefinite confinement based on this "dangerousness" finding, but on his initial, valid conviction and sentence. Because he is not similarly situated with defendants facing initial sentencing with respect to the purpose of the law, there is no denial of equal protection.

In the published portion of this case, the appellate court dealt with the equal protection question.

> Defendant argues "equal protection requires the application of the same standard for recalled sentences as defendants who are currently being sentenced." (Some capitalization omitted.) We reject his claim.
>
> "The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, "'[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."' [Citation.]" (*People v. Brown* (2012) 54 Cal.4th 314, 328; accord, *People v. Wutzke* (2002) 28 Cal.4th 923, 943.)

We cannot tell whether defendant is saying he is similarly situated to persons who are being newly sentenced for their current offenses under the three strikes law as amended by the Act, in which case there are constitutional and statutory pleading and proof requirements (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); *Apprendi, supra,* 530 U.S. 466); or persons who complete their prison terms but are then subject to further commitment as mentally disordered offenders (§ 2962 et seq.), sexually violent predators (Welf. & Inst. Code, § 6600 et seq.), or under the juvenile extended detention scheme (id., § 1800 et seq.). It does not matter, because defendant is not similarly situated to any of those persons. (*Kaulick, supra*, 215 Cal.App.4th at p. 1306; see *People v. Wutzke, supra*, 28 Cal.4th at p. 944.) Defendant is not merely entering the prison system; rather, he has been confined there for a substantial period of time. Nor is he someone who has completed his sentence and now is being subjected to additional confinement. "Instead, [defendant] was properly sentenced to prison for an indefinite term because he was properly convicted (beyond a reasonable doubt, by a unanimous jury) of a third felony after he had commit-



Losa **from pg 22**

ted two prior serious or violent felonies. It was his third felony conviction which, pursuant to the law in effect at the time, subjected him to an indeterminate sentence. Now, due to the adoption of the Act, [defendant] may be entitled to a downward modification of this indeterminate term to a determinate second strike sentence. That he may be denied such downward modification due to a finding of dangerousness based on a preponderance of the evidence does not mean that he would be subjected to indefinite confinement based on this finding. He is subject to the indeterminate term due to his original third strike sentence; the dangerousness finding would simply deny him a downward modification. This process does not deny [defendant] his constitutional right to equal protection of the law." (*Kaulick, supra*, at p. 1306, fn. omitted.)

In the unpublished portion of the opinion, the appellate court reviewed Losa's claims of evidentiary insufficiency to support the superior court's denial, but denied his petition upon finding sufficient evidence at the preponderance of the evidence proof standard.

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DEFENDANT "ARMED WITH A FIREARM" DURING COMMISSION OF HIS CURRENT OFFENSE NOT ELIGIBLE FOR PROP. 36 RESENTENCING

People v. Mamea

CA 5 Case No. F067261
November 26, 2014

John Mamea, serving 52-life in prison for three felonies that were neither violent nor serious, filed a Prop. 36 petition to recall his sentence. The superior court determined defendant was ineligible for resentencing and denied the petition. Mamea appealed, and the appellate court denied relief.

We hold: (1) a court's finding that a defendant is not eligible for resentencing is appealable; (2) a person convicted of illegally possessing a firearm is not automatically disqualified from resentencing by virtue of such a conviction; instead, the record of conviction must be examined to ascertain the existence of a disqualifying factor; and (3) disqualifying factors need not be pled and proved to a jury beyond a reasonable doubt. While the trial court here erroneously found automatic disqualification, the record on appeal establishes defendant was armed during the commission of at least one of his current offenses. Hence, we will affirm the denial of defendant's petition.

The relevant underlying facts were considered by the appellate court.

In the early morning of August 14, 1995, Fresno City College Police Officer Kirk Bryant saw a red Pontiac Grand Prix illegally parked on campus. As Bryant approached the Pontiac, it suddenly accelerated and sped away. Officer Bryant pursued the vehicle as it reached speeds of 70 miles per hour, ran three stop lights, and crashed into a power pole. Bryant identified defendant as the driver, having observed him get out of the car, run in front of Bryant's patrol vehicle, and flee the scene. During a related search of defendant's car, the officer found a loaded nine-millimeter handgun partially concealed under the driver's side floor mat, several live nine-millimeter rounds on the front passenger's floorboard, and a wallet containing a calling card and a motel receipt issued in defendant's name. A silencer was found in the trunk.

On August 17, 1995, defendant's parole officer and other law enforcement personnel went to the motel where defendant was staying and arrested him as he exited his room. During a search of defendant's room, the officers found a .38-caliber revolver.

Following a jury trial, defendant was convicted of two counts of being a felon in possession of a firearm (former § 12021, subd. (a)(1)), one count of being a felon in possession of a firearm in a vehicle (former § 12025, subds. (a)(1), (b)(1)), resisting arrest (§ 148, subd. (a)), and evading a police officer (Veh. Code, § 2800.1). The trial court found defendant had two prior convictions within the meaning of the three strikes law and he had served two prior prison terms. Defendant was sentenced to consecutive 25 years to life terms, plus an additional two years for the prior prison terms, for a total term of 52 years to life.

The appellate court was careful to distinguish between "being in possession" and "being armed" during the commission of an offense.

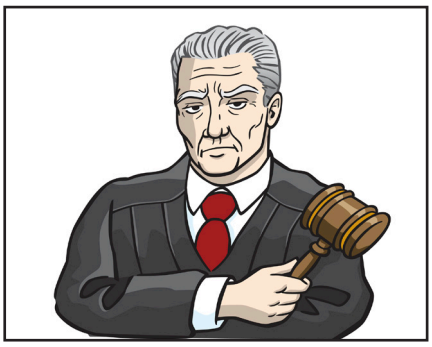
As this court has recently held, a defendant is not automatically disqualified for purposes of resentencing under the Act by his or her current conviction for being a felon in possession of a firearm. (*People v. Blakely* (2014) 225 Cal. App.4th 1042, 1051-1057.) Rather, as relevant here, eligibility for resentencing turns on whether the record of conviction establishes the defendant was armed during the commission of the current offense. (*Id*. at p. 1052.) In construing the intent of the voters in enacting the Act, we concluded that offenders who used or were

***Mamea*- from pg 23**

armed with a firearm during the commission of their current offense were considered to be a group of convicted persons that the electorate had no intention of extending the resentencing benefit to. (*Id.* at pp. 1053-1057; see *People v. Osuna* (2014) 225 Cal. App.4th 1020, 1034-1038; *People v. Superior Court* (*Cervantes*) 225 Cal.App.4th 1007, 1014-1018; *People v. Superior Court* (*Martinez*) (2014) 225 Cal.App.4th 979, 990-995.)

After reviewing the facts of Mamea's offense, the appellate court found he was "armed," and therefore denied relief.

In sum, while a defendant who has suffered a conviction for being a felon in possession of a firearm is not automatically disqualified from resentencing under the Act, in this case, the record of conviction reveals defendant was armed during the commission of that offense and, hence, he is disqualified and not eligible to be resentenced as a second strike offender.



NO DUE PROCESS RIGHT TO A HEARING ON ELIGIBILITY FOR RESENTENCING UNDER PROP. 36

People v. Oehmigen

___ Cal.App.4th ___; CA 3 Case No. C073771
December 5, 2014

After passage of Prop. 36, Leonard Oehmigen filed a petition for recall of his 1998 Three Strikes life term. He claimed that his commitment offense—assault by means of force likely to inflict great bodily injury (GBI)—was not a serious or violent felony and that neither his commitment offense nor his prior convictions came within other disqualifying criteria.

In denying the petition, the trial court relied upon the prosecutor's statement of the factual basis for the 1998 plea—that while evading police, Oehmigen used his car to commit an assault on two officers—to find that Oehmigen was armed with a deadly weapon (a car) and intended to inflict GBI during the commitment offense.

The trial court concluded that Oehmigen's failure to object to the recitation of the factual basis for the plea constituted an adoptive admission the court could consider in finding appellant ineligible for resentencing. Oehmigen appealed, and the superior court was upheld.

In certain circumstances, the silence of a defendant and his counsel in response to a prosecutor's recitation of a factual basis for a guilty plea may constitute an adoptive admission, and those facts become a part of the record of conviction. (See *People v. Sample* (2011) 200 Cal.App.4th 1253, 1261-1265.) Here, the record was sufficient to establish an adoptive admission. Oehmigen and his attorney were silent as the prosecutor described the factual basis, which established that he was armed with a deadly weapon. The appellate court concluded it was unnecessary to determine whether the record established any other disqualifying criteria.

On appeal, Oehmigen also argued that he was entitled to an evidentiary hearing on the issue of his eligibility for resentencing based on due process. The court disagreed. The issue of eligibility for Reform Act resentencing is not analogous to a hearing on a petition for habeas corpus, which is required upon a prima facie showing of relief based on a contested issue of fact. For resentencing under the Reform Act, "eligibility is *not* a question of fact that requires the resolution of disputed issues." The facts may be derived from the record of conviction. The trial court determines as a matter of law whether the facts in the record establish eligibility for resentencing. Although there is no due process right to a hearing on the question of a defendant's eligibility for resentencing under section 1170.126, a petitioner has a right to provide input in the form of briefing.

The court of appeal explained its ruling that Oehmigen was not entitled to an evidentiary hearing.

In the first place, defendant's argument rests on an unduly atomized reading of the entitlement under section 1170.126 that due process protects. The statute accords him the right to a resentencing hear-

Oehmigen **from pg. 24**

ing only upon a showing that he is eligible. It is not a right to a hearing on the issue of eligibility, followed by the hearing on whether he would present a risk of danger to the public if resentenced. As the trial court found, there is contrasting language in subdivisions (f) ("[u]pon recei[pt] [of] a petition for recall . . . the court shall determine [eligibility]," italics added) and (i) ("a defendant petitioning for resentencing may waive . . . appear[ing] in court for the resentencing," italics added). In addition, subdivision (m) contemplates a hearing preceding the resentencing. (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal. App.4th 1279, 1297-1298 & fn. 20 [finding People have due process right to notice and opportunity to be heard on issue of danger to public at such hearing].) Defendant does not address this statutory dichotomy on appeal, so we are not under any duty to analyze this point of the trial court's ruling any further.

In the second place, eligibility is not a question of fact that requires the resolution of disputed issues. The facts are limited to the record of conviction underlying a defendant's commitment offense; the statute neither contemplates an evidentiary hearing to establish these facts, nor any other procedure for receiving new evidence beyond the record of conviction. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1337, 1339 (*Bradford*).) What the trial court decides is a question of law: whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility. Therefore, this is not analogous to a hearing on a petition for habeas corpus.

Finally, due process does not command a hearing on the threshold criteria that establish entitlement to resentencing. In a context more analogous than a petition for habeas corpus, it does not violate the due process rights of parties in a dependency proceeding for a juvenile court to refuse to hold any hearing on a motion for modification (Welf. & Inst. Code, § 388) unless there are allegations adequate to establish a prima facie showing of the necessary criteria of changed circumstances and benefit to the minor; nor is the court obliged to hold an evidentiary hearing even upon a prima facie showing, as opposed to entertaining argument as to whether the allegations establish the right to relief. (*In re Hunter* W. (2011) 200 Cal.App.4th 1454, 1463 [right of due process compels hearing only after prima facie showing

Oehmigen - from pg 25

of changed circumstances]; *In re E.S.* (2011) 196 Cal.App.4th 1329, 1339-1340 [due process does not require evidentiary hearing on motion]; *In re Heather P.* (1989) 209 Cal.App.3d 886, 891 [leaving to court the determination of prima facie showing does not violate due process].)

Similar to the limited reach of due process in the context of modification petitions, we recently held that the parties to a section 1170.126 proceeding are entitled to a limited "additional procedural protection[]" of their right under due process to be heard (*Bradford, supra*, 227 Cal.App.4th at p. 1337.) The petitioner has a right to provide "input" in the form of briefing "if the petitioner has not addressed the issue [of eligibility in the petition] and the matter of eligibility concerns facts that were not actually adjudicated at the time of the petitioner's original conviction (as here)"; the People also have the right to submit a brief in response if the trial court sets a hearing on dangerousness (indicating that it made a preliminary determination of eligibility) in order to highlight facts in the record they assert establish ineligibility. (*Bradford, supra*, 227 Cal.App.4th at pp. 1340, 1341.)

Defendant complains the failure of the trial court to solicit briefing in the process of ruling on eligibility left him "unable to challenge the legal bases [on which] the court was relying." However, he has failed to establish prejudice in the context of this case: The facts in the record are undisputed, and he presently has an advocate to challenge the legal bases of the trial court's ruling in this court. Any legal error in the trial court is therefore no more prejudicial on appeal than legal error on undisputed facts in a motion for summary judgment. Accordingly, his due process interest in an accurate resolution of eligibility for resentencing is protected.

