



PRISON BINGO: Can you identify which of California's 33 prisons is pictured here? Answer on last page

FAD: COURTING A THIRD STRIKE?

Once again the Board of Parole Hearings is trying to make a silk purse from the proverbial sow's ear (or some other body part) and has re-submitted their latest incarnation of justification for and support of the Forensic Assessment Division (FAD). This will be the Board's third at-bat on this thorny and troublesome issue. And once again, Life Support Alliance, supported by a cadre of organizations and individuals, is opposing the attempt

Quick recap of the events till now: in November, 2010 the Office of Administrative Law (OAL), the arbitrator of whether rules are legally proffered, found the BPH's creation and use of the FAD in requiring all life term prisoners to undergo psychological evaluations to be an underground (read illegal) rule. In their first attempt to cover their collective keister, the Board produced a 2-page Initial Statement of Reasons for the establishment and use of the FAD, a document that was laughable in its lack of adherence to the requirements of the OAL. LSA was among the first to call for a public hearing on this change and one of what eventually numbered over 130 individuals and groups who objected to the FAD, culminating in a public hearing on January 31, 2011.

Accordingly, the OAL rejected and thoroughly rebuked the Board's reasoning for the FAD and instructed the staff that the "document" they had produced lacked in every area. The OAL instructed the Board it should "supplement" its case by providing actual proof of the need for this rule change (creation of the FAD) and suggested any such proof should be based on conclusions from empirical studies of the issue. Fast-forward to July 1, 2011, when the Board produced the new and expanded

“Revised Initial Statement of Reasons (RISOR),” this one some 14 pages long, though how a document 7 times longer than the original can be called a “supplement” has not been addressed.

Paying at least partial attention to the OAL’s admonishments, the BPH staff put forth as the empirical, scientific and professional proof of need for the FAD the reputed results of a one day meeting in August, 2006 attended by half a dozen psychological experts. According to the RISOR, these six clinicians, following their one day meeting, came to a “consensus” that an FAD-type agency would be the best way to handle required psychological evaluations and the tests presently used by the FAD were, in fact, the best and most reliable predictors of future violence in potential paroled lifers. All very neat and professional, tied up in a nice package, proof positive of the wisdom of the FAD and the solid scientific support of their tests.

Not.

Starting with the obvious, let’s check the facts first. LSA was able to contact five of the six participants of that 2006 meeting, those same clinicians who were said by the BPH to have come to a “consensus” regarding appropriateness of the FAD and those infamous tests. And indeed, we did find a consensus; all five clinicians were unanimous in agreeing that they had come to no consensus recommending the tests in that 2006 meeting. The meeting itself was described as a discussion and certainly not a scientific, empirical study. Further, they in no way recommended the battery of tests used by the FAD as appropriate or accurate for prediction of lifer recidivism or potential violence.

So, obviously, someone has it wrong. LSA asked the BPH for public records, minutes, notes, reports, any documentation from the 2006 meeting that would support the Board’s claim that the FAD and assorted tests were approved and blessed by these expert clinicians. After a bit of verbal-run around the facts finally emerged. The public record in support of this alleged “consensus” is a series of felt-tipped marker notes on flip chart paper, the sort of portable note board used to facilitate discussions at meetings. That’s it. No vote, no report, no statement of affirmation, no minutes, and certainly no mention of any consensus. In fact many of the 7 flip note pages were festooned with arrows, cross-outs, doodles and undecipherable abbreviations, all typical of notes made during group discussions when ideas, opinions and alternatives are being tossed about.

LSA, via request to the BPH, examined this “public record” and was able to photograph the final, summation page (see below for photo). We defy anyone, other than possibly a psychic (not to be confused with psychologist) to glean from this “record” any consensus, recommendation or validation of either the FAD or those vaulted tests.

It would seem to us that the Board’s characterization of the 2006 meeting as a “consensus” of experts is something of a sham, or as we noted in our submitted objections to the RISOR, it is at best misleading and a misrepresentation and at worst a prevarication. Were this a parole hearing, we fear we would have to find the subject (the Board) unsuitable because their statements don’t seem credible, they lack insight and certainly show no remorse for their wrong doings.

If this mockery of science and law were not enough to invalidate the FAD, the RISOR continues to perpetuate additional fraudulent information in again stating the corrections department in Washington State utilizes the LS/CMI psychological test. LSA was able to prove this false as well, speaking with Dr. Bruce Gage, the head of Washington’s corrections mental health unit, who verified in a July 13 conversation that Washington ceased using the LS/CMI four years ago, finding it invalid for use in parole situations.

