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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.

STATE SUPREME COURT DEPUBLISHES *RILEY*

In re Charles Riley

226 Cal.App.4th 535; CA 1(2);
Case No. A137349
CA Supreme Ct. Case No. S220036
August 20, 2014

Responding to requests for depublication filed by the Marin County and San Diego County district attorneys, the California Supreme Court ordered depublication of *In re Charles Riley.* This means that the Riley case may not be cited as precedent. The Court also declined to grant review on its own motion.

> The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed May 22, 2014 which appears at 226 Cal.App.4th 535. (Cal. Const., art. VI, section 14; Cal. Rules of Court, rule 8.1125(c)(1).) The court declines to review this matter on its own motion. The matter is now final.

Better news is that on September 19, 2014, the BPH held the court-remanded parole hearing for *Riley*, wherein it found him suitable. This grant is subject to the normal reviews by the Board and the Governor.

LITTLE PROGRESS IN *GILMAN V. BROWN*

Gilman v. Brown

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

Following the Ninth Circuit's stay pending appeal reported in the last CLN, there is little to report in the much-watched *Gilman* case challenging the Governor's power to reverse Board grants of parole as an *ex post facto* law, when applied to murder-lifers whose crimes predated its enactment. On 9/22/14, the state filed its First Brief on Cross-Appeal and Excerpts of Record.

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PO BOX 277
RANCHO CORDOVA, CA 95741
Contact LSA @ (916) 402-3750
lifesupportalliance@gmail.com

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Reviewed in this Issue:

Cases **from pg 1**

GOVERNOR'S RELIANCE ON CONFIDENTIAL FILE TO REVERSE GRANT OF PAROLE UPHELD BY SUPERIOR COURT

In re [-----]
Los Angeles Superior Court
BH009479
September 18, 2014

In a truly disturbing ruling, the Los Angeles Superior Court denied a lifer's habeas petition challenging the Governor's reversal of his grant of parole, wherein the "some evidence" relied upon by the Governor was "confidential" information in the prisoner's C-file that neither the prisoner nor his attorney was permitted access to.

The case involves secret allegations, of unknown provenance, of the lifer's ongoing gang activity in prison, which allegations admittedly did not amount to sufficient quantity/quality of data to support a CDC or BPT finding that the prisoner was gang affiliated. Thus, the court held that where C-file information is inadequate by CDC regulations to sustain a finding of gang affiliation, "some evidence" that is hidden from review in the Confidential portion of the C-file merely *alleging* in-prison gang activity, is nonetheless sufficient to permit the Governor to keep that prisoner locked away for life.

The prisoner's second-degree murders were plainly gang-related. But the prisoner has, since coming to prison, personally chosen to renounce that life style, and has continued in the General Population to have a good record. His only recent (2011) CDC 115 had to do with not going to work during a prison-wide work strike that was spawned by gang members at another prison. In a later work strike, he made the better choice to simply not refuse to go to work, a change the Board duly recognized when granting him parole.

The record showed that the prisoner had come under gang task force (ISU) scrutiny when some (secret) allegations surfaced alleging he was active in the Mexican Mafia, as recently as in the past couple years. Exercising due diligence, ISU investigated the matter and concluded that there was not sufficient evidence to validate the prisoner as a gang member.

When the question came up to the Board, the panel postponed the hearing until it could conduct its *own* investigation of the confidential evidence in the C-file. The Board also concluded that there was not sufficient "evidence," reconvened the hearing, and granted the prisoner parole.

The prisoner was at all times frank about his *past* (i.e., *pre*-prison) gang activity, including its relation to the murders. But he adamantly denied any *current* affiliation. Thus, the Governor in essence called the prisoner a liar for not admitting to unknown secret information that was in his C-file, and sentenced him to LWOP – or at least, until he "confesses."

This is truly Kafkaesque. Per the Superior Court, *secret* information (hidden even from the prisoner's attorney), insufficient for prison gang experts to make a determination of gang affiliation, may be relied upon by the Governor as "some evidence" of alleged membership in the Mexican Mafia, which by itself is neither a crime nor was the prisoner ever convicted of it (as required by PC §3041(b)).

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PUBLISHER'S NOTE

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

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

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

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

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EDITORIAL

LIFE SUPPORT ALLIANCE

Public Safety and Fiscal Responsibility
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A LITTLE HONESTY ALL AROUND

The last issue of CLN featured an open letter to Governor Brown, addressing his repeated reversals of parole grants for lifers, often men and women who had been found suitable more than once. In that missive, which received a great deal of comment both from the prison and free world side of things, we took the governor to task for his lack of understanding, insight and, frankly, disingenuous performance and words. And we stand by that evaluation.

But there is a flip side, and that's the honesty, transparency and unreserved openness that inmates need to display. So let's talk about honesty and openness from prisoners.

Each week LSA receives countless letters and phone calls from inmates or family members, and we field them all. Some are heart-rending, some despairing, some uplifting, especially those who write to tell us they are going home. We're not Pollyannas here, we've got a pretty good nose for the shifty, both from CDCR and inmates and we can often tell not only when a prisoner is side-stepping issues with us, but when he's sidestepping issues with his family and supporters as well.

It's a difficult task for us to explain to a wife, fiancé, mother or friend the real reasons a prisoner is denied parole is not because 'the board doesn't like me,' but because he/she habitually engages in behavior that garners repeated 115s. Or hasn't programmed to any significant extent. Or hasn't done the personal work that is required for rehabilitation. When we pull and read your transcript, and if your family asks for help in understanding a denial, that's just what we will do, it's often quite clear why that loved one isn't going home. That's not to say that we always agree with the commissioners' decisions; but we can figure out what they hung their collective hat on when they denied that date. And we can, we do, explain it to the family and friends who ask.

If you are minimizing (that favorite BPH word) your actions, either in the crime or in your incarcerated behavior to your family and friends, you need to be aware that this action alone is emblematic of the problem that will keep you from being found suitable. If you can't be open and honest with your family, friends and those who love you, how will you manage to convey openness and honesty to the board?
For those in our audience who write to us asking assistance, and then follow with a justification of their crime, here's a word to the wise. While we don't really care about the circumstances of your crime, we're here to help you become suitable, we do care when what we see in your correspondence is an attempt to circumnavigate your actions and responsibility. That makes our job harder and your chances at the board more iffy.

This is an unexpectedly advantageous time for lifers. The advent of SB 260, the implementation of elder parole and expanded medical parole, not to mention the increased suitability grant rate, give more lifers than ever the opportunity to come home and begin their lives anew. But none of these new developments is a panacea, no one will come home just because they come under SB 260, elder or even medical parole.

The basis for parole suitability remains that the individual is no longer a danger to society. Proving that you are no longer dangerous begins with honesty, and that begins with yourself and those closest to you. Hard to do? Sure. But so is doing more time in prison than you need to.

You might be surprised what your family/friends can take when you are real with them, and, you might be surprised how much they already have figured out. Remember, we're your support system. We love the person, not the crime.

(-----) **from pg. 2**

So, here's the Catch-22, as concocted by the Superior Court. (1) The prisoner has no legal procedure to ever know the essence of the allegations against him (he does not object to properly redacted files to protect the informants' identities); (2) he can nonetheless be denied parole by the Governor for not confessing to these unknown allegations (not amounting to a crime); but (3) he cannot challenge the Governor's decision because the confidential file is deemed in *camera* by the court to constitute "some evidence" of a gang affiliation that is admittedly (by prison gang coordinators) insufficient to validate his membership.

This case will proceed to the appellate courts on both state law and U.S. Constitutional challenges.

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GOVERNOR REVERSED: THERE WAS "NOT A SCINTILLA OF EVIDENCE" SUPPORTING HIS "LACK OF INSIGHT" OPINION

In re Gregg Jackson
CA 1(1); Case No. A138891
September 11, 2014

In June 1988, Gregg H. Jackson pled guilty to second degree murder with use of a weapon, during a robbery. At his sixth parole hearing (2012), he was found suitable. The Governor reversed, citing "lack of insight."

Gregg did not have a criminal background. Rather, he recently got into drugs, and, while this does not excuse his crime, it does distinguish his behavior from that brief moment in his life from his behavior in general. As the Probation Officer wrote:

> In his favor, it should be noted that he has no known prior criminal record, and he cooperated with the criminal justice system by pleading guilty in Municipal Court. The defendant said that at the time of the instant offense he was under the influence of speed. [¶] He stated that he had little experience with drugs, but had begun using speed approximately two weeks before this incident. He said that he was awake for approximately a week snorting speed when he became involved in this robbery and murder."

The Governor reversed on familiar "lack of insight" grounds. In particular, the Governor here relied upon his finding of "deeper reasons" that he suspected caused Jackson to act violently.

> "Mr. Jackson's crime was callous and abhorrent. Without any apparent reason or provocation, he went to Ms. Toliver's room and bludgeoned her to death with a hammer. He then stole $1000 from her dresser drawer and fled.
>
> "I am troubled that Mr. Jackson cannot adequately explain his reasons for brutally attacking Ms. Tolliver. He told the psychologist who recently evaluated him that he was trying to prove his worth and that he 'needed someone to see [him] as a dominant figure for validation.' At his hearing, he explained that he wanted to prove to himself that he was powerful and that after years of sexual abuse as a child, 'I needed somebody to carry my pain, somebody to suffer worse than I had been suffering.' He picked Ms. Toliver because she was the weakest person he knew.
>
> "Childhood sexual abuse is undeniably traumatic, but it does not justify nor explain why Mr. Jackson was willing to kill an innocent person in such a brutal fashion and without a moment's thought. There are deeper reasons underlying his desire to seek validation by targeting 'the weakest person he knew.' Until Mr. Jackson is better able to describe what caused him to become so indifferent to human life, I am not prepared to release him at this time."

Jackson complained to the Court that the Governor's "deeper reasons" finding was not supported by the evidence in the record. Specifically, the Court reported on and evaluated each of the many prior psychological evaluations, looking for evidence therein of such "deeper reasons." *But no psychologist ever made such a finding – only the Governor did.* In making its findings, the Court compared Jackson's case to the other recent cases dealing with unsupported "lack of insight" determinations. The Court's extensive analysis is instructive for anyone challenging a "lack of insight" parole rejection.

> As we have set forth above, the Governor's decision not to release Jackson "at this time"—and thus the Governor's implicit finding of current dangerousness—is predicated solely on lack of insight. The record, however, irrefutably establishes that Jackson has significant insight into why he committed the life crime and has exhibited remorse. Indeed, the record on insight here is every bit as extensive as in other cases reversing parole denials based on "lack of insight." (E.g., *In re Denham* (2012) 211 Cal.App.4th 702, 715–716; *In re Hunter* (2012) 205 Cal.App.4th 1529, 1539–1542 ; *In re Pugh* (2012) 205 Cal.App.4th 260, 269–271; *In re Morganti* (2012) 204 Cal. App.4th 904, 924–925; *In re Ryner* (2011) 196 Cal.App.4th 533, 548–550 (*Ryner*); *In re Nguyen* (2011) 195 Cal.App.4th 1020, 1034–1036 (*Nguyen*); *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110–1112,

***Jackson* from pg. 5**

overruled on another ground by *In re Prather* (2010) 50 Cal.4th 238, 252.)

Nevertheless, the Governor posited an insufficiency in Jackson's insight—that beyond the damage caused by the emotional, physical and sexual abuse Jackson suffered throughout his childhood, there "are deeper reasons underlying his desire to seek validation by targeting 'the weakest person he knew.' " There is not a scintilla of evidence, however, supporting the Governor's assertion there are "deeper reasons" for Jackson's brutal and murderous attack. The psychological evaluations did not hint at any such "deeper reasons." Nor did any evidence of such reasons surface during the hearings before the Parole Board.

This case is, thus, akin to *Nguyen*, in which the appellate court concluded "[t]he fault the Governor found with the 2008 mental health evaluator in failing 'to explore the more important issue of why [the inmate] reacted to these feelings of rejection with such obsessive behavior and extreme violence' does not supply the missing evidence of dangerousness." (*Nguyen, supra*, 195 Cal.App.4th at p. 1036.) The psychological evaluation of Nguyen prepared in anticipation of his 2008 parole hearing had concluded he " 'demonstrated a well developed awareness of the causes that resulted in the death of a human being.' " (*Id.* at p. 1035, italics in original.) After the Board denied parole with a one-year review, the inmate continued to work on his insight, and the following year the Board granted parole. The Governor reversed, identifying lack of insight. (*Id.* at pp. 1034–1035.) The Court of Appeal reversed, holding the absence of evidence resulting from the Governor's "perceived shortcoming" in the evaluator's examination could not, and did not, constitute evidence of dangerousness. (*Id.* at p. 1036.)

In short, a parole decision by the Governor, as one by the Board, must be grounded on at least some evidence. It cannot be based on supposition and speculation. (See *Ryner, supra,* 196 Cal.App.4th at p. 548 ["it is settled that the Board may not base its findings on hunches, speculation, or intuition"].) But that is all that can be said about the Governor's assertion here that there are "deeper reasons" why Jackson committed the life crime which he has not yet discerned and addressed.

Not only is there no evidence of a "deeper reason" for Jackson's criminal conduct which he has not yet discerned, there is, likewise, no evidence such a shortcoming in his insight is any indication of current dangerousness. (See *In re Morganti, supra,* 204 Cal.App.4th at pp. 923, 925 [there must be some "connection between any lack of insight on [the inmate's] part and the conclusion that he is currently dangerous"].)

SCINTILLA

scin·til·la
sinˈtilə/Submit
noun
a tiny trace or spark of a specified quality or feeling.
"a scintilla of doubt"

The discussion of insight in Ryner is apposite on this point. As in the instant case, there was no question in Ryner the inmate had considerable insight into why he committed the life crime. This led the appellate court to observe:

"Perhaps the Governor was concerned that Ryner lacks sufficient insight into the life crime. Of course, personal insight has long been recognized as a worthy goal. However, we have to question whether anyone can ever fully comprehend the myriad circumstances, feelings, and current and historical forces that motivate conduct, let alone past misconduct. Additionally, we question whether anyone can ever adequately articulate the complexity and consequences of past misconduct and atone for it to the satisfaction of everyone. Indeed, the California Supreme Court has recognized that 'expressions of insight and remorse will vary from prisoner to prisoner and . . . there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior.' (*Shaputis, supra*, 44 Cal.4th at p. 1260, fn. 18.) More importantly, in our view, one always remains vulnerable to a charge that he or she lacks sufficient insight into some aspect of past misconduct even after meaningful self-reflection and expressions of remorse. Moreover, we consider the very concept of 'insight' to be inherently vague and find that whether a person has or lacks insight is often in the eye of the beholder. Hence, although a 'lack of insight' may describe some failure to acknowledge and accept an undeniable fact about one's conduct, it can also be shorthand for subjective perceptions based on intuition or undefined criteria that are impossible to refute. (See, e.g., *In re Dannenberg* [(2009)] 173 Cal. App.4th 237, 255–256.)." (*Ryner, supra*, 196 Cal.App.4th at p. 548.)

Accordingly, "[e]vidence of lack of insight is indicative of a current dangerousness only if it shows a material deficiency in an inmate's understanding and acceptance of responsibility for the crime. To put it another way, the finding that an

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inmate lacks insight must be based on a factually identifiable deficiency in perception and understanding, a deficiency that involves an aspect of the criminal conduct or its causes that are significant, and the deficiency by itself or together with the commitment offense has some rational tendency to show that the inmate currently poses an unreasonable risk of danger." (*Ryner, supra,* 196 Cal.App.4th at pp. 548–549, fn. omitted.)

Thus, "[a]ccepting as we must, that an inmate's insufficient understanding of the causes of his crime is a factor that may show him unsuitable for parole, it is not enough to establish that the inmate's insight is deficient in some specific way." (*Morganti, supra,* 204 Ca.App.4th at p. 923.) There must be, in addition, some connection between the cited deficiency and the conclusion of current dangerousness. (Ibid.) There is no evidence in the instant record, however, of any connection between the supposed deficiency in Jackson's insight and current dangerousness.

In sum, there is a lack of evidence on both factors pertinent to lack of insight. First, there is no evidence of a "deeper reason" underlying Jackson's murderous action and thus no "factually identifiable" deficiency in his insight. Second, even if there were such a deficiency in Jackson's insight, there is no evidence such deficiency, by itself or together with the commitment offense, has some rational tendency to show current dangerousness.

The conclusion in *Ryner* is, thus, equally apposite here: "Where, as here, undisputed evidence shows that the inmate has acknowledged the material aspects of his or her conduct and offense, shown an understanding of its causes, and demonstrated remorse, the Governor's mere refusal to accept such evidence is not itself a rational or sufficient basis upon which to conclude that the inmate lacks insight, let alone that he or she remains currently dangerous." (*Ryner, supra*, 196 Cal.App.4th at p. 549.)

The circumstances in *Shaputis*, in which the Supreme Court held the inmate's lack of insight supported the denial of parole, stand in marked contrast. In that case, despite years of therapy and programming, the inmate persisted in recounting a version of events that was factually unsupported or otherwise incredible. (*Shaputis I, supra*, 44 Cal.4th at p. 1260.) For example, his claim that he killed his wife by accident was contradicted by the facts the hammer of the gun had to be manually cocked before the trigger could be pulled and a transfer bar required a person to pull and hold back the trigger in order to fire the gun. (*Shaputis II, supra,* 53 Cal.4th at p. 201; *Shaputis I, supra*, 44 Cal.4th at pp. 1248, 1260.) There was also evidence showing he delayed in calling for emergency assistance for his wife and the murder was the culmination of years of violent and brutalizing behavior toward the victim, his children, and even his prior wife. (*Shaputis II, supra,* 53 Cal.4th at p. 201; *Shaputis I, supra*, 44 Cal.4th at pp. 1247–1248, 1259.) In other words, there were specific facts supporting the conclusion Shaputis was not honest and forthright in claiming what had happened had been accidental, and his distortions all tended to minimize his culpability. (*Shaputis I, supra,* 44 Cal.4th at p. 1260 & fn. 18; *In re Denham, supra,* 211 Cal.App.4th at p. 715; see also *In re Hunter, supra,* 205 Cal.App.4th at p. 1540 [contrasting cases like Shaputis where inmate's account of the life crime " 'was 'physically impossible or strained credulity' "]; *In re Pugh, supra*, 205 Cal.App.4th at pp. 273–274 [inmate's version of events that is "contrary to the facts established at trial and is inherently improbable" indicates a "refusal to admit the truth to himself and to others," and "establishes a nexus to current dangerousness because it indicates the inmate is hiding the truth and has not been rehabilitated sufficiently to be safe in society"]; *Ryner, supra*, 196 Cal. App.4th at p. 547 [Shaputis's lack of insight "was rationally indicative of current dangerousness because it showed that he had not accepted full responsibility for his crime"].)