In his reply brief, defendant asserts that *People v. White* (2014) 223 Cal.App.4th 512 has "tacitly" held that a hearing on eligibility is required. Under the fundamental principle of ratio decidendi, there cannot be any such thing as a "tacit" holding. (*DeVore v. Department of California Highway Patrol* (2013) 221 Cal.App.4th 454, 461 [a holding is limited only to propositions expressly considered or those necessary to support express propositions on the facts before the court].) As the hearing in White was only an underlying happenstance rather than an integral part of the express or necessarily included propositions expressed in the opinion, it does not provide any support for defendant's argument, and would in any event be unpersuasive in light of our holding in *Bradford*. Consequently, defendant has failed to establish that due process requires a hearing on eligibility, or that his lack of input in the trial court prejudiced him in any fashion.

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***Cases* from pg. 26**

COURT DID NOT ABUSE ITS DISCRETION BY DENYING PROP. 36 RESENTENCING PETITION BASED ON FACTS PROVED BY PREPONDERANCE OF THE EVIDENCE

People v. Payne

___ Cal.App.4th ___; CA 5, Case No. F067838
December 17, 2014

After Prop. 36 went into effect, Randy Payne, serving life for evading an officer (Veh. Code, § 2800.2), petitioned for reduction of his sentence. His petition was denied after the trial court found his release would pose an unreasonable risk of danger to the public. He appealed.

The appellate court upheld the superior court reliance upon the preponderance of the evidence standard. That standard apportions the risks between the litigants relatively equally. It is the presumptive standard to be applied except as otherwise provided by law (Evid. Code, § 115). No standard of proof is set forth in Prop. 36, PC § 1170.126.

In the published portion of this opinion, we hold the People have the burden of proving, by a preponderance of the evidence, facts on which a finding that resentencing a petitioner would pose an unreasonable risk of danger to public safety reasonably can be based. Those facts are reviewed for substantial evidence. We further hold, however, that the preponderance of the evidence standard does not apply to the trial court's determination regarding dangerousness, nor does section 1170.126, subdivision (f), create a presumption of resentencing. The ultimate decision — whether resentencing an inmate would pose an unreasonable risk of danger to public safety — instead lies within the sound discretion of the trial court. In the unpublished portion of the opinion, we conclude recently enacted section 1170.18, subdivision (c) does not modify section 1170.126, subdivision (f). Finding no abuse of discretion, we affirm.

Payne's case history was recounted by the court.

On February 10, 1996, defendant was observed stealing several cases of motor oil from a convenience store/gas station in Merced. He subsequently led a California Highway Patrol officer in a pursuit on Highway 99. Defendant drove at speeds well over 100 miles per hour, sometimes traveling partly on the center divider and other times traveling on the shoulder. His driving forced other vehicles to move out of his way to avoid collision. As defendant approached the Livingston city limits, he drove onto the shoulder to pass vehicles stopped at a red traffic light. Defendant lost control of the car, flipped over, and struck a power pole. The car had been stolen.

On August 12, 1996, a jury convicted defendant of two felonies: evading arrest while operating a motor vehicle (Veh. Code, § 2800.2) and petty theft with prior theft convictions (§§ 488, 666). Defendant was found to have three prior serious or violent felony convictions within the meaning of the three strikes law. On April 22, 1997, he was sentenced to 25 years to life in prison.

Payne petitioned for Prop. 36 relief, which the prosecutor opposed.

The People opposed the petition. They pointed to defendant's 14-year-long record of criminal convictions, which included three strike convictions (one for robbery and two for residential burglary); the high risk of danger to others posed by his commitment offense; and defendant's admission, to the probation officer, that he had a drug problem. The People asserted defendant's conduct in prison had been poor, as he had violated prison disciplinary rules on a number of occasions. The People argued that, even after participating in Narcotics Anonymous and Alcoholics Anonymous programs over the years, defendant incurred disciplinary write-ups for "narcotic diversion" — diverting morphine medication he was to swallow — and possession of alcohol, most recently in 2013. The People further argued that, if defendant were released, he would face difficulty earning sufficient income by lawful means, as his prison records revealed his lack of marketable trade skills and lack of education. Based on the foregoing, the People asserted the trial court should find resentencing defendant would pose an unreasonable risk of danger to public safety.

The People offered evidence of Payne's prison disciplinary record, to support their burden to provide a preponderance of his current dangerousness.

Defendant's CDCR records contained several rules violation reports. In 1998, he was found guilty of possession of United States currency. In 1999, he was placed into administrative segregation pending investigation into allegations of narcotics trafficking in the prison's general population. In 2004, he was found guilty of mutual combat. He admitted punching the other inmate who, defendant said, was only defending himself. Defendant characterized the inmate as "a homeboy" who was irritating him. Staff had to use pepper spray and a baton strike to break up the fight. In 2006, a hypodermic sy-

***Payne* from pg. 27**

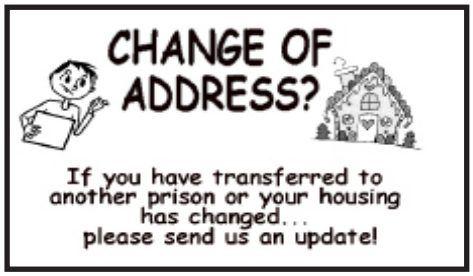
ringe with a needle was found in the cell defendant shared with another inmate. Defendant admitted it was his, and said he found it in the garbage after a building search. In 2008, defendant was found guilty of possession of tobacco. In 2010, defendant was found guilty of circumventing medical procedures by diverting medication. Defendant acknowledged he was required to place his medication into his mouth, swallow it, and then allow the nurse to determine he had done so. In 2012, a random search of a cell assigned to defendant and another inmate revealed a garbage bag full of inmate-manufactured alcohol ("'pruno'"). Defendant stated the pruno was his. At the hearing, he pled guilty to possession of inmate-manufactured alcohol and stated, "'It wasn't mine, but I took it.'" The most recent rules violation report, dated January 1, 2013, was, again, for circumventing medical procedures by diverting medication. Defendant stood in the pill line for his "'as needed'" morphine dose, placed the pill in his mouth and drank his water, but did not swallow the pill. Defendant was written up multiple times for failing to report or being late to class or to his work assignment, being out of bounds, not being in his cell during inmate count, violating grooming and cell regulations, and smoking (a violation of state law).

The court also heard evidence from a psychological evaluation, and, in consideration of that, his prison disciplinary record, and his priors, denied Payne petition for resentencing.

After a lengthy analysis, the court set forth the standard of review as "abuse of discretion."

To summarize, a trial court need not determine, by a preponderance of the evidence, that resentencing a petitioner would pose an unreasonable risk of danger to public safety before it can properly deny a petition for resentencing under the Act. Nor is the court's ultimate determination subject to substantial evidence review. Rather, its finding will be upheld if it does not constitute an abuse of discretion, i.e., if it falls within "the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) The facts or evidence upon which the court's finding of unreasonable risk is based must be proven by the People by a preponderance of the evidence, however, and are themselves subject to our review for substantial evidence. If a factor (for example, that the petitioner recently committed a battery, is violent due to repeated instances of mutual combat, etc.) is not established by a preponderance of the evidence, it cannot form the basis for a finding of unreasonable risk. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 [trial court abuses its discretion when factual findings critical to decision find no support in record]; cf. *People v. Read* (1990) 221 Cal.App.3d 685, 689-691 [where trial court erroneously determined defendant was statutorily ineligible for probation, reviewing court was required to determine whether trial court gave sufficient other reasons, supported by facts of case, for probation denial].)

Applying this standard to the facts, the appellate court determined that the superior court did not manifestly abuse its discretion in denying Payne's Prop. 36 resentencing petition.



TRIAL COURT MAY NOT HOLD PROP. 36 RESENTENCING PETITION IN ABEYANCE TO LATER RECONSIDER PETITIONER'S DANGEROUSNESS

People v. Superior Ct. (Burton)

___ Cal.App.4th ___; CA 4(2), Case No. E060210
January 6, 2015

People v. Superior Ct. (Williams)

___ Cal.App.4th ___; CA 4(2), Case No. E060260
January 6, 2015

These two virtually identical cases came down together. Both Ricky Burton and Michael Williams were sentenced to 25-life under the Three Strikes law. They later filed a Prop. 36 petitions for recall of sentence. The prosecutors opposed the petitions on the ground that both posed an unreasonable risk of danger to public safety. After a hearing, the court agreed. However, the court continued Burton's matter for two years, and recommended that Burton to be placed where he could get actual drug treatment. In Williams' case, the court stated that it would hold the petition in abeyance and hear it in a year, giving Williams a year in custody to show that he was no longer a danger to society

Burton/Williams cont. pg. 32

SIGNIFICANT EVENTS AT BPH MEAN SIGNIFICANT NUMBERS

The second edition of a yearly wrap up report from the Board of Parole Hearings, "Report of Significant Events," this time for year 2014 was recently made public by the BPH. Last year's report on the year 2013 was the first time BPH had gathered, sorted and made public much need information on statistics regarding grants and other parole-related information.

The BIG questions—what's the grant rate and how many lifers were granted parole last year—are now answered. BPH panels said yes to parole 902 times last year, for an overall grant rate of 19.2% (previously we had reported 904 grants but updated information from BPH corrected their figures). But here's the quiet little secret. That 19.2% grant rate is calculated based on the total number of hearings scheduled in 2014; just over one-third of those scheduled hearings did not happen, due to waivers, stipulations and postponements.

Doing the math using the number of hearing actually held reveals a significantly higher grant rate of about 29%. Not yet 50%, but edging ever closer. For those interested in the raw numbers, we've included a chart so you can see it in black and white.

HEARING TYPE	SCHEDULED	HELD	GRANT	DENIAL	WSP
Parole suitability, all categories	4,705	3,065	902	1,807	1,640
Elderly parole	528	388	115	247	140
YOPH/ SB 260	450	311	121	164	139

Of the two primary new hearing types, Youth and Elder, YOPH hearings seemed produce better results with 121 grants given at YOPH hearings, for a rate of about 38.9%, noticeably higher than the rate for overall hearings. Again, this is the result using figures for the number of hearings actually held. The rate for those in elderly parole hearings was virtually identical to that for hearings in general.

Other numbers of interest showed 1,346 consultation hearings (the old, and much re-vamped documentation hearings) conducted and nearly 25,000 pieces of correspondence handled. BPH staff is also responsible for some parole investigations, including pre-parole release, of which 792 were completed. The difference between the 792 pre-release investigations completed and the number of grants given is largely the result of some grants being reversed by the Governor (somewhere between 125 and about 150, firm figures expected this month) and those investigations not completed by year's end, but still on-going.

Additionally, the investigative staff completed 7 investigations into claims of intimate partner battering and 51 investigations requested by parole panels. And our old friends at the FAD were busy, reporting they completed 2,010 CRAs in 2014, and an additional 378 SRAs.

Past simple numbers, other items of interest in the report include the Board's success in shortening the length of time needed for pre-hearing process from 10 to just over 5 months, meaning the turnaround time needed to insert a new or rescheduled hearing into the calendar is much shorter; result—more hearings. Because the BPH staff is now preparing and sending what are familiarly known as "board reports" electronically this process can be accomplished quicker.

This electronic process has extended to the hearings themselves, which are now 'paperless,' or as paperless as possible. With C-files and all records now obtainable via secure computer access and a revamping of the content of those old

parole packets to include only the most relevant information the reports can now be sent to all parties, commissioners, DAs and inmate counsel, via electronic means.

Through a long-awaited and much needed agreement with Division of Adult Institutions inmate attorneys can now also bring their laptops, containing all the relevant parole hearing information, to the hearings as well. At least that's the theory and intent of the understanding, but it appears several institutions still haven't read the memo or have yet to understand it actually applies to them. Remedial actions are in process.

The electronic age also appears to be helping solve that old glitch, the lost hearing recording. While the Board has for several years recorded hearings onto removable chips for transcription, the not-unusual loss of one of those chips, containing a week's worth of hearing information was a real and frequent problem. The new process uploads each day's hearings at the end of the day to BPH offices, resulting in fewer lost transcripts.

The fact that inmates are still not receiving the transcript of their hearings within the required 30 days (currently things are running about 3 weeks slow) is not due to the recording and uploading, but to errors and difficulties incurred with the transcription process itself—and the humans who are doing it. Still a work in progress.

