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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 Nos. 14-15613, 14-15680]
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, was orally argued and submitted in the Ninth Circuit on June 17, 2015. No decision has come down yet. Subsequent to June 17, two inmates filed self-serving pro per "motions," but these are temporally of no effect in a submitted case.

STATUS OF *IN RE ROY BUTLER*

In re Roy Thinnes Butler
___Cal.App.4th___; CA1(2); A139411
May 15, 2015
CA Supreme Ct. # S227750
July 10, 2015

Roy Butler's habeas challenge to his denial of parole was settled by the parties to accord him a new hearing. He was granted parole at that hearing, and has now been released. Subsequent to all this, both an inmate and the San Diego County District Attorney independently filed motions in the CA Supreme Court requesting depublication of this lifer-friendly opinion. Oppositions to these motions were later filed by Presiding Justice J. Anthony Kline of the 1st District Court of Appeal, by the attorney for Butler, and by attorney Keith Wattley. As a result, the finality of the DCA opinion below, and its publication status, remain pending in the CA Supreme Ct.

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COURT CASES (in order)
Reviewed in this Issue:

***CASES* from pg 1**

FINALLY! SB 261 SIGNED!

Alright, everyone exhale now.

For many months and weeks many in our prison community have been holding our collective breath waiting for the final results on **SB 261**, Sen Loni Hancock's bill that would extend the considerations of Youth Offender Parole Hearings to those under the age of 23 at the time of their crime. The bill passed the legislature in early September and was presented to Governor Brown, awaiting his signature, the action that would be the final act in making SB 261 a law.

And so we waited, as days turned into weeks and nerves frayed. Still, there was no indication that SB 261 was in disfavor from Brown---just no action and no comment. LSA/CLN sent out several calls to action to our supporters, who responded by peppering the Governor's office with letters, emails, FAXes and telephone calls urging Brown to sign the bill, as his deadline to sign or veto all bills, October 11, approached.

Pundits debated whether Brown would wait until the last moment, as he has done, to sign bills that might engender opposition in the public. Saturday, October 3, a bare week before the deadline, was a pretty quiet day on the capital news scene, with an airshow at a local airbase capturing most of the attention. And so Saturday afternoon many missed the quiet news release issued by the Governor's office, disarmingly titled "Governor Brown Acts on Legislation to Strengthen Criminal Justice." And there it was, third from the last in a list of 13 bills signed into law, SB 261. Signed at last, now a law that will become effective January 1, 2016.

Brown tucked his approval of SB 261 in a slate of several bills, all with ties in some way to corrections or other quasi-legal issues. Vetoed the same day were nearly a dozen other bills, that, according to the veto message, would create a new crime, something Brown noted he opposes. "Over the last several decades, California's criminal code has grown to more than 5,000 separate provisions, covering almost every conceivable form of human misbehavior," the Governor wrote, while noting this proliferation of new 'crimes' coincided with the explosion in the population of jails and prisons.

Also approved were bills SB 230 and 519, both of which will impact how SB 261 is implemented. SB 230 will simply codify the YOPH process,

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.

***SB 261* from pg. 2**

so that what has been policy and procedure will now be law. This included the change from the old documentation hearings to the new consultation hearings, which now happen 6 years before a lifer's MEPD, giving the prisoner a 5 year window to know specifically what the board expects of him and follow the path. Initial hearings are still scheduled for one year prior to MEPD. And a YPED (Youth Parole Eligibility Date) will supersede an MEPD.

SB 519 is more impactful, and will change the way SB 261 is implemented from the manner the forerunner bill, SB 260 was effectuated last year. Cutting through the legal language and code references, SB 519 gives the BPH until Dec. 31, 2021 to bring to initial hearing those Determinate Sentenced Inmates (DSL) who fall under SB 261. The first YOPH gave the board only an 18 month implementation window, which saw lifers or Indeterminate Sentenced Inmates (ISL) brought to YOPH hearings within the first 12 months and DSL prisoners in the last 6 months.

Although this may seem a disappointing turn to many long-sentenced DSL prisoners, the reason for the delay is founded in the results of DSL hearings under SB 260. While the parole grant rate for YOPH hearings was positively impacted by the bill, at least for ISL prisoners, who had long known they would face a parole hearing, DSL inmates, most of whom never anticipated the chance to parole early, saw a dismal grant rate of about 5%. BPH theorized, and most who studied transcripts from DSL hearings concur, this disappointing result was due to DSL inmates being woefully unprepared in terms of programming, disciplinary-free time and basic understanding of the process and requirements for parole. Under terms of SB 519 consultation hearings for DSLs will be held by January 1, 2018.

The relatively quick implementation period of SB 260, coupled with the numbers of prisoners affected, also caused a scramble at the BPH's FAD shop, which resulted in many inmates receiving the CRA only days before a hearing and a backlog being created, a situation the board only expects to work itself out of by January, 2016. The addition of a 5 year window for the Board to bring the DSL inmates into the parole cycle will allow those inmates time to get their act together, make progress on programming (if they have not already done so) and prepared for a board appearance. It will also give the FAD additional time to perform the required CRAs for this population and provide those reports to both inmate and counsel in a more timely fashion.

The provision of who comes under the umbrella of SB 261 is virtually the same as for SB 260, the controlling factors being the age of the inmate at the time the crime occurred (now under 23 years of age) and the crime (no sexual offenses and no convictions for violent crimes incurred while in prison). The BPH has already ramped up scheduling and personnel capabilities in anticipation of SB 261 and has announced itself prepared to move forward immediately with both hearings for ISL prisoners as well as CRAs for all those needing one.

One last word—if you received a YOPH hearing under the original SB 260 and were denied parole, the implementation of SB 261 will not give you another immediate hearing. Nor is enactment of the new bill sufficient reason to file a successful PTA. This isn't a second bite of the same apple. If you were denied parole at a YOPH hearing, all your hearings going forward will be held under the guidelines of SB 260, but you won't get a new hearing just because the age limit has been raised. SB 261 simply brings more prisoners into the fold of youth parole consideration, it does not give you a 'do-over.'

Details on who it applies to, what rumors to put aside and more

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EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility
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EDITORIAL -

YOU MAY KNOW WHAT WAS, BUT DO YOU NOW WHAT IS?

An abbreviated version of this editorial was printed in the Sacramento Bee in response to the article following. Here is our entire response
Vanessa Nelson-Sloane

The writer of a recent SacBee Opinion-Viewpoint piece, (reprinted following this Editorial) regarding the parole of life-term inmates, made two important errors. First, there is no 'mass release' of life term inmates, but more importantly, the contention that these individuals, decades after their crime 'are still vicious killers' is simply wrong.

As the Director of a non-profit advocacy for 'lifers' and their families, I attend dozens of parole hearings each year, where I see the results of long-term rehabilitation and the thoughtful, measured and highly selective process that grants some prisoners, in accordance with the law, a second chance. Yes, more inmates are being paroled in recent years, though this change has more to do with the courts finally forcing the state to follow its own laws regarding parole than any single piece of legislation. But there are some 35,000 lifers in California prisons currently, so the parole of less than 2,000 over a 4 year span could hardly be termed 'mass release.'

Moreover, those who do win parole must prove themselves reformed and rehabilitated through an arduous process that often takes decades. Their assessors, the Commissioners of the Board of Parole Hearings, spend countless hours reviewing the history of each inmate, including the record of years of self-introspection, therapy, reflection and redemption in which each lifer must engage. The last portion of this examination is a face-to-face review of the prisoner, which can take hours and delves into every aspect of their lives, both before and after the crime. And the commissioners are not an easy sell. They do not take their responsibility lightly, and always, always err on the side of maintaining public safety.

Those prisoners who attain parole have undergone a life change and self-examination few of us in the free world can understand or endure. I work with these men and women every day, and I, along with the rest of the public, am in more danger from the stranger behind me in the grocery store line, than from a paroled lifer. And crime statistics support this. The recidivism rate of this cohort of prisoners hovers around 1%, and none for another violent crime. They have examined themselves and their failings and made the deep-seated belief and behavior changes to become changed and better people, who, almost without exception, are intent on giving back to the society they once harmed.

And lest we forget, the chance to earn parole is provided in the law. By granting parole to a handful of reformed and ready inmates the state is simply following the laws on the books—which is what we expect of any individual and any agency. Parole is not guaranteed, only the chance to be meaningfully considered for that opportunity. Our judicial system is not based on vengeance.

As a family member of a murder victim and the wife of a paroled lifer, I see the issue from an unusual

continued see EDITORIAL pg.32

SETTLEMENT OF *JOHNSON V. SHAFFER* ANNOUNCED

Johnson v. Shaffer
USDC (E.D. Cal.)
Case No. 2:12-cv-01059-KJM-AC
September 10, 2015

After three years of litigation and negotiation, attorney Keith Wattley (representing Johnson and the class of life prisoners) entered into a settlement agreement with the BPH regarding the use of Comprehensive Risk Assessments ("psych evals") in lifer hearings. Over the years, there has been much speculation as to abandonment of the FAD (Forensic Assessment Division – the Board's forensic psych evaluators), or to rejection of the standardized tests employed by the FAD that are based on non-lifer actuarial data.

For those who hoped the axe would fall on the FAD, it didn't. Rather, new guidelines and regulations were agreed to that amend how the FAD operates in parole evaluations. To provide maximum clarity of just what the recently announced agreement entails, and doesn't entail, CLN is reporting the summary issued by the Court.

1. Consistent with the terms negotiated with Plaintiffs, the Board of Parole Hearings submitted a Budget Change Proposal for additional funding to administer Comprehensive Risk Assessments (CRAs) every three years. The budget change was approved. As such, the Board will begin preparing new CRAs every three years for hearings scheduled to occur on or after June 1, 2016, if the CRA is older than three years. For hearings advanced as a result of a petition to advance or the Board's administrative review process under Penal Code section 3041.5 (b)(4) or (d)(l), a new CRA will be conducted if the prisoner's most recent CRA is more than three years old at the time of the advanced hearing; if the most recent CRA is less than three years old at the time of the advanced hearing, a new CRA will not be completed. The Board will revise its regulations to reflect this process.

2. Before the regulatory change in Paragraph 1 is submitted to the Office of Administrative Law (OAL), the Board will provide class counsel

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with a draft of the proposed regulation. Class counsel shall have thirty days to review the draft and provide written comments and suggestions to the Board. The Board will provide a written response to class counsel's written comments within thirty days. When the proposed regulation is presented to the Board's commissioners for review and a vote, class counsel may submit additional comments and suggestions through the Board's public comment process. Once the regulation is submitted to the OAL, class counsel may again submit additional comments and suggestions through the OAL public comment process.

3. In accordance with Paragraph 1, the Board will no longer conduct Subsequent Risk Assessments.

4. If, before December 31, 2016, the Board proposes any changes in how or whether the CRA, including the HCR-20 Version 3, PCL-R, or Static 99-R will be administered, or proposes using a risk-assessment tool other than the HCR-20 Version 3, PCL-R, and Static 99-R, class counsel may present an expert to discuss the proposed changes to the Board's commissioners in open session. The expert will be allowed to speak and answer questions for up to two hours. The expert must have experience with the use of risk assessments in a correctional setting.

5. The Board's Chief Psychologist will again provide a presentation to the Board's commissioners in open session regarding the recidivism rates for long-term offenders. The information presented to the commissioners will be provided in a text document and made available to class members through class counsel, on the Board's web site, and will be emailed to all attorneys on file with the Board who are currently representing life prisoners.

6. The Board's Chief Psychologist will again provide a presentation to the Board's commissioners in open session regarding when and how the Board uses the Static 99-R, a risk- assessment tool used to predict an offender's risk of sexual recidivism. This presentation will include a discussion of how the Static 99-R accounts for an offender's age and other factors that can change over time. The information presented to the commissioners will be provided in a text document and made available to class members through class counsel, on the Board's web site, and will be emailed to all attorneys on file with the Board who are currently representing life prisoners.

7. The Board will formalize a process for prisoners or their counsel to lodge timely written objections asserting factual errors in a CRA (to be defined in the regulations) before their parole consideration hearing occurs. If the Board receives a timely written objection in advance of a parole hearing, the Board will provide a written response within a reasonable period of time. The Board will submit draft regulations to reflect this process to the OAL by July 1, 2016.

8. Before the regulatory change in Paragraph 7 is submitted to the OAL, the Board will provide class counsel with a draft of the proposed regulation. Class counsel shall have thirty days to review the draft and provide written comments and suggestions to the Board. The Board will provide a written response to class counsel's written comments within thirty days. Class counsel will have additional opportunities to provide comments during the Board's and OAL's regular public comment periods.

9. When the Static 99-R is used, the CRA will inform the reader that the Static 99-R score alone generally does not assess dynamic characteristics that may mitigate or elevate a prisoner's risk.

10. All future CRAs will clarify that the Overall Risk Rating is relative to other life prisoners.

11. CRAs will inform the reader of the report that, generally speaking, the current recidivism rates for long term offenders are lower than those of other prisoners released from shorter sentences.

12. Plaintiffs will promptly dismiss all Defendants from this action except Defendant Jennifer Shaffer, the Board's Executive Officer.

13. The Court will retain jurisdiction over this case until January 1, 2017.

14. If within 30 days after January 1, 2017., Plaintiffs believe that Defendants have not submitted regulations to the OAL, completed the agreed upon presentations to the Board, and provided language to Board psychologists with instructions to include it in CRAs, Plaintiffs may seek an extension of the Court's jurisdiction over this matter for a period not to exceed 12 months. To receive an extension of the Court's jurisdiction, Plaintiffs must demonstrate by a preponderance of the evidence

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that Defendants have not materially complied with the terms of this agreement. Defendants shall have an opportunity to respond to Plaintiffs' request and present their own evidence. If Plaintiffs do not seek an extension of the Court's jurisdiction within the period noted above, or the Court denies Plaintiffs' request for an extension, this agreement and the Court's jurisdiction shall automatically terminate, and the claims in this case shall be dismissed with prejudice.

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"MUDDLED" EXPLANATION OF MURDER DOES NOT RISE TO NEXUS TO CURRENT DANGEROUSNESS

In re Michael Brodheim
CA1(4); A141314
June 7, 2015

Michael Brodheim was convicted of the 1981 first degree murder of his college girlfriend. Brodheim was unable to handle the rejection after she had ended their dating relationship. After killing her, he attempted suicide by jumping off a bridge, which he survived, albeit with head injuries. As a result, he always maintained that he did not remember the details of the killing and subsequent defiling of the body. This lack of memory concern became the focus of the Board, and later, the Governor.

Brodheim is bright and well educated, with a Masters Degree in Physics. He is thoughtful and well spoken, unlike many parole candidates reaching the Board and Governor's review. The initial response of earlier Boards was to reject his memory loss as insincere, where they believed he was using his intellect to cover unresolved underlying anger issues. After many years of Board denials, and in particular following the advent of the newer standards announced in *Lawrence*, the Board found there was no nexus to past dangerousness that would indicate he remained a current danger if paroled – and granted parole.

Governor Brown reversed, finding that Brodheim's smooth presentation was a cover for underlying unresolved insight. In particular, he called Brodheim's explanation of what he remembered "muddled," basically accusing Brodheim of conniving.

The pattern repeated itself over the years, with the Board repeatedly finding Brodheim suitable, while the Governor continued to reverse. Brodheim challenged his second reversal in the Court of Appeal, and recently won.

The Court examined the tension between the "unresolved insight issues" that bothered the Governor, and the "passage of time" that *Lawrence* announced eventually separates the event of the crime itself from being the sole reason for continued denial of parole.

The Court, in a split decision, held that because the *evidence* – consisting of numerous psych evaluations and Board hearing records that showed that his memory loss was not objectively implausible – did not constitute a nexus between current and past dangerousness, he could not continually be denied parole for this reason. Stated another way, "insight" that became "muddled" through memory loss devolving from physical trauma suffered after the murder did not constitute a reason to deny parole over three decades later.

Because there was no *other* evidence in the record to point to, and "muddled" did not satisfy *Lawrence*, the Court granted the writ and vacated the Governor's decision.

> "[W]e have reviewed the materials that were before the Board and have found no evidence that could support a decision other than the one reached by the Board. Consequently, there is not some evidence to support the Governor's decision to reject the Board's grant of parole . . . ." (*In re Dannenberg* (2009) 173 Cal. App.4th 237, 256-257.) " '[W] here, as here, it is determined there is not 'some evidence' in the record to support the Governor's decision to overrule the Board's grant of parole, the proper remedy is to vacate the Governor's decision and to reinstate that of the Board.' [Citation.]" (*Id*. at p. 256; accord, *Ryner, supra*, 196 Cal.App.4th at p. 553.)

This reversal was of the second denial by the Governor; the fact of a third grant/reversal sequence during the time the writ petition was pending did not moot the legal challenge to the second one. The Governor did not petition for review, and Brodheim was released onto parole.