"As distinct from the circumstances in Shaputis," the record here "demonstrates neither the type nor insufficiency of insight/failure to accept responsibility that would support an inference that [Jackson] will present a danger to the public if released on parole." (*Ryner, supra*, 196 Cal.App.4th at p. 550...; *In re Palermo, supra,* 171 Cal.App.4th at p. 1112 [where inmate had no prior criminal history, killing "was not so calculated and evil as to indicate, without more, that he remains a continuing danger to the public 21 years later," and inmate expressed remorse and accepted full responsibility, no evidence supported finding of current dangerousness].)

We therefore grant Jackson's habeas corpus petition and order the Board's 2012 parole decision reinstated. (See *In re Pugh, supra,* 205 Cal.App.4th at pp. 275–276; *Ryner, supra,* 196 Cal.App.4th at pp. 552–553.)

As of September 29, 2014, no petition for review has been filed.

***Cases* from pg. 7**

GOVERNOR'S REVERSAL FOR 'MINIMIZING' AND 'INSUFFICIENT INSIGHT' UPHELD

In re Anthony Brown
CA 4(1); Case No. D065504
September 24, 2014

Anthony Brown was convicted in 1994 of one count of second degree murder. In 2012, the Board found him suitable, but the Governor subsequently reversed. Upon Brown's habeas challenge, the Court of Appeal found that the Governor's decision was adequately supported by "some evidence" that Brown had 'minimized' his offense and had 'insufficient insight' into why he committed it.

The court noted that Brown had an extensive prior criminal record, but demonstrated a real turn around in prison.

Prior to the offense in question, Brown had an extensive criminal history and his performance on probation and parole was unsatisfactory.

Brown [received] four "CDC 115's," the last occurring in 2005, none of which involved violence.

The evidence showed, and the Governor did not question, that Brown's conduct while in prison had been good and showed a lengthy period of positive rehabilitation. These included participation in numerous violence awareness and anger management classes between 1999 and 2012, which taught him how to control his anger through communication and to "walk away." He has also participated in substance abuse groups since 2001. The evidence also demonstrated, and again the Governor did not dispute, that Brown had viable parole plans, including family support systems, job offers, living arrangements, and relapse prevention programs.

The court's focus was on "evidence" in the psychological reports. A 2009 report was more equivocal that recent a 2012 report. The Governor found "evidence" in *older* reports that he relied upon, giving less credence to the newest one.

The psychological evaluation prepared in conjunction with Brown's 2012 parole hearing (the Stotland Assessment), which served as an update to a 2009 Comprehensive

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Risk Assessment of Brown by Dr. Reed (the Reed Assessment), concluded he showed "generally fair insight." However, after noting Brown "attributes his involvement in the commitment offense to becoming jealous," the Stotland Assessment cautioned Brown *"does not understand the underlying causes of his inappropriate jealous reaction and other antisocial behavior"* (italics added) and Brown "could benefit from assistance to better develop insight."

The [2009] Reed Assessment apparently reached a slightly different conclusion than the [2012] Stotland Assessment. The Reed Assessment concluded Brown had accepted responsibility for the death ..., was remorseful, and had "demonstrated good understanding of the causative factors underlying the commitment offense." However, the Reed Assessment was apparently based in part on Brown's description of the offense to Dr. Reed that, although containing an admission of responsibility for the death ..., minimized Brown's actions and shifted some responsibility to Mia. ...

The 2009 Reed Assessment concluded that, "[i]n light of all of the foregoing, his clinically estimated risk of violence within the community setting on parole is low as compared to US adult male offenders." However, a 2005 evaluator (the Castro Assessment) described Brown's risk of violence as "low to moderate," and expressed (among other concerns) that Brown "externalized responsibility for his actions."

The court then analyzed the data to determine if it amounted to the requisite "some evidence" needed to sustain the Governor's ruling.

In this case, the evidence of "current demeanor and mental state" cited by the Governor were the Governor's conclusions that (1) Brown had not accepted full responsibility for his actions because he "whitewashes" his conduct and (2) Brown had not dealt with the reasons he viciously assaulted Mia because he lacked a sufficient understanding about, or insight into, why his jealousy would cause him to react with such extreme violence ... We must examine these concerns to determine whether the findings are "demonstrably shown by the record" as well as "rationally indicative of the inmate's current dangerousness." (*In re Powell, supra*, 188 Cal.App.4th at p. 1542.)

The court observed that the Governor had cited varying details given as to Brown's description of the crime, as given to psych evaluators whose opinions the Board had relied on.

There is some evidence Brown has not accepted full responsibility for his actions because there is some evidence he minimizes both his conduct and his responsibility. In his statements to the clinicians, reflected in both the 2005 Castro Assessment and the 2009 Reed Assessment, Brown denied repeatedly striking and kicking Mia, and claimed Mia was the instigator of both the argument .... Similarly, in his testimony before the BPH in 2009, he stated he pushed and slapped Mia when she grabbed him but denied punching or kicking her. In his testimony before the BPH in 2012, his narrative description of the offense stated that Mia "threw something at me," an argument ensued, and he slapped her on the side of the head.... This cursory description failed to acknowledge the extent to which he repeatedly [assaulted the victim], which provides a modicum of evidence to support the Governor's factual determination that Brown continues to minimize both his conduct and his responsibility. (*In re Shaputis* (2011) 53 Cal.4th 192, 212 ["[u]nder the 'some evidence' standard of review, the parole authority's interpretation of the evidence must be upheld if it is reasonable, in the sense that it is not arbitrary"] (*Shaputis II*).)

Although Brown asserts the Governor's conclusions regarding minimization are based on a selective reading of the record, and ignore other passages showing Brown does accept responsibility for his actions, "comments . . . may be regarded as downplaying and not fully confronting the gravity of the criminal misconduct . . . and [e]ven if this court might not have drawn that inference, we cannot say that it was irrational." (*In re Stevenson* (2013) 213 Cal.App.4th 841, 869.)

There is also some evidence supporting the Governor's conclusion Brown did not have a sufficient understanding about, or insight into, why his jealousy and selfishness would cause him to react with such extreme violence toward a particularly vulnerable [victim] when "[m]any [people] are jealous

***Brown* from pg. 9**

and selfish, but do not abuse [others]." The Stotland Assessment, while characterizing Brown's insight as "generally fair," specifically cautioned that he "does not understand the underlying cause of his inappropriate jealous reaction and other antisocial behavior" and concluded Brown "could benefit from assistance to better develop insight." When specifically asked to respond to why he believed he reacted so violently ..., Brown's only response was that he was "hurt [and] my emotions got the best of me and I just couldn't control my emotions." ...

The Governor could rationally conclude the Stotland Assessment correctly recognized Brown lacks an adequate understanding of or insight into his violent behavior (*In re Mims* (2012) 203 Cal.App.4th 478, 491 [the deferential standard of review precludes this court from "reweighing the evidence, reconsidering the credibility of the expert opinions considered by the [BPH], and substituting its own judgment" for the Governor's evaluation of the experts' opinions]) and the Governor could rationally conclude the fact Brown recognized that he lost control of his emotions is not commensurate with an adequate understanding of the root causes for why extreme violence is Brown's response to a loss of control.

The Court then applied these observations to the standards set forth in *Shaputis II*.

Because we conclude there is a modicum of evidence for the Governor's factual determinations, we are left with the question of whether (considering Brown's commitment offense and background) such facts may be rationally indicative of the inmate's current dangerousness. *Shaputis II* states our Supreme Court has "expressly recognized that the presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (*Shaputis II, supra*, 53 Cal.4th at p. 218.)

Similarly, the courts have repeatedly observed that an inmate's minimization of the gravity of the criminal misconduct that he or she carried out can be a " 'significant predictor[] of an inmate's future behavior should parole be granted.' " (*In re Stevenson, supra*, 213 Cal.App.4th at p. 869; accord, *In re Tapia* (2012) 207 Cal.App.4th 1104, 1112 ["An inmate's downplaying or minimizing aspects of the commitment offense reflects a denial of responsibility, and is probative of current dangerousness."].) We conclude the requisite rational nexus exists between the Governor's factual determinations and his ultimate conclusion that Brown currently poses an unreasonable risk of danger if released from prison, and we therefore affirm the Governor's decision reversing the BPH and denying Brown parole.

Plainly, this was a close case. But it indicates that the courts are reticent to overrule a Governor's decision if he points to some actual evidence in the record, even if, as here, it comes from *older* psychological reports.

Garrett **from pg. 10**

RELIEF GRANTED IN JUVENILE LWOP RE-SENTENCING PETITIONS

In re Brae Hansen
CA 4(1); Case No. D063983
September 16, 2014

Brae Hansen was convicted of first degree murder with the use of a firearm, and with a lying in wait allegation. She was sentenced to life without the possibility of parole, although she was 17 at the time she committed the crime. She filed a petition asking for resentencing, to take into account her age at the time of the crime. The Court granted her petition without an order to show cause.

In her petition for writ of habeas corpus, Hansen contends that Penal Code section 190.5 ..., which governs sentencing of juveniles found guilty of murder in which certain special circumstances are found true, violates the Constitution's Eighth Amendment's prohibition on cruel and unusual punishment. Hansen's petition is premised on a recent Supreme Court decision, *Miller v. Alabama* (2012) __ U.S. __, 132 S.Ct. 2455 (*Miller*), which held that a state statute imposing a mandatory sentence of life imprisonment without parole for those under the age of 18 who commit murder violates the Eighth Amendment and that such sentences may be imposed only after the court considers the "distinctive attributes of youth" and how those attributes "diminish the penological justifications for imposing the harshest sentences on juvenile offenders." (*Id*. at p. 2465.)

At the time Hansen filed her writ petition, the California Supreme Court was reviewing the same question raised by Hansen: whether existing authority interpreting section 190.5, subdivision (b), as creating a presumption in favor of a sentence of life without parole violates the Eighth Amendment to the United States Constitution under the principles announced in *Miller*. (*People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*).)

We stayed further proceedings involving Hansen's petition pending the final outcome of Gutierrez. In its decision, the Supreme Court held that Miller precludes an interpretation of section 190.5 as creating a presumption of life without parole and that previous sentencing determinations premised on such a presumption require resentencing. (*Gutierrez, supra*, 58 Cal.4th at pp. 1390-1391.)

After the Supreme Court filed its decision, we requested an informal response from the Attorney General regarding the effect of *Gutierrez* on Hansen's petition. In that response, the Attorney General concedes that relief should be granted and the case remanded for resentencing.

As the Attorney General recognizes, relief is warranted. In its sentencing memorandum, the prosecution informed the court that under governing authority, section 190.5 creates a presumption in favor of a sentence of life without the possibility of parole. When the court sentenced Hansen, it applied this presumption in favor of a sentence of life without parole and found no basis for reducing the sentence. As discussed in *Gutierrez*, although we do not fault the trial court for dutifully applying the law as it stood at the time, such a presumption raises serious constitutional concerns that require a remand for resentencing.

We may grant relief without issuing an order to show cause or writ of habeas corpus when the petitioner's custodian concedes that the requested relief must be

***Hansen* from pg. 11**

granted. (*People v. Romero* (1994) 8 Cal.4th 728, 740, fn. 7.) Given the Attorney General's concession, we conclude no useful purpose could reasonably be served by issuance of an order to show cause and/or plenary disposition of the matter. The conviction is vacated. The matter is remanded to the trial court for resentencing not inconsistent with *Miller* and *Gutierrez*.

*****

People v. Michael Pulido

CA 1(1); Case No. A136960
August 27, 2014

In 1994, Michael Pulido was sentenced to LWOP for crimes he committed when he was 16 years old. In July 15, 2013, the Court of Appeal granted Pulido habeas relief under *Miller v. Alabama* (2012) 567 U.S. ____ [183 L.Ed.2d 407, 132 S.Ct. 2455] (*Miller*), which held that mandatory life imprisonment without parole (LWOP) for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition against cruel and unusual punishment. The Court vacated petitioner's LWOP sentence and remanded for resentencing.

The People petitioned the CA Supreme Court for review, which granted review-and-hold pending resolution of similar issues in *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*). After deciding Gutierrez, the Court transferred Pulido's case with directions to vacate the prior decision and reconsider the cause in light of Gutierrez. As the Court of Appeal explained:

> We asked the parties for further briefing to address the effect of Gutierrez on our previous ruling and disposition. Specifically, we asked the parties to address "whether the trial court record complies with the Gutierrez holding that 'the trial court must consider all relevant evidence bearing on the "distinctive attributes of youth" discussed in Miller and how those attributes "diminish the penological justifications for imposing the harshest sentences

Pulido from pg. 12

on juvenile offenders." ' (*People v. Gutierrez, supra,* 58 Cal.4th at p. 1390, quoting *Miller v. Alabama* (2012) 567 U.S. ____ [132 S.Ct. 2455, 2465].)" Having independently reviewed the sentencing transcript and other documents relevant to the sentencing court's decision in light of the supplemental briefing, we now re-affirm our original decision, vacate the sentence, and remand for resentencing.

DISCUSSION

Gutierrez held the availability (after serving 15 years of an LWOP sentence) of a sentence recall mechanism pursuant to Penal Code section 1170, subdivision (d)(2) does not preclude a *Miller* challenge to that sentence on direct review. (*Gutierrez, supra*, 58 Cal.4th at pp. 1384, 1386-1387.) This court came to the same conclusion, and the parties agree this court's prior remand order is consistent with that holding.

Gutierrez also held "that the trial court must consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in Miller and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.' (*Miller, supra*, 567 U.S. at p. ____, [132 S.Ct. at p. 2465].)" (*People v. Gutierrez, supra*, 58 Cal.4th at p. 1390.) The Court distilled from *Miller* the following five relevant considerations: "First, a court must consider a juvenile offender's 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.' [Citation.] . . . [¶] Second, a sentencing court must consider any evidence or other information in the record regarding 'the family and home environment that surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional.' [Citation.] . . . [¶] Third, a court must consider any evidence or other information in the record regarding 'the circumstances of the homicide offense, including the extent of [the juvenile defendant's] participation in the conduct and the way familial and peer pressures may have affected him.' [Citation.] Also relevant is whether substance abuse played a role in the juvenile offender's commission of the crime. [Citation.] [¶] Fourth, a court must consider any evidence or other information in the record as to whether the offender 'might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. [Citations.]' [Citation.] [¶] Finally, a sentencing court must consider any evidence or other information in the record bearing on 'the possibility of rehabilitation.' [Citations.] The extent or absence of 'past criminal history' is relevant here. [Citation.] [¶] Although courts elsewhere have enumerated or categorized these factors in different ways, we note that the emerging body of post-*Miller* case law has uniformly held that a sentencing court must consider the factors discussed above before imposing life without parole on a juvenile homicide offender." (*People v. Gutierrez, supra, 58 Cal.4th 1354, 1388-1389; qu*oting *Miller, supra,* 567 U.S. at p. ____, 132 S.Ct. at pp. 2468-2469.)

Our Supreme Court observed: "To be sure, not every factor will necessarily be relevant in every case. For example, if there is no indication in the presentence report, in the parties' submissions, or in other court filings that a juvenile offender has had a troubled childhood, then that factor cannot have mitigating relevance. But Miller 'require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.' [Citation.]" (Gutierrez, supra, 58 Cal.4th at p. 1390.)

Our prior review of the record below demonstrated "the sentencing judge imposed LWOP based on his understandable sympathy for the victim, whom he described as 'a hard working, young man from Mexico' who held several jobs and 'obviously hoped for more than life gave him.' Also, the sentencing judge imposed LWOP based on his judgment the evidence showed [petitioner] was the shooter, stating, 'There is no question in my mind, whatsoever, that this defendant . . . shot the victim. He had the gun before. He had the gun afterwards. And since then he has distinguished himself in custody by formulating plans for an escape, apparently[,] and evidencing no remorse whatsoever.' For those reasons, the court stated, 'I can see no reason to, in effect, do anything to thrust this man back in society.' " ... We concluded: "Patently, prior to imposing LWOP, the sentencing judge did not focus on the factors now constitutionally mandated under *Miller*, in particular the offender's 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.' [Citation.] In sum, because *Miller* refocused the sentencing decision on 'how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison' [citation] and the trial court did not consider the 'hallmark features' of youth now mandated under *Miller* [citation], we conclude habeas relief is warranted in this case." ...

Further re-review of the record, including the amenability determination report and the probation report in light of the parties' supplemental briefs, confirms our original view. Although these reports included some factual information relevant to the *Miller*

Pulido **from pg. 13**

inquiry about petitioner's childhood, juvenile record, and the circumstances of the offense, it is clear the trial court did not view or analyze that information through the prism *Miller* now requires. For as the People's sentencing memorandum argued, such analysis was beside the point in 1994: "If the imposition of the punishment of death for 16 or 17 year old minors found guilty of capital murder does not violate federal guarantees against cruel and unusual punishment, it inevitably follows that the lesser punishment of life in prison without the possibility of parole does not constitute cruel and unusual punishment." A remand for resentencing is required by *Gutierrez* and *Miller.*

Disposition

The petition for habeas corpus is granted. Petitioner's LWOP sentence is vacated and the matter is remanded for resentencing.