A sign of the times, the change in parole consideration and legal action, is the number of habeas writs the board responded to in 2014 and the number of hearings ordered as a result of inmate-favorable rulings in those writs. The BPH, not too many years ago, faced hundreds of writs filed each year and was often on the losing end of those legal battles. Last year the board, through the state Attorney General's office, was required to respond to only 123 writs in both state and federal court and scheduled only 16 court ordered hearings as a result. No longer is a successful writ the most likely way to achieve parole; the actual parole process has now proven more successful that the court avenue for release. Also an indicator of the increased transparency and openness at BPH was the list of training sessions and presentations presented to commissioner in 2014. About 4 dozen individual topics, ranging from aging to youth, legal considerations to logistical improvements, were discussed. While LSA/CLN was in attendance at many of these sessions, as they are now largely open to the public, we would like to see, and have suggested to the board, additional sessions on lifer characteristics, program suitability and availability. We're working on it.

The FADers also received additional 'training.' About 10 reports presented to the entire FAD staff—by members of the FAD staff, with none of these sessions publically held. Does no other clinician or psychologist, study or report produced in 2014 provide useful information to the FAD? Apparently, transparency doesn't extend to the hallowed halls of the FAD, whose members remain silo-ed in their own world. And it shows.

In the handful of larger court battles still underway between CDCR/BPH and various other parties, there wasn't much to report. To comply with Armstrong II, dealing with compliance with Americans with Disabilities Act, the board continued to refine the training require to be given to all parties, including inmate counsel. Gilman v Brown, challenging the constitutionality of applying the denial lengths contained in Marsy's Law to inmates sentenced prior to the law's enactment and declared unconstitutional in February, 2014, remains in the courts awaiting a final decision on the state's appeal of that now year-old decision. In the meantime, due to the decision being stayed until resolution of the appeal, Marsy's Law remains in effect for all prisoners.

Johnson v Shaffer, challenging the board's due process compliance in preparing CRAs for lifers, remains in the courts as back and forth pleadings and responses between plaintiff and respondent continue. And under agreements reached in Plata v Brown (3 Judge Panel), the board implemented elderly, expanded medical and non-violent second strike parole processes as well as review of those lifers already granted parole but with a future release date, with an eye to advancing that release date.

It was, indeed, a busy year at the BPH. And at LSA/CLN. We anticipate the same, for both parties, this year. Our thanks to BPH Executive Director Jennifer Shaffer, for making the contents of the 2014 Significant Events Report available to us a few days early, so that we could include the information in this issue of CLN.

Board of Parole

IN THE BOARD ROOM —NEVER BORED

Executive meetings of the Board of Parole Hearings in December, 2014 and January, 2015 were relatively short and procedural, the former wrapping up lingering details of changes to policy and procedure in 2014 and the latter laying out the start of new ways for the future. Neither month presented surprises, good or bad from the board, largely due to the continuing policy, much changed from previous years, of keeping all stakeholders (that would be us, among others) in the information loop as these changes are contemplated and enacted. However, this view of board transparency is not shared by all 'stakeholders.'

While en banc decisions will be dealt with in their entirety in another article in this issue of CLN, of interest in the overall report of board 'doings' were remarks made at the December Board meeting by Alexis De la Garza, one of LA County's stable of 'just keep everyone locked up forever' assistant DAs who appear at parole hearings and BPH meetings. LSA observers have attended numerous hearings where Ms. De la Garza was representing her office and we have yet, at any hearing, to see the DA say anything positive regarding any potential parolee or take any stance other than vigorous opposition to any grant of parole. Typically De la Garza is equipped with a plethora of negative information, mostly dating from the crime itself, and always in exquisite detail regarding the 'horrendous' nature of the offense and manner of commitment. Nor is she averse to sweeping aside an even marginally positive CRA to instead suggest her own interpretation of the inmate's creditability, insight and remorse.

In January, however, Ms. De la Garza saved her most acerbic comments for the BPH administration itself. The DA often speaks regarding en banc referrals before the board, always in opposition to parole, whether or not she has any information on the case itself. This, in fact, is her grouse. In what we can only describe as a modulated rant, De la Garza used an en banc hearing to launch into a series of comments that ranged from passive-aggressive to downright whining.

Claiming first that she was not a complainer regarding Board policies (?) she proceeded to take the BPH, most especially the current administration to task for inferred violation of due process because transcripts from the hearing in question were not available for her review. Acknowledging she "know[s] nothing about this case," she nonetheless was in opposition mode, griping she had "better things to do with my time" than try to figure out the situation.

A frequent complainer (despite her protestations to the contrary) about an alleged lack of information to DAs regarding the reasons certain decisions are sent to en banc referral, De la Garza treated the board to the sort of damning-with-faint praise-then-attack tactic she often employs against inmates at hearings. Noting that she has "utmost respect" for most commissioners, ('most' said with just enough emphasis to make the point that there are some who don't qualify), and the LA DA finished her harangue by denouncing "this administration" at the BPH for "lack of transparency." Whew.

All we can say is, guess it depends on who is defining transparency. After having been on the receiving end of near-total blackout of information of any sort from previous BPH officialdom, we're not quite sure De la Garza appreciates what a real lack of transparency is. As we have reported before, whether or not LSA/CLN agree with poli-

***In the Board Room*- from pg 31**

cies and procedures of the current BPH administration, we cannot fault them for lack of transparency or withholding information or answers to queries.

Transparency in government means the agency has to let the public know what they're doing and how. And the public means the real public, as well as other governmental authorities. It means the agency has to provide basic information—not do the research and study for anyone, individual or agency. That's up to us. And the LA DA's office.

Interestingly, following close on the heels of De la Garza's grumble, came lifer attorney Marc Norton, to emphasize for those commissioners who had not, at that time, heard about the I*n Re: Andrew Young [II]* decision, detailed elsewhere in this issue of CLN, the ramifications of that ruling. Reading extensively from the decision, wherein the judges of the California 1st District Appellate Court in vacating a denial of parole and ordering the prisoner released on parole, took the unusual step of calling out, by name, the commissioner, deputy commissioner, as well as the FAD psychologist involved, Anderson, Alvord and Geca, respectively.

Norton, who had been Young's attorney at the latest unsuccessful parole hearing, noted the court ordered Young released, in part due to the Board's failure to find Young suitable as per court's direction in a previous decision. Norton closed his remarks by reminding the board a 'court order means something,' and chastised the members to remember 'this board is not above the law.'

By comparison, the goings-on of the December meeting were relatively tame, Executive Director Shaffer recapping some of the Board's new changes and hearings implemented in 2014 and the results. More information on these topics can be found in "Conversations with the Board," elsewhere in this issue of CLN.

Burton/Williams cont.from pg. 28

The prosecutor filed petitions for writ of mandate/prohibition arguing that the court had no jurisdiction to continue the matter to reconsider their dangerousness.

The appellate court agreed. Nothing in the plain language of Prop. 36 authorizes a court to continue or hold in abeyance a petition for resentencing for purposes of reexamining a prisoner's dangerousness. The court was required to make a ruling based on their dangerousness at the time of the hearing. Further, in light of their records, the trial court could not reasonably find they no longer posed a danger to society even if they remained discipline free for the next one or two years. The trial court was directed to issue a new order denying the resentencing petition.

THE EN BANCS

Always a mixed bag of reasons and outcomes, the en banc hearings considered by the BPH in December and January evidenced several examples of that old adage, it ain't over till it's over; you're not out on parole until you walk through the gates. Dates can, and do, come and go.

In December the board recommended recall of sentence for compassionate release to **Jimmy Cox**, but denied the same to **Bobby Simon**, based on Simon's continued ability to ambulate (walk) and relatively recent threats of violence. Four prisoners were reconsidered solely for the purposes of term recalculation, with two slated for new hearings to perform that effort. **Daniel Bass** and **Ricky Palmer** will have new hearings calendared, solely for the purpose of recalculating their terms. Bass was granted parole, a decision that was affirmed, while Palmer was denied, that decision also will not change in the new hearing. Two others, **Donald Bohana** and **Donnie Llamas,** saw their denials affirmed as well as the terms calculated at those hearings confirmed.

After referral for reconsideration **Thomas Bailey** will endure a rescission hearing after new information regarding alleged misconduct on Bailey's part after his grant was received. Once again the entire board asserted their collective, if relative,

***BPH- En Banc* from pg 32**

independence from the Governor, affirming two parole grants given by panels and referred back for a do-over by Brown. Grants for **Robert Gullett** and **Jaime Olmos** were affirmed; attorneys Michele Garfinkel and Charles Carbone appeared on behalf of their respective clients.

In the final enbanc decision of 2014 the commissioners broke a tie vote on suitability for **Patrick Flynn**, deciding he was not, in their collective eyes, suitable and denied parole for 3 years.

January's en banc slate presented even more head scratchers, with the full board taking some puzzling actions. The case of **Steven Martinez**, granted recall of sentence for medical concerns, was tabled until the next Executive meeting because, "record before the board does not contain sufficient details regarding Mr. Martinez' parole plans, the board hereby defers this matter to its next executive meeting and orders a full preparole plan report be prepared. In addition, the board requests verification of the letters submitted by Mr. Martinez in support of his request for recall of sentence or resentencing." LA DA De la Garza said her office was 'opposed to any relief.' No surprise there.

The strange case of **Kimini Randall**, granted parole in October and referred to en banc, was scheduled for a rescission hearing, based on "alleged internet misconduct." While the board ordered an investigation prior to the rescission hearing, the action reportedly resulted from the inmate's interaction with a cell phone, though not possession of same, and whether or not he was aware of his 'interaction' is unclear. Be careful out there.

In another rather peculiar action the board vacated the denial of **Theresa Torricellas**, due to "the inmate's self-reported concerns about her inability to adequately prepare for her hearing due to her medical condition," and will "schedule a re-hearing once the inmate has been provided additional time to review the non-confidential portion of her central file." De la Garza opposed any reconsideration, noting the panel decision had resulted in a 15 year denial.

Prisoners **Michael Story** and **Rudy Vasquez**, who were denied and stipulated, respectively, will undergo new hearings solely to recalculate their terms. Continuing the pattern of unusual actions evidenced as the year started, the board, at referral by the Governor, sent the grant of **Fernando Lemus** to a rescission hearing, citing "fundamental error resulting in the improvident grant of parole by failing to adequately consider the inmate's rehabilitative efforts" related to victims, despite the a low risk rating and the support of his victim for release.

Another Governor toss-back, **Robert Mejia**, however, saw his grant confirmed. Mejia's case is worth noting and the referral came after he reportedly engaged in relapse behavior following his grant. However his attorney, Charles Carbone, and Mejia's family, presented what the commissioners found to be a compelling case for "progress rather than perfection."

Two cases where decisions were referred to the entire board by a member of the hearing panel saw mixed results, with the grant for **Oscar Argueta** confirmed, while the grant for **Lawrence Flores** was vacated in favor of a new hearing.

Lifer Scheduling and Tracking System

Commissioners Summary

All Institutions

November 01, 2014 to November 30, 2014

Hearing Totals*	11	22	18	0	39	0	39	22	18	22	22	18	22	262	307	1**	308
Suitability Hrg Total	11	22	18	0	39	0	39	21	18	22	22	17	22	113	303	0	303
Subtotal (Deny+Stip)	0	13	0	0	18	0	18	13	11	13	17	12	11	0	144	0	144
Subtotal (Waiver)	0	1	0	0	0	0	2	0	1	0	0	1	0	23	34	0	34
Subtotal (Postpone)	1	3	2	0	0	0	1	1	2	0	3	0	2	81	31	0	31

Lifer Scheduling and Tracking System

Commissioners Summary
All Institutions
December 01, 2014 to December 31, 2014

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Hearing Totals¹	37	37	38	0	37	5	37	33	39	37	38	0	33	501	701	7**	704
Suitability Hrg Total	37	37	38	0	35	5	35	33	37	38	38	0	31	118	480	5	385
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Subtotal (Deny+Stip)	18	15	18	0	18	3	18	21	17	14	22	0	15	0	181	3	178
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Subtotal (Waiver)	0	0	0	0	0	0	1	0	0	0	0	0	0	28	38	0	38
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Subtotal (Postpone)	3	4	5	0	1	0	2	2	3	2	4	0	0	53	77	0	77
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Page 1 of 1

Lifer Scheduling and Tracking System

Commissioners Summary

All Institutions

January 01, 2014 to December 31, 2014

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Hearing Totals[1]	382	318	327	158	324	5	334	302	386	307	314	308	309	4682	9108	133[**]	8943
Suitability Hrg Total	395	391	322	153	319	5	359	282	371	282	393	287	303	1323	4037	133	4784
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Subtotal (Deny+Stip)	155	158	283	87	299	3	339	180	185	258	183	184	180	0	2181	71	2098
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Subtotal (Waiver)	3	4	5	4	1	0	13	5	4	5	5	10	5	408	814	2	812
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Subtotal (Postpone)	28	33	33	10	14	0	28	34	32	32	28	32	28	578	853	0	846
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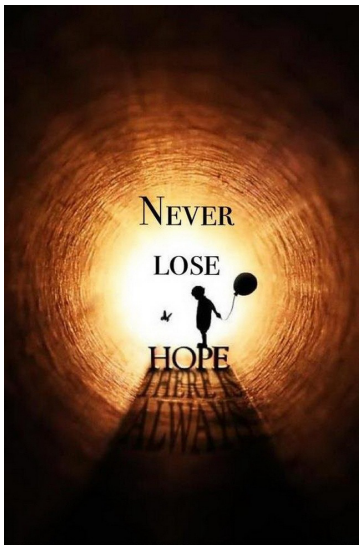
Board of Parole

CONVERSATIONS WITH THE BOARD



Of many new practices instituted by the Jerry Brown-appointed administration at the Board of Parole Hearings perhaps one of the most all-encompassing is a quarterly meeting and conference call with all stakeholders in the lifer and parole process. At one time and under previous leadership, any information about board policies and procedures was kept a tightly guarded secret (we recall the not-so-long ago days when we had to pay simply to look at transcripts at the BPH building). But since the appointment of BPH Executive Director Jennifer Shaffer and Chief Legal Counsel Howard Moseley transparency not only about policies and procedures but also about the why and how of those topics has been accessible to all parties. The board has become open and informative about what goes on in that big building on K Street in Sacramento.