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REFUSAL TO ADMIT TO THE MURDER IS NOT LAWFUL GROUNDS FOR DENIAL OF PAROLE

In re Fred Swanigan

--- Cal.App.4th --- ;
CA2(1); B261904
September 1, 2015

Fred Swanigan was convicted of a 1981 murder where he was identified by half a dozen witnesses. He had an alibi at trial, and none of the material reportedly associated with the crime (gun, bandana, sweatshirt, etc.) were located. For over three decades, he has denied he was the killer, but the Board kept denying him because they found his claim of innocence, in light of evidence from trial records, to be "implausible." In this published decision, the Court of Appeal held that absent *other* evidence showing he was currently a danger – not just the conclusory "lack of insight" they attached to his denial of guilt – the Board erred in denying parole.

The Court of Appeal noted that the record over the years showed that the Board, as urged by the District Attorney, was "stuck" on denial of guilt as the principal reason for denial of parole.

Swanigan's first parole hearing took place **in 1996**. At that hearing, as he had done continuously since 1980, Swanigan denied involvement in the commitment offense. The Board denied parole and recommended that Swanigan participate in self-help programs and comply with prison standards. ... Over the next 18 years, Swanigan continued to deny that he committed the murder and the Board continued to deny parole.

At his eighth hearing **in 2009**, Swanigan "accepted responsibility" for the life crime, stating "I would like to accept full responsibility for the crime, and I'm not trying to minimize my participation. And I do have remorse for the victim because I can relate as well as I can understand the loss that the person is dealing with, because I've lost my mother and she got killed. I know you can't bring anybody back and it's forever. When you've lost somebody to this degree, you never can bring the victim back, so you understand the loss." The Board was not satisfied and denied parole, citing Swanigan's repeated denials of

involvement in the crime, saying "we do note that you do continue to maintain your innocence, and this is despite the jury findings, the judicial review at the time before sentencing, and also the [a]ppellate finding from the appellate court." At the same hearing **in 2009**, in explaining the rationale for the Board's decision, Presiding Commissioner Garner told Swanigan that with respect to "current attitude toward the crime, . . . other than accepting responsibility in your closing today, there's been an ongoing indication of denial of commission of the offense." Similarly, with respect to remorse, the Board informed Swanigan that "one of the difficulties is it's hard for you to admit remorse other than feeling sorry for the fact that the victim did die. And of course, the difficulty would be associated with the indication that you did not commit the crime." The deputy district attorney argued against parole, citing the appellate opinion affirming Swanigan's conviction, that "the inmate's denials are absurd," that he is "failing in the area of insight" because he "has not internalized and expressed the reasons that caused him to act that way."

In 2012, before his parole hearing that year, Swanigan described to Dr. Pritchard his reaction to what he perceived as the Board's insistence that he admit the murder. "It is not what happened [his committing the murder]. I am being coerced. I feel like I have to say it. It has been a nightmare to be accused of a crime I did not commit. Nobody will listen to me. I was almost in tears [at the Board hearing in 2009] . . . . I'm not a liar. I have done 31 years. They [the Board] just want to hear what they want to hear."

At the 2012 parole hearing Swanigan did not again "accept responsibility" for the crime, and again denied the murder. The Board again denied parole.

Although the Board cited positive factors that tended to show suitability for parole, the Board concluded: "So what we need to do then is consider whether or not there are any other circumstances coupled with the noted immutable circumstances that would lead us to the conclusion that Mr. Swanigan poses a continued threat to public safety, and we

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find that he does for the following reasons. First of all, we noted that Mr. Swanigan has failed to show adequate signs of remorse and accept full responsibility for his criminal actions. He continues to deny responsibility for the life crime in spite of a record that clearly identified him as the perpetrator with eyewitnesses. His version of the life crime in our estimation is not plausible. . . . More importantly, we note that Mr. Swanigan has failed to not only accept responsibility for his actions, but the concern that we have today is that if you don't take responsibility for your actions, then you're likely to repeat similar kinds of actions in the future, if there is not any recognition of your role in the life crime and further examination of why you committed the crime. And until you get to that point, we would consider you a continuing risk to public safety." (Italics added.)

The 2012 Board told Swanigan at least 10 times that his denial of parole centered on his denial of the life crime. Swanigan's next parole hearing was scheduled in three years.

In 2014, Swanigan received an advanced parole hearing. The notice granting the advanced hearing date stated that Swanigan's "next suitability hearing will be advanced to offer him an opportunity to discuss his commitment offense and to demonstrate that he has an understanding of the causative factors of the life crime." At the hearing, Swanigan at first admitted the murder but shortly thereafter recanted after a recess during which his attorney told him to tell the truth. He described to the Board the dispute over the car that he and Como engaged in for six months prior to the shooting. Regarding the events of the crime Swanigan gave little detail, explaining that he walked to Como's place of business on the day of the shooting, shot Como once, and ran away. One of the commissioners asked Swanigan why he had previously denied the murder. Whereupon Swanigan, after a brief recess, recanted and again denied that he shot Como. The Board expressed frustration with Swanigan, after which he explained that "I've been in prison—this is my eleventh hearing and I've been goaded this way. I've been goaded that way. I've been telling the truth from day one, and as I said, it wasn't anyone listening to me. . . . And so I accept responsibility when I came here. It seemed like the hearings get worse and worse and worse and the time just keep passing by and I just—I'm tired."

What the Court sought to find was what current evidence existed in the record demonstrating current dangerousness if paroled.

It found none.

Swanigan stated at least once during the hearing that he believed he was required to admit the crime. Presiding Commissioner John Peck discussed with Swanigan the evidence that supported his conviction, stating that he was "trying to figure out if his version is plausible or implausible." Commissioner Peck questioned Swanigan about his admission that he committed the crime and then recanting it, saying, "[y]ou told me earlier you did do it. Now you're telling me you didn't do it. You've been in prison for a long time for a crime that you didn't commit. You've been telling the truth. That wasn't working so you decided today to try to tell us something that you thought we wanted to hear so you get an opportunity for a date. Is that correct or is that wrong?" Swanigan responded, referencing the order granting the advanced hearing date, saying, "Well, it says here I have to talk about the case, you know, understand it."

The deputy district attorney, arguing against parole, also would have confirmed Swanigan's impression that he was required to admit the life crime before the Board would grant him parole, saying "[i]f he admitted today, I would have said after 33 1/2 years of lying, I can't say today he got the right answer, go home. All I can say is the sooner he admits, the sooner he can get started on significant, relevant rehabilitation. Until then, I'm asking for a denial now, and if I'm here again, I will ask for a denial another time."

Once again the Board denied parole, but now adding the new ground that Swanigan had lied to them when he briefly confessed, basing the denial both on lack of insight into the life crime and lack of credibility.

Although summarily denied by the Los Angeles Superior Court below, Swanigan gained an Order to Show Cause upon application to the Court of Appeal. In its decision, the Court noted Swanigan's low risk ratings by the psychs, his clean prison record for over a dozen years, the Board Commissioners' recognition of and praise for his accomplishments inside the walls, and his parole plans. What the

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Court sought to find was what ***current*** evidence existed in the record demonstrating current dangerousness if paroled. It found none.

The Court focused on legal standards announced in the case law.

> A conclusion that an inmate lacks insight into the commitment offense "is not some evidence of current dangerousness unless it is based on evidence in the record . . ." that legally may be relied upon. The Board "cannot rely on the fact that the inmate insists on his innocence; the express provisions of Penal Code section 5011 and section 2236 of Title 15 of the California Code of Regulations prohibit requiring an admission of guilt as a condition for release on parole." (*In re McDonald* (2010) 189 Cal.App.4th 1008, 1023 (*McDonald)*.)
>
> "[H]owever horrible the crime, it is an insufficient basis for the denial of parole unless there is an evidence-based, rational nexus between the offense and present behavior." (*In re Hunter* (2012) 205 Cal.App.4th 1529, 1538 (*Hunter*).)

Nor did the Court bite into the "lack of insight" mantra here.

> "'[T]he conclusion that there is a lack of insight is not some evidence of current dangerousness unless it is based on evidence in the record'" upon which the Board can legally rely. (*In re Jackson* (2011) 193 Cal.App.4th 1376, 1390 (*Jackson*).) The Board "'cannot rely on the fact that the inmate insists on his innocence; the express provisions of . . . section 5011 and section 2236 of title 15 . . . prohibit requiring an admission of guilt as a condition for release on parole.'" (*Ibid*.)
>
> "[L]ack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness." (*Shaputis II, supra*, 53 Cal.4th at p. 219.) So even assuming Swanigan failed to show insight, the question remains: Did the Board rely on any facts that connect that lack of insight to the conclusion that Swanigan is currently dangerous? We believe not.

The Court relied on *Jackson* in its analysis:

> Jackson filed a petition for writ of habeas corpus in the superior court, which denied the petition, as did the Court of Appeal. The California Supreme Court issued an order requiring the Attorney General to show cause before the Court of Appeal "'why the Board of Parole Hearings' decision to deny petitioner parole . . . did not violate Penal Code section 5011, subdivision (b), and California Code of Regulations, title 15, section 2236, by relying, either directly or indirectly, on petitioner's refusal to admit guilt as a factor demonstrating unsuitability for parole.'" (*Jackson, supra*, 193 Cal. App.4th at p. 1383.)
>
> As in this case, the Attorney General in *Jackson* contended that the Board did not deny Jackson parole because of his refusal to admit his guilt. Rather, the Board "justifiably denied Jackson parole due to his lack of insight into the crime, his failure to take responsibility for it, and his lack of remorse." (*Jackson, supra*, 193 Cal.App.4th at p. 1389.) In granting the petition, the Court of Appeal concluded, however, that the Board's stated findings that Jackson lacked insight into the crime, failed to take responsibility for it, and did not have remorse, were based solely on Jackson's refusal to admit that he shot and killed Wade. Because basing a parole determination on that evidence is expressly prohibited by section 5011, subdivision (b) and section 2236 of title 15, the Board thus lacked any evidence to support its decision that Jackson was unsuitable for parole. (*Jackson,* at p. 1391.)

Indeed, the Court found that Swanigan's innocence claim was *not* absurd on its face, and concluded that it was wrong, both factually and legally, to deny parole because of his refusal to admit to the killing.

> The same is true here. The Board relied on Swanigan's refusal to admit guilt to conclude he did not have insight or show remorse. But this, the Board was not permitted to do. Moreover, as in Jackson, Swanigan's case is not one in which his claim of innocence is physically impossible or strains credulity, or even is inconsistent with the evidence presented at trial. No physical evidence tied Swanigan to the murder. The assailant covered his face with a bandana.
>
> Two of the witnesses were young children, and one adult witness's identification, as acknowledged by the trial court when it excluded the evidence of the identification, was potentially tainted by presentation with an individual photo of Swanigan after the witness said that the photo of Swanigan from the six-pack identification exhibited discrepancies from the person he saw. Eyewitness identification, particularly of a stranger, is fraught with potential for mistake. "It is no news that eyewitness identification in criminal cases is a problem; it is an old and famous problem. Judges and lawyers have long known that the identification of strangers is a chancy matter, and nearly a century of psychological research has confirmed this skeptical view." (Gross, *Loss of Innocence: Eyewit-*

***SWANIGAN* from pg. 10**

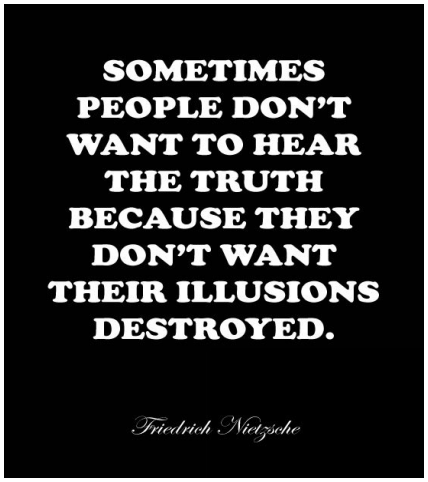
ness Identification and Proof of Guilt (1987) 16 J. Legal Stud. 395, fn. omitted.) This is particularly true when as here the identification is made some time after the event, and when the assailant's face is obscured. (*Id*. at p. 399 ["the most dramatic decline in accuracy occurs within the first few hours"].)

In addition, Swanigan presented a defense. He testified that he was elsewhere and provided corroborating testimony from his girlfriend, and he has maintained for over 30 years, with the one exception discussed herein, that he did not commit the murder.

As was the case in *Hunter, supra*, 205 Cal.App.4th 1529, in the case before us the Board did not articulate a rational basis for finding Swanigan unsuitable for parole that is supported by "some evidence" that Swanigan will pose an unreasonable risk to public safety if paroled. As in *Hunter*, "[t]here is no evidence that his mental state (including his remorse, acceptance of responsibility, or insight) indicates current dangerousness. . . . In short, the record fails to provide any rational basis for finding [Swanigan] unsuitable for parole." (*Id*. at p. 1544.)

Finally, the conundrum of having to lie (admitting guilt) to get a parole date, did not pass legal muster.

Given the Board's unauthorized insistence at multiple parole hearings that it would not consider granting parole until Swanigan admitted the crime, the apparent confirmation of that view by the deputy district attorney at the 2009 hearing, and the statement in the order setting Swanigan's parole hearing that he would be required to discuss the life crime, it would take more than normal human fortitude to resist forever. But a lack of such extraordinary fortitude is not some evidence that a person is an unreasonable risk to public safety or is currently dangerous. Indeed, the Board acknowledged the predicament in which it placed Swanigan, saying, "You feel like you're in a Catch-22 situation is if I don't tell them I did it, even if it's a lie, I'm never going to get the heck out of here, right." The 2012 Board, the deputy district attorney, and even the notice granting Swanigan's 2014 hearing had, in fact, told Swanigan just that. His compliance with that insistence, briefly made and quickly withdrawn, is not "some evidence" that Swanigan's release would pose a current threat to public safety.



Nor can the Board's insistence that Swanigan, who denies committing the offense, both "be honest" and "accept responsibility" for his actions, be reconciled with section 5011, subdivision (b) and section 2236 of title 15, which expressly preclude conditioning parole on an admission of guilt.

Accordingly, the Court found that there was no evidence of Swanigan's current dangerousness based on the reasons cited by the Board, and ordered a new hearing complying with due process of law and its decision. (*In re Prather* (2010) 50 Cal.4th 238, 244.)

BOARD'S RAPID-FIRE MECHANICAL RECITAL OF THE 'GREAT WEIGHT' YOPH FACTORS DOESN'T AFFORD YOUTH OFFENDER THE BENEFIT OF THE LAW

In re Andrew Silva

Santa Clara County Superior Ct.,
No. CC583671
August 27, 2015

Andrew Silva, who was 17 at the time of the attempted murder, and who was denied parole at his YOPH hearing, petitioned the Superior Court challenging the pro forma, meaningless, recital of factors "(a) – (f)", and "1 – 4" as indicia of the Board's disingenuineness in denying him parole. In essence, he claimed that he was treated the same as an adult offender, due the Board's intransigence.

The court noted that the recital of the YOPH factors was insincerely read into the record, as a matter of rote. This fact was made obvious by the occurrence of dozens of gaps in the transcript marked "inaudible" (36 on two pages alone) in just the section dealing with the YOPH law recitation, while the balance of the transcript had very few such "inaudible" gaps.

> What should have been an accurate and thoughtful articulation of the "impetuosity" of youth, their 'lessened culpability' and greater 'capacity for change,' [citing *Miller v. Alabama* and *Graham v. Florida*], the Board proceeded to announce its decision without understanding the link between what it has just read and the facts before it.

Indeed, the court found that the Board did what it usually chided

SILVA from pg. 11

unsuccessful parole candidates for: showed lack of insight.

> In this case the Parole Board did exactly what it routinely faults inmates for doing. Here, the Parole Board merely read from a prepared script and demonstrated no insight into the matter before it. ...
>
> Instead of affording Petitioner the meaningful youthful offender parole hearing he should have had, the Board appears to have proceeded as it does in adult cases.

The court also rejected the Attorney General's argument that if the Board articulated 10 reasons to deny parole, 9 of which failed under legal challenge, that the remaining reason would suffice to provide the "modicum" required to uphold the decision.

That is not the standard set by the California Supreme Court. Applying the correct standard to the clear error at hand, and in light of the fact that this was a "youthful offender parole hearing at which "great weight" was supposed to be given to the hallmark features of youth and the diminished culpability of juveniles as compared to adults, it is not clear what a Board providing due process would have done. Accordingly, the habeas corpus petition is granted and the matter remanded for a new parole hearing to be conducted in accordance with due process as outlined above. (*In re Prather* (2010) 50 Cal.4th 230.

BOARD'S UNLAWFUL USE OF 'SOME EVIDENCE' STANDARD TO DENY PAROLE REQUIRES VACATING ITS DECISION

In re Anthony Broussard
Santa Clara County Superior Ct.,
No. 82546
August 18, 2015

Anthony Broussard, who was 16 at the time of the first degree murder, and who was denied parole at his YOPH hearing, petitioned the Superior Court challenging the Board's clearly stated use of the "some evidence" standard upon which it grounded its decision. Broussard argued that the Board's decision is to be made to the ordinary preponderance of the evidence standard, not the "some evidence" standard.

BROUSSARD from pg. 12

The court cited Penal Code § 3041 for the proposition that parole is to normally be granted, unless consideration of specified factors counsel otherwise. The court agreed with Petitioner that this has been interpreted to mean the Board's weighing process is to the ordinary preponderance of the evidence.