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People v. Keandre Windfield

___Cal.4th ___; CA 4(2);
No. E055062
August 19, 2014

Two crime partners, Windfield, 18, and Johnson, 17, were sentenced to 90 years to life. They petitioned for resentencing based on that term's equivalence to an LWOP sentence. In a published opinion, the Court of Appeal remanded the 17 year-old's, but not the 18 year old's, case for resentencing consideration for individualized consideration of the factors enumerated in *Miller v. Alabama* (2012) 132 S.Ct. 2455

Windfield and Johnson were convicted of first degree murder, attempted premeditated murder, assault with a gun, and gang enhancements. Both were sentenced to 90 years to life. On appeal, they challenged their sentences as cruel and unusual punishment. Because Johnson was only 17 at the time, the Court remanded his case for resentencing, relying on *Miller*, for the proposition that *mandatory* LWOP for defendants who were under the age of 18 at the time of their homicide offenses constituted cruel and unusual punishment under the Eighth Amendment. Following *Miller*, The California Supreme Court held a sentence of 110 years to life is the functional equivalent of LWOP (*People v. Caballero* (2012) 55 Cal.4th 262). Here, the trial court imposed sentence without the individualized consideration of Johnson, as required by *Miller.* Thus, Johnson's case was remanded for resentencing after consideration of the *Miller* factors as set forth in *People v. Gutierrez* (2014) 58 Cal.4th 1354. But there is a bright line distinction as to when "youth" ends, and "adulthood" commences. Thus, for 18 year-old Windfield, there was no precedent extending *Miller* to him.

The Court distinguished the law as it applies to both Windfield and Johnson. First, as to Windfield:

> Windfield was sentenced in this case to three 25-year-to-life terms, plus a life term with a 15 year minimum which was run concurrently with the time imposed in another case of two 25-year-to-life terms, two 15-year-to-life terms plus 40 years. Windfield contends that this sentence violates *Miller v. Alabama* (2012) 567 U.S.___ [132 S.Ct. 2455] (*Miller*).

Windfield was 18 years old when he committed the crimes in both cases and 21 when he was sentenced for both. He points out that his minimum parole eligibility extends beyond any life expectancy he could possibly have. In *Miller*, the United States Supreme Court held "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" (*Miller, supra*, 567 U.S. ___ [132 S.Ct. at p. 2460].) The high court noted, "Because juveniles have diminished culpability and greater prospects for reform, . . . 'they are less deserving of the most severe punishments.' [Citation.] . . . [C]hildren have a '"lack of maturity and an underdeveloped sense of responsibility,"' leading to recklessness, impulsivity, and heedless risk-taking. [Citation.] . . . [They] 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. [Citation.] . . . [A] child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].' [Citation.] [¶] . . . [¶] . . . [T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because '"[t]he heart of the retribution rationale"' relates to an offender's blameworthiness, '"the case for retribution is not as

***Windfield* from pg. 14**

strong with a minor as with an adult.'" [Citations.] Nor can deterrence do the work in this context, because "'the same characteristics that render juveniles less culpable than adults'"—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. [Citations.] Similarly, incapacitation could not support the life-without-parole sentence . . . . Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'—but "'incorrigibility is inconsistent with youth.'" [Citations.] And for the same reason, rehabilitation could not justify that sentence. Life without parole 'forswears altogether the rehabilitative ideal.' [Citation.] It reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change. [Citation.] [¶] . . . [¶] . . . [T]he characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. [Citation.] . . . '[C]riminal procedure laws that fail to take defendants' youthfulness into account would be flawed.' [Citation.] . . . [¶] [T]he mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionally punishes a juvenile offender. . . . [¶] . . . Imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.' [Citations.]" (*Id*. at pp.___[132 S.Ct. at pp. 2464-2466.] "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself . . . . It neglects the circumstances of the homicide . . . , including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors . . . or his incapacity to assist his own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Id*. at p.___[132 S.Ct. at p. 2468.] "Our decision . . . mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." (*Id*. at p.___ [132 S.Ct. at p. 2471].)

Windfield contends that scientific literature shows that the features of juveniles discussed in *Miller* extend to 18 year olds. However, we are bound by precedent and there is no precedent for us to declare that Miller applies to 18 year olds. Our legislature has determined that 18 is the age at which a person is considered an adult. (*People v. Gamache* (2010) 48 Cal.4th 347, 405.)

In *People v. Argeta* (2012) 210 Cal. App.4th 1478, 1482 (*Argeta*), the appellate court rejected an identical argument, holding, "while '[d]rawing the line at 18 years of age is subject . . . to the objections always raised against categorical rules . . . [, it] is the point where society draws the line for many purposes between childhood and adulthood.' [Citations.] Making an exception for a defendant who committed a crime just five months past his 18th birthday opens the door for the next defendant who is only six months into adulthood. Such arguments would have no logical end, and so a line must be drawn at some point. We respect the line our society has drawn and which the United States Supreme Court has relied on for sentencing purposes, and conclude [that the defendant's] sentence is not cruel and/or unusual under *Graham* [*v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011]], *Miller, supra*, 567 U.S. ___[132 S.Ct. 2455], or [P*eople v.] Caballero* [(2012) 55 Cal.4th 262]." Recently, in *Gutierrez, supra*, 58 Cal.4th at page 1380, the California Supreme Court endorsed the distinction drawn between those under the age of 18 at the time of the crime and those 18 or older.

For Johnson, the Court's rationale led to a resentencing order.

Johnson, who was 17 when he committed these crimes, also received a sentence of 90 years to life. As he correctly points out, the California Supreme Court has held that a sentence of 110 years to life is the functional equivalent of a sentence of life without parole (*People v. Caballero* (2012) 55 Cal.4th 262, 295 (*Caballero*)), an appellate court concluded that a sentence of 84 years to life is the same (*People v. Mendez* (2010) 188 Cal.App.4th 47, 63 [cited with approval in *Caballero*] and in *Argeta, supra,* 210 Cal.App.4th at p. 1482), the appellate court concluded that a term of at least 75 years in prison for a defendant who was 15 years old at the time of the crime "likely requires that he be in prison for the rest of his life" and the People therein conceded that a minimum sentence of 100 years was the functional equivalent of a life sentence without parole. Johnson also correctly points out that the sentencing court imposed sentence without individualized consideration of him as a person. There was no sentencing memorandum submitted by counsel for Johnson, the probation report contained scant

***Windfield* from pg. 15**

information about Johnson personally and neither counsel for Johnson nor the sentencing court addressed this topic during sentencing. While we recognize that Johnson did not object below to the imposition of this sentence, certainly, an argument could be made that the failure to invoke Graham v. Florida (2010) 560 U.S. 48 [130 S.Ct. 2011] on Johnson's behalf could amount to incompetency of trial counsel.

At the same time, we note that the mandatory aspect of Johnson's sentence was 50 years to life—that this trial court exercised its discretion, citing the fact that the crimes involved different victims in order to impose consecutive terms for the murder and attempted murder.

Miller held that it is a violation of the Eighth Amendment to impose a mandatory life without parole sentence upon a juvenile in a homicide case because such a penalty "precludes consideration of [the juvenile's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds [the defendant]—and from which [the defendant] cannot usually extricate [him-or her-]self—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of [the defendant's] participation in the conduct and the way familiar and peer pressures may have affected [the defendant]. Indeed, it ignores that [the defendant] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth . . . ." a sentence from taking account of an offender's age and wealth of characteristics and circumstances attendant to it." (Miller, supra, 567 U.S. at pp.___ [132 S.Ct. at pp. 2467-2468] Miller concluded that a sentence of life without the possibility of parole or its functional equivalent was appropriate for "the rare juvenile offender whose crime reflects irreparable corruption." (Id. at p.___ [132 S.Ct. at p. 2469].) In Caballero, supra, 55 Cal.4th at page 268, where a juvenile was sentenced to 110 years to life for nonhomicide crimes, the California Supreme Court held that "the state may not deprive [juveniles] at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future."

More recently, however, in *Gutierrez*, involving two 17 year old defendants convicted of special circumstances murder in two different cases, the California Supreme Court held that section 190.5(b), which prescribes the sentences for juveniles convicted of special circumstance murder, does not embody a presumption in favor of life without the possibility of parole, as doing so would run afoul of Miller. Our high court reasoned, "Under *Miller*, a state may authorize its courts to impose life without parole on a juvenile homicide offender when the penalty is discretionary and when the sentencing court's discretion is properly exercised in accordance with *Miller.* Unlike the sentencing laws at issue in *Miller*, section 190.5(b) is discretionary and does not mandate life without parole for juvenile homicide offenders. California's individualized, discretionary sentencing of juvenile homicide offenders differs in significant ways from the mandatory sentencing scheme at issue in *Miller*. Nevertheless, in light of *Miller's* reasoning, a sentence of life without parole under section 190.5(b) would raise serious constitutional concerns if it were imposed pursuant to a statutory presumption in favor of such punishment. [¶] At the core of *Miller's* rationale is the proposition—articulated in *Roper*, amplified in *Graham*, and further elaborated in *Miller* itself—that constitutionally significant differences between children and adults 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' [Citation.] The high court said in plain terms that because of 'children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.' [Citation.] 'That is especially so because of the great difficulty . . . of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." [Citations.]' [Citation.] [¶] Reading section 190.5(b) to establish a presumption in favor of life without parole . . . is in serious tension with the foregoing statements in *Miller*. . . . 'Treating [life without parole] as the default sentence takes the premise of *Miller* that such sentences should be rarities and turns that premise on its head . . . .' [¶] . . . [¶] . . . [A] sentencing court has discretion under *Miller* to decide on an individual basis whether a 16- or 17-year old offender is a '"rare juvenile offender whose crime reflects irreparable corruption."' [Citation.] . . . [¶] Further, *Miller* made clear that its concerns about juveniles' lessened culpability and greater capacity for reform have force independent of the nature of their crimes. . . . *Miller* said,

***Windfield*-from pg. 16**

'the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.' [Citation.] . . . *Graham [v. Florida* (2010) 560 U.S. 48] and *Roper* [*v. Simmons* (2005) 543 U.S. 551] likewise indicate that the mitigating features for youth can be dispositively relevant, whether the crime is a nonhomicide offense or a heinous murder punishable by death if committed by an adult. [Citations.] . . . To presume that [a broad and diverse range of first degree murder offenses] committed by 16 and 17 year olds merit a presumptive penalty of life without parole cannot be easily reconciled with *Miller's* principle that 'the distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders' are not 'crime-specific.' [Citation.] [¶] . . . *Miller* made clear that its concerns about imposing life without parole have applicability whatever the age or crime of a juvenile offender." (*Gutierrez*, at pp. 1379-1381.) Pointing out that while the sentencing court in each of the two defendants' cases "understood it had a degree of discretion in sentencing the defendant . . . neither court made its sentencing decision with awareness of the full scope of discretion conferred by section 190.5(b) or with the guidance set forth in *Miller* and this opinion for the proper exercise of its discretion" the Supreme Court remanded both cases for resentencing, as the record did not clearly indicate that the sentencing courts would have imposed the same sentences they did even if they had been aware of the full scope of their discretion. (*Id.* at pp. 1390-1391, italics added.) Although there are obvious differences between the context of the cases in *Gutierrez* and the case here, the language in *Gutierrez,* which we reiterate above, sends a message, which is clear to us, that where the functional equivalent of a life term without parole is imposed on a 17 year old convicted of murder, the sentencing court must consider the *Miller* factors. Unless the record demonstrates that the sentencing court would have arrived at the same sentence had it considered the *Miller* factors, remand is appropriate for such consideration.

It should be noted that Johnson's "victory" is not to get his sentence reduced, but to have a new sentencing *hearing* wherein the factor of his youth is properly considered by the sentencing court. From this balanced sentencing hearing, he could either get a lesser sentence, or not.

***Cases* from pg 17**

RESENTENCED JUVENILE, NOW PAROLE-ELIGIBLE AT AGE 42, LOSES APPEAL OF THAT SENTENCE

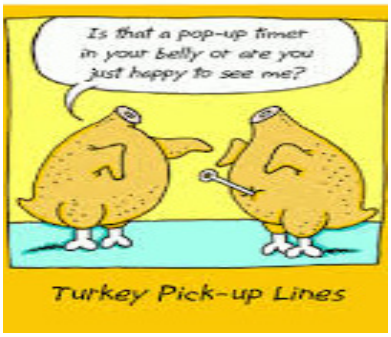
People v. Amon Morrison
CA 2(3); No. B252837
June 30, 2014

Amon Morrison, then 17, was originally sentenced to two consecutive life terms for attempted murders and two consecutive terms of 25 years to life for the use of a firearm. He would have been eligible for parole only when he turned 84. On appeal, his sentence was overturned and he was remanded to the trial court for resentencing, taking into consideration his youth. On remand, the trial court sentenced him to one life term plus 25-life, which the court believed rendered him eligible for parole at age 42. He now appealed that sentence.

The appellate court rejected Morrison's complaint that his new sentence was "cruel and unusual."

On May 12, 2014, Morrison filed a supplemental brief in which he argues the sentence of life in prison, with the possibility of parole after seven years, plus 25 years to life imposed at the second sentencing proceeding was excessive and still amounts to cruel and unusual punishment. He asserts as a juvenile offender who did not kill or intend to kill, and who was merely an aider and abettor who did not even know there was a firearm in the car, his culpability was greatly diminished. In addition, as a juvenile who had experienced an extremely difficult childhood which involved mental illness and the use of drugs, he lacked the maturity and sense of responsibility necessary to warrant the sentence imposed.

Morrison's contentions are without merit. With regard to the evidentiary issues, a jury found Morrison guilty of the crimes charged beyond a reasonable doubt. As to his second sentencing, we note the trial court recognized that, at the time the crimes were committed, Morrison was only four months shy of being an 18-year-old adult. Finally, as we indicated at page 4, ante, in *People v. Caballero, supra*, 55 Cal.4th at p. 268, the California Supreme Court stated that when a juvenile offender commits an offense which is not a homicide, the state must provide the juvenile offender " ' " 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime. [Citation.]" (*Caballero*, at p. 268.)' " Given the sentence imposed, considered with Morrison's presentence custody credits, it appears he will be eligible to apply for parole when he is approximately 42 years old. That is well within his expected lifetime.



NUMEROUS COURT DECISIONS CONTINUE TO SHAPE THE CONTOURS OF PROP. 36 AND THIRD-STRIKE LIFE SENTENCING

The following cases illustrate evolving interpretations of the Three Strikes lifer law, as well as Prop. 36-based attempts to gain resentencing. While many frivolous petitions continue to flood and clog the courts, there have been some illustrative decisions which are reported in this issue to inform the growing Three Strikes lifer population.

THIRD-STRIKER ELIGIBLE FOR RESENTENCING BECAUSE HE WAS NOT SERVING A LIFE SENTENCE

People v. Gene Atkins
___Cal.4th ___; CA 2(5);
No. B253416
September 4, 2014

This case concerns the novel question of whether a prisoner is eligible for Prop. 36 resentencing even though his commitment offenses included serious felonies, *IF* he was not serving an indeterminate term f*or those offenses.*

This appeal arises from the denial of a Penal Code section 1170.126 resentencing petition. The trial court ruled defendant, Gene Atkins, was ineligible for resentencing because his current convictions include criminal threats, a serious felony. However, the sole indeterminate life term defendant is serving is for stalking, a nonserious, non-violent felony. Defendant is not serving an indeterminate sentence for a serious or violent felony. Rather, defendant is subject to one stayed indeterminate term and three determinate terms for criminal threats, a serious felony. In the published portion of this opinion, we hold that defendant's mere conviction of four serious felonies for criminal threats does not permit the denial of his resentencing petition.

In 2002, Gene Atkins was convicted of four counts of making criminal threats (Pen. Code, § 422) and one count of stalking. He had several strike priors. At sentencing, the trial court struck the priors as to three of the criminal threats counts and imposed determinate terms. The court imposed a life three strikes sentence on the stalking count and a like term

***Atkins*-from pg. 18**

on one criminal threats count, which was stayed (Pen. Code, § 654).

After Prop. 36 was approved by voters, Atkins filed a petition for resentencing, which the trial court summarily denied because Atkins' commitment offenses included criminal threats, a serious felony. On appeal, the court reversed and remanded. The appellate court held that as to retrospective application, Prop. 36 allows qualified defendants to petition for recall of their *indeterminate three strikes life term* and be resentenced as two strike offenders.

"In order for defendant's criminal threats conviction to bar resentencing, he would have to be subject to an indeterminate sentence for *that offense*, which he is not." [Italics added.] Atkins is serving a life three strikes term for *stalking, a nonserious felony.* But a *stayed* sentence may not be used *for any punitive purpose.* In addition, Atkins was not convicted of any enumerated disqualifying offense (Pen. Code, § 1170.126 (e)(2)). Based on the unambiguous language of section 1170.126, subdivision (e), Atkins was eligible for resentencing.

Here is the published portion of the appellate majority's reasoning.

On The Grounds Stated By
The Trial Court,
The Petition May Not Be
Summarily Denied.

Defendant argues the trial court could not summarily deny his recall petition merely because he was convicted of making criminal threats, which is a serious felony. (§ 1192.7, subd. (c)(38); see *People v. Garcia* (2012) 209 Cal.App.4th 530, 532.) We agree. In order for defendant's criminal threats conviction to bar resentencing, he would have to be subject to an indeterminate sentence for that offense, which he is not.