> ...total number of grants handed down in 2014 was a remarkable ***902***

In mid-January the latest of these stakeholder confabs was held and LSA was, aside from BPH staff, the only stakeholder in personal attendance, though others, largely attorneys and DAs, participated via teleconference call. Primarily a recap of 2014 administrative directives, policy and procedure changes, the gathering offered an opportunity for all those interested enough to join in to check their understanding of those new guidelines and how they are to be applied, as well as ask questions and make comments.

Never shy violets, the LSA reps were front and center, with our own questions and follow-ups. We were also afforded the opportunity to discuss ancillary issues with BPH staff after the meeting, in a more wide-ranging conversation. 2014 was a busy and eventful year at the BPH, with the implementation of both youth and elder hearings, expansion of medical parole, plus the addition of various non-lifer inmate populations who were heretofore off the BPH radar and calendar.

While many topics were related to procedures for attorneys, of interest to all were the new hearing types implemented in response to the 3 judge panel. Those include, in addition to youth, elder and medical, parole consideration for non-violent second-strikers. Although complete figures for the entire year were still being parsed out, firm figures for actions from Jan. 1 through Nov. 30, 2014 were available.

While total hearings scheduled and held are not yet rounded up, ***the total number of grants handed down in 2014 was a remarkable 902.*** That number far surpasses any in recent memory, if not history. Of course, not all these lifers went home. Some received a future release date and at least 125+ were reversed by Gov. Brown. Yet it was not so long ago that the number of paroles granted in a year could be counted on one hand. With digits left over.

SB 260-YOPH: In the initial 11 months 394 of these specialized hearings were scheduled, resulting in 112 grants, 146 denials, and 2 split decisions. The remainder of the scheduled hearings were accounted for by waivers, cancellations, etc. In short, of the 260 cases heard, 112 were granted, a net grant rate of 43%. All those heard in 2014 were lifers convicted of crimes committed while juveniles. The first parole hearings for DSL inmates convicted as youths will have just begun this month.

Elder/Medical: Elder parole consideration began in February 2014 and by the end of November 514 hearings had been scheduled, with 115 grants, 245 denials, and 2 split decisions. Expanded medical parole hearings which started in October, 2014, saw 21 hearings slated, resulting in 9 grants, 8 denials, 1 continuance and 3 cancellations. At least one more was pending. Shaffer also confirmed for LSA that those inmates considered for the new expanded medical parole must, by in large, require 24/7 care in a skilled nursing facility or other such location.

BPH - from pg. 37

The expanded medical parole will not apply to those inmates whose medical condition, while debilitating, still allows them to perform most basic care functions for themselves. Thus simply being confined to a wheelchair, suffering from a heart condition or other similar maladies do not, alone, qualify an inmate for medical parole consideration.

DSL hearings: In response to a question Shaffer confirmed that for those inmates who are determinately sentenced and who may now come before the parole board because of recent changes in policy and law (SB 9, SB 260 and non-violent second strikers, for example) they, too, will be subject to denials in the time frame specified by Marsy's Law. This is because by law, 3, 5, 7, 10 and 15 year denials are all the board can pronounce. However, no matter what the denial length, should that inmate's release date (EPRD, earliest possible release date) fall before the end of the parole denial time, it is the ERPD, not the parole denial that will determine release.

So while it may be a bit scary for a DSL inmate to appear before the board and receive a 10 year denial when his/her release date is only 8 years away, that release date will be honored, barring any additional criminal charges/sentences from conduct while incarcerated. This could actually be of benefit to those souls sentenced to unconscionably long DSL terms (75 years, for example), as even if they are denied by the parole board they will almost without exception appear at another parole hearing with another chance at freedom before the end of that unreachable ERPD.

Other topics dealt with at the meetings included the resolution to the question of whether or not non-violent, non-sex offense second strikers who, by laws in effect at the time of their conviction were required to serve 80% of their time before release could be considered under the new guidelines offering parole hearings to those who have served 50% of their sentence. The answer is yes, regardless of the minimum time requirements at time of sentencing anyone who has served 50% of their sentence or will have reached that benchmark by the time a parole hearing under the new guidelines is scheduled will have that hearing and be eligible for release.

As Shaffer explained, "numerous state laws" were ordered waived by the federal judges in order to accelerate the release of inmates to reach the population cap. In this case, the federal government, in the person(s) of three judges, trump state regulations.However, no DSL inmates who fall under this new process and are 24 months or less from their EPRD will be scheduled for a parole hearing.

In later discussions BPH leaders noted that those inmates who have been granted parole but have a future release date number only about 30 individuals at present. An additional 6 with future release dates have already been released, time having been subtracted from their MEPD due to both the urging of the 3 judge panel and the prisoners' good behavior since their grant. These are the only lifers to whom the term 'early release' can be applied.

For those remaining custody pending a future release date after being found suitable, Moseley explained each case is being considered, roughly in chronological order of the appointed release date. In other words, the farther out the parole release date the longer until that individual is reviewed by the board with an eye to an 'early release.' In the meantime, all progress hearings scheduled will go forward, with the opportunity at those for each inmate to receive additional time reduction in that setting.

10 Day Rule:Shaffer reminded interested parties that the 10 day rule, whereby all documents should be in the hands of the BPH no later than 10 days prior to a hearing, really applies primarily to District Attorneys. While inmates may submit documents on the day of the hearing those can and often are limited by the panel members to a total of 20 pages, excluding support letters.

She also explained that while a DA at parole hearings may offer both a closing statement and read a statement from the victims who are not in attendance, the victim impact statement, no matter who voices it, must address the in-

BPH - from pg. 38

mate, crime and possible parole from the viewpoint of the victim; it is not an opportunity for the DAs to have a second closing.

BPH Outreach:In a not-to-us-anyway surprising revelation Shaffer indicated the BPH's concern about the misinformation rampant in the public about parole, lifers and early release. In Shaffer's estimation (and ours) the greater number of lifers now being released is the result of court decisions and the BPH making a conscious decision to follow the law, not because of political or soft-on crime policies. She emphasized that her aim is to assist commissioners in being able to render parole decisions that will withstand judicial scrutiny, from writs and other prisoner legal filings. In other words, decisions that follow and can be supported by law.

To foster understanding not only of the parole process but also of the impact lifers have (or rather don't have) on crime statistics Shaffer has instituted an outreach to the community. At the meeting and conference call she

issued a standing offer for anyone representing a group (community, church, fraternal or other) who might be interested in hearing about parole to request someone for the BPH attend a meeting.

Noting the Board staff was prepared to travel "pretty much anywhere in the state," she indicated a new and welcome concern by the BPH on how lifers are viewed by the public. LSA made sure the first invitation the Executive Director received was from us, to appear at our upcoming family seminar in late February in Sacramento.

Stay tuned!

BPH- from pg. 39

DRAFT REGS FOR YOPH HEARINGS

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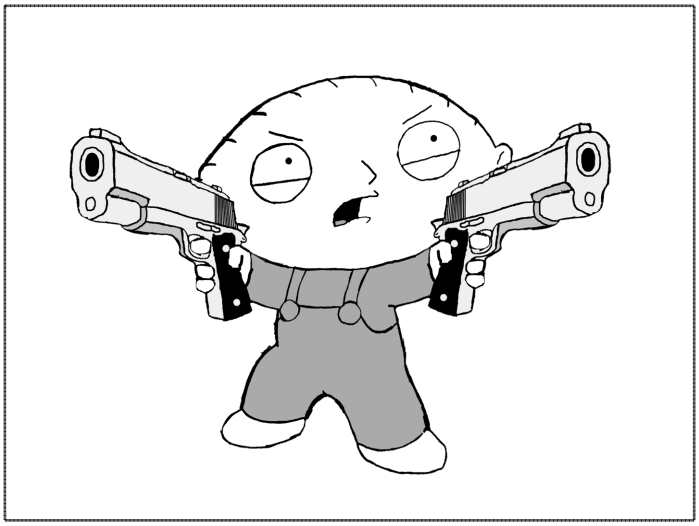
AVAILABLE FOR COMMENT



Laws that are passed and put into effect are often only a skeletal framework of the intent. The actual flesh on that frame are the regulations which lay out how the law will be put into effect—the law says what to do and the regulations say how to do it.

And so it is with the draft regulations for implementation of SB 260, the Youth Offender Parole Hearing act, were recently presented for public scrutiny and comment. And the public includes you, the end-user of SB 260, a lifer/long-term prisoner. While SB 260 was put into effect just over a year ago, the regs are only now nearing the end of the official process before adoption. Nothing much new or surprising in the nature of the draft proposal, but it is nonetheless open for public comment and BPH response before the final adoption of the text.

The qualifications for SB 260 eligibility have not changed, nor has the time frame (all, including long-term DSL inmates, must have their first YOPH hearing by June 30, 2015) been expanded. The major qualifications remain being under 18 at the time of the commitment offense, not receiving an LWOP or condemned sentence, and not having racked up additional charges since incarceration. Some of the finer points include the calculating of a YPED (Youth Parole Eligibility Date), the time at which anyone falling under SB 260 may be entitled to their first parole hearing, any subsequent hearing will be held under SB 260 standards and of course both the FAD and parole commissioners must take youthful factors into consideration in developing their respective opinions and decisions.

While the denial lengths under Marsy's Law apply to YOPH hearings, if an inmate is found suitable at a YOPH hearing there is no term calculation and, following a decision review by the BPH legal division and Governor's review, "the board shall notify the department that the inmate is immediately eligible for release." Eligibility for SB 260 consideration is now being determined by CDCR classification staff and any prisoner believing him or herself eligible must file a 602 appeal if denied that eligibility.

Never one to have much faith in the infallibility of classifications, or the willingness of CDCR to give great consideration, or even real consideration, to inmate grievances, LSA asked the not-so-hypothetical question, what if appeals of eligibility are exhausted at the third level and the inmate is still deemed ineligible, by CDCR, for consideration under YOPH?

Can that prisoner then file a second appeal to BPH, using the form originally used to appeal such decisions when BPH was making eligibility decisions? The answer—that determination hasn't been made, but is open for discussion. And so discussion we hope to initiate. Anyone wanting the complete draft may request the document from LSA by writing to us. Please include a single postage stamp or SASE to cover mailing costs (if possible) and write DRAFT REGS on the envelope.

Send requests to:

LSA, PO BOX 277, Rancho Cordova, CA. 95741.

If you choose to comment on the proposed regulations, address your correspondence to the

Board of Parole Hearings,
PO BOX 4036, Sacramento, Ca. 95814.

IF THE PTA IS YES, BUT THE SUITABILITY IS NO

LSA/CLN often receives letters from prisoners disappointed and confused as to why they were returned to a parole hearing prior to the end of their denial length as the result of a successful PTA or even an unsolicited Administrative Review, only to be found unsuitable at that new hearing. Hope is raised when a prisoner receives notification that the board thinks they may have made substantial progress and wishes to review their situation before the end of that last denial, but that hope is often devastatingly dashed when the inmate then receives another denial at that advanced hearing.