> In making that determination, the Board is to consider "all relevant, reliable information," including certain enumerated circumstances tending to show unsuitability or suitability. ... To deny parole, unsuitability factors must be found by a preponderance of the evidence. (*In re Morrall* (2002) 102 Cal. App.4th 280, 302, citing Evidence Code section 115, *In re Twinn* (2010) 190 Cal.App.4th 447, 462, *In re Tripp* (2007) 150 Cal.App.4th 306, 312.

Here, the Board blew it – clearly announcing it was grounding its decision on the "some evidence" standard.

> The fundamental consideration in making a parole eligibility decision is the potential threat to public safety upon the inmate's release. Accordingly, a denial of parole must be based upon some evidence, in the record, of an inmate's current dangerousness. Having these legal standards in mind we find the inmate not eligible for parole." Decision, p. 2.

The Attorney General tried to wiggle out of this fatal blunder by arguing that the record was nonetheless replete with evidence of Broussard's unsuitability, and that any error in announcing the standard it used was harmless. The court flatly rejected this, noting that this was supposed to be a YOPH hearing, where deference to Broussard's youth was to be given in weighing against any otherwise negative factors, but instead, the Board disadvantaged Broussard by making parole denial easier.

Because the Board used the wrong legal standard in denying parole, it committed an abuse of discretion warranting reversal. Therefore, the petition for writ of habeas is GRANTED and, under *In re Prather* (2010) 50 Cal.4th 238, the denial of parole is reversed and the case remanded to the Board to conduct a new hearing consistent with this decision and the dictates of due process.

PROP. 36 CASES

MISTAKEN PROP. 36 ELIGIBILITY DETERMINATION REVERSED; PETITIONER REINCARCERATED

People v. Albert Amaya
--- Cal.App.4th --- ; CA 4(2)
E060218
April 23, 2015

The California Appellate Court held that when one is granted relief in a Prop. 36 resentencing petition by the Superior Court below, but that court erred by mistakenly finding the petitioner was eligible for Prop. 36 consideration, the lower court's granting of relief was void on the face of the record. In the case at bar, the petitioner was errantly resentenced and released, before the error was detected and corrected. He was subsequently reincarcerated.

In 2008, Albert Amaya was convicted of attempted extortion (PC § 524) and a gang allegation (PC § 186.22(b)). Because Amaya had two prior strikes, he was sentenced to 25 - life under the Three Strikes law. The trial court did not impose any term for the gang allegation and it was not reflected in the abstract of judgment.

In 2013, Amaya petitioned for resentencing under Prop. 36. However, the gang allegation disqualified Amaya from Prop. 36 relief because it caused his current conviction for attempted extortion to be a serious felony. All the parties and the court clerk mistakenly represented to the trial court that the gang allegation had been stricken and the court, believing Amaya was eligible for Prop. 36 relief, granted the petition, resentenced Amaya, and released him from prison with credit for time served.

A month later the People detected the mistake and moved to recall or set aside the resentencing order as void. The trial court vacated the resentencing order and reinstated the original sentence. Amaya appealed.

The Court of Appeal affirmed. A trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced. Clerical errors, unauthorized sentences, and PC § 1170(d) are exceptions that permit resentencing in certain circumstances, but they could not properly be invoked here. However, another exception occurs when a sentence is void on the face of the record. Here, the record demonstrated that the court granted Prop. 36 relief that it had no power to grant.

Accordingly, the mistaken relief was properly corrected, and Amaya is back in state prison serving his original three-strike life sentence.

THRASH from pg. 13

SERIOUS OR VIOLENT CRIME COMMITTED BEFORE PROP. 36 WAS ENACTED IS NOT ELIGIBLE FOR RESENTENCING UNDER PROP. 36; IF YOU HAVE TWO 3-STRIKE LIFE SENTENCES, THE FACT THAT ONE IS INELIGIBLE FOR PROP. 36 RELIEF DOES NOT BAR PROP. 36 RELIEF FOR THE OTHER

People v. Timothy Johnson
People v. Oscar Machado
---Cal.4th ---;
S219454, S219819
July 2, 2015

The California Supreme Court resolved two interrelated questions regarding Prop. 36 eligibility where there are multiple life sentences.

> We granted review to resolve two issues related to the Act's resentencing provisions. First, in People v. Johnson (S219454), we address for purposes of resentencing a defendant whether the classification of an offense as a serious or violent felony is determined as of November 7, 2012, the effective date of Proposition 36, or the law in effect when the offense was committed. Second, in People v. Machado (S219819), we address whether an inmate who was convicted of both a serious or violent felony and a felony that is neither serious nor violent is eligible for resentencing with respect to the felony that is neither serious nor violent. For the reasons set forth below, we hold that when a court resentences a third-strike defendant the classification of the current offense is based on the law as of the effective date of Proposition 36, and that the presence of a conviction of a serious or violent felony does not disqualify an inmate from resentencing with respect to a current offense that is neither serious nor violent.

In 1998, Timothy Johnson was convicted of two counts of attempting to dissuade a witness (PC § 136.1(a)(2)). Because he had prior strikes, the trial court sentenced him to two terms of 25 - life under the Three Strikes law. After Prop. 36 passed, Johnson filed a recall petition. The petition was denied on the basis that his two convictions for attempting to dissuade a witness were serious or violent felonies, which rendered them ineligible for resentencing.

However, when Johnson committed his crimes in 1998, attempting to dissuade a witness was not classified as a serious or violent felony. Johnson appealed, arguing that the determination of whether a felony is serious or violent for purposes of Prop. 36 resentencing should be based on whether the offense was serious or violent at the time it was committed.

The Supreme Court held that an inmate is only eligible for resentencing under PC § 1170.126 if he/she is serving an indeterminate Three Strikes sentence for a felony or felonies that are not serious and/or violent. The Supreme Court determined that;

> Section 1170.126's use of the present verb tense in describing the character of the current offense, the parallel structure of the sentencing and resentencing provisions, and the ballot arguments in support of Proposition 36 lead us to conclude that the classification of an offense as serious or violent for purposes of resentencing is based on the law as of November 7, 2012, the effective date of Proposition 36.

As a result, Johnson was not eligible for resentencing because the crime of attempting to dissuade a witness had been classified as a serious and violent felony prior to November 7, 2012.

In an important second decision, the Supreme Court held that when a Three-Striker with *multiple* life sentences petitions for resentencing under Prop. 36, *he is eligible for resentencing of a current conviction that is not serious or violent even though he has another current conviction that is serious or violent.*

In 1998, Oscar Machado was convicted of first degree burglary and second degree burglary (PC §§ 459, 460). Because he had two prior strikes for robbery the trial court sentenced him to two terms of 25 years to life under the Three Strikes law. Following Prop. 36, he filed a recall petition for his second degree burglary conviction. Even though his second degree burglary conviction was not a serious or violent felony, the trial court found him ineligible for resentencing because his *other* current offense, first degree burglary, was a serious felony.

Machado appealed and the Court of Appeal reversed, which the Supreme Court now upheld. Historically, sentencing under the Three Strikes law has focused on the sentence to be imposed on each count individually.

> Considering section 1170.126 in the context of the history of sentencing under the Three Strikes law and Proposition 36's amendments to the sentencing provisions, and construing it in accor-

JOHNSON/MACHADO from pg. 14

dance with the legislative history, the court conclude[d] that resentencing is allowed with respect to a count that is neither serious nor violent, despite the presence of another count that is serious or violent.

The Court summarized its two holdings:

In *People v. Johnson* (S219454), we hold that for purposes of resentencing under section 1170.126, the characterization of the current offense as serious or violent is based on the law as of the effective date of Proposition 36, November 7, 2012. In *People v. Machado* (S219819), we hold that an inmate is eligible for resentencing with respect to a current offense that is neither serious nor violent despite the presence of another current offense that is serious or violent.

The practical effect of gaining Prop. 36 resentencing on one, but not both, former life sentences, is to gain an earlier consideration for parole on the remaining life sentence. Thus, where a former double life term (such as 50-life) might be unsurvivable due to one's age, the advent of Prop. 36 relief for the *other* life term offers the hope of relief in one's lifetime.

POST JOHNSON, APPELLATE COURTS REVERSE AND REMAND PROP. 36 DENIALS BASED ON SOME QUALIFYING OFFENSES BELOW

P. v. Larry Watson
CA 2(8); No. B261560
August 19, 2015

P. v. Roy Rogers
CA 4(2); No. E061185
August 18, 2015

Following the *Johnson* California Supreme Court decision above, two appellate courts granted relief to Prop. 36 denials below where the petitioners had been summarily barred relief because at least one of their underlying strikes was serious/violent.

On February 6, 2007, Larry Watson robbed a woman of her purse. He then led the police on a high speed car chase, which ended only when he crashed into the back of another car. He was convicted of robbery (count 1; Pen. Code, § 211), evading a peace officer with willful and wanton disregard for the safety of others (count 2; Veh. Code, § 2800.2(a)), and misdemeanor resisting and delaying a peace officer in discharging his or her office (count 3; § 148(a)(1)). The trial court found Watson had been convicted of three strike priors which were also prior serious felony convictions. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d); 667, subd. (a)(1).) As a result, Watson was sentenced to a third-strike sentence of 25 years to life on counts 1 and 2, plus two five-year enhancements for his prior serious felony convictions on count 1, plus a one year sentence on count 3 to be served in county jail; all terms were ordered to run consecutively.

In October 2014, Watson filed a petition to recall his sentence for evading a peace officer in count 2 on the ground it is not a serious or violent crime. As a result, Watson argued he was entitled to be resentenced as a second strike offender as to that count. The trial court denied Watson's petition on November 13, 2014, reasoning that Watson's conviction on count 1 for second degree robbery, a violent felony pursuant to section 667.5, subdivision (c)(9), made him ineligible for resentencing under Proposition 36. Watson timely appealed.

He joined a number of inmates seeking a recall of their sentences for nonserious and nonviolent third-strike offenses where their aggregate sentence included a conviction for a serious or violent felony. Proposition 36 failed to specify whether an inmate was disqualified from seeking a recall of his sentence if he was also convicted of a serious or violent felony. As noted in the outset of this opinion, courts of appeal were divided on whether such a defendant was entitled to resentencing. On July 2, 2015, the California Supreme Court resolved the issue by holding, "an inmate is eligible for resentencing with respect to a current offense that is neither serious nor violent despite the presence of another current offense that is serious or violent." (*Johnson, supra*, 61 Cal.4th at p. 695.) The issue is now settled, and it is ap-

WATSON/ROGERS from pg. 15

parent that Watson should have been considered for possible resentencing. Although Watson's conviction for attempted second degree robbery is properly considered a disqualifying conviction as a serious felony under section 1170.126, he is nonetheless eligible for recall of his indeterminate sentence for evading a peace officer with willful and wanton disregard for the safety of others pursuant to section 1170.126, subdivision (f), "unless the court, in its discretion, determines that resentencing [Watson] would pose an unreasonable risk of danger to public safety." (*Ibid.*)

Accordingly, the denial of Watson's petition for recall of sentence was reversed and the matter remanded for the trial court to exercise its discretion as authorized under section 1170.126.

In January 1996, Roy Rogers was convicted of one count of first degree attempted burglary (§§ 664/459; count 1); two counts of second degree attempted burglary (§ 459; counts 2 and 4); one count of second degree burglary (§§ 664/459; count 3); and one count of misdemeanor being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a); count 5). The jury subsequently found true that defendant had suffered two prior prison terms (§ 667.5, subd. (b)), two prior serious felony convictions (§ 667, subd. (a)), and two prior serious or violent felony convictions, to wit, a 1991 and a 1992 first degree burglary conviction (§§ 667, subd. (c) & (e)(2) & 1170.12, subd. (c)).

The trial court sentenced Rogers to a total prison term of 110 years to life with credit for time served as follows: 25 years to life for counts 1 through 4, plus five years each for the prior serious felony convictions. The trial court struck the sentence for the prior prison term enhancements.

In December 2012, defendant filed a 49-page petition to recall his sentence and to be resentenced under section 1170.126. The trial court denied defendant's petition, finding defendant ineligible for resentencing under section 1170.126.

In December 2013, defendant filed simultaneous petitions for writ of mandate both in the trial and appelate courts, arguing the trial court had erred earlier in finding him ineligible for resentencing under section 1170.126. The appelate court summarily denied his petition on the merits, while the trial court procedurally denied the new petition as repetitive.

In April 2014, on defendant's behalf, the public defender's office filed a motion for reconsideration in support of defendant's petition for recall of sentence with points and authorities. The trial court heard the motion for reconsideration in May 2014. Following argument, the trial court denied the motion. This appeal followed.

The Court of Appeal granted relief, based on the new Johnson ruling.

Defendant concedes that he is ineligible for resentencing on his conviction for attempted first degree burglary, which is a serious felony under section 1192.7, subdivision (c)(18). (§ 1170.126, subd. (e)(1) [an inmate is eligible for resentencing if he or she "is serving an indeterminate term of life imprisonment imposed [under the Three Strikes law] for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7"], italics added.) He contends, however, that he is eligible for resentencing on his convictions for attempted second degree burglary and receiving stolen property because those offenses are not defined as serious or violent felonies.

He argues that the language of section 1170.126 and the intent of the Reform Act, as well as common sense, are consistent with a conclusion that an inmate is eligible for resentencing on nonserious, nonviolent commitment offenses, notwithstanding ineligibility on the other third strike term. The People concede that defendant's convictions for attempted second degree burglary and receiving stolen property are nonserious and nonviolent offenses, but maintain defendant is ineligible under the statutory interpretation of the Reform Act due to his serious conviction for attempted first degree burglary.

Based on the conclusion recently reached by our Supreme Court in *Johnson,* we agree with defendant and remand the matter.

Resolving the exact issue raised in this appeal, on July 2, 2015, our Supreme Court in *Johnson* concluded: "In sum, section 1170.126 is ambiguous as to whether a current offense that is serious or violent disqualifies an inmate from resentencing with respect to another count that is neither serious nor violent. Considering section 1170.126 in the context of the history of sentencing under the Three Strikes law and Proposition 36's amendments to the sentencing provisions, and construing it in accordance with the legislative history, we conclude that resentencing is allowed with respect to a count that is neither serious nor violent,

WATSON/ROGERS from pg. 16

despite the presence of another count that is serious or violent. Because an inmate who is serving an indeterminate life term for a felony that is serious or violent will not be released on parole until the Board of Parole Hearings concludes he or she is not a threat to the public safety, resentencing with respect to another offense that is neither serious nor violent does not benefit an inmate who remains dangerous. Reducing the inmate's base term by reducing the sentence imposed for an offense that is neither serious nor violent will result only in earlier consideration for parole. If the Board of Parole Hearings determines that the inmate is not a threat to the public safety, the reduction in the base term and the resultant earlier parole date will make room for dangerous felons and save funds that would otherwise be spent incarcerating an inmate who has served a sentence that fits the crime and who is no longer dangerous." (*Johnson, supra*, 61 Cal.4th 674.)

A decision of the California Supreme Court is controlling authority and must be followed by lower courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we remand the matter to the trial court for a hearing on defendant's petition to recall his sentence and for resentencing.

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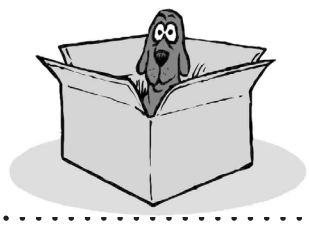


FOR PROP. 36 RESENTENCING PURPOSES, A PRIOR JUVENILE CONVICTION IS NOT BARRED FROM CONSIDERATION

P. v. Barney Arias
---Cal.App.4th---; CA5;
No. F068671
September 8, 2015

The novel question answered by the Court of Appeal in this published decision is whether a prior serious/violent *juvenile* conviction may be properly used to bar Prop. 36 resentencing relief. The Court found that the Prop. 36 statutory language trumped the Welfare and Institutions Code § 203 language, and that juvenile convictions may be used in determining Prop. 36 resentencing ineligibility.

The court framed the question thusly:

> Penal Code section 1170.126 enumerates the criteria for post-conviction release of third strike offenders serving indeterminate life sentences for crimes that are not serious or violent felonies. Excluded from resentencing are those inmates with prior convictions for "any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(3).) "Any homicide … defined in Sections 187 to 191.5, inclusive" is one such offense. (§§ 667, subd. (e)(2)(C)(iv)(IV), 1170.12, subd. (c)(2)(C)(iv)(IV).)

Barney Arias (defendant), an inmate serving a term of 26 years to life following conviction of felonies that were not violent (as defined by § 667.5, subd. (c)) or serious (as defined by § 1192.7, subd. (c)), filed a petition for resentencing under section 1170.126, subdivision (b). He has a prior juvenile adjudication for murder (§ 187). The trial court found him ineligible for resentencing and denied the petition.

On appeal, defendant argues his prior juvenile adjudication should not render him ineligible for resentencing because Welfare and Institutions Code section 203 precludes juvenile adjudications from being "deemed a conviction" "for any purpose."

The court explained the logic behind its decision.