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Given the nature of the issues raised by defendant and the Attorney General, we review their contentions de novo. The applicable standard of review was described by our Supreme Court while interpreting a provision of section 667: "Because section 667(a) was enacted by the electorate, it is the voters' intent that controls. (*People v. Jones* [(1993) 5 Cal.4th 1142], 1149.) Nonetheless, our interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571; *People v. Jones, supra*,[5 Cal.4th] at p. 1146.) We therefore first look to 'the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.' (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1216; accord, *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) Once the electorate's intent has been ascertained, the provisions must be construed to conform to that intent. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 979.) '[W]e may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.' (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)" (*People v. Park* (2013) 56 Cal.4th 782, 796.) The best indicator of voter intent is the language appearing in the initiative. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.) Our Supreme Court has explained, "Usually, there is no need to construe a provision's words when they are clear and unambiguous and thus not reasonably susceptible of more than one meaning. [Citations.]" (*Arias v. Superior Court, supra*, 46 Cal.4th at p. 979; *People v. Leal* (2004) 33 Cal.4th 999, 1007.)

Proposition 36, the Three Strikes Reform Act of 2012, was approved by the voters in the November 6, 2012 General Election. Sections 667 and 1170.12 were amended and section 1170.126 was enacted. As the Court of Appeal explained in *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168: "The Act changes the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment. Under the original version of the three strikes law a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the

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prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. (§§ 667, 1170.12.) The Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (Accord, *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1292.)

In ruling on a section 1170.126 resentencing petition, the trial court must first determine whether an inmate is eligible for resentencing. (§ 1170.126, subd. (f).) Resentencing may occur if: the defendant is serving an indeterminate life term imposed for a non-serious, nonviolent felony conviction; the defendant's current sentence was not imposed for any of the disqualifying offenses specified in section 1170.126, subdivision (e)(2); and the defendant had no prior convictions for any of the disqualifying offenses adverted to in section 1170.126, subdivision (e)(3). (§ 1170.126, subd. (e).) If the defendant is eligible, the trial court must resentence her or him unless, in its discretion, it determines resentencing the offender would pose an unreasonable risk of danger to the public. (§ 1170.126, subd. (f); *People v. Superior Court* (*Kaulick*), *supra*, 215 Cal.App.4th at pp. 1293-1294, fn. 12.) Here, as noted above, the trial court denied the resentencing petition on threshold eligibility grounds.

At issue here is whether defendant is ineligible because he is serving three determinate terms and is subject to one stayed indeterminate term for criminal threats. As noted, the indeterminate term of 25 years to life plus 2 years for being on bail when he stalked K.W. was imposed under count 10 for stalking. And, the 25-year-to-life indeterminate sentence for criminal threats as charged in count 9 was stayed pursuant to section 654, subdivision (a). Further, three determinate terms for criminal threats were imposed for counts 1, 3 and 4.

Eligibility for resentencing is governed by section 1170.126 subdivision (e). Section 1170.126 subdivision (e) specifies three separate criteria which determine whether the defendant is entitled to resentencing. The first criterion is set forth in section 1170.126 subdivision (e)(1) which states: "(e) An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 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." Defendant is not serving an indeterminate life term for a serious or violent offense. The serious offenses of which defendant has been convicted are either being served as determinate sentences or as a stayed indeterminate term. Absent a statutory provision not applicable here, a stayed term may not be used for any punitive penal purpose. (*People v. Pearson* (1986) 42 Cal.3d 351, 361-363; *People v. Haney* (1994) 26 Cal.App.4th 472, 476; cf. *People v. Benson* (1998) 18 Cal.4th 24, 30-31 [express language in §§ 667, subd. (d) and 1170.12, subd. (b) permits use of a stayed sentence to serve as a qualifying conviction].) Defendant is not serving a disqualifying indeterminate term. (Couzens & Bigelow, *The Amendment of the Three Strikes Sentencing Law* (November 2013), p. 27.)

The second criterion is set forth in section 1170.126, subdivision (e)(2) which states in part: "The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." The enumerated disqualifying offenses, which may not be serious or violent offenses, are set forth in sections 667, subdivision (e)(2)(C)(i) through (iii) and 1170.12, subdivision (c)(2)(C)(i) through (iii) as follows: "(i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true. [¶] (ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266 and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314. [¶] (iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." This second disqualifying criterion was described by our colleague Associate Justice Gilbert Nares thusly: "That criterion is satisfied if the prisoner's life sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of sections 667(e)(2)(C) and 1170.12(c)(2)(C). (§ 1170.126(e)(2).) Stated differently, the second resentencing eligibility criterion set forth in section 1170.126(e)(2) is not satisfied—and the petitioning pris-

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oner is ineligible for resentencing relief under the Reform Act—if the prisoner's life sentence was imposed for any of the disqualifying offenses (which the parties sometimes refer to as exclusions) appearing in sections 667(e)(2)(C)(i)-(iii) and 1170.12(c)(2)(C)(i)-(iii)." (*People v. White* (2014) 223 Cal.App.4th 512, 523.) Defendant's current sentences and offenses contain none of the elements in sections 667, subdivision (e)(2)(C)(i) through (iii) and 1170.12, subdivision (c)(2)(C)(i) through (iii). (Couzens & Bigelow, *supra*, 32-33.) Finally, a defendant may be disqualified from resentencing if he or she has enumerated prior convictions. The parties do not assert that section 1170.126, subdivision (e)(3) with its reference to lists of disqualifying prior convictions apply here. As defendant is not disqualified by section 1170.126 subdivision (e), he is eligible for resentencing.

The Attorney General cites to portions of the Voter Information Guide for Proposition 36 for the November 6, 2012 General Election. However, the issues raised by the trial court's ruling and the relevant provisions of section 1170.126, subdivision (e) require no statutory construction. In the absence of ambiguous language in the relevant provisions of section 1170.126, subdivision (e), resort to the voter information guide as a basis for statutory construction is unwarranted. (*Arias v. Superior Court, supra*, 46 Cal.4th at p. 979; *People v. Leal*, *supra*, 33 Cal.4th at p. 1007.) No doubt, other issues presented by section 1170.126 and the amendments to sections 667 and 1170.12 will require resort to the voter information guide as a basis for statutory construction. But such is unwarranted here.

Justice Kriegler dissented, finding section 1170.126 ambiguous on this question, which would require further consideration of voter intent in enacting the law.

The state's petition for rehearing was denied on September 18; a petition for review may well follow.

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THIRD-STRIKER'S DENIAL OF REDUCED SENTENCE UPHELD ON APPEAL

People v. Lupe Escobedo
CA 2(6); No. B251093
August 11, 2014

Lupe Escobedo appealed an order denying his petition for resentencing under Prop. 36. He contended that he was entitled to resentencing because the People did not prove *beyond a reasonable doubt* that he posed an unreasonable risk of danger to the public if released. The Court of Appeal held that a reduced sentence modification under Prop. 36 does not implicate Sixth Amendment concerns, and affirmed the trial court's decision not to resentence Escobedo.

Escobedo is serving 50 - life under the three strikes law for a 1998 conviction of two counts of receiving stolen property. Escobedo's criminal history includes serious and violent felony convictions.

The trial court found that Escobedo is eligible to be considered for resentencing because he is serving an indeterminate term under the three strikes law and his current sentence was not imposed for a serious or violent felony. (§ 1170.126, subd. (e).) But the court exercised its discretion not to resentence Escobedo because it found that he would pose an unreasonable risk of danger to public safety. (Id. subd. (f).) The court explained its reasons in a written decision. It expressed concern about Escobedo's serious and violent criminal conviction history and his lengthy record of discipline while incarcerated. The trial court concluded that, "the People have proven, by a preponderance of the evidence, that the defendant poses an unreasonable risk of danger to the public safety should he be released. If the correct standard of proof in a petition such as this is proof beyond a reasonable doubt, the court would not find that the People have met their burden." [Italics added.]

Thus, one issue was framed by the trial court, namely, what is the correct burden of proof here.

We reject Escobedo's contention that "unreasonable risk of danger to public safety" is a fact that must be pled and proved to a jury beyond a reasonable doubt. We agree with *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1285.

Any fact that increases the penalty for a crime beyond the statutory maximum must be proved to a jury beyond a reasonable doubt in order to satisfy the Sixth Amend-

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ment right to a jury trial. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Alleyne v. U.S.* (2013) __ U.S. __ [133 S.Ct. 2151].) But this constraint applies only to a fact that is "legally essential to punishment." (*Blakely v. Washington* (2004) 542 U.S. 296, 313.) It does not, however, apply to a proceeding in which a trial court may, in its discretion, modify downward a properly imposed sentence. (*Dillon v. United States* (2010) 560 U.S. 817, 828-829; *Kaulick, supra*, 215 Cal.App.4th 1279 [decision whether resentencing would pose "unreasonable risk of danger" for purposes of section 1170.126, subdivision (f) does not implicate Sixth Amendment rights]; see *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1038 [decision whether a petitioner was armed with a firearm during the current offense and is therefore ineligible for resentencing under section 1170.126, subdivision (e), does not implicate Sixth Amendment rights]; accord *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063.)

Like the petitioner in *Kaulick*, Escobedo contends that the Three Strikes Reform Act establishes a new statutory maximum penalty for eligible petitioners–a second strike sentence. He points out that the presumptive outcome for an eligible petitioner under section 1170.126 is resentencing, "unless" the court finds unreasonable risk. He contends the factor "unreasonable risk" increases the new statutory maximum and therefore implicates Sixth Amendment rights. We reject the contention for the same reasons expressed by our colleagues in Division Three. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1301-1303.)

Escobedo is serving a lawful statutory sentence of 50 years to life based on facts he either admitted or were proven to a jury beyond a reasonable doubt. "[T]he factual finding at issue [does not] increase[] the maximum potential penalty for the offense." (*People v. Towne* (2008) 44 Cal.4th 63, 77.) The resentencing provision of the Three Strikes Reform Act is an act of lenity on the part of the electorate. "It does not provide for wholesale resentencing of eligible petitioners. Instead, it provides for a proceeding where the original sentence may be modified downward." (*Kaulick, supra*, 215 Cal. App.4th at pp. 1304-1305.) These proceedings do not implicate Sixth Amendment concerns.

Given this burden of proof, the Court of Appeal then reviewed the trial court's reasoning in finding Escobedo unworthy of resentencing. The trial court had relied on Escobedo's prior criminal record, statements he made at the time of his arrest, and in-prison behavior. The appellate court found the trial court did not abuse its discretion when, in weighing this evidence, it found a preponderance of evidence that Escobedo would be an "unreasonable risk of danger to society" if resentenced.

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COURT OF APPEAL DECISION ON DIRECT APPEAL FORMS PROPER FACTUAL BASIS FOR DETERMINATION OF PROP. 36 ELIGIBILITY

People v. Michael Guilford
___Cal.4th ___; CA 3;
No. C073329
July 31, 2014

Michael Guilford appealed from an order denying his petition to recall his sentence under Prop. 36. He contended that, under Prop. 36, (1) the trial court improperly considered the prior opinion on direct appeal from his convictions in finding him ineligible for resentencing, (2) the prior opinion did not find that he was ineligible, and (3) he was entitled to have a jury determine his eligibility.

First, the Court of Appeal held that when making its preliminary finding that Guilford was ineligible for Strike Reform resentencing, the trial court could rely on facts from the appellate opinion on direct appeal of the convictions. In 1994 Guilford was convicted of spousal battery and it was proven he had three strike priors. He received a life three-strike sentence. After passage of Prop. 36 he sought resentencing. After reading the Court of Appeal opinion from his commitment offense, the trial court found him ineligible for sentence recall because the facts reported in that opinion showed that he intended to inflict great bodily injury, which is a disqualifying factor (Pen. Code, § 1170.126, subd. (e)). Guilford appealed.

The Court of Appeal affirmed the trial court. There are two parts to Prop. 36. The first is *pro*spective, reducing the penalty for nonserious offenses, when two or more serious felony priors are proved, to a doubled term (unless there are disqualifying factors which must be pled and proved). The second part is *retro*spective, allowing a reduction in a life three strike term already imposed for a nonserious offense (unless there are disqualifying factors) if the defendant's release does not pose an unreasonable risk of danger. Under the Three Strikes law a trial court may look to the record of the prior conviction, including a prior appellate opinion, to determine whether the facts constitute a strike prior; that same procedure may be used to determine whether a defendant qualifies

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for Proposition 36 resentencing. To the extent the "prior appellate opinion [is] 'hearsay,' it is still admissible in the context of a Proposition 36 eligibility review," just as hearsay is acceptable in probation/parole revocation proceedings. Given the fact no petition for rehearing was filed after the opinion issued, it may be reasonably inferred it correctly summarized the evidence against Guilford.

The appellate court also ruled on Guilford's complaint that ineligibility factors be pled and proved. The Court made the distinction between *pro*spective, and *retro*spective, applications. It held that there is no requirement that ineligibility factors be pled and proved when Prop. 36 is retrospectively applied. Prop. 36 requires pleading and proof of disqualifying factors when it is applied prospectively to prohibit a life three strike sentence for a nonserious felony where the defendant has two or more strike priors. No such requirement applies to retrospective application of Prop. 36 to defendants serving a life three strike term for a nonserious felony. Rather, the burden falls on the trial court to determine eligibility for resentencing because, in retrospective application of Prop. 36, a lawful life three strike term has already been imposed.

The trial court had an adequate factual basis when it relied on the Court of Appeal decision for gaining the facts of the case. Importantly, that prior opinion sufficiently established the disqualifying factor that Guilford intended to inflict great bodily injury. The evidence showed he battered his wife, fracturing her nose. Other crimes evidence was introduced which showed that Guilford battered his wife on almost a daily basis. The trial court reasonably concluded Guilford intended to inflict great bodily injury when he punched his wife in the face.

Finally, the appellate court held that Guilford was not entitled to a jury trial on Prop. 36 resentencing eligibility factors. Citing *Dillon v. U.S.* (2010) 560 U.S. 817), the Court observed that Sixth Amendment jury rights "do not apply to limits on downward sentence modifications due to intervening laws."

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Cases **- from pg 23**

TRIAL COURT'S GRANT OF SENTENCE REDUCTION REVERSED ON APPEAL

People v. James Harper
CA 4(2); No. E059104
July 18, 2014

This appeal by the People followed the trial court's order granting James Harper's petition to recall sentence under Prop. 36. The People contend that the trial court erred in finding defendant eligible for resentencing under Prop. 36 because during the commission of the offense, Harper "intended to cause great bodily injury to another person." The appellate court reversed the trial court.

On December 6, 2012, defendant filed a petition for resentencing under section 1170.126. The People opposed the petition on the ground that defendant was statutorily ineligible under the Reform Act. The People argued that defendant was ineligible because during the commitment offense he "intended to cause great bodily injury to another person"; section 667, subdivision (e)(2)(C)(iii), does not require a great bodily injury enhancement; the prosecution did not have to plead and prove defendant intended to cause great bodily injury to another person; and defendant posed a risk to public safety....

Following argument from the parties, the trial court granted the petition, finding defendant eligible for resentencing under section 1170.126. The court explained: "I am finding that I cannot find on what the jury convicted [defendant] of that he intended to cause great bodily injury. I cannot determine that. . . . I would have to determine from the probation report, which isn't a jury finding, and I would have to determine from the appellate opinion, which isn't a jury finding, and I don't think the appellate opinion found that. The opinion of course didn't even address that because this wasn't the issue for the Court of [A]ppeal."

The trial court also found by a preponderance of the evidence that defendant did not pose a dangerous risk to public safety. The court thereafter resentenced defendant to the upper term of four years, doubled to eight years due to the prior strike offenses for assault by means of force likely to produce great bodily injury, and stayed the eight-year sentence for corporal injury to a cohabitant. Defendant was awarded a total of 4,386 days of custody credit and ordered to report to either postrelease community service or parole.

The People argued that Harper was statutorily ineligible under the plain language of Prop. 36 because the record clearly shows he intended to cause great bodily injury to another person during the commission of his commitment offense. (§ 667, subd. (e)(2)(C)(iii).)

Based on case law and the plain meaning of the statute, "intend to cause" means a defendant must have the specific intent to cause great bodily injury. (See, e.g., *People v. Colantuono* (1994) 7 Cal.4th 206, 214; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1584-1585; § 459 [burglary statute; "enters . . . with intent to]; § 209 ["kidnaps . . . with intent to"]; § 206 [commits torture "with the intent to"]; § 220 [assault with intent to commit rape].) Hence, there are two requirements to the intended-to-cause-great-bodily-injury exclusion: (1) the infliction of great bodily injury, and (2) the specific intent to cause great bodily injury to another person during the commission of the commitment offense. "The intent of the perpetrator can be established not only by the circumstances of the offense, but also from other circumstantial evidence." (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1043, citing *People v. Raley* (1992) 2 Cal.4th 870, 888-889; *People v. Mincey* (1992) 2 Cal.4th 408, 433.)

Here, defendant was convicted of willfully and unlawfully inflicting corporal injury on a cohabitant resulting in a traumatic condition (§ 273.5, subd. (a)), and willfully and unlawfully committing an assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). The record of conviction clearly shows that defendant, during the commission of his current offenses, intended to cause great bodily injury to the victim. ... An officer testified that the victim had multiple bruises to her face, arms, and neck, and appeared very fearful. Defendant's actions, defendant's statements, the manner in which the victim was assaulted and the injuries she sustained, show that defendant "intended to cause great bodily injury to another person" during the commission of his current offenses. Defendant therefore was ineligible for resentencing under the plain, ordinary meaning of section 667, subdivision (e)(2)(C)(iii).

Based on this determination from the record, the Court of Appeal reversed the trial court, finding Harper ineligible for sentence reduction under Prop. 36.

***Cases* from pg. 24**

TRIAL COURT'S DENIAL OF SENTENCE REDUCTION UPHELD ON APPEAL

People v. Jonathon High
CA 2(6); No. B253668
August 26, 2014

Jonathon High appealed a trial court order denying his petition for resentencing under Prop. 36. He contended that the trial court erred in finding that resentencing him would pose an unreasonable risk of danger to public safety. The Court of Appeal concluded the trial court did not abuse its discretion, and affirmed.

In 1997, High was convicted of transportation of a controlled substance and possession of cocaine for sale. Neither of these offenses was a serious or violent felony. He had two prior felony strikes. The trial court sentenced him to 25-life, pursuant to the three strikes law.