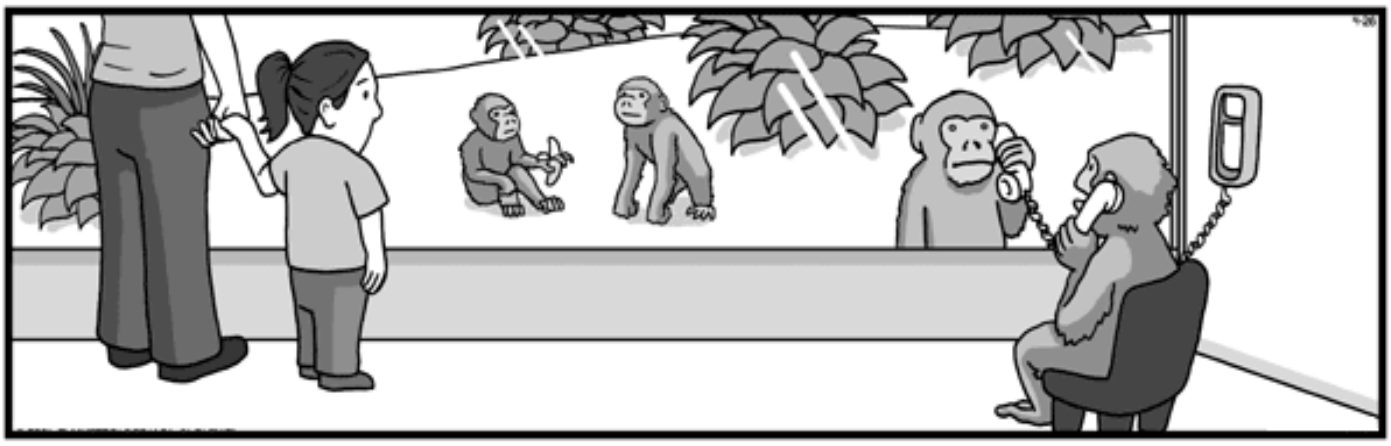
Asked why this is often the case, BPH Chief Legal Counsel Howard Moseley said it basically comes down to the difference between people and paper. While the gains may look impressive on paper (i.e. many more certificates, classes, programs) when the parole panel actually has the opportunity to converse with the lifer they may find that while the paper accomplishments are numerous, the take-away from all those programs was not sufficient to overcome still lingering deficiencs in understanding and that old friend, insight.

This again addresses the fact that the board is not looking for quantity so much as quality. Those inmates arriving at an advanced hearing with a stack of new chronos and certificates are going to find the panel not as concerned with counting the papers, as with, 'Did you actually learn anything, acquire any insight, new coping skills, new understanding that you can apply to your life, from those classes or were you simply there for the certificate and chrono?'

Insight, that elusive but board-coveted quality, is difficult to define in person, but even harder to see on paper. Moseley indicated that the Deputy Commissioners, in perusing possible advancement candidates, are able only to review files. If the accomplishments listed appear to indicate the inmate has vigorously sought more information and self-help, that may be enough to snag a hearing advance. But once that individual is before the panel in person, it becomes not how many classes did you take, but what did you actually get out of them.

Mosely also indicated the AR and PTA process provide the benefit of bringing more prisoners to hearings more often, as many denied parole are now being seen before the end of that 3 year period. He also noted that once a parole decision has been made, that re-sets the clock for the one-every-3-years PTA process. And, decisions can be appealed both through request for a Decision Review as well as the writ avenue.

The takeaway from the conversation was simply that if you receive notification that your hearing has been advanced, don't look at that as the ticket home; you still must prove your bonafideses to the board. Any programming you engage in should receive your full attention and effort; an accumulation of paper will not open the gate.



PERSONALITY DISORDER? PICK YOURS

Many Comprehensive Risk Assessments (CRA) from the BPH's pet psychs, the Forensic Assessment Division, not-so fondly known as the FAD, offer up diagnosis of personality disorders for the prisoners under 'assessment.' These labels, which purportedly tell parole panels that you're just not quite right, can often form one of the pillars of denial of parole.

But just what do these multi-syllabic words mean and how do these 'disorders' affect your behavior and thus your dangerousness? According to the Mayo Clinic, which even FAD clinicians should recognize as an authoritative source of information, personality disorders can be grouped into three categories, or 'clusters.' According to the clinic's report on "Personality Disorders" those suffering from one of these disorders is subject to "trouble perceiving and relating to situations and to people. This causes significant problems and limitations in relationships, social encounters, work and school."

Of the three categories, (simply labeled Cluster A, B or C) the disorders included in Cluster B are those most commonly cited in CRA reports, with just a smattering of references to disorders included in Clusters A or C. Perhaps because those in Cluster B are said to lead to "unpredictable thinking or behavior."

Included in Cluster B are some disorders we feel sure you'll recognize, if not in yourself, perhaps in someone else, or at least as a factor mentioned in a CRA. We present this information in the hope that by at least understanding what the FAD reporters are alleging they see you can make some changes.

What can you do about it if you feel there is a mis-identification of a personality disorder? Probably very little, as the diagnosis of such is the purview of clinicians, part of what they consider their 'expert' and 'learned' opinion. Uh-huh. But perhaps you can re-read your CRA, reflect on the responses you gave and see if you're a victim of semantics and misunderstanding. And if not, if the descriptions herein really do fit you, then perhaps some introspection, even therapy, is in order.

Cluster B Personality Disorders

Antisocial Personality Disorder: characterized by the following traits: a disregard for needs/feelings of others; persistent lying, stealing, conning behavior; repeated violations of rights of others; impulsive and irresponsible behavior. This type of personality also engages in aggressive, violent actions, disregards the safety of others; lack of remorse for that behavior and, surprisingly, recurring problems with the law. Hmm, reads like a bad psych eval.

Borderline Personality Disorder: sufferers exhibit impulsive and risky behavior (unsafe sex, gambling); frequent and intense displays of anger; up and down moods and a fragile self-image. They may experience intense/unstable relationships; intense fear of being alone/abandoned and feelings of emptiness. They may also display suicidal behavior and threats and stress-related paranoia. And while all of us may have suffered from one or two of these feelings from time to time, the intensity and length of the emotions and behavior tends to be the qualifying factor.

Narcissistic personality disorder: a belief that you are special and more important than others; exaggeration of achievements/talents, power and success including attractiveness; expectation of constant praise and admiration from others. Those with this disorder display arrogance, often take advantage of others and display envy or a belief that others envy them. And while we all have a little narcissism in us, when these aspects becoming the controlling component of behavior trouble usually follows.

Of the personality disorders listed in Clusters A and C, only a few often show up in CRA reports. Cluster A traits, are characterized by odd, eccentric thinking or behavior, include Paranoid Personality Disorder. This results in distrust and suspicion of theirs, their motives and loyalty (in-

cluding spouse or sexual partner); perception of innocent remarks as insults, resulting in angry and hostile reactions and a tendency to hold grudges. Not a happy, or stable, scenario.

Cluster C personality disorders often produce anxious, fearful thinking or behavior. These are shown in Dependent Personality Disorders, which produces a clinging dependence on others, a tolerance of abusive behavior and intense need to start a new relationship immediately when one ends. These are the followers the board continually worries about—will your dependent personality allow you to follow someone into a disastrous situation?

Cluster C also gives us Obsessive/Compulsive Personality Disorder, preoccupied with details and perfection, leading to a desire to control people and events. Those exhibiting this personality disorder, (not to be confused with obsessive/compulsive disorder, a type of anxiety disorder) are rigid, stubborn and Inflexible about their views on morality, ethics or values. Intolerance, anyone?

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SECOND STRIKE RELIEF

Many California inmates serving second strike terms for non-violent, non-sexual offenses will soon be considered by the BPH for possible release, a situation they never expected to deal with. Under orders from the 3 federal judge panel CDCR and BPH have come up with a new parole process to address the above individuals once they have served 50% of their sentence. The new second strike process began January1, with actual reviews expected to begin about February 15.

Initial eligibility for consideration will be made by classification units at each prison and those found eligible will have their cases referred to the BPH for consideration by a Deputy Commissioner. No in-person hearing will be held; all the review is done 'on paper,' though actually it is more likely to be done 'on (computer) screen.' The first qualification, to have served 50% of sentence or be within 12 months of that point, is pretty cut and dried. The remaining qualifications, not engaging in 'negative institutional behavior,' is a bit more dicey.

Any of the following will disqualify an inmate from release consideration:

-Currently or within the last 5 years served a SHU term
-Serious RVR, Division A-1 or A-2, within the last 5 years
-Placement in Work Group C during the past year
-Received two or more serious rules violations within the last year
-Found guilty of drug-related offense or refused to provide a UA sample in the last year

Once referred the prisoner will have 30 days to submit any written statement to the board, if he/she wishes. Prisoners may request to review their C-file prior the classification hearing or before preparing any statement. If you believe you might be a candidate for this process, it would behoove you to request that review prior to your classification hearing, to be sure all is well with that important document. DAs from the county of commitment and any registered victims will be notified and allowed to submit written statements as well.

Within 50 days of referral from the classification unit an Administrative Review will be held at the BPH, where all relevant information will be considered and a determination made as to whether or not the inmate would pose a danger if released. The institution, and thus the prisoner, will be notified of the decision by (yet another) form, BPH Form 1047C, Non-Violent Second Striker Decision Form.

If granted release, the prisoner will be released to supervision of state parole or post community release supervision, depending on the statutory requirements for his offense, and this will happen no less than 50 days after the decision to release has been made.

Of concern to many is whether or not classification will make the right decisions. While we try to avoid casting stones unnecessarily, the 'history' of CDCR's classification unit making decisions on where to place the department's 'inventory' is not stellar. If denied referral, the 602 should be your next stop.

It should be noted, both referral for release consideration and the grant of release itself can be lost, as the classification committee can rescind the referral and the board can vacate the grant, should the inmate indulge in any 'negative institutional behavior' at any time prior to release. Be careful out there!

POSSIBILITIES

THE SECOND CHANCE PROJECT

LSA and CLN have been asked about the Second Chance Initiative, and here is our position.

This proposal was initiated by a group of very thoughtful, literate and well-versed lifers at San Quentin. The intent is to give those with first time felony convictions resulting in very lengthy or life sentences an opportunity go to before the courts to obtain an advanced appearance in front of the parole board. Certain lengthy sentences and other criteria may factor into this as well, but the primary integer will be a first time felony conviction.

LSA and other advocates have met with the San Quentin men and we all agree this proposal has merit. At present it is in the very early development stages and most likely this will take 2 - 3 years before it can be presented. Legal research needs to be done and a draft proposal written.

It was agreed that there is a better chance of this proposal being passed through legislative avenues rather than as a ballot initiative. Ballot initiatives can be quite costly, often in the million dollar plus range, and the voters may misunderstand this change as a reduction in punishment. In actuality it is not, as the courts and Parole Board still make the decision whether a lifer or long serving inmate is sufficiently rehabilitated to ensure it is safe to release him or her back into society. This proposal simply provides a certain class of long-serving inmate with a realistic opportunity to show his/her life change and suitability in a less-than-end-of-life timeframe.

This would provide a specific group of lifers and long-serving inmates with a real chance at parole where formerly there was none, considering the length of the sentence (ex: 64 years to life, or 20 years DSL enhancements) and time-served requirements. It is not a "get out of jail free" or early release card in any sense of the term. Criteria for inclusion will be established, a process outlined and all stakeholders considered.

LSA will meet routinely with lifers, other advocates and agencies, to discuss changes and next steps in the development, and will keep you all informed in CLN and Lifer-Line as Second Chance continues through various stages of fine-tuning.

We also encourage prisoners to tell their families and friends to sign the online petition at change.org, as the results can be used to indicate support for this very important and much-needed measure.

EDITORIAL from pg.4

But the attitude exhibited by you, and many members of the public, keeps these reformed individuals from finding work, housing and restarting their lives.

Prison is punishment. When the term has been served, society has exacted its price for the transgression. That's the way the law works. The price should not continue to be assessed forever by everyone the released prisoner meets.

Most will tell you they continue to feel they owe society and will give of themselves in any way possible to make amends. But we, society, have to be willing to accept those amends and accept those individuals back into our world. Denying them entry into society, making them outcasts, sets the stage for failure, for which we then are as much to blame as someone who reoffends.

These are our husbands, sons, brothers, fathers; even daughters, sisters, wives and mothers. Don't paint everyone with the same broad brush--the law, as well as most faiths, offer a second chance to those who earn it.

I'm going to try not to paint you with the broad brush of small-minded hypocrisy and suggest you do some research, both factual and the soul searching variety. Don't condemn, out of hand, what you do not know or understand.

This is <u>your</u> second chance.

Vanessa Nelson-Sloane, Director
Life Support Alliance
Sacramento, California

BPH -

ATTORNEY SURVEY- State or Private

Life Support Alliance is seeking information on the performance and reliability of Lifer attorneys in the lifer parole hearing process. Please fill out the form below in as much detail as possible, use extra sheets if needed. Please include your name, CDC number and date of hearing, as this will allow us to request and review actual transcripts; your name will be kept confidential if you desire. Details and facts are vital; simple yes or no answers are not probative.