> The circumstances under which a juvenile adjudication constitutes a "conviction" for purposes of the three strikes law, as set out in sections 667, subdivision (d)(3) and 1170.12, subdivision (b)(3), were not altered in any substantive manner by the Act. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of proposed laws, pp. 106, 108.) Construing section 1170.126, subdivision (e)(3) in the context of, and in harmony with, those provisions, it is clear the electorate intended "convictions," as used in that section, to mean "convictions" as defined in sections 667, subdivision (d) and 1170.12, subdivision (b). To hold otherwise would lead to an absurd result: A person whose current conviction was not a serious or violent felony, but who had two prior strike convictions, one of which was a juvenile adjudication for murder, would be disqualified from being sentenced as a second strike offender under section 667, subdivision (e)(2)(C)(iv)(IV) and would receive an indeterminate term of 25 years to life pursuant to section 667, subdivision (e)(2)(A)(ii). That same person would not, however, be disqualified from having that indeterminate sentence recalled and being re-

ARIAS from pg. 17

sentenced as a second strike offender under section 1170.126, subdivision (e).

Accordingly, it is readily apparent that where, as here, a prior juvenile adjudication constitutes "a prior serious and/or violent felony conviction" for purposes of sentencing under the three strikes law (§§ 667, subd. (d)(3), 1170.12, subd. (b)(3)), it also constitutes a "prior conviction" for purposes of determining eligibility for resentencing under section 1170.126, subdivision (e). If, as in defendant's case, the prior adjudication was for one of the offenses listed in section 667, subdivision (e)(2)(C)(iv) and/or section 1170.12, subdivision (c)(2)(C)(iv), it disqualifies the petitioner from eligibility for resentencing pursuant to subdivision (e)(3) of section 1170.126.

FOR PROP. 36 RESENTENCING PURPOSES, EXTENSIVE PRIOR CRIMINALITY UPHELD AS GROUNDS TO DENY RELIEF

P. v. Jessie Behill
CA5; No. F067821
August 19, 2015

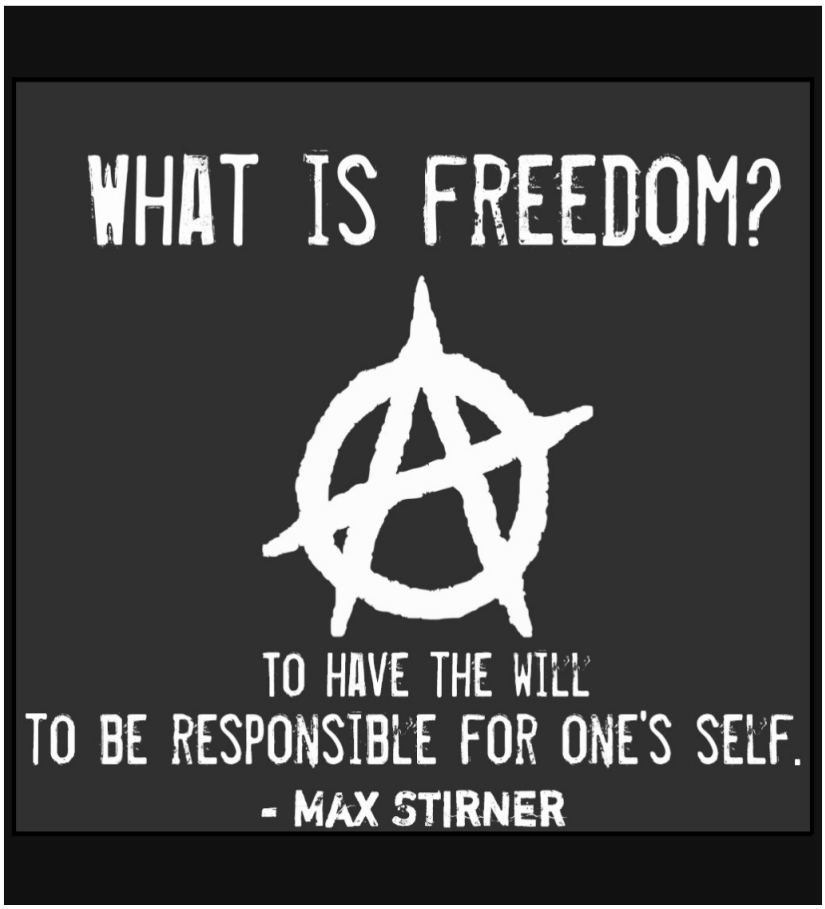
Jessie Behill qualified for a resentencing hearing on his Third Strike life sentence. This appeal resulted when Behill was denied relief by the Superior Court, based on Behill's extensive prior criminality record, notwithstanding his claims of rehabilitation while in prison. The Court of Appeal rejected his many legal challenges to the resentencing determination process.

The trial court found defendant posed an unreasonable risk to public safety, and denied the petition. On appeal, defendant contends (1) the language of Proposition 36 creates a presumption in favor of resentencing; (2) the dangerousness referred to in Proposition 36 must be current dangerousness; (3) the People were required to prove defendant's current dangerousness beyond a reasonable doubt; (4) the trial court erred by failing to consider the fiscal consequences of denying defendant's petition for resentencing; (5) the danger referred to in Proposition 36 refers only to the danger of violence; (6) the trial court abused its discretion by denying defendant's petition for resentencing; and (7) the definition of "unreasonable risk of danger to public safety," included in section 1170.18, subdivision (c), applies to Proposition 36.

Simply stated, Behill's current conviction was plainly non-serious and non-violent, but his past crimes were.

On February 9, 2001, defendant pled guilty to possession of heroin for sale (Health & Saf. Code, § 11351). At sentencing, the trial court found defendant had three prior strikes: a 1982 conviction for assault with a firearm (§ 245, subd. (a)(1)), a 1992 conviction for robbery (§ 212.5, subd. (a)), and a 1992 conviction for assault with a deadly weapon (§ 245, subd. (a)(1)). Defendant was sentenced to 25 years to life in prison.

The facts were presented by the parties to the Superior Court in the resentencing hearing. The People argued Behill's release would pose an unreasonable risk to public safety. They noted his record contained numerous felony convictions for shootings, assaults, and robberies, and that defendant had committed several rules violations during his incarcera-



BEHILL from pg. 18

tion, including two instances of violence against other inmates, a 2004 misdemeanor conviction for possession of heroin in prison (§ 4573.6), and a 2005 rules violation for distributing controlled substances.

Behill countered that he had ceased using drugs and alcohol in 2004, had no rules violations since 2005, and had been consistently praised by his supervisors for his performance at his prison employment. He also stated he had the support of his family and Native American tribe, and would immediately enter an alcoholism program if he were released from prison.

The trial court issued its written decision.

The petitioner's criminal history is particularly serious in this case. One of his victims has been paralyzed for over 30 years. In another case he and his accomplice tied up the victims while his accomplice was armed with a firearm. In a third case, he pulled the female victim by the hair and punched here [sic] in the eye. While in custody, he has been disciplined for acts of violence and for substance abuse and distribution. The court has also considered the petitioners [sic] mental health status. The court is aware of and has considered the fact the petitioner has been involved in some recent rehabilitation efforts and has strong family and tribal support.

The court believes that based on all the above factors, the People have meet [sic] its [sic] burden of showing that the petitioner still represents an unreasonable risk of danger to public safety.

In answering the first question, whether Prop. 36 creates a *presumption* in favor of resentencing, the Court observed

> Section 1170.126, subdivision (f) does not say defendant shall be resentenced unless the People prove resentencing would pose an unreasonable risk of danger to public safety. Fairly read, the language mandates the resentencing of a statutorily-eligible petitioner who does not pose an unreasonable risk of danger to public safety, but prohibits the resentencing of petitioners who do. Section 1170.126, subdivision (f) does not create a presumption in favor of resentencing, but rather establishes different actions for different factual situations.

As to whether dangerousness must be *current* dangerousness, the Court rejected the attempt to draw on parole case law.

> Next, defendant asserts that, as in a parole eligibility determination, the relevant question is whether a petitioning inmate currently poses an unreasonable risk of danger to public safety. While we reject the notion that parole eligibility reviews are a guide for appellate review of resentencing denial, we agree that the phrase "poses an unreasonable risk of danger to public safety" refers to an inmate's current dangerousness, and not the inmate's past dangerousness. (§ 1170.126, subd. (f), italics added.)
>
> In the instant case, however, there is no indication that the sentencing court's determination was based solely on defendant's past dangerousness and, as discussed below, there was sufficient evidence to conclude defendant posed a current risk of danger to public safety. Therefore, we find no error.

Third, Behill argued that the People were required to prove his current dangerousness beyond a reasonable doubt.

> We conclude a court's decision to deny a petition for recall of sentence is reviewed only for an abuse of discretion, and need not be supported by proof beyond a reasonable doubt, or even by a preponderance of the evidence. That is not to say, however, that the trial court's decision need not be supported by evidence. The burden of proof falls on the People, and the facts relied on by the sentencing court must be established by a preponderance of the evidence. (*Kaulick, supra*, 215 Cal.App.4th at p. 1305.) Put differently, while the court's decision need not be established by a preponderance of the evidence, the

BEHILL from pg 19

facts relied upon by the sentencing court must be established by a preponderance of the evidence.

Here, defendant does not dispute that the facts underlying the trial court's decision were established by a preponderance of the evidence, he merely asserts the evidence did not establish beyond a reasonable doubt that defendant posed an unreasonable risk of danger to public safety. As defendant's argument mischaracterizes both the burden of proof and the standard of review, it is rejected.

Next, the court rejected Behill's argument that the dangerousness addressed by section 1170.126, subdivision (f) refers solely to the danger of future violence.

When interpreting a ballot initiative, we afford words their ordinary and usual meanings. (*People v. Park* (2013) 56 Cal.4th 782, 796.) "Safety" has been defined as "the condition of being safe: freedom from exposure to danger: exemption from hurt, injury, or loss" (Webster's 3d New Internat. Dict. (1986) p. 1998) and "[t]he condition of being safe; freedom from danger, risk, or injury" (American Heritage Dict. (2d college ed. 1982) p. 1084).

Upon viewing these definitions, it cannot seriously be asserted that only violent criminals pose a danger to the public safety, as nonviolent offenses such as burglary or narcotics distribution create considerable risk of loss or injury to members of the community, as well as significant exposure to danger. This reality is readily reflected in the three strikes law itself, which classifies first degree burglary and furnishing certain drugs to a minor as strikes, and in the language of Proposition 36 itself, which expressly prohibits resentencing for individuals convicted of specified nonviolent narcotics violations. (§§ 667, subd. (d)(1); 1192.7, subd. (c)(18), (24); 1170.126, subd. (e)(2); 667, subd. (e)(2)(C)(i); 1170.12, subd. (c)(2)(C)(i).) We reject defendant's contention.

Finally, Behill's claim of abuse of discretion by the trial court was rejected.

In the instant case, the trial court's order denying defendant's petition for resentencing specifically weighed defendant's conviction history and disciplinary record against his rehabilitation record and family support. While the evidence considered by the trial court shows a recent history of rehabilitation, it also shows an extensive history of violent offenses. The record shows defendant had accumulated 13 strike-worthy convictions prior to his incarceration in 2001. Further, after his incarceration in 2001, defendant committed multiple violent and drug-related rules violations. Given this record, even with defendant's recent good behavior, we cannot state the trial court's decision to deny defendant's petition was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra*, 33 Cal.4th at p. 377.) There was ample evidence to support the trial court's finding that defendant posed an unreasonable risk of danger to public safety and, defendant is not entitled to relief.

In sum, the order denying Behill's petition for resentencing was affirmed.

FAILURE TO KEEP GPS-TRACKING ANKLE BRACELET CHARGED IS VALID GROUNDS FOR VIOLATION OF PAROLE

P. v. Daniel Contreras
CA2(6); No. B257409
September 15, 2015

When life-sentenced prisoners are paroled, they can be fitted with GPS-tracking ankle bracelets, at the discretion of their Parole Agent. Most often, these devices are ordered for sex offenders and those with former gang affiliations. But a few are parceled out for other "high control" clients, which includes lifers. Accordingly, it is important for lifer parolees to understand the importance of keeping these devices charged (twice per day).

Parolee Daniel Contreras had a medical condition requiring him to use the bathroom on short notice. On one such occasion, he claimed, he had to stop charging his GPS-tracking ankle bracelet in order to use the bathroom. This set off an alarm to his agent, who subsequently violated him for not following his terms and conditions of parole. Contreras challenged this violation court, and lost.

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The facts produced by the agent showed more culpability, however.

On May 14, 2014, [Agent] Bates received notice that the battery power on appellant's GPS was low. At 2:00 a.m., on May 18, 2014, he received a phone call reporting that appellant's GPS "device was dead." Later that morning, Bates sent officers to arrest appellant at the residence where he was staying [ ]. He also called that residence and left a message for appellant. Bates later retrieved more detailed records which indicated that in the three days leading up to May 18, appellant had only charged the GPS device for 13 minutes, which was not sufficient to keep it functional. The records further indicated that in another 48-hour period, appellant charged the device "for a total of two hours."

Contreras argued unsuccessfully that his failure to timely recharge his device was not contrary to the law.

He argues the statute's prohibition against disabling a GPS device does not encompass a failure to charge the device. We disagree.

He also argued unsuccessfully that his failure to timely recharge his device did not amount to knowingly circumventing the law.

Appellant also claims that he did not "knowingly circumvent" the operation of the GPS by failing to charge it. The record belies his claim. Appellant expressly acknowledged his obligation to keep the GPS charged by accepting the terms of his parole, including the condition that he charge it for one hour or more each morning and each evening. The undisputed evidence established that appellant failed to meet that obligation. Because he knew he was obligated to keep the GPS charged, he was subject to a criminal penalty for failing to do so. (*People v. Barker* (2004) 34 Cal.4th 345, 351-352.)

The important lesson here for lifer parolees is that if you are fitted with one of these ankle bracelets, take great care to not let the batteries run down – you could suffer a parole violation. If you happen to be a lifer with a 5-life or 7-life (PC § 3000.1(b)) parole tail, the event of a violation that results in being returned to custody will automatically trigger resetting of your minimum 5 or 7 year parole tail – a very expensive lesson!

HAVING A RAZOR EMBEDDED IN YOUR SOAP BAR IN PRISON IS DEEMED "ARMED" FOR PURPOSES OF A THIRD-STRIKE LIFE SENTENCE

P. v. Jerry Criado
CA3; No. C075225
September 24, 2015

Jerry Criado appealed from the trial court's denial of his Prop. 36 petition for recall of sentence, where he was found ineligible. He contended that the finding that he was armed during the offense required a tethering offense, and there was insufficient evidence to support the armed finding. He lost. The facts are summarized below.

On October 31, 1995, defendant, an inmate at Deuel Vocational Institution, was escorted from his cell to the shower by two correctional officers. Among his shower items were a bar of soap and a razor. After defendant had been showering for about 15 minutes, the officers heard a crunching noise. Defendant handed the pieces of a broken razor to one of the officers, who noticed that the blade was missing. A search of defendant's person and clothes did not result in the discovery of the blade. When an officer started searching defendant's shower items, defendant whispered to the officer in Spanish, "Está in la Tira," or, "It's in the tier." The officer found one-half of the razor blade in defendant's bar of soap.

Defendant was convicted of possessing a deadly weapon while in prison (§ 4502) with two prior strikes. He was sentenced to 25 years to life.
Defendant filed a petition for recall of sentence in May 2013. The trial court denied the petition, finding him ineligible because he

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was armed during the commission of the current offense.

The entire question turned on whether he was "armed" by the possession of a razor hidden in a bar of soap.

Defendant contends there is insufficient evidence to support the finding he was armed with a deadly weapon during the commission of his offense.

In order to find defendant ineligible for resentencing, the trial court had to make a factual determination he was armed with a deadly weapon during the commission of his offense. (*People v. Bradford, supra,* 227 Cal.App.4th at pp. 1331-1332.) This determination is retrospective in nature, similar to determining the nature of a prior conviction. (*Id*. at pp. 1337-1338.) We review a trial court's factual findings regarding the nature of a prior conviction for substantial evidence, viewing the record in the light most favorable to the judgment. (*People v. Griffis* (2013) 212 Cal.App.4th 956, 959, 965; *People v. Jones* (1999) 75 Cal. App.4th 616, 633.)

A defendant is "armed" within the meaning of section 12022 "if the defendant has the specified weapon available for use, either offensively or defensively. [Citations.] . . . '[A deadly weapon] that is available for use as a weapon creates the very real danger it will be used.' [Citation.] Therefore, '[i]t is the availability -- the ready access -- of the weapon that constitutes arming.' [Citation.]" (*People v. Bland* (1995) 10 Cal.4th 991, 997, italics omitted.) A defendant does not have to use the weapon or to have it on his person in order to be armed with it. (*Id.* at pp. 997-998.)

Defendant argues having one-half of a razor blade embedded in a piece of soap did not render the blade readily accessible to him for offense or defense. From this, he concludes there was not substantial evidence supporting the trial court's finding that he was armed with a deadly weapon.