On February 6, 2013, High petitioned the trial court to recall his three strike sentence and resentence him as a second strike offender, pursuant to section 1170.126 of Prop. 36. The prosecution opposed the petition. The court conducted a hearing and, in the exercise of its discretion, determined "that resentencing [appellant] would pose an unreasonable risk of danger to public safety" and denied his petition. (§ 1170.126, subd. (f).)

The Court of Appeal framed the issue:

Appellant contends the court erred in finding that resentencing him posed an unreasonable risk of danger because "there is no reliable evidence" that he presents such a risk. This suggests that "substantial evidence" is the appropriate standard for our review. It is not. The abuse of discretion standard applies to our review, and we structure the discussion accordingly. We note, however, that the record contains substantial evidence to support the challenged finding. As we shall explain, we review the record to determine if the court abused its discretion in finding by a preponderance of the evidence that appellant "would pose an unreasonable risk of danger to public safety."

The Court first disposed of the question of the abuse of discretion standard.

***High* cont. on pg. 27**

WHAT WE NEED-(*asking again!*)

We get many letters from prisoners offering the help LSA/CLN in any way they can, usually offering to send us the transcripts of their hearings. Transcripts are indeed one of the best ways we have, absent actual attendance at the parole hearings, of keeping up on what is going on, both with individual commissioners and other suitability issues.

But, please don't send us your transcripts. We already have enough paper copy transcripts to make end tables for the lamps in our office. If we had lamps. Not only are paper copies bulky and heavy, we know it is often difficult for prisoners to get copies made and we certainly don't want anyone to send us their only copy. We can retrieve transcripts from the BPH electronically, by email, in usually a few hours or a day.

This is a right we fought hard for and enjoy using. When LSA first began asking to review transcripts (under the old regime) we were forced to pay to look at the electronic versions at the BPH office. Yes, we paid simply to look at the documents, which, by law, are public record. Paid under protest—every check for payment was embellished with the mantra "Paid Under Protest."

And we complained about this lack of transparency in government to any ear that would listen, including those in legislative offices and the media. And, apparently someone listened. With the advent of a new administration at BPH a few years ago, we, and most other citizens, can now receive hearing transcripts by email—much faster, easier and certainly less clutter-producing, not to mention saving a few hundred trees.

What we do need copies of, however, are CRA and SRA documents and those 'updated' risk assessments done in conjunction with SB 260 hearings. Those we cannot access, as they are not considered public documents, but they are an important part of evaluating how the board is coming to decisions and how within the law the process remains.

If you or your attorney has asked for a new CRA for any reason and the request has been declined, we'd like that information also, along with any documentation as to the reason for the refusal. Those who receive an update to their CRA prior to an SB 260 hearing, or if you didn't get such an update prior to your SB 260 hearing, we want to know that too, whether or not you were found suitable.

If you are willing to share those evaluations, and we are very judicious about how they are used, with all identifying information redacted, we and other lifers who might be helped, would greatly appreciate that sharing. If you have only one copy and want it back, just include a note explaining that and we will send them back to you.

Send your CRAs, updates and other relevant material to LSA at PO BOX 277, Rancho Cordova, CA. 95741 and write CRA on the envelope. We thank you in advance

***High* from pg. 25**

The Abuse of Discretion Standard Applies to the Review of a Trial Court's Discretionary Exercise of Power Pursuant to Section 1170.126, Subdivision (f).

"[S]ection 1170.126 entrusts the trial court with discretion that may be exercised to protect the public. A court may deny a section 1170.126 petition if, after examination of the prisoner's criminal history, disciplinary record while incarcerated and any other relevant evidence, it determines that the prisoner poses 'an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).)" (*Yearwood, supra*, 213 Cal.App.4th at p. 176.)

"Where, as here, a discretionary power is statutorily vested in the trial court," we apply the abuse of discretion standard. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) Reviewing courts often apply that standard to the review of discretionary postconviction decisions. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 531 [decision to dismiss or strike a prior conviction allegation under § 1385]; *People v. Carmony* (2004) 33 Cal.4th 367, 375 [refusal to dismiss or strike a prior conviction allegation under § 1385]; *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974, 977 [decision whether to reduce a wobbler offense to a misdemeanor under § 17, subd. (b)].) We conclude the abuse of discretion standard applies to the review of the trial court's section 1170.126 discretionary risk-of-danger finding. Under this deferential standard, the court's ruling will not be reversed on appeal unless the appellant demonstrates that the court exercised its discretion in an "'. . . arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.

[Citations.]'" (*Rodrigues, supra*, at pp. 1124-1125.) Where the record shows the trial court balanced the relevant facts and reached an impartial decision in conformity with the law, we affirm. (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 961.)

As to whether the trial court had an adequate evidentiary foundation to make a finding that High would be an unreasonable risk of danger if released, the Court of Appeal found the following record dispositive.

Appellant argues that there is no reliable evidence to support the trial court's finding that resentencing appellant would pose an unreasonable risk of danger to public safety. The record belies his claim.

In hearing the petition for resentencing, the trial court was required to and did consider appellant's "criminal history, disciplinary record while incarcerated and . . . other relevant evidence," to determine whether he posed "'an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).)" (*Yearwood, supra*, 213 Cal. App.4th at p. 176.) The "other evidence" included appellant's prison education records (including college transcripts); a letter from appellant describing his goals and explaining he had obtained his associate of arts degree; and his favorable prison work records.

Appellant acquired his first strike in 1987, for robbing a victim at gunpoint and leading the police on a high-speed chase in a stolen car. He was sentenced to two years in prison. He violated parole three times. In 1989, appellant committed his second strike ... in a brutal first degree robbery involving four separate victims, whom they attacked seriatim, during the late night and early morning hours. They trapped each victim when he or she was alone. They beat, threatened, handcuffed, tortured and robbed two male victims before taking and using their keys to invade their respective apartments, where the girlfriend of each victim was home alone... Appellant was sentenced to six years in prison. In 1995, his parole was revoked after he was charged with corporal injury upon a spouse or domestic partner.

In 1996, appellant was stopped for driving unsafely while in possession of the drugs that led to his conviction for the "current offenses" (transportation of a controlled substance and possession of cocaine for sale). The trial court sentenced him to an indeterminate 25-years-to-life three strike sentence.

During his incarceration, appellant was cited for multiple disciplinary violations. ...

At the close of the hearing to determine whether appellant qualified for resentencing, the trial court found: "Based on the totality of the circumstances, including the conduct of the committing case, conduct of the prior strike offenses, which is egregious, and the conduct while in prison, it's pretty clear to me there's no question that [appellant] poses an unreasonable risk of danger to the community. . . . [¶] In looking at his actual conduct, the old conduct is pretty scary, the conduct in prison is pretty scary. He appears to me to be a violent guy and threat to public safety . . . ."

Appellant argues the court erred in finding that he posed an unreasonable risk of danger for various reasons. For example, he stresses the court considered records which lacked a final disposition of a prison offense ... which an official had recommended be dismissed or reheard. However, there were many other discipline reports in appellant's prison record. He discounts several reports by stating they involved "mutual combat," which "is not surprising . . . for inmates who

***High* from pg. 27**

have been in prison for 16 years." Those reports were nonetheless relevant to the issue of appellant's qualification for resentencing, and the Act authorized the court to consider them. (§ 1170.126, subd. (g).)

Appellant also asserts that his prior strike convictions do not support the court's risk-of-danger finding because they occurred decades ago, and there is little or no evidence in the record about what role he played in the offenses. While the strike offenses are old, the record adequately explains his role in them. In the 1987 robbery, appellant drove the stolen car and led police on a high speed chase which resulted in a collision. Appellant was found nearby with the victim's jewelry. The probation report also describes appellant's active involvement in the 1989 first degree robbery.

Under the abuse of discretion standard, the appellate court did not find that the trial court abused its discretion in denying High resentencing.

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THREE-STRIKES LIFER SERVING LIFE TERMS FOR BOTH QUALIFYING AND NON-QUALIFYING OFFENSES IS NOT ELIGIBLE FOR PROP. 36 RESENTENCING

People v. Sidney Hubbard

___Cal.4th ___; CA 3;
No. C073340
August 19, 2014

In 1996, Sidney Hubbard was convicted of attempted robbery and reckless evasion of a police pursuit. Multiple allegations of prior serious felony convictions were found true, and he was sentenced to consecutive indeterminate terms of 25 years to life under the Three Strikes law. In 2012, he filed a recall petition under Prop. 36 requesting resentencing on his conviction for reckless evasion. The trial court denied the petition because *one* of Hubbard's *two* commitment offenses was a serious and violent felony.

Under Prop. 36, a prisoner serving a three strikes life sentence for a felony conviction that is not serious or violent is eligible for resentencing subject to certain exceptions. (Pen. Code, § 1170.126.) Section 1170.126 does not expressly refer to "hybrid" three strike life sentences, such as Hubbard's, where the offender was convicted of *both* qualifying *and* disqualifying offenses. The court here concluded "that the statute is intended to apply *exclusively* to persons serving a sentence of an indeterminate life term that would *not* have been an indeterminate life term under the 2012 prospective amendments" and that "[t]he only way the current sentence would not have been an indeterminate life term under the prospective provisions is if no commitment conviction was disqualifying . . . ." As a result, eligibility for resentencing must be assessed on the commitment judgment as a whole and not per offense. This conclusion is supported by the official voting materials. The court disagreed that the principle authorizing a trial court to exercise its power to strike recidivist findings in the interest of justice on an offense-specific basis applies in this context. (See *People v. Garcia*(1999) 20 Cal.4th 490.)

Language from the majority opinion of the Court is compelling.

Given these expressed concerns, it would not be in accordance with imputed voter intent to interpret section 1170.126 as allowing it to apply to the component commitment convictions of a hybrid indeterminate life sentence that are not serious or violent felonies. It is true that it would save money and perhaps be more fitting to the crime of reckless evasion if defendant were to serve only a consecutive determinate doubled base term. But the intent of the voters discussed above does not give equal weight both to the public fisc and the protection of the public, such that there is any call for giving effect to the " 'rule of lenity.' " (*People v. McCoy* (2012) 208 Cal. App.4th 1333, 1339, fn. 6.) Rather, the voters were concerned with saving money only if public safety were ensured at the same time. (*People v. White* (2014) 223 Cal. App.4th 512, 522 [noting electorate "approved a mandate" that amendments be "liberally construed" to protect safety of people of California]; *Yearwood, supra,* 213 Cal.App.4th at p. 175 [enhancing public safety is key purpose of amendments].) Therefore, if a "truly dangerous" felon—i.e., one who has committed a present serious or violent felony—is not to get any benefit under section 1170.126, then a situation in

***Hubbard*- from pg 28**

which this felon committed even more felonies in addition to a disqualifying serious or violent felony is not one entitling such felon to any amelioration of the resulting sentence. We also do not agree, as has been suggested, that the "danger to public safety" determination is the vehicle through which to deny relief to defendants with hybrid sentences. The eligibility analysis is focused on screening out offenses that are deemed to be a danger to society, and the public safety analysis serves to screen out offenders whose characteristics otherwise represent a danger. In sum, we conclude that the voters did not intend to allow a defendant who has a disqualifying current conviction to benefit from section 1170.126. Even if defendant is serving "an indeterminate term of life imprisonment" under sections 667 or 1170.12, he is not someone "whose sentence under this act would not have been an indeterminate life sentence" had he been sentenced under the current law (§ 1170.126, subd. (a)).

This issue is currently pending in the California Supreme Court, and review-and-hold could be granted in this case as well. (*Braziel v. Superior Court* (2014) 225 Cal.App.4th 933, review granted 7/30/2014 (S218503/B249830); *People v. Machado* (2014) 226 Cal.App.4th 1044, mod. 226 Cal.App.4th 1376a, review granted 7/30/2014 (S219819/B249557).)

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PROP. 36 RESENTENCING CANDIDATE NOT ENTITLED TO JURY TRIAL

People v. Kelly Kimble

CA 3; No. C073819
July 14, 2014

Kelly Kimble appealed from the trial court's denial of his petition for resentencing under Prop. 36. He contended a jury was required to find him dangerous beyond a reasonable doubt for the trial court to deny his petition for resentencing and, barring that, the trial court should have made the dangerousness finding "upon a showing of clear and convincing evidence." Following the decision of another appellate court (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279 (*Kaulick*)), the Court of Appeal affirmed the trial court.

Now, on appeal, defendant contends that a jury was required to find him dangerous beyond a reasonable doubt and, barring that, the finding of dangerousness should have been made by the trial court "upon a showing of clear and convincing evidence." Quoting *Kaulick*, we explain why defendant is wrong.

Defendant first argues he had a right to a jury trial based on proof beyond a reasonable doubt of his dangerousness. As explained in *Kaulick*, "[t]his argument presumes that a finding of dangerousness is a factor which justifies enhancing a defendant's sentence beyond a statutorily presumed second strike sentence" and "that, once the trial court concluded that he was eligible for resentencing under the Act, he was subject only to a second strike sentence, unless the prosecution established dangerousness." (*Kaulick, supra*, 215 Cal.App.4th at pp. 1301, 1302.)

"The statutory language, however, is not amenable to [the defendant]'s interpretation. Penal Code section 1170.126, subdivision (f) does not state that a petitioner eligible for resentencing has his sentence immediately recalled and is resentenced to either a second strike term (if not dangerous) or a third strike indeterminate term (if dangerousness is established). Instead, the statute provides that he 'shall be resentenced' to a second strike sentence 'unless the court . . . determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' In other words,

***Kimble*- from pg 29**

dangerousness is not a factor which enhances the sentence imposed when a defendant is resentenced under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all. If the court finds that resentencing a prisoner would pose an unreasonable risk of danger, the court does not resentence the prisoner, and the petitioner simply finishes out the term to which he or she was originally sentenced." (*Kaulick, supra*, 215 Cal.App.4th at pp. 1302-1303.)

"The maximum sentence to which [the defendant], and those similarly situated to him, is subject was, and shall always be, the indeterminate life term to which he was originally sentenced. While Proposition 36 presents him with an opportunity to be resentenced to a lesser term, unless certain facts are established, he is nonetheless still subject to the third strike sentence based on the facts established at the time he was originally sentenced. As such, a court's discretionary decision to decline to modify the sentence in his 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." (*Kaulick, supra*, 215 Cal. App.4th at p. 1303.)

As to defendant's backup argument that the standard of proof for a finding of dangerousness should have been clear and convincing evidence, we agree with Kaulick that "the proper standard of proof is preponderance of the evidence. Evidence Code section 115 provides that, '[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.' There is no statute or case authority providing for a greater burden, and [the defendant] has not persuaded us that any greater burden is necessary. In contrast, it is the general rule in California that 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. [Citation.] As dangerousness is such a factor, preponderance of the evidence is the appropriate standard." (*Kaulick, supra*, 215 Cal. App.4th at p. 1305, fns. omitted.)

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STRIKING PUNISHMENT FOR ARMING ENHANCEMENT DOES NOT NULLIFY INELIGIBILITY FOR PROP. 36 RESENTENCING

People v. Humberto Quinones

___Cal.4th ___; CA 3;
No. C074081
August 11, 2014

Humberto Quinones was convicted in 1996 of drug offenses and possession of a firearm by a felon. Allegations that he was personally armed during the drug offenses and that he suffered two prior strikes were found true. The court imposed a sentence for the felon-in-possession charge, but struck the arming allegation as unnecessary. Quinones was sentenced to 75 years to life under the Three Strikes law.

In 2013, he petitioned for resentencing under Prop. 36, arguing that he was eligible for resentencing because the trial court struck the arming enhancement. The trial court denied the petition.

The Court of Appeal held that a prisoner is ineligible for resentencing under Prop. 36 if they were armed with a firearm or deadly weapon during the commission of the current offense. (Pen. Code, §§ 1170.126, subd. (e)(2); 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).) Here, the record showed that Quinones was armed with a firearm and the jury found those facts true beyond a reasonable doubt. Although the trial court found it "unnecessary" to add the additional term for the firearm enhancement, this did not change the fact that Quinones was armed with a firearm. The factual finding that an enhancement is true is not nullified when a sentencing court strikes an enhancement allegation in the interests of justice under Penal Code section 1335; the enhancement may still be considered to determine whether a petitioner is eligible for resentencing under Prop. 36.

In this case, the trial court determined the current offense fell within the bar of section 667, subdivision (e)(2)(C)(iii), and section 1170.12, subd. (c)(2)(C)(iii), each of which describes the circumstance where "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon."

The jury found beyond a reasonable doubt that defendant possessed a firearm during the commission of the offenses, and the sentencing judge suggested the same during the sentencing proceeding. In the course of declining to strike one or both strikes, the sentencing judge found defendant was sophisticated, given the amount of heroin he possessed and the fact he possessed a pistol, cell phone, and pager; and that the heroin was packaged for sale. Thus, apparently given the lengthy three strikes sentence imposed--which defendant at the time characterized as equating to a life-without-parole sentence--the sentencing judge found the additional

***Quinones* from pg 30**

term for the firearm enhancement to be "unnecessary" and declined to impose it. But that does not change the fact that defendant was armed with a firearm during the commission of the current offenses. Nothing in the record on appeal suggests any legal infirmity with the enhancement, such as a lack of evidentiary support, or other legal defect.

Nor, contrary to repeated implications by defendant, did the sentencing judge *dismiss* the enhancement under section 1385. Defendant concedes that at the time, section 1170.1, subdivision (h) permitted trial courts to strike the "additional punishment" for the armed enhancement. (Stats. 1994, ch. 1188, § 12.) The record, read in context, shows that is what occurred.