NAME*_____ CDC #*_____ HEARING DATE*_____

COMMISSIONER_____ Deputy Commissioner _____

GRANTED/DENIED(YRS)_____INITIAL/SUBSEQUENT_____

EVER FOUND SUITABLE/WHEN_____

ATTORNEY_____STATE OR PRIVATE_____

HRG. LOCATION_____ PRIVACY with ATTORNEY _____

MEET BEFORE HRG?_____HOW MANY TIMES?_____

TIME SPENT CONSULTING_____FAMILIAR WITH YOUR CASE? _____

_____

OBJECT TO MARSY'S LAW?_____ OBJECT TO PSYCH EVAL?_____

LANGUAGE PROBLEMS?_____ WAS ATTORNEY PREPARED?_____

WOULD YOU HIRE OR RECOMMEND? _____ FILE A COMPLAINT? _____

Please provide details regarding attorney's performance, or lack of, including interaction with parole panel and/or any DAs present. Was attorney attentive during hearing, did s/he provide support/advice to you? Was s/he knowledgeable re: your case and/or parole process?

_____

_____

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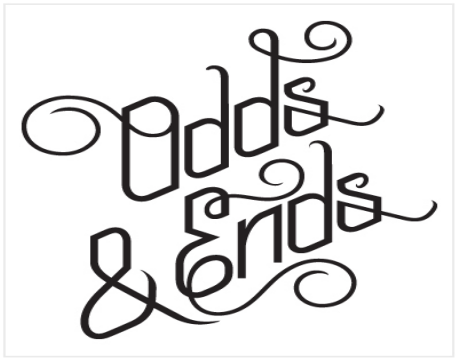
Mail to CLN/LSAPO Box 277, Rancho Cordova, CA. 95741.
We appreciate your help in addressing these issues.

BPH -

NEWS BITES AND BITS



Odds and ends, bits and pieces of information collected at various times and places over the past months, all related to lifer matters.

- In previous conversation in the past year or so BPH administrators indicated that, following few years of increasing parole grants, the number of grants might decline, as the "low-hanging fruit," those lifers long-suitable but in the past never able to achieve a grant due to political and other reasons, were at last given lawful consideration and paroled. Although no one expected to see a decline to the single digits of yesteryear, some decline in numbers was anticipated.

Now, however, with the advent of youth, elder and specialized parole hearings (2nd strikers, DSL) that expectation is no longer in play. While the rates may fluctuate somewhat from year to year no one now foresees a marked decline. Good news for lifers!

-Under a directive issued last year the board will now accept video and audio renditions of victims' statements at hearings, should the victims and/or their representative be unable or choose not to appear. The caveat with these is that a written transcript of the offering must accompany the submission, so that there will be a written record of the remarks. Should such a submission be offered at the hearing without accompanying transcript, it will not be accepted.

-It has been reported that physicians in prisons have told prisoners they are no longer able to provide/prescribe/authorize such items as aspirin, sun screen, cough drops and the like. While these and similar items have long been considered medical issue, recently the Receiver's Office reached an agreement with the department whereby a variety of over-the-counter remedies will be available to inmates in the canteen or made available to indigent prisoners.

The process is apparently still underway and we are still hoping to receive a comprehensive list of what is expected to be available in the canteens, information we will release as soon as it become available. Sunscreen and some lotions are also expected to be among the items now stocked.

-Despite what some sages, and even some attorneys may say, neither transitional housing or a firm job offer are required by law or even by the commissioners in order to find an inmate suitable. While job offers are always nice and the board members do like transitional housing, the absence of either or both in parole plans will not alone be grounds for denial.

-One more cautionary item, and again, this is being spread by some attorneys as well as rumor on the yard. Elder parole factors do not carry the same weight as the 'hallmarks of youth' do for those in SB 260 hearings. While panels are required to give 'great weight' to the attributes of youth (primarily the inability to make good decisions, easily led, etc.) the panels are under no such firm direction for elder factors. That is because youth parole was promulgated via legislative action; a bill or law passed by the legislature and signed by the Governor.

Elder parole consideration and the factors therein, did not come into play as a law, but rather as an agreement between the state, in the venues of CDCR/BPH and the 3 federal judges as one way to help the state meet the population cap set by those judges. While the factors of elder parole were agreed to by the state and commissioners are trained and expected to consider those factors in both finding of suitability and determining length of denial, they are not required to give elder factors 'great weight.'

-The Condom Conundrum seems to have been resolved, with the passage and signing of legislation last year that would make condoms readily available in California prisons. Although touted for over 30

***BPH* - from pg 46**

years as a health and life-saving measure by health care advocates, other pundits fear the distribution of prophylactics will be a 'green light' for sexual behavior.

However, the ban on sexual activity in prisons and jails remains in place. So while those engaging in illicit sexual activity in prison (is there licit sexual behavior in prison?) may not contract a fatal disease, they can still receive an RVR, which can be equally fatal to parole.

-CDCR is under orders not to isolate disabled inmates in segregation units simply because the prisons have no other housing facilities suitable for their needs. Judge Claudia Wilken, hearing a class action suit involving the state's use of solitary confinement said recently CDCR continues to violate the Americans with Disabilities Act via this practice.

Although CDCR maintains such actions are 'temporary,' Wilken found in the past year 211 disabled prisoners were placed in segregated housing for periods from a day to a month. Most violations were at RJ Donovan, but at least 10 other institutions were found to be participating in the same practice.

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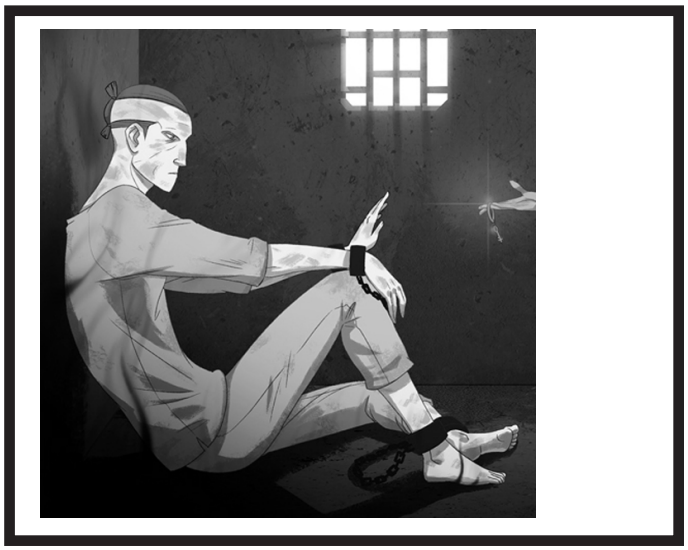

CDCR

ZERO POPULATION GROWTH—FOR NOW

Amid much bally-hoo and self-congrats, CDCR announced in late January that it had, at that moment in time at least, reached the population cap set by the 3 federal judge panel. On Thursday, Jan, 20, 2015 at midnight, the population of inmates housed in the state's 36 (official) prisons reached 113,463 individuals, just below the limit of 113,720 the judges say they will allow. This translates to 137.2% of the system's design capacity, squeaking below the set limit of 137.5% of that capacity. Smoke and mirrors, anyone?

Department officials, acknowledging the transient nature of numbers, called the event "a snapshot in time," and noted "much work remains." Prisoner attorney Michael Bein called the development a "significant moment" but reminded that the reductions must remain in place over time for the state to be in compliance with the court.

In figures released just days before the Thursday announcement, the department reported a total of 114,129 persons housed at in-state prisons. Thus, 666 prisoners were off the state rolls in a 15 day time span. Where did they go? Well, probably not into the wind.

Comparison between the numbers reported on Dec. 10, 2014 and Jan, 14, 2015 show that 1,697 more inmates were in state custody in December that the state reported in January. An additional 8,852 souls were being held for California by private prisons in a handful of states, a number lower by a mere dozen from the month before.

While most individual institutions showed a small decrease in percent of population a handful recorded a small uptick. Calipatria, Centinela, CHCF, CMF, Ironwood, San Quentin and SVSP on the men's side were all up, if very slightly. In the women's facility list both CIW and FWF showed an increase of 4 and 3 percent respectively; interestingly, CCWF reported a

***CDCR* - from pg 47**

decrease of about 8%. So, maybe we can figure out where some of that 8% went.

CCWF, despite the decrease, remains the most overcrowded of any in-state institution, sitting at 169.5% of design capacity. Calipatria, at 163.4% has the highest population of men's institutions. Two prisons actually show a less-than-full level, CHCF at 66.5% is the lowest of any prison, followed by CMF at 90.4%.

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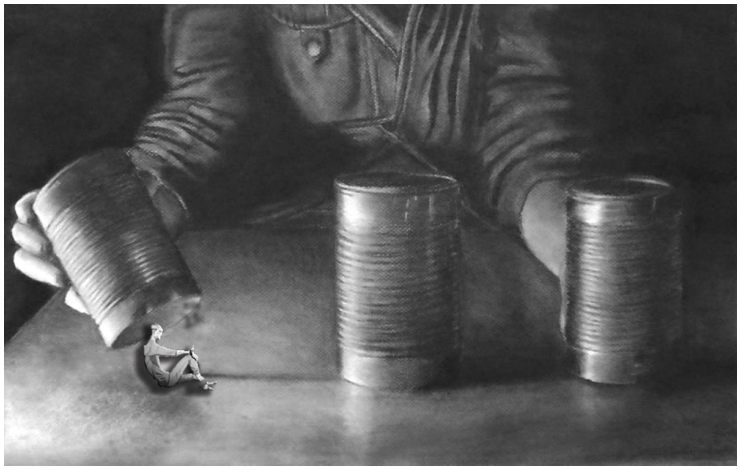


COLLATERAL AND HIDDEN EFFECTS OF POP DECREASE

Or how to hide thousands of men and women in plain sight...

While CDCR officials are busy patting themselves on the back for achieving a population reduction 'ahead' of the feet-to-the-fire, do-it-or-else-we-will deadline set by the federal judges overseeing the shrinking of the gulag, it's easy to forget that the state actually is holding more prisoners than the over one hundred thousand in official state prisons. As noted, well over 8,000 are officially California prisoners, but housed in states as far away as Mississippi, Oklahoma and Arizona. These are private, for-profit prisons run by Corrections Corporation of America, your friendly neighborhood mercenaries.

Even though the department acknowledges that family unity and support are one of the best anti-recidivism tools at hand—and one of the least expensive—it continues to ship human cargo out of reach of families and friends. Bound by law, as well as stated commitment to provide rehabilitative services for state citizens who run afoul of the law, the department makes little effort to provide information or transparency about what programs are available in these backwater lockups.

More than 2,000 state prisoners are helping line the pockets of the GEO Corporation, the prison-industrial mainstay that owns and operates (and makes money from) imprisoning men at California City. Modified Community Correctional Facilities (MCCF) in McFarland and now Shafter, run, at least in the McFarland facility, also by GEO, house hundreds more; the department acknowledges there are currently contracts for "4,234 MCCF beds that are in various stages of activation and transfer." And just in case you think the end is in sight, in a carefully worded paragraph in the latest report to the court CDCR notes some county jails may still be accessible for state holds, as "[t]he State continues to evaluate the need for additional in-state jail bed contracts to house CDCR inmates."

At this rate pretty soon the county lock ups will be in the same condition that brought the wrath of the feds down on the state prison system.If all these hidden 'units' are added up, the total population of California prisoners could swell by an additional 14,000 or so.

Programming? Education?? Phone calls???? Visiting????? Who knows. We know a little, from letters sent by inmates warehoused in these 'correctional facilities,' and because we hear from their families. Few jobs, little education (the newly appointed head of Division of Rehabilitative Programming's Correctional Education Office recently confirmed for LSA that prisoners housed out of state and in private institutions don't come under his supervision and he can't reach them—a situation that both he and we lament), limited access to visits and phone calls, rampant idleness. All sound like the hallmarks of rehabilitation to us.

Oh, wait. It's only the CDCR institutions that must provide their inventory units with attempts at rehabilitation. Those for-profit guys don't have that obligation. Their only obligation is to bring in the bucks. And in this case, prisoners equal money. One human rights organization defines human trafficking as "slavery that occurs when one person exerts control over another person in order to exploit them economically." Yeah, that sounds about right.

CDCR

VALLEY FEVER TESTING —DON'T PANIC

We've received many letters and calls from both inmates and family members worried about the recent push at virtually all institutions to test for Valley Fever. Chief among the concerns is that CDCR will use the results to round up busloads of inmates to ship off to those hotbeds of Coccidioidomycocis (Valley Fever to those of us who speak English), Avenal State Prison and the unfortunately named Pleasant Valley State Prison.

And while we would be the last to say CDCR never does nefarious things, this is not one of them. Or at least that isn't the intent. And it isn't even really CDCR's idea. LSA met recently with a representative of the Receiver's Office, going over various medical issues, Valley Fever testing among them.