The Board also attempts to lay the responsibility and justification for creation of the FAD on findings contained in the *Rutherford* decision (isn’t that called failure to accept responsibility?). However, well-known lifer attorney Keith Wattley confirmed for LSA that *Rutherford* does not require either an FAD-like agency or the specific tests being used:

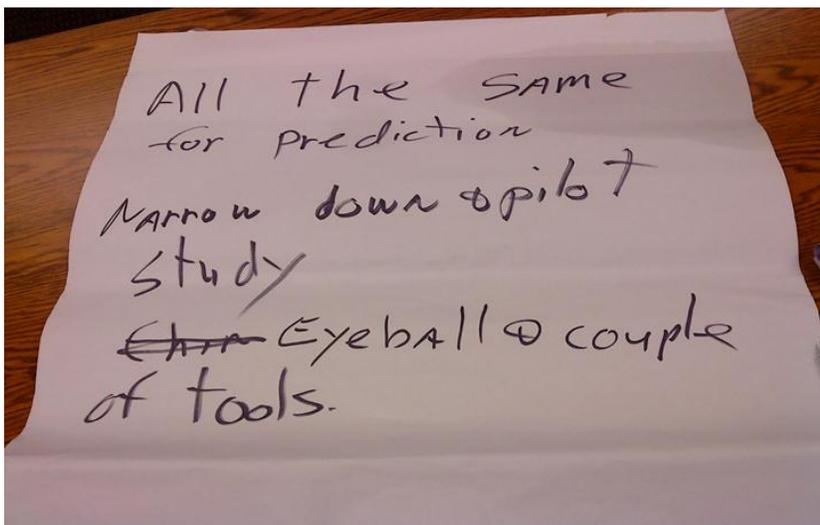
“The FAD [was] developed as part of BPH’s response to a growing backlog caused by frequent postponements related to missing psych evaluations. The Board was the one to say these reports

were necessary for every hearing, after which their fallout with institution-based staff psychologists led to BPH's development of the FAD. The only thing the *Rutherford* court ordered was, if the psych reports are necessary and hearings will be postponed without sufficient staffing, BPH has to make sure there is sufficient staffing – whether prison staff psychologists or FAD. Of course, as we have all long said, these psych reports aren't really necessary in most cases anyway” said Wattlely.

We could go on, detailing the inadequacies of this latest fiction from the BPH and we did submit in our objection to the latest document additional discrepancies in the Board's version of fact and the actual reality. We also requested the Board allow for a new public hearing, given the vastly increased size of the new RISOR and the short time allowed by the BPH for stakeholders to respond. The RISOR was issued on July 1, a Friday prior to the start of a 3-day weekend for many agencies, including the CDC and the US Post Office. The RISOR was mailed to commenters who objected to the original document, many of those inmates, who, because of both the mail-holiday and slow institutional mail delivery, did not receive notice of the new changes until July 8, with public comment due in Sacramento by July 15. Call us suspicious but we don't think the timing of the RISOR's release was a coincidence.

What now? The Board has until Sept. 2, 2011 to submit to the OAL their response to the various questions and objections brought up in this, the third round of scrutiny of the FAD. In the intervening time, LSA has repeatedly asked the BPH to suspend operation of the FAD and administering of psych evals using the tests in question until the legality and necessity of the FAD can be determined.

But the BPH, like a recalcitrant child, continues to do things the way they want to, regardless of the appropriateness of their actions and heedless of any eventual outcome or damage. LSA and other groups continue to explore ways of intervening in this continued malfeasance and await the OAL's response to the BPH's latest canard.



A sample of the “public record” the BPH claims endorses both the FAD and its battery of tests.

CALIFORNIA LIFER NEWSLETTER FOR COURT CASE INFORMATION

There are many prisoner newsletters and publications, and although we at LSA are somewhat biased in favor of our own *Lifer-Line*, we can and do unreservedly recommend *California Lifer Newsletter* (CLN) as the definitive and most complete source for information on court cases and decisions. CLN publisher Donald (Doc) Miller provides much needed accurate and comprehensive reporting on a multitude of court decisions and how they affect lifers.

Subscriptions to CLN are available (at bargain basement prices for lifers) from *California Lifer Newsletter*, PO Box 687, Walnut, Ca. 91788. Lifers may pay in stamps (4 books) or \$25 yearly.