In *People v. Shirley* (1993) 18 Cal. App.4th 40 (*Shirley*), we held that the fact a sentencing court struck an admitted great bodily injury enhancement at sentencing did not preclude a later court from considering that enhancement to conclude the prior conviction was serious within the meaning of section 667. (*Shirley, supra*, 18 Cal. App.4th at pp. 45-48.) "Though a court may strike an enhancement allegation in the interests of justice at sentencing when authorized to do so, the enhancement is not nullified by lenient acts of the sentencing court." (*Id*. at p. 47; accord *People v. Turner* (1998) 67 Cal.App.4th 1258, 1268 ["the act of striking the prior conviction necessarily confirms a finding of truth with regard to the allegation. The striking of a prior conviction does not operate to defeat the factual finding of the truth of the prior conviction, instead, such act merely serves to prohibit a certain purpose for which the prior conviction may be used"].)

People v. White (2014) 223 Cal. App.4th 512 is closely on point. White had been convicted of possession of a firearm by a felon, which is not a disqualifying fact, but no arming enhancement had even been charged against him. (*Id*. at pp. 518-519.) *White* held that it was appropriate in considering White's recall petition for the trial court to consider the facts of the crime, as shown by the record, to disqualify him. (*Id*. at pp. 524-526, 527.)

Here we have an even stronger case than *White*; not only do the facts show defendant was armed with a firearm, but the jury also found those facts beyond a reasonable doubt. That the sentencing judge found it "unnecessary" to add punishment therefore is immaterial.

NEITHER A STAYED PUNISHMENT NOR ONE INELIGIBLE CRIME NULLIFIES INELIGIBILITY FOR PROP. 36 RESENTENCING

People v. Abelardo Soto

___Cal.4th ___; CA 2(3);
No. B249197
July 17, 2014

Abelardo Soto was convicted in 1998 of possession of a controlled substance (count 1), transportation (count 2), and possession of a firearm (count 3). As to count 2, the jury found true an allegation that Soto was personally armed with a firearm. Soto admitted two prior strike convictions. On count 1, Soto was given a three strikes life sentence. An identical term was imposed on count 2, but it was stayed under section 654. After Proposition 36 was enacted, Soto filed a petition for resentencing. The trial court denied the petition, finding Soto ineligible because he was armed with a firearm during the commission of his offense (Pen. Code, § 1170.126, subd. (e)(2)(C)(iii)). On appeal, Soto conceded that the arming allegation on count 2 would disqualify him from resentencing, but argued that, because the sentence for that count was stayed, he was not "serving" a sentence for it and therefore he was not disqualified from resentencing.

The Court of Appeal affirmed the trial court. Section 1170.126, subdivision (e)(2) states that an inmate is eligible for resentencing if the "inmate's current sentence was not *imposed* for any of the offenses" listed in the referenced statutes. A sentence that has been stayed under section 654 has nevertheless been imposed and is still part of a defendant's "current sentence." For purposes of three strikes sentencing, a stayed sentence still qualifies as a strike and a stay does not expunge the conviction. Soto was ineligible for resentencing because the words "current sentence" in section 1170.126, subdivision (e)(2) necessarily included the stayed sentence on count 2.

Soto also argued that he was eligible for resentencing on count 1 (possession of a controlled substance) because, standing alone, it qualifies him for resentencing. The appellate court disagreed. Soto did more than possess a controlled substance—he transported the substance while personally armed. His conviction of count 2 with its armed allegation made him ineligible for resentencing under Proposition 36 and this conviction remains in effect even though the sentence was stayed under section 654. Resentencing Soto on count 1 would change nothing and would be an idle act.

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***Cases* from pg 31**

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

Schinkel v. Superior Court
___Cal.4th ___; CA 3; No. C073404
September 12, 2014

Larry Schinkel, Jr., serving an indeterminate life term under the "Three Strikes" law, filed a petition for resentencing under Prop. 36. The trial court denied it without a hearing because Schinkel's current conviction for solicitation of murder necessarily included an intent to cause great bodily injury, which is a disqualifying factor for resentencing under the Three Strikes Reform Act of 2012.

The appellate court treated Schinkel's appeal from the order denying his petition as a petition for writ of mandate and, in denying it, concluded: (1) the trial court properly determined Schinkel is ineligible for resentencing under Prop. 36 because his conviction for solicitation of murder necessarily included the intent to cause great bodily injury; (2) Schinkel is not eligible for resentencing on other nondisqualifying current convictions because Prop. 36 excludes defendant's class of dangerous criminals from the benefit of resentencing; and (3) defendant is not entitled to a jury trial on whether he is eligible for resentencing.

One key point of law here is the determination that "intent to cause great bodily injury" necessarily devolves from the unexecuted act of solicitation of murder. The record shows that Schinkel plotted to kill a child victim to prevent her from testifying against him. On his Prop. 36 application, he asserted that because no one was in fact injured, he could not be denied resentencing based on "intent to commit great bodily injury." The Court of Appeal adamantly disagreed.

> On appeal, defendant contends that his current conviction for solicitation of murder does not disqualify him from resentencing under the Three Strikes Reform Act. He relies on the fact that, while the offense is listed as a disqualifying prior conviction, it is not listed as a disqualifying current conviction. His argument carries some logic – if solicitation of murder is listed as a disqualifying prior conviction but not as a disqualifying current conviction, then the Legislature must have intended to allow resentencing under the Act for a current solicitation of murder conviction. However, the argument is ultimately untenable because it would require us to ignore the voters' express desire to exclude from resentencing all defendants who have a current conviction involving an intent to cause great bodily injury. (See *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284 [we must give effect and significance to every word and phrase].)
>
> Solicitation of murder is committed when a person "with the intent that the crime be committed, solicits another to commit or join in the commission of murder . . . ." (§ 653f, subd. (b).) Express malice, a specific intent to kill, is an element of solicitation of murder. (*People v. Bottger* (1983) 142 Cal. App.3d 974, 980.) Certainly, intending to kill someone involves intending to cause that person great bodily injury. Therefore, intent to cause great bodily injury is necessarily included in solicitation of murder.

Schinkel nonetheless persisted in his argument that because "nobody got hurt," he shouldn't be held to such an intent. Again, the Court of Appeal flatly rejected his contention.

> Defendant argues that "there is an indication that the necessary intent is to inflict great bodily injury personally and concurrently or contemporaneously with the crime." To the contrary, neither personal infliction nor contemporaneous infliction is a part of the Three Strikes Reform Act exclusion from resentencing of offenses committed with intent to cause great bodily injury.
>
> Concerning a personal infliction element of the great-bodily-injury provision of the Three Strikes Reform Act, defendant argues that "the electorate meant to refer to the elements of the sentence enhancement provision of section 12022.7, including the element of personal infliction of great bodily injury." Section 12022.7 provides for a sentence enhancement if the defendant "personally inflicts great bodily injury on any person . . . in the commission of a felony." (§ 12022.7, subd. (a).) While this sentence enhancement for actual infliction of great bodily injury expressly requires personal infliction of such injury, there is no indication the voters intended to adopt that express provision when they excluded from resentencing those who intended to cause great bodily injury. The Act neither refers to section 12022.7 nor adopts the personal infliction language.
>
> Concerning contemporaneous infliction of great bodily injury, there is also no authority for imputing an additional element. The provision of the Three Strikes Reform Act states that "[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person." (§§ 667, subd. (e)

***Schinkel* from pg 32**

(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).) This language does not imply that the injury had to occur during the commission of the offense; instead, it states only that, during the commission of the offense, the defendant intended to cause the injury. Here, defendant necessarily intended to cause great bodily injury to the witness when he solicited her murder.

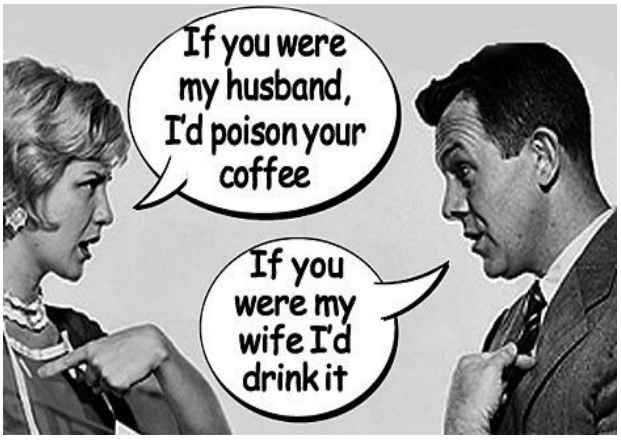
Finally, Schinkel asked the Court to order resentencing on four other convictions -- sex offenses against minors. Disagreeing, and finding Schinkel one of the "truly dangerous criminals" the Three-Strikes Act was intended to keep off the streets, the Court held:

Defendant contends that, even if he is not eligible for resentencing on the solicitation of murder count, he is eligible for resentencing on the other counts for which he received indeterminate life terms because those were not disqualifying current convictions. We disagree because defendant is one of the truly dangerous criminals that the voters meant to exclude from the resentencing provisions of Three Strikes Reform Act.

Four of defendant's convictions were for sexual intercourse with a minor, which is not one of the disqualifying current convictions under Three Strikes Reform Act. He was sentenced on those four convictions to 25 years to life each (two consecutive and two concurrent terms). He argues that he should be resentenced on those counts. He bases his argument on the language of the statute, as well as *People v. Garcia* (1999) 20 Cal.4th 490 (*Garcia*).

It is undisputed that section 1170.126 does not mention whether a defendant is eligible for resentencing on qualifying current convictions, such as the sexual intercourse counts in this case, even if he also has a disqualifying current conviction, such as the solicitation of murder count. However, subdivision (a) of the statute states the purpose of the Act: "The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to [the Three Strikes law], whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126, subd. (a).)

Applying this language to the question presented, we conclude that the voters did not intend to allow a defendant who has a disqualifying current conviction to benefit from the Act. Even if defendant is "serving an indeterminate term of imprisonment pursuant to [the Three Strikes law]," he is not someone "whose sentence under this act would not have been an indeterminate life sentence" had he been sentenced under the current law. Because his sentence would be an indeterminate life sentence under the current law, the Three Strikes Reform Act's resentencing provisions were not meant to benefit defendant.



The Voter Information Guide for Proposition 36 reinforces this underlying purpose of the Three Strikes Reform Act not to allow resentencing for those who would be subject to an indeterminate life sentence under current law. Ballot pamphlet arguments are a "proper extrinsic aid in construing voter initiatives adopted by popular vote. [Citations.]" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 171.)

The proponents of the Three Strikes Reform Act, in their argument in the Voter Information Guide, touted the Act as helping to "keep dangerous criminals off the streets." "Criminal justice experts and law enforcement leaders carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, p. 52.) While it is true that the Act was also meant to relieve prison overcrowding and save the state money, the proponents assured the voters that dangerous criminals would not receive a benefit from the Act. (*Ibid.*)

Defendant is one of those "truly dangerous criminals" referred to in the Act because he intended to inflict great bodily injury. (§ 1170.126, subd. (e)(2).) Allowing defendant to be resentenced on the sexual intercourse counts would allow a "truly dangerous criminal[]" who would be subject to an indeterminate life sentence even under current law to derive a benefit from the change in law. Therefore, defendant is not eligible for resentencing on the sexual intercourse counts because the voters' intent as shown in the Voter Information Guide, as well as in the purpose language of the statute, was that an individual such as this defendant would not derive a benefit from the Act.

Board of Parole Hearings

BOARD BUSINESS AND EN BANC

August and September Executive Board meetings of the BPH saw commissioners whiz through the business portion of the meetings, only to lose steam confronting a lengthy calendar of en banc considerations. In fact, the only item of real significance on the agenda for either month was a discussion of the coming new electronic 'parole packets that will now be prepared for commissioners by the BPH, no longer by staff at individual prisons. More on this development elsewhere in this issue.

Governor referrals of grants brought 4 inmates to the board's attention in each of the two months, with varying results. **Frank Brooks'** grant of parole was affirmed, despite opposition from the Los Angeles County D.A.'s office. **Charnetta** Simmons' grant was also confirmed.

However, the grants for **Jesus Diaz** and **Marc Merolillo** were vacated, in Diaz' case because the board members decided the Governor was right in citing what he referred to as "the prisoner's shallow and unconvincing explanations for his actions," and in the case of Merolillo, because the panel, after hearing from relatives of the victim in the case, felt there was merit to the Governor's concerns about the inmate's "ability to maintain his sobriety." In all cases the various D.A.'s opposed parole, always claiming the prisoners in question needed more programming.

September's Governor referrals saw only slightly better results from Governor referrals, with two of the four grants affirmed and two lost. **Russell Funk** will receive a new hearing, follow the board's decision to vacate his grant of parole, following opposition by the Governor and the LA County D.A.'s office. LA - D.A. De La Garza dismissed Funk's explanation of the crime as 'route and contrived," and the Board will now ask him to "explain why he reacted so violently during his life crime."

Carl Robinson will be referred for a rescission hearing to determine whether the panel granting Robison parole in May "committed a fundamental error resulting in an improvident grant of parole," based on rules violations. However, grants to **Carmen Lord** and **Terry Sewell** were affirmed, in Lord's case despite opposition for De La Garza, who opined she could tell that Lord received a "reluctant grant of parole."

In August a handful of hearings decisions were affirmed, but new hearings scheduled solely to recalculate the term. This was the case for **Arnold Mendez,** who was granted parole, as well as for **Robert Rouse** and **Salvador Sumaran,** who both received denials. **John Smith** will also receive a new hearing, in his case to provide a chance for Smith to review non-confidential documents used by the panel.

August also saw denial of parole affirmed for **Malcom Scott** and **Terri Scrape,** both of whose original hearings resulted in tie votes. As per statute, no public or attorney comment was allowed on these cases.

Always a delicate and contentious process, September's board meeting en banc calendar found five ill prisoners seeking approval of compassionate release petitions, with the board showing no compassion in three of the appeals. **Dennis Jewell** and **Novis Lackey** were recommended to the courts for resentencing under compassionate release, with representatives from Justice Now speaking on behalf of the prisoners.

However, **Robert Fuentes,** already on vigil status at CMF at the time of the September board meeting, was refused compassionate release because the board still felt that, despite his vigil status signifying he had 48 hours or less to live, that Fuentes posed

BPH - cont.

"a current risk of dangerousness demonstrated by his pattern of violent behavior even in a controlled setting and his unresolved gang issues." Hickman, only in CDCR custody since 2012, and apparently still somewhat ambulatory, was denied in part on recentness of his crime and unsatisfactory residence plans if released. Jennings, up for consideration for compassionate release for the third time, having confounded the prison doctors, was denied because the board felt his anger issues were unresolved and his plans to live out of state.

In an unusual move, the board moved to vacate the grant made to **Elonza Tyler,** and schedule a new hearing following an investigation into allegations that the prisoner engaged in post-conviction harassment of a victim. The board considered Tyler's case originally because the original hearing did not comply with statues requiring notification of victims before a hearing. Tyler's victims appeared at the board hearing, all opposing his release, as did a representative from a victim's rights group.

And once again in September the board was faced with numerous instances wherein decisions, mostly denials, were addressed and vacated and will be reheard, due to term mis-calculations. Such was the case for **Steven Chandler, Jay Copeland, Lee Goins, James Kennedy, Ricky Otero and David Rosales.**

Otto Graham, who had stipulated to unsuitability, saw that stipulation vacated and will have a new hearing to consider his updated medical condition and status. The board also withdrew decisions for **Fortino Guiterrez** and **William Harris,** and will hold new hearings because no recording of the previous proceedings was available for transcription. Again.

Gabriella Maldonado, granted parole in July under the umbrella of SB 260, saw that date vacated and will receive a new hearing to allow the panel to consider allegations that she had access to an external website and contacted individuals for support.

ELECTRONIC PAROLE PACKETS

Don't be amazed at your next parole hearing if your attorney shows up in the hearing room with a laptop computer. Under guidelines recently agreed to by both CDCR's Division of Adult Institutions (DAI) and the BPH, inmate attorneys will now be able to access relevant documents during hearings via laptops, much as DAs have been able to do for years.

This new procedure, a manifestation of the changing times and BPH Administration's efforts to not only bring parole hearings into the 20th century but also to provide more equal treatment to inmate attorneys, is something LSA brought up to the BPH nearly 3 years ago. The reaction at that time was cautiously positive, with then newly-appointed Executive Director Jennifer Shaffer noting that the issue preventing inmate attorneys using computers during hearings was not one from the BPH, but from prisons, who were (and are) paranoid (our characterization, not hers) about inmates and computers/access to the real world.

Shaffer has been working on this issue for some time, aware that DAs, who have long been able to bring in computers and cell phones, had an advantage over inmate attorneys during hearings, when the DAs could access materials quickly via computers than inmate attorneys, who had to plow through mounds of paper. And, it appears, Shaffer has been successful in navigating this circuitous channel.