The testing is done at the behest of the Medical Receiver's Office, in response to direction from the Center for Disease Control (the other CDC, which actually knows what it's doing). As many will remember last year there was quite a binge of inmate shifting, CDCR under direction from the medical folks, to remove from constant exposure at ASP and PVSP all those ethnicities who are known to be particularly susceptible to VF.

The new testing push is a follow up to that population shift, and is being done to identify those inmates who have already been exposed and/or perhaps have acquired an immunity to the disease. A positive test result means that at some point the inmate has encountered the Valley Fever 'bug.' A negative showing means that particular individual has not yet been exposed—and shouldn't be.

According to the Receiver's Office test results will be included in each inmate's file and will be considered if and when that inmate is considered for transfer to another prison. If the individual has already been exposed to Valley Fever he will then be eligible, but eligible only, for transfer to ASP or PVSP. But being eligible does not mean an automatic transfer there; it is one of the factors to be considered in transfer recommendations nor does it mean he would automatically be sent there.

If, however, the inmate shows no indication of having been exposed to Coccid-whatever, that result would exclude his potential for transfer to either ASP or PVSP. In other words, the testing may say yes, you could possibly go there or no, you're exempt from those locations.

Additionally, whether or not to take the test is a voluntary decision and refusal to do so will not garner the inmate a 115 or a stay in the hole. Those are the medical office's expectations on the way this process is to be handled and we have a commitment from that office to swiftly investigate any reports of retribution against inmates who decline to be tested.

The test itself is a rather innocuous affair, much akin to the arm prick procedure used to test for TB. Inmates are to be told the results of their tests, when they return to medical to have those results 'read.' Contrary to rumor and panicked calls we've received, no inmate will be 'injected' with anything and no one will be isolated during the test process.

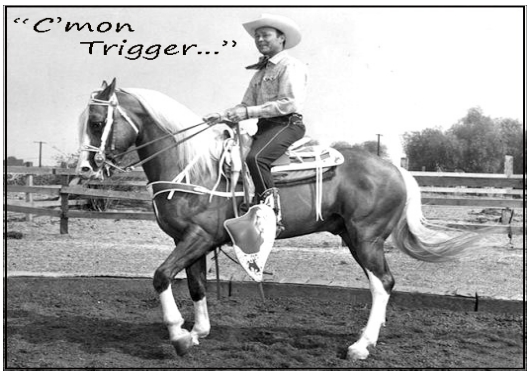
Those who refuse the test will be eligible for transfer to ASP or PVSP as part of consideration at their classification review, but again, not automatically transferred and the results of the test should not trigger a classification hearing. The test is being administered for medical, not custodial or punitive reasons.

Women, who obviously aren't in the running for transfer to ASP or PVSP, will not be tested, nor will those of African-American or Filipino ethnicity. The latter two groups are known to be susceptible to Valley Fever and have already been excluded from transfer to the problem areas.

If problems or other issues occur regarding Valley Fever testing LSA/CLN would like to hear about them. Although the Receiver's Office has prepared and distributed to the prisons videos to be shown in the prison network and printed material explaining the testing it appears, from the volume of correspondence and panicked calls LSA/CLN has received, that somehow the word has not gotten out.

PAROLE-

COMMON TRIGGERS



Culled from a variety of professional sources and reports, here are some common triggers that can lead to relapse and how to prevent them.

TRIGGER #1: Old places, old faces, old habits.
Hard as it may be to leave old friends and familiar places behind, those may be what helped you get in trouble in the first place. You can find yourself in a difficult situation if you continue to frequent the old hang-outs and hangers-on, no matter how dedicated you are to your recovery.

Action: *Choose a different locale and different companions, ones who are as committed as you are to recovery and positive action. Find a meeting, talk to your sponsor.*

TRIGGER #2: Isolation; just me and my problems.
Even after years of positive living things can happen that will threaten your good intentions. And you'll find it's harder to create a support system anew than it is to maintain one.

Action: *Make sure you've maintained your support network, so that when you need it (them) you aren't a stranger. Even if things are fine now, there could come a time when you need a touchstone—make sure you keep in touch with that rock of support.*

TRIGGER #3: Easy access.
No matter what your issue of choice, substance abuse, pornography, tobacco, having it in easy reach, even if you aren't indulging, is a bad idea. Familiarity brings contempt, and you start to forget what can happen after the first step. Even you can't control everything.

Action: *Don't keep reminders of old, bad habits around, even if it's just to prove that you can maintain your control. Why put yourself intentionally at risk, when the rest of the world is doing enough of that for you? Be aware of your limitations and don't tempt fate.*

TRIGGER #4: Expecting too much, of yourself and everyone else.
Things will never be perfect or always go well, but it isn't always your fault or your responsibility. Don't shoulder more than you can handle—you set yourself up for failure and old feelings of low self-esteem and confidence.

Action: *Keep your goals simple and realistic. Allow yourself to bask in the glow of accomplishment of each and every goal and cut yourself a little slack when things don't go as planned. Remember the progress you've made.*

TRIGGER #5: **Wallowing in the muck of unresolved issues from the past**.
Like your crime, the facts of the past won't change and should not continue to define your present and future. Let it go. Obsessing only leads to stress and stress is a huge trigger for all sorts of bad outcomes.

Action: *Give the forgiveness you seek. Focus on your recovery and the here and now. If hurts happen now, address them immediately and calmly, with the help of your support network and the tools you have.*

***PAROLE*- cont.**

TRIGGER #6: Don't transfer your addiction/obsession to another venue.
Even if it seems healthy, becoming obsessive about anything is dangerous. If you've left substance abuse or anger behind, don't dive into habitual exercise, computer time or even fanatical group attendance. Any activity or thought that dominates your thoughts, time and life or causes you to feel irritable when you can't indulge in that activity is a concern.

Action: *Diversify! Schedule various activities throughout your leisure time and spread your talents around. Too much of even a good thing can be bad.*

TRIGGER #7: Ignoring changes in routine, emotions and warning signs.
Even a good change-a new job or relationship—can cause stress. When day to day habits change—and they will—when emotions run high and warning signs appear, be aware and prepared to act.

Action: *Try to keep a stable routine, and continue as many familiar tasks as possible, even in new situations. Know that even good changes can be difficult at first, but this, too, shall pass and what's new now will become normal tomorrow. Take inventory of your emotions, ask for help and don't assume the feelings will just go away.*

TRIGGER #8: Personal problems and strained relationships.
Personal issues, whether financial, social or trying to cope with a significant other still in the troughs of addictive behavior can become overwhelming, if not addressed. Living in recovery and rehabilitation is an on-going process that sometimes takes sacrifice.

Action: D*on't wait to handle these; deal with issues as they come up. Look for 'positive action' ways to resolve conflicts but be prepared to remove yourself from a situation that isn't going to get better. Address financial or living issues directly as they arise and don't wait for them to extrapolate. If positive, pro-active methods on your part aren't reciprocated, be prepared to protect yourself and your recovery.*

TRIGGER #9: Overestimating yourself.
Dirty Harry said it best: "A man's got to know his limitations." Confidence is great, but over-confidence can be a disaster. Taking on too much and trying to handle all of it alone is a recipe for disaster.

Action: *Remember that being positive and confident does not mean you won't need help from time to time. Recognize and honor your limitations—asking for help is a sign of knowledge and strength of character, not weakness.*

TRIGGER #10: Recovery and rehabilitation have an end date.
It's all over now, the job is done and those old problems, that may have been silent for years or decades, are dead and gone. Not so, believe this at your peril.

Action: *Recognize that relapse, into any sort of unproductive or harmful behavior, is always possible, no matter how long you've been on the right path. Stress is rampant in today's society and you'll never be immune from it. Always keep in mind your triggers and your relapse prevention tools—even small challenges become easier to manage when you recognize them, act on them and overcome.*

All of us are works in progress. Lifers and others who have walked the fire of self-examination, evaluation and change are perhaps better prepared than the Average Joe to maintain sober, safe and productive lives, but even this dedicated breed can run into complications and predicaments in life. It isn't a question of if or when you'll be challenged, just a question of if you know how to handle those challenges and best them.

PAROLE

TO TRANSITION OR NOT

Much discussion these days as to whether or not lifers preparing to go to board hearings 'must' or even 'should' plan on paroling to transitional housing prior to finding other housing or even returning to their families. And there is no definitive answer.

While some attorneys (who shall be nameless but annoying) continue to tell their clients that they 'must' or will be 'required' to have transitional housing acceptance if they expect to be found suitable, that is simply NOT the case. In speaking with both administration at the BPH as well as several individual commissioners, the answer is always the same; transitional housing is not a requirement and you will not be denied parole simply because your plans do not include a stint in such a facility.

Does the board like transitional housing? Yes, certainly. Do they feel more at ease when an inmate proposes to include this in their parole plans? Yes, somewhat. Is it often useful and a good idea? Yes, without question. Does one-size fit all? Assuredly, not.

Transitional housing is often a good idea, especially for those long-serving lifers who have either no close relatives or lost touch with family and have no specific 'home' to parole to. It is also very useful even for those long-timers who do have family, as the shock of finally having a lifer come home is felt on both sides—by the former prisoner and his family, whether that family is Mom, Dad, siblings or wife. It's a case of you-don't-know-what-you-don't know, and neither do your loved ones. The change, the stress and the day-to-day of getting back into life are a huge challenge and oft times a bit of help from someone else who has walked that path is very helpful. And that help can be found in the fellowship of transitional living.

So while we think a stay in transitional housing can be a tremendous help to paroling lifers—and their families—all transitional housing is not created equal. For those lifers who, after consideration, believe planning a first stop in transitional living is a good idea, we say, we agree; but be careful where you choose to go. While 'transitional housing' is right now a growing industry, too many of these transitional homes are, in reality, simply more substance abuse treatment facilities, and not true transitional homes.

These often can be very frustrating, impeding and lacking in providing what paroling lifers need. LSA/CLN has dived head-long into this fray, talking about options (not THAT Options) for lifers with the BPH, DAPO, parole agents, Division of Rehabilitative Programs (DRP) and even the vendors who operate many of the best known 'programs.' We've talked to paroled lifers who went through some of the various transitional facilities available, asking about the good (some) the bad (some) and the ugly (yeah, some of that too). And here's our conclusion.

Yes, the board likes to see transitional housing in a parole plan, because they are aware of the challenges of

Parole **- from pg 52**

life and liberty you will be facing. It makes the board feel as though you are serious about success and taking advantage of every opportunity to find support and reentry help. And so you should. But if you have good, solid plans to parole to a family member, that, too, is possible.

If you do opt for transitional housing, start early to investigate what's available in your area of choice and what the specific program requirements are for those facilities. It would help if there was a one, or even several, reliable lists of transitional housing in various areas, but there isn't. Unfortunately, some 'programs' change with the wind. And while we've got research underway in our office to develop at least a basic list of what and where, it's still a work in progress.

When you hear of a program and are about to ask for a letter of acceptance, be sure you ask specifically about the restrictions of the program, the costs (if any, many are state funded) how long you must stay in the house and what sort of help, other than substance abuse counseling, they provide. There is, in our opinion, nothing worse than a drug and alcohol certified counselor/former lifer being stuck for 6 months in a restrictive substance abuse programming house--back in Addiction 101.

Understand clearly the program you've requested acceptance into and realize that if you are placed there, either by the board or your agent, then you will be there until (a) the end of the program (b) you manage to accomplish a transfer, not an easy task. And, as of right now, there are few programs specifically targeted at lifers and their needs—many are just plugging you into their on-going program, showing another occupied bed.

LSA recently presented our basics as to what lifers DO and DO NOT need in transitional housing to a meeting of parole supervisors and administrators. And we will be doing so again, at future meetings. These are not just our own ideas, these are culled from experiences of paroled lifers and we are continually updating the information.

So consider some of these points as you make your plans. Remember, transitional housing, true transitional/sober living environment, can be a tremendous boon to lifers suffering from the Rip Van Winkle effect. But changing custody from behind the wire to behind the fence can be suffocating.