A CONVERSATION WITH NEW BPH EXECUTIVE DIRECTOR

A few weeks ago Life Support Alliance was afforded the opportunity to meet with the newly appointed Executive Director of the Board of Parole Hearings, Jennifer Shaffer. Also attending was Deirdre Wilson of California Coalition of Women Prisoners.

Ms. Shaffer was appointed to the ED position by Governor Brown on July 10, 2011, following several months in the Board's Hearing Operations division. This followed stints with the Inspector General's Office and with the CDCR's Office of Victims and Survivor Services. Ms. Shaffer has also served as counsel and analyst for the California Performance Review and the Assembly Committee on Public Safety.

Our meeting, lasting over an hour, was wide ranging and reasonably frank. Ms. Shaffer offered a brief rundown of her previous experience in various agencies, mentioning, perhaps in response to our previously expressed concern regarding her work in Victims' Services, that as an attorney her job while in those bureaus was to advocate for those clients. Now, however, she is not representing or advocating for any faction of the parole process, only seeking to uphold the law.

Indeed, Ms. Shaffer mentioned several times her belief in adherence to the law, aligning herself with Governor Brown in his recent statements to follow the law, not politics, in governing. She appears to be very law-oriented, expressing her intent to follow and apply the law regardless of political affiliations or consequences and hopes to increase understanding among all levels of BPH staff that it is the job of the Board to follow the law. If true, this would be a welcome change.

Ms. Shaffer outlined her three basic tenants of operation as Executive Director:

- First, seek to understand [the problem, other perspective, and issue]
- Do the right thing, even if it isn't the easy thing.
- Seek, encourage and give input into issues and problems.

The new Executive Director indicated she would like to see better and more adjudication- based training for commissioners and was clearly troubled by reports (confirmed by Commissioner Arthur Anderson in his Senate Rules Confirmation hearing) that state-appointed lifer attorneys often are not adequately trained or compensated. She said she hopes to provide better and more transparent training for commissioners and staff (we're hoping by this she means the FAD's psychologists). Ms. Shaffer will have a chance to make good on this hope in December, when the BPH holds its next series of training sessions for commissioners. More open sessions would be welcome.

Asked specifically if she would object to non-participating observers being present during parole hearings Ms. Shaffer expressed surprise the hearings were closed to observers. When assured that is indeed the case, she replied she was not necessarily opposed to observers, but was less willing to agree to allow friends, family and supporters of prisoners to attend their hearings, again, in a non-participating capacity. She expressed her reasoning as hoping to avoid "carloads" of individuals attending the hearings. She also suggested stakeholders might consider seeking legislative relief in obtaining permission to attend hearings, something LSA will explore.

Having only been in her position a matter of six weeks when we spoke Ms. Shaffer, admitted she was not totally familiar with the Forensic Assessment Division (FAD) and the on-going wrangle about the use of the division and its tests on lifers. She did opine that as an attorney, she felt the Office of Administrative Law often was too broad in their definitions of what constitutes a regulation. We doubt the OAL would agree with that statement; LSA surely does not.

She indicated she was uneasy with making major changes in the operation of the FAD due to the provisions in and settlement of the Rutherford case. However, as addressed in our lead article in this issue, the Rutherford case does not require the FAD in either specific or general terms. Another point where Ms. Shaffer and LSA at present disagree. Ms. Shaffer did commit to a crash course in the FAD and a follow up meeting on the issue.

Regarding the two “elephant in the room” issues, the overall parole grant rate and the meaning and application of “shall normally find,” Ms. Shaffer, to our mind, is batting about .500. While suggesting she expects to see an increase in parole grants as a newly-trained and law-savvy board makes its way through hearings involving long-serving lifers who have been repeatedly denied parole, she also indicated she felt that while “shall normally find” might seem to tip the scales in direction of granting parole, recent case law (*Lawrence* and *Shaputis* were specifically mentioned) provides weight on the other side of the equation and, to her mind, provides for a more evenly balanced consideration theatre. One hit, one strike.

The Governor’s appointee, who will face confirmation sometime after the first of the year, indicated that while she anticipates an increase in grant rates she would expect the increases to “level off” at some point, as most of the older lifers in subsequent hearings are considered and decided and the newer crop of lifers, those sentenced under three strikes, begin their initial appearances. Encouragingly, she did offer she would not anticipate grant rates returning to the basement levels of previous years. Good news, if it comes to pass. Ms. Shaffer was careful to add that she would expect to see this change in grant rates not through her direction to the commission, but as the result of more appropriately focused and increased training provided to the board. She clearly sees her role as Executive Director as providing direction to the board, but not overt directives. That, we feel, is appropriate.