BPH 1008 BOARD PACKET CHECKLIST

ORIGINAL VS. REVISED

No.	ORIGINAL BPH 1008 CHECKLIST	Notes
1	Cumulative Case Summary	
2	Board Reports (All)	no longer created
3	Psychiatric Reports (All)	
4	Prior Decisions (All)	
Notices and Responses		
5	Notices and Responses (This Hearing Only)	
6	Official letters (Since Last Hearing)	delete
7	Opposition letters (Since Last Hearing)	
8	Supporting letters (Since Last Hearing)	
9	letters of Employment (Since Last Hearing)	
Legal Documents		
10	Probation Officer's Report	
11	Arrest Reports	
12	Autopsy Reports	delete
13	Abstract of Judgement	
14	Minute Order	
15	Charging Documents	delete
16	Appellate Decisions	
17	Sentencing Transcripts	
18	1203.01 P.C Statement	delete
19	BPT Investigations	delete
20	Grieve-Peterson-Last-Hop-Transcript & Dec. Face Sheet	partial delete
Miscellaneous		
21	Notice of Hearing Rights	
22	ADA Reasonable Accommodation (BPT 1073 & 1073A)	
23	Listing of All Disciplinary Reports	delete
24	Listing of All Counseling Chronos	delete
25	Diplomas or Certificate of Completion	
26	Laudatory Chronos	
27	Chronos for Participation in Self-Help	

No. From Orig	REVISED BPH 1008 CHECKLIST	Notes
Case Summary		
1	Legal Status Summary	
11	Police / Arrest Reports (commitment offense)	
10	Probation Officer's Report	
Legal		
13	Abstract of Judgment (commitment offense)	
14	Minute Order (commitment offense)	
17	Sentencing Transcripts (commitment offense)	
16	Appellate Court Decision (commitment offense)	
17	Sentencing Transcripts	
	In Re Thomson (abstract of judgment) (if applicable)	add
Classification		
	CDC 1030 Confidential Info. Disclosure	add
	CDC 128G Classification Chrono (most recent annual)	add
Disciplinary		
	CDC 115 (all)	add
	CDC 128A Custodial Counseling Chronos (since last hearing)	add
General Chronos		
26	128B Laudatory/Informative/General Chronos (since last hearing)	
	128E Educational Progress Reports (last 5 years)	add
	128C-2 Recommendation for Adaptive Support (most recent)	add
	CDC 101 Work Supervisors Report (last 5 years)	add
Miscellaneous		
25, 27	Vocational / Self-Help Certificates	
BPH		
21	BPH 1002 Notice of Hearing Rights (current hearing)	
21	BPH 1003 Request for Attorney/Waiver of Attorney (current hearing)	
22	BPH 1073 ADA Accommodations (current hearing)	
4 / 20	Dec. Face Sheet & Dec. Portion of Transcript (since last doc, i.e.denial/grant/stip)	
	Post-Conviction Progress Report(s)	add
5	BPH 1007 A-E Notice of Hearing & Responses (3042) (current hearing)	
3	Risk Assessments (2009 and forward)	
8	Letters of Support (current hearing)	
7	Letters of Opposition Non-Confidential (current hearing)	
9	Parole Plans (Transitional Housing Letters, etc.) (current hearing)	
	PTA Package (if applicable) (includes 1045/1045B, etc)	add
	Sua Sponte (AR-Misc. Decision) (if applicable)	add
Confidential		
	CDC 1030 Confidential Information Listing	add
	CDC 1030A Confidential Information Listing Know. of Receipt	add

Be aware, inmate attorneys can only bring their electronic devices to parole hearings, not to consultations or other prisoner meetings. The CDCR's DAI still isn't that comfortable with inmates close to computers. And those computers will not have internet access during the hearings.

Also one of the reasons Shaffer has conscientiously pursued this agreement involves the BPH's efforts to join the digital age and provide many documents via email, rather than on paper. In this, they are joined by the CDCR which last year began scanning all C-files and holding them in electronic form. Beginning the first of October the BPH is now prepare what used to be called the board or parole packet and will be sending those files via email to commissioners, DA and attorneys for parole hearings that are scheduled beginning in January, 2015.

So, your counselor and/or the lifer desk at each prison will no longer be preparing this document for your hearing. The BPH will do so, allowing the board staff to accelerate the time needed to schedule a parole hearing from 10 months to a hoped for 5 months.

As part of the process, and because commissioners and other participants in the hearing process will be able to access all relevant files and documents via computer, some information previously included in the packets is being deleted from the packet, though still available through searching the C-file. What will no longer be automatically provided for the panel members includes autopsy reports and charging documents, information on the last hearing for crime partners, if any; and CRAs prior to prior to January, 2009 (when the FAD came to full force).

Also included will be all RVRs and counseling chronos (those pesky 115s and 128s). The procedure

BPH - from pg. 36

for inmates and their attorneys to submit documents ahead of hearings remains, the same, with the BPH requesting such submissions continue to be via mail and to the relevant institutions.

As for support letters, beginning January, 2015, those should be sent to the BPH as well. This is something of a throwback procedure, as in past years the practice was to send support letters to the BPH, the prisoner's attorney, counselor and the prisoner him/herself. More recently, BPH has advised support letters be sent to the lifer desk at institutions, and those support letters that found their way to the BPH office in Sacramento were then forwarded to the specific prison.

Now it appears BPH, perhaps recognizing that documents sent to counselors or the lifer desk often have a mysterious way of being misplaced, will field all support letters, making them part of the file.

HERE COME DA JUDGE

"A rose by any other name may smell as sweet, but a Deputy Commissioner by any other name is just confusing."

Shades of that old comedy routine from decades-old "Laugh-in" shows—we trust many of our lifer readers are old enough, as are we, to remember that classic. It felt a bit like déjà vu all over again recently, all because of a new name change.

After receiving letters from several inmates asking why a 'judge' suddenly appeared on the panel at their parole hearing, LSA/CLN began to do a bit of checking, and, after attendance at a few parole hearings found the answer. Under a personnel qualification change implemented by the BPH in an effort to provide better trained individuals to serve in the Deputy Commissioner spot, those hired for that position going forward must be qualified to be Administrative Law Judges, a nice title for someone trained as an attorney.

However, some of the newly anointed 'judges' apparently were so struck by the rubric, meant only to delineate their level of training, that they began using the title in their introduction on the record at hearings. A bit confusing, and a bit concerning.

The presence of a judge conjures up all sorts of rumors, among them: will my sentence by changed? Can I introduce new evidence? Where should I file an appeal-where is this new judge from? Even some attorneys, not yet aware of the change in title, asked just who was presiding at the hearing—the Commissioner or the "judge?"

Frankly, had it not been for the confusion factor, we would have found it somewhat amusing. But there was that pesky confusion factor, and so we asked of the BPH administration, what's the policy going forward? We even brought the subject up at the monthly Executive Board meeting, asking the Board to consider rescinding the use of the honorary title Judge at hearings, in the interest of clarity. And our concerns were heard.

Apparently it was just a passing fancy, as shortly thereafter it was announced that going forward, all DCs would in fact, remain DCs in name as well as practice. So, if you had a 'judge' at your recent hearing—no worries. Only the name was changed to, well, certainly not to protect the innocent.

PTA/AR: DOES IT PAY?

It's been just over year since the BPH initiated a policy of automatically reviewing (Administrative Review or AR) each 3 year denial within a year of that hearing, with an eye toward possibly advancing that inmate's hearing, if the review shows significant progress. And at the end of every parole hearing resulting in denial commissioners are careful to advise the prisoner that he/she can file a Petition to Advance (PTA), Form 1045A, to seek an advanced hearing.

BPH officials have reported about 58% of PTAs are approved, resulting in an advanced hearing and we receive reports from prisoners who are surprised, not having filed a PTA, when they receive notice that their hearings are being moved up as the result of an AR. And while both these actions appear to be positive moves, we also receive many letters from those who, having had that advanced hearing, are once again found unsuitable.

Naturally, the next question is: what's the point in a PTA or AR? Are these procedures working and making a difference? Inquiring minds, ours, wanted to know and so we posed that question to the BPH. In line with the increased transparency and openness instituted under the leadership of Executive Director Jennifer Shaffer, the information was quickly forthcoming. High marks to Ms. Shaffer and BPH Chief Legal Counsel Howard Moseley, for their willingness to provide relevant information to the public and most especially the end users of the parole system, prisoners.

And how do the results look? Pretty much like those for parole hearings held in the natural schedule. Overall, about 24% of hearings advanced through the PTA process resulted in a grant and about 29.5% of those advanced through the AR system were successful That's pretty close to the grant rate of regularly scheduled hearings, which fluctuates monthly, between about 24 and 28%.

The overriding question is whether the two paths to an early hearing result in prisoner going home sooner than through the natural sequence of hearings scheduled after a denial. And that, we don't know. While the BPH has begun tabulating how many hearings are advanced and through what process as well as how many such advanced sessions result in grants, they are not tracking, at least so far, whether those hearings resulting in a denial actually add more incarceration time.

And that's possible. It's a bit convoluted, but bear with us a moment and consider this scenario:

Prisoner X gets a 5 year denial in 2012.
In 'the natural,' the next hearings is 2017.

Because of a successful PTA or AR, X's hearing is advanced to 2014.

If he is successful at that 2014 hearing and released, he's cut up to 3 years off his incarceration.

If he gets a 3 year denial, he'll still be up for consideration again in 2017, as he would have been in the natural flow of hearings, absent the advancement process.

But, if X gets another 5 year denial at that advanced hearing (and it has happened), then his next chance for freedom isn't until 2019, two years past the 'natural' hearing date of 2017.

And while we know this has occurred, having heard the howls from the prisoners involved, we don't know how often or how many prisoners this might affect. Clearly, to receive notice that a hearing has been advanced appears to send a signal that things are looking up; to receive a denial after that is particularly crushing.

In the first year the hearing review/advancement process, either through PTA or AR was in place, 324 lifers were found suitable at advanced hearings. This may constitute the only 'early' release lifers will see. There are other interesting 'factoids' to be gleaned from the report, and as we have the time to digest all the figures we'll let you know. One easily apparent and interesting factor is that, after having their PTA granted, 6 individuals waived that advanced hearing and another 88 postponed. For those who received an advanced hearing via the AR process, only 3 waived, no one postponed, but 3 stipulated to unsuitability.

Overall figures show that in the 18 months between January, 2013 and June, 2014 the BPH received 1,251 PTAs, of which 724 were granted, resulting in an advanced hearing, with 174 grants hand out. Although in operation a shorter time, the AR process appears to show similar results. The AR process has so far reviewed 957 3-year denials handed down between July 1, 2012 and June, 30, 2013 (the reviews are conducted about 1 year after the hearing) and has advanced hearings in 508 of those instances, with 150 grants given at the advanced hearings.

It is important for those inmates considering filing a PTA request to remember that those requests are first screened out on the 'merit' of the petition. The 1045A form asks for the changed facts or circumstances the prisoner feels merits an advanced hearing, and there must be substantial input in this field. A PTA will not be advanced for review, much less granted, if the only change in circumstance is the passage of time.

The board is looking for significant work here, additional programming, certifications, achievements. Or, some new circumstance, such as the implementation of youth or elder parole considerations. But if you've put in that significant work or fall under those changed circumstances, then your chances of success with a PTA are better than 50/50.

These reports, among others, are slated to be included in the second edition of the BPH's "Significant Events" report issued later this year. Once that report is issued there may be updated information available.

*****

OUR GRATITUDE AND THANKS TO CCI

As we have often stated, LSA depends on donations to help fund the work, including publications and travel to parole hearings, that we do. And we are grateful for each donor and donation. But our special thanks and heart-felt gratitude goes to those inmates and inmate groups who contribute to us, as we know their dollars are even more keenly felt and hard earned.

So it is with great thanks that we acknowledge the super donation of $500 made to LSA from the

Higher Power AA Group from California Correctional Institute in Tehachapi.

We understand what it takes for prisoners to accumulate that much money and we are humbled by your confidence and trust in us and the work we do for you, and all lifers.

***BPH* - from pg 40**

SPECIALIZED HEARINGS AT A GLANCE

Are you SB 260/YOPH? Elder? Medical?

As if the parole process were not already confusing enough, the advent of several new specialties in parole hearings has brought that confusion to a fever pitch. In an effort to make finding where, if anywhere in these new processes, you fit, here is a short summary of who qualifies for what type of hearing and what it means.

SB 260/YOPH.

Called Youth Offender Parole Hearings, this bill went into effect January 1 of this year, and affects those individuals, both determinate sentenced and life sentenced (DSL and ISL respectively) who were under 18 at the time their crime was committed.

You may be disqualified, however, if:

1) you commit another crime after the age of 18 that involves malice aforethought or results in an additional life term;
2) you are sentenced to an LWOP term;
3) the controlling offense is a result of a 3 strikes conviction. If you are disqualified there is an appeal process.

Time requirements are:

1) for DSL inmates sentenced to more than 15 years, hearings will be held in the 15th year of incarceration;
2) life term <25 years, in the 20th year in prison, and
3) life term 25>, in the 25th year of prison time.

All those included in SB 260 consideration and currently eligible for a parole hearing (given term and time incarcerated) will have a parole hearing (either a subsequent or initial) before July 1, 2015, with the DSL inmates probably going to board between January and July. The parole panels are required to give "great weight" to the inability of youthful offenders, due to lack of brain development inherent in their young age, to make sound decisions and anticipate and fully consider consequences of their actions. The Comprehensive Risk Assessment is required also consider these factors in reaching a risk assessment.

The bill also relieves those granted parole under SB 260 from minimum term requirements.

ELDER PAROLE.

Beginning October, 2014, the board will give special consideration to those inmates who are

1) over 60 years of age and
2) have served 25 or more years in prison.

While all parole suitability requirements must be met, the panels have been instructed in the minimal recidivism and violence potential for inmates in this category. Qualifying inmates may be either lifers or DSL prisoners, but the process excludes LWOP and condemned.

-Inmates already in the board's hearing cycle (lifers) scheduled for hearings beginning in October will be considered under elder parole standards.

-Those who received a hearing prior to implementation of elder parole and who qualify will be reviewed for possible new hearing via

***BPH*- New CRA's cont.**

the Administrative Review process and may also request an advanced hearing via the 1045A PTA process.

-Those not currently in the BPH hearing cycle (DSL and those who have not yet had an initial hearing) will be scheduled as they are identified.

Risk assessments will be performed or revised to reflect the applicable standards regarding risk of elderly inmates reoffending. Both DSL and ISL inmates found suitable for parole at elder parole hearings will be released when the standard review process of their grants is completed.

EXPANDED MEDICAL PAROLE.

Expanded medical parole hearings began July 1, 2014 for those inmates, excluding LWOP and condemned, who:

- Suffer from a significant and permanent medical condition that results in cognitive or physical debilitation or incapacitation
- Qualify for placement in a licensed health care facility
- Do not pose an unreasonable risk of danger to the community

Once certified to medically qualify for this consideration parole hearings will convene and determine both the suitability of the prisoner and in what sort of facility the prisoner will be placed. Additional conditions, including periodic medical evaluations and other monitoring requirements, may be imposed.

This is *not* parole to home or family, but to a licensed care facility. Consideration for expanded medical parole may be instigated by the prisoner, a medical professional at the prison or family.

LSA- Seminar-Oakland

October brought another Life Support Alliance LIFER FAMILY SEMINAR to Oakland's Omni Building, with about 30 attendees, 7 former Lifers along with LSA Director Vanessa Nelson-Sloane, Co-Director Gail Brown, Office Manager Robin G. and LSA member Mona Manley.

We were honored to also have Robert Barton, Inspector General from OIG. Mr. Barton's office expressed a desire to attend and he was gracious enough to address our audience with an overview of what OIG does. Below is a summary:

Our mission is to assist in safeguarding the integrity of the State's correctional system—in effect, to act as the eyes and ears of the public in overseeing the State's prisons and correctional programs. The OIG accomplishes that mission by conducting reviews of policies, practices, and procedures of the California Department of Corrections and Rehabilitation (CDCR) when requested by the Governor, the Senate Committee on Rules, or the Assembly. The OIG is also responsible for contemporaneous oversight of the internal affairs investigations and the disciplinary process of CDCR, for conducting reviews of the delivery of medical care at each State institution, and for determining the qualifications of candidates submitted by the Governor for the position of warden.

Our next Lifer Family Seminar will be held Saturday Nov. 8, 2014, in Riverside Ca.
Please contact LSA for reservations and information.

State Appointed - ATTORNEY SURVEY

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

NAME*_____ CDC #*_____ HEARING DATE*_____

COMMISSIONER_____ GRANTED/DENIED(YRS)_____

INITIAL/SUBSEQUENT_____ EVER FOUND SUITABLE/WHEN_____

ATTORNEY_____ HRG. LOCATION_____

MEET BEFORE HRG?_____HOW MANY TIMES?_____

TIME SPENT CONSULTING_____FAMILIAR WITH YOUR CASE? _____

_____

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

LANGUAGE PROBLEMS?_____ WAS ATTORNEY PREPARED?_____

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

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

_____

_____

_____

_____

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

Lifer Scheduling and Tracking System

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

Hearing Totals*	31	38	33	13	34	27	27	32	29	26	25	28	244	587	34**	553

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FRITZ	GARNER	GUERRERO	LABAHN	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	31	38	33	12	34	27	27	29	28	24	25	28	101	437	33	404
Grants	12	16	7	2	10	4	8	5	3	12	13	5	0	97	5	92
Denials	17	20	18	5	19	16	16	16	13	12	10	17	0	179	20	159
Stipulations	1	0	7	3	3	6	0	4	9	0	1	5	0	39	3	36
Waivers	0	0	0	0	0	0	1	0	0	0	0	0	50	51	0	51
Postponements	1	2	0	2	1	1	0	3	3	0	1	0	29	43	4	39
Continuances	0	0	1	0	1	0	2	1	0	0	0	1	0	6	1	5
Split	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	22	22	0	22

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

Subtotal (Deny+Stip)	18	20	25	8	22	22	16	20	22	12	11	22	0	218	23	195
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	6	13	14	5	14	7	8	7	14	8	3	12	0	111	13	98
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	10	6	9	2	8	14	7	9	6	3	7	9	0	90	9	81
7 years	2	1	2	1	0	1	1	3	2	1	1	1	0	16	1	15
10 years	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	1
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	0	0	0	0	0	1	0	0	0	0	0	50	51	0	51
1 year	0	0	0	0	0	0	1	0	0	0	0	0	27	28	0	28
2 years	0	0	0	0	0	0	0	0	0	0	0	0	13	13	0	13
3 years	0	0	0	0	0	0	0	0	0	0	0	0	7	7	0	7
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	3	3	0	3

Postponement Analysis per Commissioner

Subtotal (Postpone)	1	2	0	2	1	1	0	3	3	0	1	0	29	43	4	39
Within State Control	1	0	0	1	0	0	0	0	1	0	1	0	22	26	1	25
Exigent Circumstance	0	0	0	0	0	1	0	2	1	0	0	0	2	6	1	5
Prisoner Postpone	0	2	0	1	1	0	0	1	1	0	0	0	5	11	2	9

*Hearing Totals include other actions such as Rescission, Progress, PC 3000.1, Documentation, 3 year Reviews for 5 year Denials, EnBanc Reviews, PC 1170, Term Calcs, Consultations and Inmate Petition (JR/ROM).
** Hearings Conducted with more than one "Commissioner" column count on the Hearing Total* line does not include En Banc Reviews.