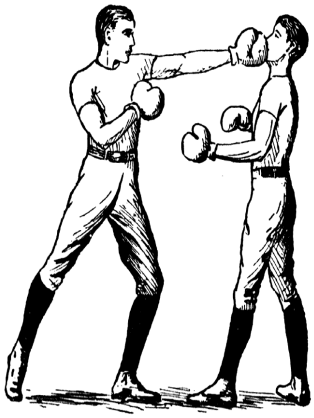
What Lifers Need in Transitional Housing —Life Skills

1) Help in Re-establishing identity (DL, SS #)
2) Social and relationship skills—how to get along in society these days
3) Money, budgeting, shopping—how to use debit card, electronic banking, automatic deposit, the cost of everything,
4) Navigating the technological society—on-line job apps, don't put everything on Facebook, being media savvy, cell phones and apps
5) Shedding the Rip Van Winkle effect—things have changed and you'll need some pointers in how the world runs now--mentoring
6) Contact with family and friends—you need to re-establish these relationships, not be held back by blackouts, setting boundaries with family & friends

What Lifers Don't Need in Transitional Housing—Treatment/Custody

1) Substance abuse/sobriety treatment—constant, daily programming on getting clean
2) Blackouts—impede both family reunification and true reentry
3) Warehousing—restrictions to the facility only slow down your reintegration
4) 24/7 supervision—if you needed that, you'd still be behind the wire
5) Restrictions on communication/contact—you can't look for a job, talk to your family, find your life if you can't have a computer access, cell phone, letters or spend the day with people
6) Babysitting—you need the freedom to relearn how to make your own day-to-day decisions, including when to eat, how to manage your time and get around

Connecting the Dots . . .



Insight, understanding, remorse. All very subjective topics, but all necessary for a lifer to exhibit before the BPH panels are willing to consider him/her sufficiently rehabilitated to reach that threshold of being 'no longer an unreasonable risk of danger to society.'

Often times it's a bit like the old saying about art; I don't know what it is, but I know it when I see it. Inmates often come to hearings with some understanding that the effects of their past influenced their actions that resulted in a crime, but when asked to put it all together, to connect the dots and talk about 'the causative factors' of the crime—they draw a blank. One commissioner reported his growing frustration and concern with prospective parolees who, when asked why the crime happened could only say 'I hated my father.'

Ok, clearly a problem, but how did issues with your father result in a major crime involving a totally different man, one you'd perhaps never met before? This is the story of one former lifer, now paroled, who was able to find that insight, connect the dots and articulate the causative factors of his crime. It's not everyone's story or solution, but it does illustrate how events effect emotions, which affect perceptions and attitudes, which influence decisions, which often result in extreme actions.

These are snapshots from a life, snippets of events that culminated in a personal and societal disaster of huge impact, that was at once predictable and yet unforeseen. It has happened thousands of times and continues to happen hundreds of times each year.

My Life:

I was born to an alcoholic father and co-dependent mother. My parents moved around a lot and divorced when I was very young, after which I didn't see my father for many years. My mother married my step-father, who was also an alcoholic. He was away a lot but always drunk when he was around.

He was abusive to me and my mother. I hated him because he used to torment and humiliate me, but at that time I didn't realize there was anything wrong with my life. When I was in elementary school I caught my mother in a compromising situation with the father of my best friend; it crushed me and took away all my trust of her. My mother always provided all the tangible things I needed; food, clothing, housing, taught me manners, etcetera; but growing up I can't remember her ever hugging me.

Eventually, we fled my step-father and moved again. I didn't know anyone and I had a hard time fitting in. I hated school because I felt like I didn't fit, wound up in a lot of fights and was miserable. My mother didn't understand me and we fought, awfully, also. I was an angry young man and thought I should be left in charge of my own life.

At the age of 12 my mother introduced me to alcohol and to pot at the age of 13. I was prescribed Ritalin to settle me down; it is an amphetamine. At some point I stole the whole bottle and abused it with a friend and that was the end of prescription Ritalin, but came to realize that Ritalin had fostered an affinity for amphetamines.

My best friend since 5th grade, Mike, was my first drinking buddy. We were poison to each other and used to steal his uncles' alcohol and other things, like Valium and stay out all night

getting drunk and/or high and emulating their behavior, always at odds with authorities, along the way building a pattern of failed relationships with everyone.

Having grown up in the projects, all of my drug use was achieved through a lifestyle of dealing drugs; that was the only way I could afford it.

But the drug life morality we lived by wasn't conducive to building lasting relationships. Quite frankly, I've found that drug addiction and stable relationships don't seem to co-exist very well. Defeated after another in a long line of failed relationships,I threw in the towel and ran headlong back into the only lifestyle I knew, that of an addicted drug dealer trying to fake being a citizen.

In time,I was shot in the shoulder/chest and nearly killed. My lifelong mindset of solving my own problems culminated in deciding that, "since everybody carried a gun nowadays, I needed to start carrying a gun too." Just 5 ½ weeks after being shot myself, I got into a confrontation. I felt overwhelmed with humiliation and became enraged and as a result I shot someone. One big difference is that the man I shot died; and almost inevitably, I found myself in jail and later convicted of murder, sentenced to 27 years to life.

After many years in prison and much self-help I realized my thinking had degenerated drastically from what is acceptable in order for my life to get to the place where it was okay in my head to kill somebody. I'm convinced that without fail that we operate on what we believe in. When I committed that heinous crime, somehow in my mind I believed it was the right thing for me to do at that time. Even so, the instant it occurred I knew I had made the biggest mistake of my life and that it was irreversible.

Thus began my process of self-discovery; I began to practically examine myself. And I was able to see some pretty significant things.

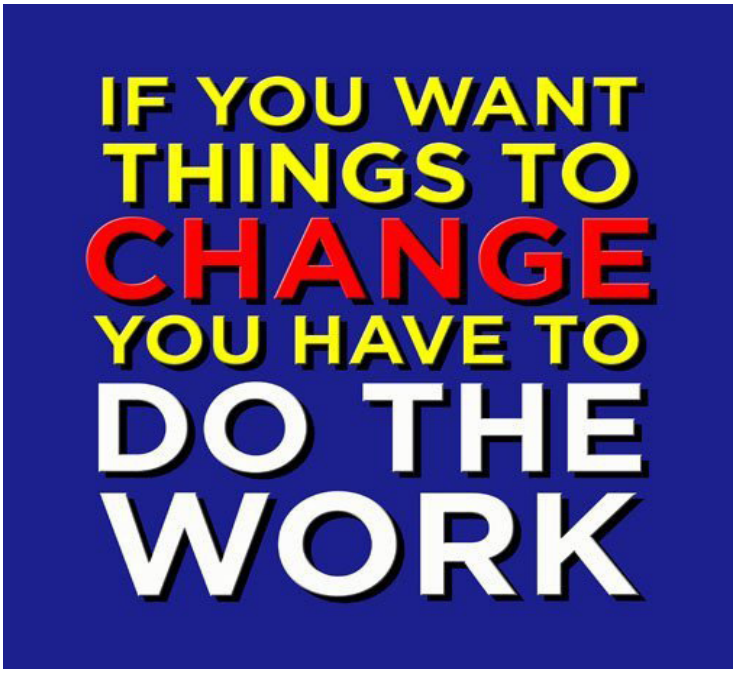
I realized that my father's absence resulted in me feeling abandoned by him, which resulted in low self-esteem. From that grew an unhealthy quest for approval, and actions that would allow me to 'fit in.' All the moving around while growing up resulted in many broken friendships. The result was a fear of intimacy, so I quit making any real connections and became a loner. My relationship with my mother fostered problems with how I viewed women and trust. As a result of my stepfather's torment I adopted the mindset that I had to solve all my own problems and figure everything out for myself because there was never going to be anyone I could count on, especially an authority figure.

Being subjected to his humiliation made me feel stupid and inadequate, which fortified my need to prove myself, but it also made me very angry and frustrated. This resulted in serious anger issues and the fact that violence seemed to solve some problems, and at least for a moment relieved stress, fortified a belief in violence.

I was full of fear of every kind and unable to communicate about the fear or the things that caused it. I was only able to bottle it up until it got to the breaking point. Then I would explode in a violent rage. So I learned that I grew up full of anger, resentment, shame and remorse. I didn't know it at the time because I had never known anything else. But it was no wonder that drugs and alcohol seemed such a solution for me, I learned that the anger, resentment, shame and remorse lead to self-centered actions trying to prove my worth. If substance abuse and/or violence salved those feelings, even for a moment, then that seemed to be the solution. But those solutions never worked for long and the feelings never stayed away. I was barricaded in my own lack of understanding and denial; I had put so much time and effort into rationalizing my actions as the fault of someone else or what I had to do to be a man, I didn't realize that time and effort was spent in building the very prison that dictated so much of my out of control behavior.

My recovery and rehabilitation began with a 12 step program, which helped me discover the root causes of all those old feelings, beliefs and fears. I could more easily see how ridiculous my beliefs had become and change them, and because my beliefs have changed, I can change the actions I choose to take as well.

I've learned the world is full of people with hurts, habits and hang-ups just like mine; misunderstandings, misperceptions; misinterpretations of life's workings. The steps help me to look at myself and understand what I find and grow through it. There's a line from an old Eagles song that says, "now it seems to me some fine things have been laid upon your table but you only want the ones that you can't get." That was me trying so hard to gain the world's approval.



You can't begin to understand the "causative factors of your crime" until you go back to what caused your thinking, your feelings, to be outside lines of society. Because the events of your life caused your feelings, which led to your thinking, which developed your belief system, which rationalized your actions as the best course you could take in any given situation. That's how the dots connect and knowing how that pattern of dots connected to create such an ugly picture will help you re-draw those connections into a picture of someone able to cope with emotions we all feel; stress, anger, fear, without resorting to violence. Someone who is no longer an unreasonable risk of danger to society.

LSA

CAN YOU HELP US?

We think you can. **So we're asking lifers, and other categories of prisoners who are now experiencing parole hearings to send us information, input and observations (along with documentation) on a number of subjects.**

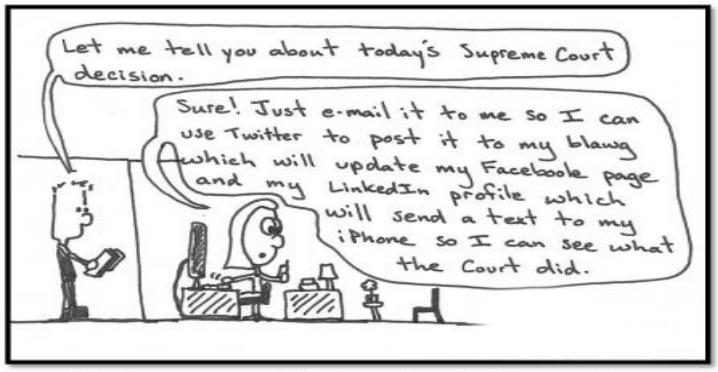
If you have something to say about anyone of the following areas or events, we want to know. Send us your thoughts, CRAs, survey information, anything that will add to our knowledge and data bank on the issues below. And if you have documentation to support your thoughts, send that too—we'll return the originals if you need them.

These topics are among the issues LSA/CLN is researching, with an eye to impacting the current situations and practices.

CRAs: especially for those with hearings held under the guidelines of youth or elder parole, we would like to review your CRA. The FAD is charged with considering the ramifications of both youth at the time of the crime and the lessening risk of recidivism with age in the risk assessments. Let's just say, we're skeptical as to the actual consideration of these factors evidenced in the evaluations prepared by the clinicians.

Attorney Surveys:while our research is primarily aimed at evaluating the performance of state appointed attorneys, we'll take all information offered, including that on privately hired ones too. If you don't have a survey form, one is included in this issue, or you can just write us your thoughts. Two things to remember here: if you were denied, it is not primarily the fault of your attorney and, when reporting on that attorney's performance, don't forget to provide us with the name. Yes, it does happen.

Restorative Justice: many institutions have restorative justice programs or events and if you have participated in one of those, either as a one-day presentation or as an on-going class, we want the particulars. How was it structured, who facilitated or sponsored and what did you get from your participation.



How lawyers use technology to make things easier.

LTOPP Grads: Now that the first crop of participants have graduated from the department's pilot program for Long Term Offender Programming we want not only your feedback, but your results. If you've been to the board since your graduation or even participation in LTOPP, how did your hearing go and did the program seem to help you.

VNOK's at Hearings; if victims or their families attended your recent parole hearing, how was their participation handled? Were you, as well as they, treated with respect? Did the victim impact statements include unfounded allegations, how was the statement presented (by the families, read by a representative, on recorded video or audio presentation)? And please don't forget to tell us who presided over your hearing.

DATE TO THE GATE (D2G): Everyone has to have a pet project and this is ours. As previously outlined LSA is in the first stages of creating a hoped-for helpful presentation for lifers found suitable but not yet released that will highlight some of the subtle challenges in reintegrating into the world. Although we're working with a variety of in-the-world sources, including paroled lifers, we want to know what you want to know. Tell us what subjects hold the most mystery for you or what you feel will be most challenging and we'll try to find some answers.

While this list looks pretty substantial, it's only a few lines on the list of subjects we're working on and researching. So save us a little time and trouble—make it easy for us to find information by dropping in right in our laps—or our mailbox in this case. We look forward to hearing from all contributors.

Send your input to
LSA, PO Box 277, Rancho Cordova, CA., 95741.

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