Overall, following our conversation with Jennifer Shaffer we are inclined to take a cautious wait and see stance, hoping she can make good on her intentions to provide better, less custodial based training and more transparency to Board operations and be willing and able to continue open communication with all stakeholders in the parole morass. If she holds true to her stated basic tenants, especially the second, do the right thing, even if it isn’t the easy thing, the BPH will have made a tremendous step forward.

JULY BPH EXECUTIVE BOARD MEETING NEW COMMISSIONERS SEATED



Macaulay



Fritz



Robles

The July public meeting of the Board of Parole Hearing Executive Committee was remarkable for two things; brevity and changing faces.

The meeting, with only one en banc case to consider, lasted less than 45 minutes. And on the dais was a panorama of ten individuals, many of whom were newly seated members. Executive Director Jennifer Shaffer, still somewhat a rookie at only her second meeting, gave in abstentia thanks to departing Commissioners Troy Arbaugh and Susan Melanson. Both saw their terms end when the Senate Rules Committee failed to hold confirmation hearings for them within the 365-day appointment approval window.

Also absent, but with no explanation, was Board Chairman Robert Doyle, passed by the Rules Committee in June, but whose confirmation was not brought before the entire Senate. Although Doyle has officially not been a member of the BPH since late June neither Ms. Shaffer nor any

commissioner commented on his absence. Commissioner Jack Garner filled the chairman position, but with no comment on whether this would be a permanent slot.

In an unexplained but interesting comment Ms. Shaffer reminded both the commissioners and, curiously, the public, of the rules governing use of restraints on prisoners, particularly in hearings, including the provision that prisoners were not to be bound to stationary objects. No further explanation of the comment was offered. However, LSA has been aware of increased legislative interest in the reported use of restraints during hearings.

This meeting marked the initial appearance of the three newest Parole Commissioners; all appointed June 28 by Governor Brown. Two, Juliet Macaulay and Cynthia Fritz, have served as Deputy Parole Commissioners; though Ms. Shaffer noted neither had been members of lifer panels prior to their appointment. The third new commissioner, Gilbert Robles, is a former parole agent with the CYA and holds a Master's Degree in Psychology.

None of the new trio is expected to face confirmation hearings before early 2012. Absent Doyle, the cadre of lifer panel Commissioners stands at nine, well short of the full complement of 12 commissioners. Gov. Brown is reported to be on the verge of additional appointments, perhaps to be made after the Legislature reconvenes in mid-August. At present the sitting commissioners are: Anthony Adams, Arthur Anderson, Jeffrey Ferguson, Jack Garner, John Peck, and Michael Prizmich, plus the three new appointees, Fritz, Macaulay and Robles.

LSA MISCELLANIA

Life Support Alliance continues to request survey responses from life prisoners concerning their experiences with both parole hearings and psychological evaluations by the Forensic Assessment Division (FAD). We are particularly interested in the performance of the newest BPH commissioners not yet confirmed, Anthony Adams, Juliet Macaulay, Cynthia Fritz and Gilbert Robles.

Forms for both the hearing survey and the questionnaire dealing with psych evals and the clinicians performing them are available via email or regular mail. Our mailing address is PO Box 3103, Rancho Cordova, Ca. 95741; email at lifesupportalliance@gmail.com.

LSA, must, unfortunately, plead guilty to being behind schedule in mail responses. Requests for newsletter signups are burgeoning, and we continue to receive stacks of letters with individual questions and requests. With apologies offered, we will respond to all letters.

As our newsletter list grows, so do postage costs. Our commitment to send our newsletter free to all who ask for it remains. But to assist in maintaining this promise we request those prisoners who can, send stamps to help defray costs. More importantly, if you have a relative or friend outside who can receive the newsletter via email to print and mail to you, that helps even more. We put no restriction on the number of copies our email subscribers can print and mail—the more the better.

PRISON BINGO ANSWER

The photo is an aerial view of Solano State Prison in Vacaville, west of Sacramento. Solano, a Level II/III institution, presently houses just over 5,000 inmates, which is 192% of design capacity, ranking Solano number 10 in population overload, according to the latest figures from the CDC. Most overcrowded, this week, is Deuel Vocational Institute in Tracy, at 226% of design capacity. At the other end of the population chart, California Medical Facility, a neighbor of Solano in Vacaville, is now at 126% of capacity.