Not so. Possessory offenses, like drug possession or possession of a deadly weapon, are " 'continuing' offense[s], one[s] that extend[] through time." (*People v. Bland, supra*, 10 Cal.4th at p. 999.) Therefore, the defendant is criminally liable the entire time he possesses the illegal item. (Ibid.) From the evidence here, the trial court could reasonably infer defendant was the person who placed the partial razor blade in the soap. Since defendant had to have physical possession of the blade to place it in the soap, he was necessarily armed with the

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weapon. (See *People v. White*, supra, 223 Cal.App.4th at p. 525 [personally carrying firearm sufficient evidence to support armed finding disqualifying defendant from resentencing].) Substantial evidence supports the trial court's armed finding.

Accordingly, the Court of Appeal upheld the denial of Criado's Prop. 36 resentencing petition based on an "armed" allegation, leaving his 25-life sentence for this in-prison write-up intact.

JUVENILE (17) WITH 55-LIFE SENTENCE LOSES 8TH AMENDMENT CHALLENGE TO "LWOP EQUIVALENT" CABALLERO RELIEF, BECAUSE HE IS ELIGIBLE FOR A YOUTH OFFENDER PAROLE HEARING UNDER PC § 3051

P. v. Mariano Diaz

CA5; No. F068070
August 19, 2015

The Court examined the tension between the Eighth Amendment's prohibition against "cruel and unusual" punishment and the sentencing of a nonhomicide juvenile offender to 55 years to life in prison. Appellant Mariano Diaz, Jr., received this sentence for crimes he committed when he was 17 years old. He contends his sentence is the functional equivalent of a life sentence without the possibility of parole (LWOP) in violation of the Eighth Amendment as set forth in *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*) and *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*). He argued this matter should be remanded for resentencing under these authorities. He also maintained the need for resentencing has not been rendered moot by the passage of Senate Bill No. 260, which promulgated, in part, Penal Code section 3051.

Based on his sentence, section 3051 provides appellant with a parole eligibility hearing during his 25th year of incarceration. (§ 3051, subd. (b)(3).) Because section 3051 gives appellant a parole eligibility hearing well within his natural life expectancy, we determine he is not facing a de facto LWOP sentence. As such, appellant cannot establish an Eighth Amendment violation.

The Court summarized, analyzed, and distinguished recent relevant controlling case law, in an easy to understand format that is useful to the Three-Striker juvenile offender population.

We begin our analysis with an overview of the three controlling cases regarding the Eighth Amendment and juvenile sentencing.

First, in *Graham, supra,* 560 U.S. 48, the court held that the Eighth Amendment prohibits states from sentencing a juvenile convicted of nonhomicide offenses to LWOP. (*Graham, supra*, at p. 75.) The Supreme Court noted a "moral" difference between homicide and nonhomicide crimes, and it commented on various scientific data showing the developmental differences between juvenile and adult minds, including the ability of juveniles to change more readily than adults. (*Id*. at pp. 68-69.) *Graham* determined that a state, while not required to guarantee eventual freedom to a juvenile offender, must give such offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id*. at p. 75.) A state is prohibited from making a judgment at the outset that a juvenile offender will never be fit to reenter society. (*Ibid*.)

Second, in *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*) the court held that the Eighth Amendment prohibits the imposition of a mandatory LWOP sentence on a juvenile offender even in a case of homicide. (*Miller, supra,* 132 S.Ct. at p. 2469.) *Miller* determined that the Eighth Amendment does not necessarily foreclose an LWOP sentence on a juvenile but the trial court, before imposing such a sentence, must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Miller, supra*, 132 S.Ct. at p. 2469.) *Miller* sets forth a list of factors for the trial court to determine before imposing an LWOP sentence, including "immaturity, impetuosity, and failure to appreciate risks and consequences"; whether "the family and home environment that surrounds" the juvenile is "brutal and dysfunctional"; "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; and "the possibility of rehabilitation." (*Miller, supra*, 132 S.Ct. at p. 2468.) LWOP may then be sentenced if the court, after considering all the relevant information, determines the case involves one of the "'rare juvenile offender[s] whose crime reflects irreparable corruption.' [Citations.]" (*Miller, supra*, 132 S.Ct. at p. 2469.)

Finally, in *Caballero, supra*, 55 Cal.4th 262, our Supreme Court reviewed *Graham* and *Miller* and held the Eighth Amendment's prohibition against cruel and unusual punishment is violated in a nonhomicide case when a juvenile offender is sentenced to a term of

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years with a parole eligibility date that falls outside the juvenile's natural life expectancy. (*Caballero, supra*, at p. 268.) In *Caballero*, the juvenile defendant received a 110-year-to-life sentence after he was convicted of three counts of attempted murder. The *Caballero* court concluded the sentence was the "functional equivalent" of LWOP and it reversed because the Eighth Amendment was violated. (*Caballero, supra*, at pp. 267-268.)

In reversing, *Caballero* emphasized *Graham*'s requirement that a state must provide a juvenile offender with a "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" within his or her expected lifetime. (*Caballero, supra*, 55 Cal.4th at p. 269.) The state may not deprive juvenile offenders "at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." (*Id*. at p. 268.) Our Supreme Court stated "the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison 'based on demonstrated maturity and rehabilitation.' [Citation.]" (*Id*. at pp. 268-269.)

Caballero, however, neither analyzed nor determined how much potential life expectancy a state must provide a juvenile offender beyond the initial parole eligibility hearing date in order to satisfy the Eighth Amendment.

The State then argued that SB260, which set forth YOPH hearings for LWOPs, would benefit Diaz with a parole consideration hearing after 25 years, and that his claim under the 8th Amendment was therefore mooted. The Court agreed.

Appellant argues that Senate Bill No. 260 has not mooted his constitutional challenge or the need for remand to the trial court for further modification of his sentence. However, because of section 3051, appellant has an opportunity for parole well within his expected lifetime regardless of which actuarial table is used or how that data is viewed. He will

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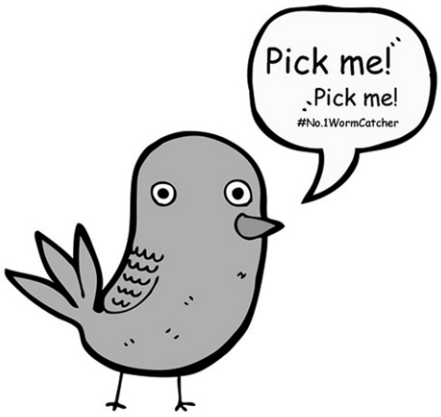
receive a parole eligibility hearing during his 25th year of incarceration (§ 3051, subd. (b)(3)) and will have a "meaningful opportunity" to obtain release. (§ 3051, subd. (e).) When considering appellant's parole suitability, the board is to give "great weight" to his



diminished culpability as a juvenile along with any subsequent growth and increased maturity. (§ 4801, subd. (c), see also § 3051, subd. (f)(1).)

Because of Senate Bill No. 260, appellant has the required "meaningful opportunity" to obtain release within his natural life expectancy. (*Graham, supra*, 560 U.S. at p. 75.) Appellant is neither facing a "functional" nor a "de facto" LWOP sentence. Accordingly, appellant cannot establish that his sentence violates the Eighth Amendment under the statutory scheme in place for juvenile parole eligibility hearings.

Appellant, however, asserts reversal is required because the trial court failed to indicate on the record a consideration of his youthfulness or other personal factors, his development, or his environment. He further notes the probation report was also virtually devoid of information about his life, although it recommended a sentence of 40 years to life. He generally contends the trial court failed to articulate the factors set forth in *Miller* and *Caballero* during the resentencing hearing. He maintains that this missing information will assist the parole board in determining when he should be released. In the alternative, he argues his current sentence is "facially unconstitutional" and asks this court to modify his sentence to include an appropriate minimum parole eligibility date. These contentions are unpersuasive.

A trial court must utilize the factors set forth in *Miller* when exercising discretion to sentence a juvenile to either LWOP or 25 years to life sentence pursuant to section 190.5, subdivision (b). (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1360-1361.) In such a circumstance, the Eighth Amendment requires a trial court "to consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender." (*Id.* at p. 1361, quoting *Miller, supra*, 132 S.Ct. at p. 2465.) Because section 190.5, subdivision (b), is not involved in the present matter, the trial court was not required to engage in a *Miller* analysis. Further, *Graham* does not require a trial court to make any particular findings when prescribing a sentence for a nonhomicide juvenile offender. To the contrary, *Graham* made it the states' responsibility to provide such offenders with a meaningful opportunity to obtain release, although it noted a juvenile offender is not guaranteed eventual freedom. (*Graham, supra*, 560 U.S. at p. 75.) *Graham* required each state to "explore the means and mechanisms for compliance." (*Ibid*.)

Senate Bill No. 260 was not yet promulgated when our Supreme Court handed down *Caballero*. Indeed, it was Caballero that noted legislative action was required to establish "a parole eligibility mechanism" for juvenile defendants serving de facto life sentences. (*Caballero, supra*, 55 Cal.4th at p. 269, fn. 5.) In the interim, *Caballero* instructed trial courts to consider the mitigating circumstances when sentencing a juvenile offender in order to determine a constitutionally suitable time for parole eligibility review. (*Id*. at pp. 268-269.) Senate Bill No. 260, however, was California's response to Graham and it provides a uniform parole eligibility mechanism for all juvenile offenders, including the factors that the parole board must consider in determining parole eligibility. (§ 3051, subd. (f)(1), § 4801, subd. (c).) In light of the enacted statutory scheme, remand is unnecessary for further consideration or action by the sentencing court.

Finally, we decline appellant's request to modify his sentence to include an appropriate minimum parole eligibility date. Current law provides for such a date. (§ 3051, subd. (b)(3).) Should section 3051 be amended or appealed, appellant continues to have appropriate relief, such as a petition for habeas corpus.

THIRD-STRIKER WITH FOUR LIFE SENTENCES IS ELIGIBLE FOR RESENTENCING CONSIDERATION ON TWO OF THEM, BECAUSE THEY PREDATED PROP. 36

P. v. Pedro Gonzales
CA 2(6); No. B261367
September 21, 2015

In 2002, Pedro Gonzales was sentenced to four consecutive 25-year-to-life three strike terms. Two were based on third strikes for a serious felony--first degree residential burglary (§ 1192.7, subd. (c)(18).) The other two life sentences were based on felonies that qualified as third strikes

TOP ROW

Steve Byron,Dan Lucas, Paul Bryr, Steven Adams, Frank Benson, Jim Sternbergh, Eric Taylor, Daniel McGinnis,

STANDING

David Peaslee, Chris Stewart, _____,_____Reyes Rios, Frank Currey, _____

SEATED

Joe Gallo, Fred_____, Ian Clark, Ernie Roux, Skeet, David Sloane, Todd Ferguson,

GROUND

Darryl Tunstall, Jack McGarey,

Eugene Dey,_____, ChrisFowler, John Dannenberg, Emmett Faught, Billy Davenport, Dwain Moore

Cliff Whitaker, Keith Chandler, Andy Schlappi, Erika Schomberg, Phong Dang, Jeff Creagan

_____, Angelo Garcia, Minh Ngo, Peter Maldonado, Steve Prellwitz, Rebecca White-Prellwitz, Mariano Munoz, Thor Vang

Jon Burnight, David Kwiatkowski

LSA's

1st Annual LIFER PICNIC
Sept. 19th 2015

Ron Pack, Jim Sternbergh, Gigi Pack

Our 'grill-master' Robin
(LSA office manager)

Melanie Taylor and Dan Lucas

Dan Lucas and Lindsay

Lifer supporter with Ernie, Frank

Eric Taylor, Vanessa (LSA) & Melanie Taylor

Food ! Fun !

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& Ernie Roux

so many showed up we almost
RAN OUT OF FOOD !

Minh Ngo, wife Lynna, Lisa Maldonado

Friendship

Gail (LSA) & Steve and Rebecca Prellwitz

Brian Wanerman
& Dave Sloane

Food ! Fun !

Attorneys love seeing their clients OUT !
M.Garfinkel, T. Lum, M. Norton, B. Wanerman, E. Eggers

Our back-up photographers!
(Including Bill Lane formerly with SCBC)

Frank Currey, Meredith Smith,
Chrystynna & Jon Burnight

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prior to Proposition 36 -- possession of a firearm by a felon and receiving stolen property.

In 2014, Gonzales filed a Prop. 36 petition for resentencing. He claimed that 1) only two of his four three strike life sentences were based on "serious" third strike felonies, and 2) he was eligible for resentencing on the two third strikes that were not serious or violent felonies.

The trial court ruled Gonzales was not eligible for resentencing on any of his third strike felonies. It said, "One of Defendant's current convictions is for first degree burglary in violation of Penal Code section 459, which is a serious felony . . . thereby making Defendant ineligible for resentencing . . . ." It denied the petition "with prejudice."

In its analysis, the appellate court agreed that two of the prior felonies might not fall under the exclusions of Prop. 36, but that the trial court never reached this question because of its blanket refusal to entertain any resentencing consideration simply because at least one of the four priors was a serious/violent offense. The remedy here was to reverse and remand to the trial court to consider whether two of the priors did in fact qualify for resentencing, notwithstanding that the other two did not.

LONG, CONTINUOUS, VIOLENT HISTORY DOOMS PROP. 36 RESENTENCING RELIEF

P. v. Dennis Hanson
CA 5; No. F069169
September 15, 2015

On May 26, 1998 Dennis Hanson was convicted of felony corporal injury of a cohabitant (PC § 273.5). Based on prior strikes for assault with a deadly weapon and false imprisonment with use of a weapon, he was sentenced to 28 - life as a third striker. In 2013, following the passage of Prop. 36, he filed a resentencing petition.

In their opposition, the People stated defendant's most recent conviction occurred after he punched his girlfriend, threatened to kill her, and struck her 80-year-old mother. His prior criminal history, which spanned from 1973 to 1998, also included two additional convictions for corporal injury to a cohabitant, two convictions for driving under the influence, two convictions for assault with a deadly weapon, three convictions for battery, and convictions for false imprisonment, resisting arrest, theft, and grand theft.

The People buttressed their opposition by outlining defendant's disciplinary history while incarcerated, which included some incidents of physical violence and insubordination towards staff.

At his petition hearing, the victim of defendant's most recent offense, testified of the violence she suffered. Hanson then testified on his own behalf, stating his disciplinary problems while incarcerated were due to his attitude and "just having bad days sometimes." He stated he knew it was time to let go of his anger and attitude issues. His son testified that, if defendant were released, he would take him in.

After the conclusion of the hearing, the court found that defendant posed an unreasonable risk of danger to public safety and denied the petition for resentencing. In support of this finding, the court cited defendant's near-continuous history of violent crime when not incarcerated, his pattern of verbally abusive and physically violent behavior while incarcerated, and his lack of remorse and insight as dispositive factors. Hanson appealed.

Hanson argued that the state had the obligation to prove his dangerousness beyond a reasonable doubt. The court disagreed.

> Under section 1170.126, subdivision (f), the determination of a petitioner's dangerousness is left to the discretion of the trial court. "[A] court's discretionary decision to decline to modify the sentence in [a petitioner's] favor can be based on any otherwise appropriate factor (i.e., dangerousness), and such factor need not be established by proof beyond a reasonable doubt to a jury." (*People v. Superior Court* (2013) 215 Cal. App.4th 1279, 1303 (*Kaulick*).) Instead, "once a defendant is eligible for an increased penalty, the trial court, in exercising its discretion to impose that penalty, may rely on factors established by a preponderance of the evidence." (*Id*. at p. 1305.)
>
> Given the foregoing, we conclude the court's decision to deny a petition for recall of sentence is reviewed only for an abuse of discretion, and need not be supported by a proof beyond a reasonable doubt, or even by a preponderance of the evidence. That is not to say, however, that the trial court's decision need not be supported by evidence. As noted in *Kaulick*, the burden of proof falls with the People, and the facts relied on by the court must be established by a preponderance of the evidence. (*Kaulick, supra*, 215 Cal.App.4th at p. 1305.) Put differently, while the court's decision need not be established by a preponderance of the evidence, the facts relied upon by the court must be established by a preponderance of the evidence. Defendant's claim that dangerousness must be proven beyond a reasonable doubt is without merit.

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Next, Hanson complained that the trial court should not have taken testimony from the victim. Again, the court disagreed.

> Proposition 36 provides that "[a] resentencing hearing ordered under this act shall constitute a 'post-conviction release proceeding' under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy's Law)." (§ 1170.126, subd. (m).) Under Marsy's Law, crime victims are entitled to "reasonable notice of all ... parole or other post-conviction release proceedings, and to be present at all such proceedings." Marsy's Law also provides victims a right to be heard at any proceedings involving post-conviction release decisions. (Cal. Const., art. I, § 28, subd. (b)(8).)
>
> Here, because Proposition 36 explicitly defines a resentencing hearing as a post-conviction release proceeding and Marsy's Law explicitly entitles a victim to be heard at any proceedings involving post-conviction release decisions, we find that the victim in this case had a right to make a victim impact statement before the court. To hold otherwise would permit a victim to be heard at the resentencing hearing held after the dangerousness determination, but not during the dangerousness determination that determines an inmate's eligibility for resentencing. However, "as a practical matter, it would make little sense to permit the crime victim to be heard on the issue of which second strike term to impose, but not permit the victim to be heard on the issue of whether resentencing the defendant at all would present a risk of dangerousness." (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1300.) Accordingly, we conclude victims have a right to be heard at the hearings regarding both dangerousness and resentencing.

Finally, the court considered Hanson's challenge to the discretion of the trial court, asking that his poor health and advance age be given proper consideration. The appellate court found no abuse of discretion below, based on the record cited.

> We review a trial court's determination that an inmate poses an unreasonable risk of danger to public safety for an abuse of discretion. (*People v. Davis* (2015) 234 Cal. App.4th 1001, 1017.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Here, the record shows that defendant was engaged in a nearly continuous course of serious and frequently violent criminal conduct from 1973—when defendant was 18 years old—to 1998—the year in which his current incarceration began. The record further shows that, during his current incarceration, defendant has repeatedly engaged in abusive behavior towards staff—particularly female staff, which echoes defendant's criminal history of domestic violence. Defendant also has instances of physical violence in his disciplinary record.
>
> While defendant points to poor health and advanced age as reasons mitigating his present dangerousness, his disciplinary record shows verbally abusive behavior as recently as a year prior to the hearing on his petition for resentencing, and physically violent behavior as recently as 2009. Defendant's verbally abusive behavior is most troubling, as two instances from the year prior to his petition involved the abuse of female staff, and defendant's criminal history includes three separate convictions for corporal injury to a cohabitant. Given the combination of defendant's extensive and serious history of violent crime, as well as his inability to refrain from abusive and intimidating behavior towards women while incarcerated, we cannot conclude the trial court abused its discretion by finding defendant posed an unreasonable risk of danger to public safety.

Accordingly, Hanson's appeal from the denial of Prop. 36 relief was denied.

INTENT TO COMMIT GREAT BODILY INJURY IS SERIOUS/VIOLENT FELONY FOR PROP. 36 PURPOSES

P. v. Thomas Hubbard
CA2(5); No. B262376
September 4, 2015

The Court of Appeal held that mere *intent* to commit great bodily injury (GBI) suffices to disqualify you from Prop. 36 relief.

A third strike defendant is not eligible for resentencing if he committed the underlying offense "with the intent to cause great bodily injury" to another person within the meaning of sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii). (§

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1170.126, subd. (e)(2).)

> If the underlying conviction does not involve a sustained allegation that the defendant has actually inflicted great bodily injury, the trial court determines from the entire record of the conviction whether the defendant intended to inflict great bodily injury. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 660-661.) We review the trial court's finding of intent under the deferential sufficiency of the evidence standard. (*Id*. at p. 661.) "Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.)

Here, the trial court found that "the evidence shows that [defendant] did intend to cause Jennings great bodily harm. He refused to let her get out of his car, threatened to 'kick her butt,' dragged her from the car, hit her in the eye and kicked her while she was on the ground." The testimony of Jennings and Carter supports the trial court's factual findings. These acts and statements by defendant are sufficient to support a reasonable inference that defendant intended to inflict great bodily harm on Jennings. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028 [well established that use of hands or fists alone may be force likely to produce great bodily injury].)

Accordingly, relief was denied by the appellate court.

EDITORIAL from pg. 4

perspective. While society must always protect itself and exact a price from those who step outside its bounds, that same society cannot simply eternally warehouse, out of anger or fear, those who have repented and reformed and are ready to contribute. Redemption and a second chance are provided for in law and in most of the world's great religions. And we see it at work every day, often so quietly, so humbly, we might not recognize it.

Who of us have not changed over the course of years, decades? Why should we believe prisoners have remained the same individuals they were decades ago? If you know what was, you may not know what is. Before you demonize and condemn, take the time to explore and understand.

Reformed life term prisoners will parole. That is the law. And those of us who understand this process, and work with these individuals, will continue to help them in their return to society. Because we understand that anyone is redeemable, that everyone can change and improve. And because we choose not to spread fear and hatred, but seek to understand and be understood.

Vanessa Nelson-Sloane, Director

BY JENN CARSON
Special to The Bee
When the Colorado movie theater shooter was given a life sentence in late August, I asked myself whether "life" would actually mean life – or whether James Holmes could end up back in his hometown of San Diego in a few decades due to a policy change in Colorado similar to California's new elder lifer parole policy.

The state's elder parole program allows some lifers age 60 or older who have served at least 25 years of their sentences to seek parole. Under this policy, James Schoenfeld, the Chowchilla school bus kidnapper, has been released. So has Christopher Hubbart, known as the "Pillowcase Rapist" for the sexual assaults of 40 women.

This elder release policy has impacted my life directly. My father, Michael Bear Carson, and his second wife, Suzan Carson, were granted parole hearings this year. They were known as the "San Francisco Witch Killers" because they allegedly told one victim that they were traveling around killing witches.

Thankfully, Michael Carson's hearing was postponed to 2020, but Suzan Carson may be granted early release at her hearing in Chino on Dec. 2.

At the time of their conviction in 1984, I was a fourth-grader who was told that I would no longer need to live in hiding. The families of the three known victims were told that they would serve sentences of 75 years to life.

EDITORIAL from **pg. 32**

Now, 31 years later, the victims' families and I have lost this security.

These elder parole rules are just one of several policies that have led to the mass release of California inmates. They include Assembly Bill 109, also known as realignment, which transferred inmates from state prisons to county custody. Proposition 47 reclassified some felonies as misdemeanors, including the possession of date-rape drugs or a stolen gun.

Another age-related prison reform bill, Senate Bill 260, allows the release of adult offenders who were incarcerated as minors. It was intended to allow teen offenders a second chance at life. Unfortunately, SB 260 has allowed the early release of rapists and murders including xxxxxxx, who was just shy of 18 when he murdered xxxxxxxxxxxx with an axe.

Altogether, California prison "reforms" have resulted in the release of 1,963 lifers between 2011 and 2015, compared to only two between 1999 and 2003.

When 1 in 100 adults sat in prison and 1 in 40 children had an incarcerated parent in 2010 in the United States, it was clear that prison reform was needed. But releasing murderers is not the answer for overcrowding.

The incarceration pendulum needs to swing to the center with common-sense policies that address both civil rights and public safety before there is a tsunami of violent crime in our communities.

Jenn Carson, who lives in Moreno Valley, is a school-based counselor and an advocate for children of prisoners.

A "...TSUNAMI OF VIOLENT CRIME..."
FROM PAROLED LIFERS?
(...WELL GUESS SHE DOESN'T KNOW LIFERS!)

Board of Parole Hearings

THE BOARD'S BUSINESS

August's Board of Parole Hearings Executive Board meetings set what may be a record for brevity, with both half day sessions ending within an hour of being convened. Nonetheless, some business was accomplished.

Executive Director Jennifer Shaffer reported on her journeys to 24 of the 35 prisons in the state, meeting with both staff and inmates on the recent changes in law and procedures, including the guidelines for expanded medical parole, YOPH and elder parole. Shaffer plans to continue these trips, to eventually reach all prisons in the state.

The Director also gave commissioners and the public first notice of upcoming changes and assistance that will be available to inmates who are veterans of the US Armed Forces. Under legislation enacted in 2012 CDCR is required to "develop guidance policies to assist veterans who are inmates in pursuing claims for federal veterans' benefits, or in establishing rights to any other privilege, preference, care, or compensation provided under federal or state law because of honorable service in the military." As part of those guidelines CDCR has reached an agreement with the state Department of Veterans Affairs to identify eligible inmates as well as what benefits they may be entitled to receive.

From a BPH perspective, this could eventually mean pro bono attorneys and assistance in finding housing and assistance through the reentry process. More information on this subject is expected to be forthcoming, and LSA/CLN will report new developments on what assistance will be available to veteran inmates and how to access that assistance.

The Board's September meeting featured a few more agenda items, though none kept the commissioners from making short work of the agenda and moving on. The most extensive report was from Shaffer on the possible effects of SB 261, which at that time had not yet passed into law, but the BPH was nevertheless gearing up to be ready for passage and implementation. Good thing, too, as SB 261 was later passed and signed by the Governor. For a more detailed report, see article elsewhere in this issue.

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Shaffer's comments also extended to AB 487, which would have required the BPH to notify DA offices when an inmate submitted a Petition to Advance and would have afforded that office the chance to provide input into whether or not the DA office would support the advancement of any given inmate's hearing through the PTA process. Such notification and input would have delayed the Board's decision on granting a PTA by as much as a month. While AB 487 was passed by the legislature, it will not be enacted, due to an early October veto by Governor Brown, who said in his veto message on the bill, that the timing of parole hearings was "best left to the wise discretion" of the BPH.

Also noted in the reports to commissioners was the participation in Northern California training session for state appointed attorneys conducted in mid-September. It was noted that 26 attorneys and 4 members of the public attended the session; well, not exactly. Actually, it was 26 attorneys and 4 members of the Life Support Alliance staff—we were the only 'public' in attendance.

SUMMER EN BANCS

As noted in the companion article regarding business at the BPH Executive Board meetings during the summer months, the en banc calendars for August and September, while showing several items, took little time. August's agenda noted 7 en banc hearings, but no one appeared before the board to speak on any of those names. The commissioners, however, did deliberate and made the following decisions

Declined to grant recall of sentence, or compassionate release, to **Jules Dachino**, after the prisoner tested positive for methamphetamine use. Affirmed the denial of parole decisions for **Natalie Guiuan**, **Garrett Nelson** and **Tom Yu**, but new hearings will be rescheduled for the sole purpose of recalculation of terms. Also affirmed was the denial of parole for **Star Vanpool**, along with the term calculated at that hearing.

The grant of parole given to **Wayne Wicks** will be referred for a rescission hearing, based on new information alleging gang association. **Manual Huerta**, subject of a split decision (tie vote) at his hearing, was denied parole when the majority of the commissioners found him to be unsuitable.

In September inmate **Rocky Scoggins** was granted compassionate release, one of the few this year, on the condition that he reside with his sister in Arizona, who has hospice training and can meet his care requirements. **Joseph Broughton**, denied parole in June, but brought to en banc by the Board's chief counsel "to consider whether the decision is consistent with *In re Lawrence"* saw that denial upheld, despite his attorney Marc Norton urging the board to vacate and reconsider.

Denial of parole was also affirmed for **Gregory Hamilton**, despite a parade of supporters, including former CDCR personnel and program sponsors, who brought to the board their experiences with the prisoner. **Clifford Jenkins**, who stipulated to unsuitability, and **Melvin Jones**, who was found unsuitable, will see a new hearings simply to recalculate their terms.

Going for rescission hearings following grants will be **Michael Comeaux** and **Abdelkader Morceli**, both based on alleged new confidential information alleging they remain an unreasonable risk of danger. Comeaux's attorney, Brian Wanerman attended and encouraged to board to stand by their earlier grant.

The Governor referred 4 grants for the Board to consider via en banc, and the commissioners split the results. Rescission hearings will be ordered for **Adolfo Peralta** and **Eric Pritchard**, to consider whether the parole panel "committed a fundamental error resulting in an improvident grant" of parole. However, grants to **Richard Carey** and **Tai Troung** were affirmed.

Also receiving a positive result was **John Field**, who was granted parole following a split decision by his original parole panel. The board, after no public comment or discussion, voted to forward to the Governor the pardon application of **Nguyet Ngo.**

Perhaps the most interesting of the en banc considerations was the case of **Marcos Rodriquez,** granted parole in May, but who will now endure a rescission hearing based, primarily, on semantics and soup. Despite pleas from his family and comments from his attorney, Keith Wattley, the panel decided his alleged 'institutional misconduct' warranted a rescission hearing.

Rodriguez was reportedly stopped on the yard in possession of about 40 'soups.' When questioned about the quantity, Rodriguez, who produced a receipt indicating he had purchased the soups at canteen, allegedly said he 'owed' the soups and was given a 128, reasons unclear. Attorney Wattley, who brought with him a visual aide for

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the commissioners, a bag containing 40 soups, told the board ordering a rescission hearing on the basis of soup was 'absurd' and certainly not grounds for a rescission hearing.

The board, however, apparently suspicious of Rodriguez' characterization of his intention to give away the product because he 'owed' someone, and looking back to the prisoner's former gang affiliation, decided to order a rescission hearing, apparently to determine if owing soup indicates gang affiliation, if gang or other illegal prison debts can by paid with soup, or if there is such a thing as too much soup. Film at 11.

RUMOR CONTROL- EN BANC HEARINGS

Friends, family and even prisoners have been contacting LSA/CLN about a supposed 'blanket policy' from the Governor's office to send to en banc review by the entire parole commission any grant of parole for an inmate convicted of a sex offense. We've even heard there are over 200 such referrals 'backlogged' before the board, and that as each grant is considered, the full commission rescinds the grant.

We can't speak for the Governor's office, but we don't, at this point, see any 'blanket policy.' And certainly we don't see a mass rush by the whole board to reverse any grants issued to those whose crime involved a sex offense. In fact, a quick review of en banc reviews referred to the Board by the Governor so far this year shows the board as a whole tends to stand behind their fellow commissioner who gave the original grant.

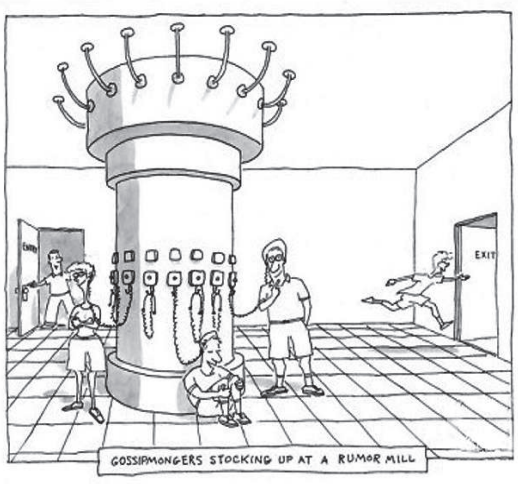
From January through September (CLN will go to press before the October Executive Meeting) the Governor referred a total of 16 grants for reconsideration. We don't know the entirely of reasons for these referrals, as this information is not always articulated at the public discussion.

However, of those 16 referrals, only 3 grants were sent for rescission consideration by the Board. By contrast, during the same time frame, 3 grants were sent to re-consideration due to new confidential information surfacing since the parole hearing and another 2 grants were to be reconsidered due to the prisoners receiving RVRs since the grant.

As a refresher, while the Governor can unilaterally reverse (or 'take') the grant of parole given to a prisoner convicted of murder when the Governor thinks the grant was erroneously given, for those prisoners whose life sentence is not the result of a murder conviction, the Governor cannot reverse the date himself, but can refer the decision back for consideration by the entire 12 member Parole Board, an 'en banc,' or 'in the bench, or by the whole,' board. So while we can't, at this point, note a trend based on the type of crime being sent for en banc, we will keep a close watch on the situation, with the knowledge that crimes against women, in particular, have been shown to be one of Gov. Brown's 'triggers' for reversals.

ISL VS. DSL—THE DEBATE CONTINUES

And speaking of rumors...a contentious issue, Indeterminate Sentence Length (ISL) versus Determinate Sentence Length (DSL), continues to cause rumor, fractious conversation and confusion. And periodically swamp LSA/CLN with requests for information of all sorts, about all factors of this dispute.



Most recently we've noticed a distinct uptick in letters asking about a rumor that all long-serving inmates, many of whom were sentenced to 7 to life sentences decades ago, are about to be officially classified as DSL inmates, are thus being 'illegally held past [their] term and will soon be released by court order.' Well, not that we've heard. We've even had prisoners write asking us who they should contact to receive their $100 per day owed to them for being kept in prison "past my release date." Don't start counting the money yet.

We have addressed the issue previously, but as questions continue, we will continue to offer such information as can be found.

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FRITZ	GARNER	LABAHN	MINOR	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**21**	**20**	**29**	**25**	**6**	**23**	**20**	**30**	**0**	**13**	**26**	**30**	**79**	**322**	**1**	**321**
Grants	6	8	10	7	0	4	5	5	0	2	11	9	0	67	1	66
Denials	12	11	9	17	5	13	12	19	0	9	12	16	0	135	0	135
Stipulations	3	1	2	0	1	3	2	4	0	1	1	1	0	19	0	19
Waivers	0	0	3	0	0	1	0	0	0	0	0	2	25	31	0	31
Postponements	0	0	3	1	0	1	0	2	0	0	2	2	45	56	0	56
Continuances	0	0	2	0	0	0	1	0	0	1	0	0	0	4	0	4
Split	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	9	9	0	9

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

Subtotal (Deny+Stip)	**15**	**12**	**11**	**17**	**6**	**16**	**14**	**23**	**0**	**10**	**13**	**17**	**0**	**154**	**0**	**154**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	7	10	7	15	2	10	7	10	0	3	12	13	0	96	0	96
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	6	2	3	1	1	4	6	9	0	0	1	3	0	36	0	36
7 years	2	0	1	1	2	1	1	3	0	5	0	1	0	17	0	17
10 years	0	0	0	0	0	1	0	1	0	2	0	0	0	4	0	4
15 years	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**0**	**3**	**0**	**0**	**1**	**0**	**0**	**0**	**0**	**0**	**2**	**25**	**31**	**0**	**31**
1 year	0	0	2	0	0	1	0	0	0	0	0	2	19	24	0	24
2 years	0	0	1	0	0	0	0	0	0	0	0	0	4	5	0	5
3 years	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	**0**	**0**	**3**	**1**	**0**	**1**	**0**	**2**	**0**	**0**	**2**	**2**	**45**	**56**	**0**	**56**
Within State Control	0	0	0	0	0	1	0	0	0	0	0	0	44	45	0	45
Exigent Circumstance	0	0	3	1	0	0	0	0	0	0	0	1	0	5	0	5
Prisoner Postpone	0	0	0	0	0	0	0	2	0	0	2	1	1	6	0	6

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FRITZ	GARNER	LABAHN	MINOR	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**22**	**28**	**31**	**31**	**25**	**27**	**23**	**35**	**35**	**36**	**26**	**30**	**112**	**461**	**0**	**461**
Grants	9	10	7	8	8	2	2	8	3	8	9	7	0	81	0	81
Denials	12	14	15	22	14	17	17	22	20	22	13	17	0	205	0	205
Stipulations	0	2	3	1	2	1	2	3	8	3	2	4	0	31	0	31
Waivers	0	1	0	0	0	2	0	1	0	1	0	1	37	43	0	43
Postponements	1	0	6	0	0	4	1	1	3	2	1	1	63	83	0	83
Continuances	0	0	0	0	1	0	0	0	1	0	1	0	0	3	0	3
Split	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	1
Cancellations	0	1	0	0	0	1	0	0	0	0	0	0	12	14	0	14

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

Subtotal (Deny+Stip)	**12**	**16**	**18**	**23**	**16**	**18**	**19**	**25**	**28**	**25**	**15**	**21**	**0**	**236**	**0**	**236**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	9	10	14	16	10	9	9	6	12	14	11	10	0	130	0	130
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	1	5	3	3	3	7	7	14	14	7	4	8	0	76	0	76
7 years	2	1	1	2	3	1	0	2	1	3	0	1	0	17	0	17
10 years	0	0	0	2	0	1	2	3	1	1	0	2	0	12	0	12
15 years	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**1**	**0**	**0**	**0**	**2**	**0**	**1**	**0**	**1**	**0**	**1**	**37**	**43**	**0**	**43**
1 year	0	0	0	0	0	2	0	1	0	0	0	1	25	29	0	29
2 years	0	0	0	0	0	0	0	0	0	1	0	0	6	7	0	7
3 years	0	1	0	0	0	0	0	0	0	0	0	0	5	6	0	6
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	**1**	**0**	**6**	**0**	**0**	**4**	**1**	**1**	**3**	**2**	**1**	**1**	**63**	**83**	**0**	**83**
Within State Control	1	0	3	0	0	1	1	1	2	1	1	0	52	63	0	63
Exigent Circumstance	0	0	1	0	0	1	0	0	1	1	0	1	3	8	0	8
Prisoner Postpone	0	0	2	0	0	2	0	0	0	0	0	0	8	12	0	12

BPH

THAT OTHER JOHNSON CASE

Settlement reached in Johnson v Shaffer; re: FAD

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

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

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

Under terms of that settlement, agreed to by both plaintiff and defendant, through their attorneys, the defendants (basically the BPH, in the person of Executive Director Jennifer Shaffer) "without any admission or concession by Defendants of any past or present and ongoing violations of a federal right" agreed to certain changes in the FAD/CRA process. Both parties indicated they agreed to a settlement to avoid "lengthy and substantial litigation, including trial and potential appellate proceedings, all of which will consume time and resources and present the parties with ongoing litigation risks and uncertainties."

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

The original suit also noted the FAD was formed after experts were invited to consider options and recommend assessment tools. However, regarding the three tools (the PCL-R, LS/CMI and HCR-20) selected for use, "the invited experts advised against use of these tools, on grounds they are scientifically unreliable and have not been validated for predicting violence among long-term prisoners like California lifers. BPH mandated the use of these tools despite this expert advice, knowing and intending that the tools would result in unreliable findings of dangerousness and thus provide a basis for denial of parole." This allegation LSA was able to personally and independently document in 2010.[1]

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

- The Board will institute a policy of providing new CRAs every three years, instead of every 5 years.
- If granted an advanced hearing a new CRA will be provided if the current report will be older than 3 years at the time of the advanced hearing.
- The Board will no longer offer Subsequent Risk Assessments
- If the Board proposes any change in the test instruments to be used (at this point those include the aforementioned PCL-R, the HCR-20 and the Static 99) class counsel (Uncommon Law) may present an expert to discuss the proposed changes.
- "When the Static 99-R is used, the CRA will inform the reader that the Static 99-score alone generally does not assess dynamic characteristics that may mitigate or elevate a prisoner's risk."[2]
- The Board's chief psychologist (Dr. Cliff Kusaj) will, again, provide a 'presentation' to the commissioners "regarding the recidivism rate for long term offenders," and "how and when the Board uses the Static 99…tool to predict an offender's risk of sexual recidivism." [3]

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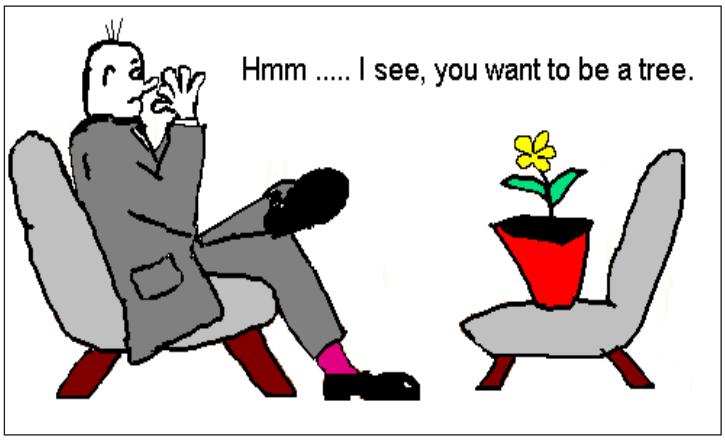
- The board agrees to "formalize a process for prisoners or their counsel to lodge timely written obligations asserting factual errors in the CRA," and "will provide a written response within a reasonable period of time."[4]
- "All future CRAs will clarify that the Overall Risk Rating is relative to other lifer prisoners," and "the CRAs will inform….that, generally speaking, the current recidivism rates for long term offenders are lower than those of other prisoners released from shorter sentences."
- "Defendants will not oppose a motion for reasonable attorney's fees and costs that does not exceed $120,000."



By terms of the settlement BPH will be promulgating new regulations on implementing both some of the terms of the agreement and some currently used policies. Under the law this is done in a process through the Office of Administrative Law, a process that provides the public (which, in this case, includes prisoners) to review and comment on the proposed regs. And we're quite certain the BPH will be forthcoming with the new regulations.

Not only is the present BPH administration committed to transparency in the Board's dealings, but we're fairly certain long-time personnel at the BPH remember the beginning days of the FAD, when the legality of the creation of the FAD was successfully challenged via bypass of the OAL process by then-prisoner Michael Brodheim and the resultant scrambling by the board to revamp the regs, go through the process and get the board back in compliance with the law.

In fairness, that debacle was prior to the appointment of Shaffer and similar circumstances are unlikely to happen again under her watch, and that of Chief Legal Counsel Howard Moseley. We may not like the results, but the process will no doubt be faithfully followed.

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

1.In mid-2011, then newly appointed BPH Executive Director Jennifer Shaffer, recognizing that notes and minutes from the 'experts' meeting in 2008 that led to creation of the FAD, were public record, allowed LSA to review those notes. Of interest was the absence of any final 'report' or formal recommendations from the experts. The entirety of the notes from the session were contained on half-dozen over-sized flip chart pages, rolled and stored at BPH headquarters. When contacted personally by LSA, 5 of the original 6 experts on the panel confirmed the meeting specifically did not produce recommendations on either creation of a FAD-like body or recommend specific 'tools;' the sixth participant refused to speak with us out of trepidation of retaliation, not from BPH, but from CDCR. Absent the ability to make copies of the meeting notes, we were allowed to photograph the pages and still possess those photos.

2. LSA raised a concern early on about the use of questions from the Static-99, a 'tool' originally constructed to provide information on housing and programming for those convicted of a sexual offense. Our initial research into the FAD in 2010-11, found individual questions from the Static-99, but not the entire test, were asked of almost every prisoner 'evaluated' by early incarnations of the FAD, regardless of whether or not the individual had a sexual offense. We questioned, both in print and in discussions with BPH personnel, the utility and appropriateness of these disturbing and provocative questions, absent any indication of sexual offenses. While no announcement or decision was forthcoming, the application of these questions to lifers in general seems to have somewhat abated.

3. FAD Chief Psychologist Dr. Cliff Kusaj has, on numerous occasions, both in public meeting and non-public discussions where LSA was present, indicated that a 'moderate' risk of violence for a lifer is akin to a 'low' risk for a member of the general public

4.The settlement requires the BPH to draft regulations to reflect this process and present them to the Office of Administrative Law (OAL) by July 1, 2016. The draft will be presented to class counsel (Uncommon Law) for comment and comment from both counsel and the public will be taken during the OAL's regular process

DEFINING 'RECIDIVISM'

The Board of State and Community Corrections (BSCC), the quasi-official overseer of realignment and how it's working, may soon adopt a final definition of 'recidivism,' a word much bandied about and meaning various things to various people. There has never been a one-size-fits-all meaning for the word, but one has now been proposed by the BSCC.

But that proposed definition is being decried in some circles as simply a means for politicians behind realignment to protect themselves from criticism on the success, or not, of that policy. Under the BSCC's proposal, a former prisoner would be considered a recidivist only if he or she were to be convicted of a new felony or misdemeanor within three years of release from custody, or being released under either state parole or local probation supervision.

Recidivism, defined only as a conviction for a new crime within 3 years of release, is a narrow definition and would (coincidentally?) serve to statistically minimize the official recidivism rates and (perhaps) cast realignment, and those supporting the effort, in a more positive light. Currently definitions for what constitutes recidivism can differ not just between state and local jurisdictions, but from county to county, some applying the label to anyone rearrested or returned to custody not for a new crime, but for a parole/probation violation.

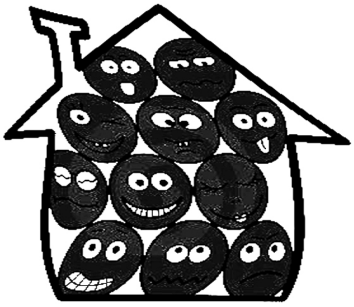
The BSCC is slated to consider the new definition and make a decision in November. Whatever the eventual definition adopted, lifers continue to be the lowest recidivating group of former prisoners, a fact that redefining the word is unlikely to change.

POPULATION LEVELS, UNDER AND OVER AT THE SAME TIME

Several years after the start of the 'population reduction' plan for California prisons, the latest state report to the 3 federal judges overseeing the process shows the amazing ability of statistics to both reveal and obscure the situation. While trumpeting that the prison population level has reached the target level some 6 months early, figures from the state also show many prisons are not only still overcrowded, more than a dozen remain over the acceptable level of 137.5% of design capacity.

In the official report filed with the judges on Sept. 15, 2015, CDCR reports the overall number of prisoners housed in-state stands at 111,656, or 135% of capacity.

That's the reveal and the part CDCR hopes the judges will notice. The rest, well, 19 of the state's official 34 prisons still hold hundreds more inmates than their original design contemplated, indeed, more than the judges have agreed to allow. Men's institutions range from a low of 71% of capacity to over 182%, while all 3 female facilities (counting the tiny Folsom Women's Facility as a stand-alone women's prison) are well above capacity. Only 3 prisons are currently less than 100% filled.



Most crowded status is held by Valley State Prison in Chowchilla, at 3,617 inmates a whopping 187.2% of capacity. On the other end, California Health Care Facility in Stockton is still limping along at 2,104 prisoners, 71.3%. For women's prisons, the most crowded is CIW, where 1,993 women are filling that prison to 142.6%. Even FWF is over the top, its 488 women equaling 121% of design.

Top 5 'offenders' for overcrowding, based on percentages, are:

1. VSP, 3,617, 182.7%
2. Mule Creek, 2.916, 171.5%
3. Ironwood, 3,690, 167.7%
4. North Kern, 4,466, 165.8%
5. Calipatria, 3,822, 165.6%

Lowest in the overcrowding sweepstakes are:

1. CHCF, 2,104, 71.3%
2. Avenal, 2,773, 95%
3. CMC, 3,773, 97.3%
4. CRC (Norco), 2,449, 98.3%

Also coming in at over the 137.5% level were CCI, Centinela, Corcoran, CTF, DVI, HDSP, KVSP, Lancaster, RJD, SATF, Solano, SVSP and Wasco. But, somehow, even though so many locations are over the 135% level and even more are over 100% of capacity, the department still, overall, meets the population cap level, where supposedly, prisons are no longer unconstitutionally overcrowded.

Who said numbers don't lie?

POLITICS

SB 261—TRUE AND FALSE

TRUE

SB 261 was signed into law by Gov. Brown on Sept. 4, 2016 and will become effective January 1, 2016.

It will extend the provisions of Youthful Offender Parole Hearings (YOPH) outlined in SB 260 to those who were under age 23 at the time of their crime.

There are minimum time requirements to be served before an SB 261 hearing will be scheduled, depending on your crime. All time served, whether in CYA, DJJ or county lock up counts toward that minimum.

Everyone entitled to a YOPH will receive a Comprehensive Risk Assessment (CRA or psych evaluation) before their hearing, if their last CRA was more than 3 years ago or if they have never received a CRA.

The considerations of SB 261 may help you 'explain the unexplainable,' why you became involved in criminal activity at a young age

You will be notified by classification that you qualify for a YOPH hearing

SB 261 applies to long-term determinant sentenced prisoners as well as 'lifers.'

If you were recently denied parole and did not qualify for an SB 260 hearing, but do qualify for SB 261, you can cite the passage of this bill as the 'new circumstance' required for positive consideration of a PTA.

Depending on your age and length of incarceration, you may qualify for both YOPH and Elder Parole consideration.

If you qualify for parole under SB 261 and are found suitable, but have a consecutive sentence to serve you will be released 'immediately,' after the 150 day review period.

If you qualify for YOPH consideration every parole hearing you attend going forward will be held under the guidelines of YOPH.

All reviews, including the Governor's right to reverse a grant of parole or send for en banc consideration, apply to SB 261 hearings. All denial lengths under Marsy's Law apply to YOPH hearings where parole is denied.

FALSE

SB 260 and 261 are 'easy outs' and you are sure to get a parole grant under these bills

Not true. The suitability factors remain the same, it is up to you to become suitable.

Age is the only qualifying factor.

No, your crime must not preclude you from SB 261 coverage and you must serve a minimum number of years before you can be considered for parole under this bill.

If you qualified for a YOPH hearing under SB 260 but were denied, you will get another automatic hearing now that SB 261 has passed.

No, if you qualified for SB 260 and were denied, absent other new factors, you will not get advanced hearing simply because of the enactment of SB 261.

Everyone covered by SB 261 will have a parole hearing by July 1, 2017.

No, if you are a determinate sentenced prisoner who qualifies for SB 261 the BPH has until Dec.31, 2021 to schedule your initial board hearing. This is to allow you sufficient time to program successfully.

You must apply to the BPH for a YOPH hearing.

No, classification will determine if you qualify and notify the BPH, which will then schedule both a hearing and a CRA, based on your sentence and length of incarceration.

YOPH applies to LWOP.

No, LWOP inmates are not included under SB 261.

The Courts

SUNSET ON SHU SOLITARY?

What took decades and finally culminated in a federal lawsuit that brought together inmates in the far-reaches of California's prison system and New York City law firm founded by William Kunstler but a settlement has finally been reached between CDCR and plaintiffs in a long-running suit against the Draconian conditions in Pelican Bay State Prison's infamous SHU. The September, 10, 2015 settlement may, at last, mark the end of indeterminate solitary confinement in the California prison system.

First filed in December, 2009, as a 97-page handwritten suit by inmates Todd Ashker and Danny Troxell, Ashker v Brown became a class action suit in 2012. The settlement announced recently will affect over 3,000 California inmates currently held in SHU locations from the northern redwood to the southern desert.

No other state maintains such high numbers of segregated prisoners. Even Secretary of Corrections Jeffrey Beard acknowledged the need for change, noting "It will move California more into the mainstream of what other states are doing while still allowing us the ability to deal with people who are presenting problems within our system, but do so in a way where we rely less on the use of segregation,"

For decades CDCR practice had been to severely isolate prisoners even suspected of gang involvement, often through no greater 'evidence' than the so-called 'validation' of possessing art with alleged gang symbols, having the name or phone number of a reputed gang member or tattoos. "I think we were the only state that was locking up so many people solely based on validation and not based on behavior," Beard said.

Going forward, only those prisoners who actively participate in gang activity or a serous rules violations, such as assault on a correctional officer or fellow prisoner will be assessed a SHU term. Most significantly, for those whose conduct warrants SHU confinement, that placement will not be for an indefinite term. SHU terms now cannot exceed more than five consecutive years.

After that, prisoners still deemed too recalcitrant to return to general population will be housed in new high-security units, where they can interact with other prisoners, make phone calls, and participate in educational and vocational programs while still separated from the general population. Although they will have access to more privileges than currently available in SHU settings their freedoms will still be curtailed.

Inmates who have served 10 years in an SHU will moved to newly created, less restrictive but still secure settings. The settlement terms also assure the 'step-down' program instituted by CDCR in 2013 will continue. About 1,800 inmates are currently in solitary for alleged gang affiliation, but can work their way out of the SHU through gradual process of 'stepping down' to inclusion in the general population. What had been a 4 year transition will now take only 2 years.

"We believe two years is enough time to determine if an inmate is amenable to change," Beard said. "If not, there is no need to continue to waste resources until they are in fact ready to change. Those who do change will be released to general population. Those that don't will be released from segregation but kept in a more restrictive general population unit until they decide they want to change."

"....We don't believe that its good for anybody to keep them locked up for 10, 20, 30 years,"

CDCR Secretary Beard

Since the step-down program began two years ago nearly 1,500 reviews of inmates had been completed, with 1,110 released into the general population, a 75.1 percent release rate. Beard noted this had been accomplished with

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moves and been made with minimal problems. Reviews of inmates in solitary now will be accelerated by the settlement. Beard indicated he expected the number of inmates now in SHU housing to "fall substantially as we move forward."

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

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

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

Beard estimates there are currently about 2,800 prisoners who are SHU housed and that as many as 1,800 were expected to be in general population status within 2 years. Lawyers for the New York-based nonprofit Center for Constitutional Rights, co-founded by famed civil rights attorney William Kunstler, acted as attorneys for the plaintiffs.

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CDCR

OIG RE: FALSE POSITIVE UA

What started out as a trickle, (no pun intended) then became a flood, is still something of a rainstorm, as LSA/CLN continues to be contacted by inmates in various prisons (though some institutions seem worse than others) about the issue of being issued a RVR for a positive UA test caused by prescribed drugs. We've accumulated quite a file, and have reached out, over the past many months, to several contacts for assistance.

Since LSA is not a legal firm and can provide no legal representation, nor are we related to the many inmates who contact us, we have, in CDCR parlance, 'no standing' with these inmates and therefore can't be notified (for privacy, HIPPA and, that old favorite, security, reasons) we don't always know the outcome of the issue. And while we appreciate the assistance of various individuals in many divisions/departments of CDCR, well, frankly we're never sure just how diligent some of these matters are pursued. After receiving word that Connie Gipson, newly confirmed AD at CDCR offices in Sacramento, would take on the issue we reached out to Ms. Gipson. Her secretary suggested we 'send her the names.' Yeah. Not so much. It's a bit more complex than that, and, having dealt with Ms. Gipson on other issues, we recognize a brush off when we hear one. But, there is a fallback position.

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

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

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

Inmates fighting this issue can contact the following (send copies only, OIG will not return original documents:

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

For future reference, it appears CDCR, working with various other agencies and divisions is making efforts to finally develop a standardized statewide process to prevent spurious RVRs from passing the 115 hearing stage, as well as specific procedures for the collection and transit of the samples. Reportedly, if asked for a random UA, inmates who believe their medical condition and/or prescribed medications may cause a positive test, the inmate can complete an CDCR Form 7385, Authorization for Release of Protected Health Information, to request a current copy of his/her Medication Administration Record (MAR).

The MAR will then be used to determine if any positive UA result could be caused by medications listed on the Form 7385. If required, RVR hearing staff can call technicians at the testing laboratory for additional information and verification. Current discussion calls for any Form 7385s

CDCR from pg. 44

submitted with a UA sample to be sent to the pharmacy within 24 hours, with response time from the pharmacy not to exceed 48 hours after receiving the Form 7385. And hopefully (but don't count on it) staff officiating at RVR hearings will be cognizant of the fact that lab techs are, by in large, available Monday-Friday, basically 8 am to 5 pm and schedule any RVR hearings where prescribed drugs might be a factor in those time frames.

IT IS IMPORTANT THAT ANYONE WHO MIGHT SUSPECT THEIR MEDS COULD CAUSE A FALSE POSITIVE TO REQUEST THE FORM 7385 AT THE TIME OF THE UA SAMPLE COLLECTION.

It appears the onus to provide this information, to prove no illicit drugs are being ingested, is on the prisoner—another instance of considered guilty until proven innocent. Hopefully, the same form/process can be used for those who suspect a medical condition or disease might

cause a positive result (diabetes and liver disease have been culprits in the past).

So, be proactive, be aware of what meds you are legitimately on and what they might cause. Be sure your rights are protected by filing the Form 7385 and being sure it is considered during any hearing, that hearing officers, should they wish to contact lab techs, do so when said lab techs are available.

If you get caught up in this Catch-22 situation LSA/CLN is still following the problem and working on a final solution. It's up to you to take the first defensive moves (well, first by not taking any sort self-medication) by being sure you fill out forms, starting with the Form 7385 and possibly ending with a 602. The final move should be to contact both our offices and the OIG.

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State of California Department of Corrections and Rehabilitation

Memorandum

Date : September 3, 2015

To : All Inmates

Subject: **MANDATORY RANDOM URINALYSIS PROGRAM: POSITIVE TEST RESULTS THAT MAY BE CAUSED BY PRESCRIBED MEDICATIONS - REVISED**

This memorandum supersedes the September 12, 2014, memorandum titled *Mandatory Random Urinalysis Program: Positive Test Result that may be caused by Prescribed Medications*.

The purpose of this memorandum is to provide the inmate population with a process for providing medical verification to custody staff when a urine sample is collected under the Mandatory Random Urinalysis Program (MRUP) and he/she believes a positive urinalysis test result may be caused by their prescribed medications.

Although this memorandum is currently in conflict with the Department Operations Manual (DOM), Section 52010.23, there will be upcoming changes to DOM which will be in accordance with the changes in this memorandum.

Effective September 12, 2015, the process shall be as outlined below:

1. During the collection of urine samples, the collecting Officer will inform the inmate of the following:

    a. The reason(s) for requesting the urine sample.
    b. That refusal to provide a urine sample shall result in disciplinary action.
    c. If he/she believes the collected urine sample may potentially test positive for a narcotic or illicit substance due to his/her prescribed medications, the inmate may complete an Authorization for Release of Protected Health Information (CDCR Form 7385), to request a current copy of his/her Medication Administration Record (MAR), to include medications prescribed for the 60 days prior to the collection of the urine sample, be released to the institution's Drug Testing Coordinator (DTC).
    d. In the event the submitted urine sample test is positive, the DTC will submit the CDCR Form 7385 to the Pharmacy staff in order to obtain a copy of his/her MAR.
    e. This information will be used by the DTC to contact the contract laboratory to verify if the positive result(s) may have been caused by the inmate's prescribed medications.
    f. If it is determined by the contract laboratory that the positive urinalysis result(s) are consistent with the inmate's prescribed medications, NO disciplinary action shall be taken.
    g. However, if it is determined by the contract laboratory that the positive urinalysis result(s) are inconsistent with the inmate's prescribed medications, the inmate shall be subject to disciplinary action in accordance with the California Code of Regulations (CCR), Title 15, Subsection(s), 3016, 3290, and 3315.

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All Inmates
Page 2

2. The collecting Officer will provide the inmate with an Authorization for Release of Protected Health Information (CDCR Form 7385). If the inmate elects to submit the form, the inmate will complete the following areas:

    a. Complete the "Patient Information" section.
    b. List the "Drug Testing Coordinator" as the intended recipient, in the section titled, "Person/Organization to Receive the Information."
    c. Complete the "Authorization Expiration Event or Expiration Date for Release of Verbal Information/Written Correspondence (Not Including Health Care Records)" section by checking the box "Happening/conclusion of this event" and specify on the line next to this box, "Review of Positive Urinalysis Result."
    d. Complete the "Hardcopy Health Care Records to be Released" section by checking the box "From" specify on the line next to this box the date 60 days prior to the collection of the urine sample. Specify on the line next to the "To" the date of collection of the urine sample. In this same section, check the box "Other" and specify "Medication Administration Record."
    e. Complete the "Purpose for the Release or Use of the Information" section by checking the box "Other" and specify "Review of Positive Urinalysis Result."
    f. Sign and date the form.
    g. Submit the "Authorization for Release of Protected Health Information" form to the collecting Officer. The collecting Officer will then print their first initial and last name, sign and date the CDCR Form 7385, and issue the inmate a photocopy of the signed CDCR Form 7385.
    h. The collecting Officer will deliver the completed CDCR Form 7385 to the institution's DTC for processing.

All questions should be addressed to your facility supervisors.

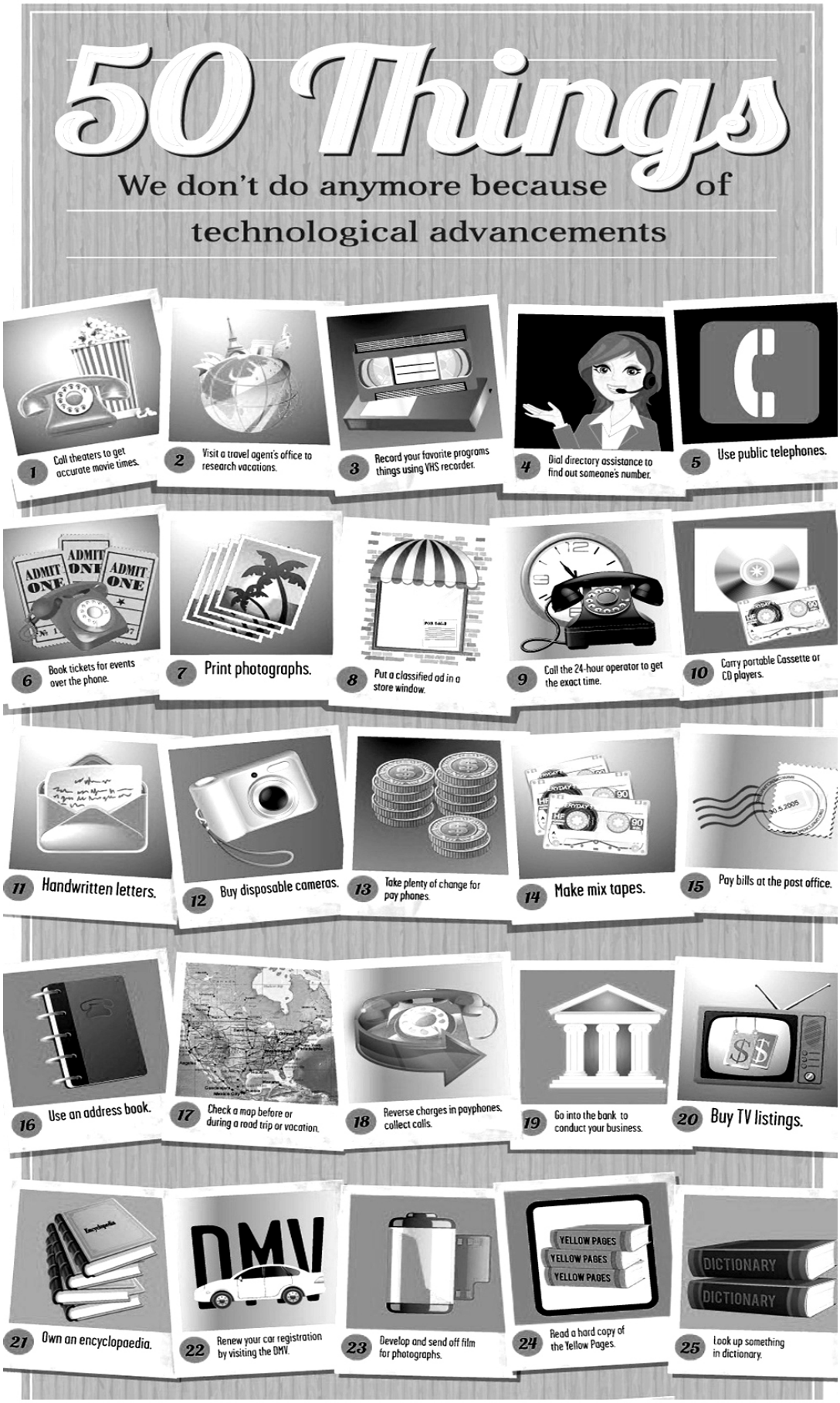
KELLY HARRINGTON
Director
Division of Adult Institutions

R. STEVEN THARRATT, M.D.
Director, Health Care Operations
Statewide Chief Medical Executive

cc: Kathleen Allison
Ralph M. Diaz
Associate Directors, DAI
Regional Health Care Executives
Wardens
Chief Executive Officers

Just in case you've truly been living with the delusion that there aren't that many new changes to adjust to out here ... we are providing you this

VISUAL AIDE




26 Remember phone numbers.
27 Watch videos. DVD & VCR.
28 Have pen pals. Write letters.
29 Use a telephone book.
PHONE BOOK
30 Use pagers.
31 Fax documents.
32 Buy CD's/ Have a CD collection.
33 Pay by paper check.
34 Make a photo album.
35 Watch TV shows at the time they are shown.
36 Warm drinks on the stove.
37 Dial *69 to find out who called you last.
*69
38 Try on shoes at the mall.
39 Hand wash clothes.
40 Advertise in newspapers.
ADS
41 Send love letters.
I ♥ YOU
42 Hand-write essays and school work.
43 Buy flowers from a florist.
44 Use a dictionary to find out how to spell something.
45 Keep a personal diary.
46 Send post cards.
47 Buy newspapers.
NEWS
48 Hang laundry out to dry on clotheslines.
49 Keep printed bills or bank statements.
50 Visit yard sales and flea markets.
BIG SALE

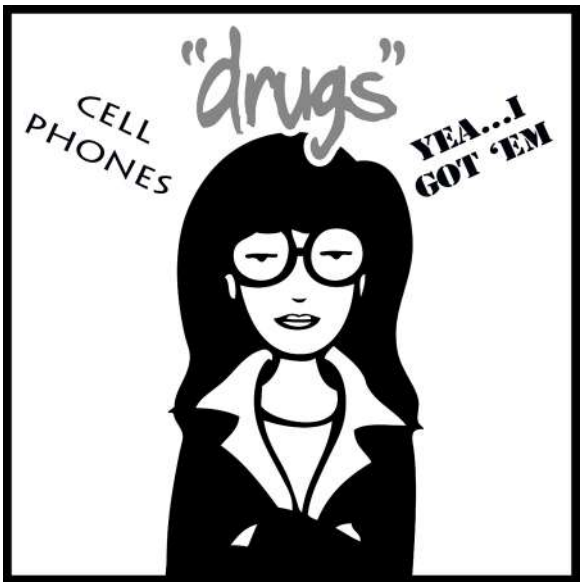
TELL US AGAIN, SEC. BEARD~

Who's bringing drugs into the prisons??

As reported in last month's CLN, so far this year the state has spent about $8 million in trying to interdict drugs coming into the prisons via, says Secretary of Corrections Jeffery Beard, *visitors*. And to date, no one has been arrested for attempting to smuggle in any drugs and in fact, no drugs have been found via the ion scanners and strip searches of visitors.

So, millions of dollars, thousands of ion scans, hundreds of strip searches and countless numbers of dog sniffs later—the scorecard is blank. Which is not to say we condone anyone bringing any sort of contraband into prisons, most especially drugs/alcohol. Those visitors who try this and are caught, usually by their own stupidity, get no sympathy from us, as you make it harder for the rest of us to visit. But, that also isn't to say that no drugs are getting into institutions.

Staff at one prison DID find quite a haul of a variety of contraband recently. And they didn't have to look far, fire up the ion scanner or ask anyone to strip. In late August COs manning the gate at Calipatria State Prison detected what was described as "a strong odor of marijuana" emanating from the vehicle of a substance abuse counselor. No, the irony is not lost on us.



According to the confidential report the gate officer asked the 43-year-old female if she had any contraband in her vehicle or possessions, to which she replied, "Yes." Well, that's a start. She then went on to spontaneously offer up suggestions, "'I have marijuana, cellphones and probably more drugs" in her various possessions.

And she wasn't lying. When officers inventoried the vehicle they found a veritable smorgasbord of no-noes. To wit (according to the official report):

Tobacco – 7.58 ounces
Cough syrup, 2.5 ounces each – 4 bottles
Travel-size Crown Royal whiskey – 1 bottle
Soma, Xanax, Valium, Norco – 409 pills
THC (marijuana) – 4.46 pounds
Methamphetamine –11.8 ounces
Heroin – 3.9 ounces
Cellphones – 40

And maybe a partridge in a pear tree. She also gave up the two inmates allegedly involved in the plan. Well, why not, she gave up everything else. The staffer was arrested, we can only guess what actions were taken relative to the two inmates, though we suspect they won't be seen on the yard for a while, and all three were referred to the Imperial County DA's office for prosecution.

A CDCR spokesman verified the facts in the confidential document, first obtained by the Sacramento Bee newspaper, were accurate, but offered no other comment. And, to date, Sec. Beard has had nothing to say either.

So now the scorecard reads: visitors, 0; staff, 1. And, like golf, this is one game where you win with the lowest score.

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