Lifer Scheduling and Tracking System

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

Hearing Totals*	25	0	19	28	1	33	24	30	14	9	24	19	23	297	546	6**	540

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FERGUSON	FRITZ	GARNER	GUERRERO	LABAHN	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	24	0	18	28	1	33	24	30	14	9	24	18	23	93	339	5	334
Grants	8	0	7	8	0	11	3	5	4	2	4	8	7	0	67	2	65
Denials	14	0	11	18	1	17	13	19	9	6	17	8	14	0	147	3	144
Stipulations	1	0	0	1	0	2	2	2	1	1	1	1	1	0	13	0	13
Waivers	0	0	0	0	0	0	3	0	0	0	0	1	0	45	49	0	49
Postponements	0	0	0	0	0	3	3	1	0	0	2	0	0	36	45	0	45
Continuances	1	0	0	1	0	0	0	3	0	0	0	0	1	0	6	0	6
Split	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	12	12	0	12

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

Subtotal (Deny+Stip)	15	0	11	19	1	19	15	21	10	7	18	9	15	0	160	3	157
1 year	0	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	0
3 years	12	0	8	14	0	18	11	9	1	5	8	6	8	0	100	2	98
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	3	0	2	3	1	1	3	7	7	2	6	3	7	0	45	1	44
7 years	0	0	1	2	0	0	1	0	2	0	2	0	0	0	8	0	8
10 years	0	0	0	0	0	0	0	4	0	0	2	0	0	0	6	0	6
15 years	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	0	0	0	0	0	3	0	0	0	0	1	0	45	49	0	49
1 year	0	0	0	0	0	0	3	0	0	0	0	1	0	23	27	0	27
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	12	12	0	12
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	6	6	0	6
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0	3

Postponement Analysis per Commissioner

Subtotal (Postpone)	0	0	0	0	0	3	3	1	0	0	2	0	0	36	45	0	45
Within State Control	0	0	0	0	0	1	1	1	0	0	2	0	0	29	34	0	34
Exigent Circumstance	0	0	0	0	0	1	1	0	0	0	0	0	0	0	2	0	2
Prisoner Postpone	0	0	0	0	0	1	1	0	0	0	0	0	0	7	9	0	9

*Hearing Totals include other actions such as Rescission, Progress, PC 3000.1, Documentation, 3 year Reviews for 5 year Denials, EnBanc Reviews, PC 1170, Term Calcs, Consultations and Inmate Petition (JR/ROM).
** Hearings Conducted with more than one "Commissioner" column count on the Hearing Total* line does not include En Banc Reviews.

Politics

A NEW WRINKLE IN AN OLD COVERUP

Of the many issues LSA/CLN is currently grappling with are two that have, of late, disastrously collided into a perfect storm of confusion, questionable legality and outrage. And while this new dilemma appears to affect only a handful of lifers, the repercussions from this bastardized mash up could be far reaching.

We've written many times regarding our concerns with the Governor's proclivity to reverse lifers' parole dates, most recently in the last CLN issue, where we questioned his understanding and insight. And we've discussed with BPH officials the exasperating and seemingly on-going problem of transcripts of hearings not being available due to loss of the tape or other 'technical difficulties.

In most cases when transcripts are unprocurable due to one of these scenarios the BPH will hold a new hearing for those denied parole and will issue a miscellaneous decision memorializing a grant of parole, so that the successful prisoner need not go through the experience of another parole hearing, and this practice has seemed to work. Until now.

It is a procedure that, while not perfect, was done with the best intentions of providing lifers found suitable the quickest path to freedom, alleviating them of the requirement to undergo a new hearing. Often the granting panel would reconvene briefly to record a summary of their decision to grant, but it was an incomplete record at best, with commissioners relying on their notes from months ago doing their best to state their reasons for granting parole. At the same time, it was efficient for the BPH, because new hearings for those granted parole, which would have required convening the same panel, would not have to be worked into the schedule within a certain time frame. The BPH found it difficult enough to plug in those who were denied and needed a new hearing to produce transcripts for possible court action.

Then in early October we received word in quick succession of three grants of parole reversed by Governor, without benefit of a transcript of the current, successful board hearing. As we go to press for CLN we know of three, but experience has shown us that there are probably more lifers devastated by the same situation that we don't yet know about.

As all lifers know the decision on whether or not a lifer is suitable to parole is based on 'current dangerousness,' a concept driven home even more forcefully in 2008 when the Lawrence decision stripped the parole board of the authority to never endingly use the crime itself as reason to deny parole. Panels now are careful to articulate that a prisoner denied parole is denied on the basis of their current risk level, a situation that is determined by considering both historical, static factors and those presently presented by the inmate.

But it seems that this standard doesn't hold for the Governor. Or at least, he doesn't seem to think it does. And we're not alone in our disbelief (quickly followed by bewilderment, confusion, astonishment and outrage) of his actions. Off record many officials are stunned by this turn of events, almost all responding with "how can he do that," "that isn't right," and "is that even legal?" To which we respond, "good question," "no it isn't," and "that's what we're trying to find out."

In each case we are so far aware of the Governor, or at least his legal team, reached back to review transcripts from earlier, unsuccessful hearings wherein the prisoners in question were found unsuitable for parole. Using those transcripts the Governor cites in his reversal letters reasons for those denials, but applies them to the current situation. And, in each case, those factors from those

previous hearings had been successfully addressed in the latest parole appearance and so noted by the panel in finding the individuals suitable. But, in each case, the transcript from that successful hearing is missing, due to recording problems.

Obviously, the problem here is twofold: the Governor's irascibility and the technical issues of producing transcripts from recordings. One depends on personality and the political climate, one on technology. One should be easy to fix—the other, well, what can we say.

We've taken these issues to BPH, where officials were surprised to learn of the reversals-without-transcript—and a bit miffed also. While they are unable to impact the reversals themselves they can work on the technical issue of providing transcripts. In all fairness, the problem of missing transcripts is almost as frustrating for BPH as it is for us, but not as frustrating as it is for the inmates involved. Officials are trying to come up with a solution to insure transcripts are successfully recreated and we've offered suggestions to try and circumvent the problem. Hopefully, this area can be successfully addressed, which will alleviate one of the issues.

The second, that of the Governor, we also hope to address and have been told that this too, may change with the political winds that blow, including the breeze that will be felt after the coming election. Not that anyone would deny a prisoner release for political reasons. And we thought the days of the Imperial Governator ended with Arnie.

In the meantime, the questions as to whether this practice is in line with legal guidelines, we're exploring those possibilities. So far opinions differ, some legal gurus opining that it can be done, as the Governor is to look at the entirety of the record before allowing a grant to proceed, others saying that, by the same requirement, considering the entirety of the record, a reversal without consideration of the latest and most current information is extralegal.

Of course, those so denied can file in court and all experts seem to agree these writs should be virtually a slam dunk. But that presupposes the prisoners in this conundrum have the resources to bear the expense, to say nothing of the time incarcerated, to fight this battle—one they should never face.

In the interim, we are collecting what reports and data we can about this situation, and hope to find any others that are in the same woeful position. If that's you, send us your reversal letter and any transcript summary you may have received. As always, if you can only send originals, we'll send those back to you, but we need to know how many lifers this egregious action has impacted.

What we do and where we take this information is still under review, as this is the grayest of gray areas of law, certainly uncharted waters from a legal perspective. And as we must remind everyone, LSA/CLN is not a legal firm and cannot, on our own, file litigation. But nor will we ignore this latest fiasco and allow the Governor to sashay down the garden path un-accosted by reality and law.

REAPPOINTMENTS AND RESIGNATIONS

It's that time again, time for Governor Brown to appoint and/or reappoint several commissioner to the BPH stable. And so he has, reappointing a half dozen sitting commissioners for another 3 year term.

The last month also saw the resignation of Commissioner Richard Guerrero, who decided, for unspecified reasons, not to sit for confirmation as a commissioner, thereby giving up his position after a single year. Brown has not, as yet, made an appointment to fill the vacancy, so for now the board is proceeding with 11 members rather than the requisite 12.

Reappointed were Commissioners John Peck, Brian Roberts, Terri Turner, Marisela Montes, Amarit Singh and Jack Garner. Turner, Montes, Singh and Roberts are ending their first terms as full commissioners; Peck and Garner are veterans of the battle. Following reappointment these six will be considered by the Senate Rules Committee, which will recommend their confirmation (or not) by the full Senate.

Confirmation hearings in Senate Rules are open to the public, with input from stakeholders encouraged and actually considered prior to the senators voting yea or nay. Past confirmations for various commissioners has seen LSA/CLN as sometimes the lone speaker at the hearings and we will be there again this time.

Whether we support, oppose or take no position on these commissioners depends on how we evaluate their performance in adhering to the law, providing adequate consideration for prisoners (and their attorneys) and how sound their decisions are. We do not base our decisions on number or percentage of grants, but rather how well commissioners understand and apply the laws, regulations and policies affecting parole decisions.

That's where you, our readers come in. We can't make it to all parole hearings, so we're asking for your input. You, the prisoner, after all, are the ultimate stakeholder in this process. If you've had a recent—or even not so recent—hearing chaired by any of the above commissioners, let us know how things went. Not just if you got a grant or not, but how you were treated, how your hearing went and if you felt you got fair consideration.

We're interested in all facets. Send us your concerns, along with your name, CDC # and hearing date, so we can check those transcripts. And remember, as with attorneys, just being denied parole is not the sole indication of any given commissioner's impartiality or performance.

BPH Appointments

Michele Minor

Michelle Minor, 53 of Galt, has been appointed to the California Department of Corrections and Rehabilitation Board of Parole Hearings. Minor has been project manager at the Richard A. McGee Correctional Training Center since 2013 and has served in several positions at the California Department of Corrections and Rehabilitation since 1985, including deputy director at the Office of Rehabilitative Programs, program administrator at the Stockton Training Center, lieutenant at the Division of Juvenile Justice, sergeant at the California Youth Authority and officer at the Heman G. Stark Youth Correctional Facility. This position requires Senate confirmation the compensation is $117,504. Minor is a Democrat.

CDCR

UPDATE:
115s AND PRESCRIBED MEDS
STILL AN ISSUE

As we reported in last month's newsletters, LSA has received several reports of prisoners, who were taking medications prescribed by CDCR's own doctors, being issued 115s RVRs as a result of testing positive for those meds during random UAs. Duh.

And while we had hoped that this we-can't-make-up-stuff-this-dumb problem might have been isolated in one or two institutions, that now appears not to be the case. We continue to receive reports and documentation from inmates at several prisons verifying that either through ignorance, spite or a territorial pissing-match (pardon the pun) this situation is more widespread than we had thought.

The good news: taking this issue to our contacts in the legislature and CDCR we have been able to impact the problem to some extent and new 'guidelines' have been issued that are supposed to clear up the problem and alleviate the anxiety that has caused some prisoners to cease taking their prescribed meds for fear of getting the write up. Of course, they could still be written up for failing to take the authorized meds. Catch 22, anyone? But progress IS being made, though often on a case-by-case basis.

We know of some inmates in this situation who were convicted of 115s and who have since had those RVRs removed from their C-file, 'in the interest of justice,' and others who have had the write ups dismissed at the hearing, for the same reason. Ironic, at best. But, the important thing is to get those bogus 115s removed, most especially for lifers who may be headed to the board anytime in the next 5 years.

If you or someone you know is in this situation, charged with a 115 for drug usage when a valid prescription for that drug is in force, send us all the information, including all documentation, ASAP. That includes the 115, any findings from the hearing and what validation you may have of your prescription. And don't depend on the medicos at your prison to stand up for you. We have numerous instances when these 'clinicians' either renege on their validation of prescription at the 115 hearing or are not well-trained enough (scary, but not surprising) to understand that a prescribed drug may show up in a UA test as a derivative of another.

The most common problems seems to be faced by those prisoners prescribed Tylenol with Codeine, a common pain alleviator. Aside from the custodial staff at institutions being in something of turf battle with the medical staff (no big deal, nothing much at stake here, just people's lives) and refusing to talk to each other, some on both sides don't seem to be aware that codeine use will frequently test positive for morphine in UA samples. It does. There is proof. A little education would help.

So if you're faced with this situation let us know. Send us all the documents you can, we'll make copies and send back the originals, if you need them and we'll take your case as far as we can, which, thankfully, is pretty far. Send us the documents at the same time you apprise us of your situation, so we don't have to waste time writing back to you for those items. If in doubt, send it—we'll sort it out.

CDCR from pg. 49

So far we have documented instances of this insanity at Solano, VSP, and CMC and are currently waiting on documents to support reports from RJD and old Folsom. If inmates in other institutions are suffering under this nonsense, let us know. And while this absurdity seems to have ramped up in line with Sec. of CDCR Beard's pet project to stop drug use inside prisons we are alert for instances pre-dating this push when those on CDCR's own meds were penalized for same.

But---we are talking here only about drugs you are taking that are prescribed by CDCR medical staff. If you are self-medicating, sorry. If you are supplementing your prescription with additional 'goodies,' we can't help you. And, we can't help you fight a 10 year old 115 beef that has nothing to do with prescribed drugs. Get real guys.

We want to do everything we can to be sure no prisoner is saddled with a damaging 115 for a bogus reason. In addition to working with staff and CDCR on the problem we've alerted the BPH to the issue and explained the situation to the board, hopeful that the commissioners will be aware of possible spurious RVRs if they are encountered at hearings.

THE REAL STORY BEHIND DRUGS IN PRISONS

by Life Support Alliance
Printed in *Capitol Weekly*
10-14-2014

In a recent article attempting to justify the new and Draconian measures the California Department of Corrections, under the 'leadership' of Jeffrey Beard, is instituting Sec. Beard makes the case for interdicting drugs before they enter prison walls. He cites the dangers of drug debts, leading to gang activity, violence and increased addiction for those who are released after serving their sentence.

All true. To counter act this menace CDCR has announced, on an 'emergency' basis, the introduction of drug sniffing dogs and ion scanners to be used on prisoners and visitors to detect drugs and that other scourge of society, cell phones.

No one in their right mind would mount a case for drugs inside prisons, nor for smuggling any contraband, including cell phones. But Beard lays the onus for this activity squarely on the visitors, friends and family of inmates in the prisons. He makes the claim that 'every weekend' visitors are arrested for attempting to smuggle in drugs. Also true. And he claims so far this year some 270+ visitors have been arrested.

Maybe. But considering that in any one weekend 1,200 to 1,500 people visit at one prison, CSP-Solano, alone, and even at the modest rate of maybe 800 per prison per weekend, given the number of prisons in California (36 at last count) and at 52 weekends per year…well, you do the math. Even if another 270 were arrested by the end of this year, that's still a small percentage compared to the numbers of visitors intent on nothing more than seeing their loved one who is in prison.

Beard also makes much of learned studies linking the use of drugs and violence in prisons (not surprising, the same link exists in the free world) and cites the number of prisoner deaths so far this year from drug overdoses—but somehow he neglects to mention the number of deaths of those mentally ill prisoners, many supposed to be on suicide watch, which could have been prevented had custody staff been doing their jobs. Not to mention the deaths due to medical neglect and over-use of pepper spray, a practice a US court found not only unconstitutional, but inhumane.

But in all the justification for the new measures going in under Beard's watch the Secretary never mentions the well known, privately acknowledged fact that while visitors may bring in small amounts of drugs, the importation of trafficable amounts of drugs comes in not through visitors, but through staff at the prisons, including custody staff, with their 'fix' taking care of the leaky faucet, while there's a gaping hole in the roof. And nearly all cell phone trafficking is done by staff, often to the tune of more than $100,000 per year in unreportable cash.

The problem is so bad, in fact, that the state is playing the confession of one former custody offer, recorded from his prison cell, as a warning to the other 9,000+

***CDCR*- from pg 50**

prison guards. The media has been rife in recent years with reports of officers, from sheriff's deputies to guards in state and federal prisons, being caught with contraband, often in sting operations such as the one that a couple of years ago netted a prison guard who was paid $1,500 to smuggle a cell phone inside to an undercover FBI agent posing as a prisoner. In the first 6 months of 2013 alone 54 guards were found to have smuggled cell phones into prisons, according to California's own Inspector General.

Visitors to prisons already go through a rigorous screening process, including restrictions on what clothing can be worn, where they sit in visiting and they must all clear a metal detector. Visits are conducted under the eagle-eyes of prison staff, who can and do make even the smallest trespass (don't put your arm around your wife!) an offense capable of terminating visiting privileges and resulting in disciplinary action for the inmates.

But--guards, prison staff and volunteers come and go pretty much at will. Guards, in particular, often bring large ice-chest sized coolers with their lunches inside the wire, and from personal experience, if those coolers are checked, it is cursory in nature. And often, no check is made at all. Metal detectors are by-passed, guards and familiar faces are waved through with a high-five salute.

The newest proposed regulations call for the use of drug dogs in visiting, which will 'alert' on any sniff of drugs. Of course, if those drugs were consumed legally by the visitor, say prescription pain medication, too bad. The visitors' only recourse is to submit to an unclothed body search, which is even less pleasant than it sounds.

And if the dogs alert on a staff member? Oh, they will receive a pat down and if nothing is found, such as, say a 5 pound bag of weed hidden in their pant leg, they can go ahead and enter. With whatever they're carrying.

So how about a little true transparency and truth from the Secretary of Corrections? Clean up your own house first, Jeff, and then come after the nickel and dime stuff brought in by visitors. And in the meantime, if you're going to introduce Gestapo tactics in trying to stop contraband coming into prisons, at least be honest and even handed enough to apply the same standards to visitors and staff.

Anyone caught bringing contraband into prisons should face stiff penalties—and if they happen to be sworn custody staff, sworn to uphold the law and protect the citizenry of the state, maybe, just maybe, the price should be even higher.

Capitol Weekly is distributed throughout legislative offices and read by Capitol staff, Senate and Assembly members and Gov. Brown.

AND ANOTHER THING….

Inmates in some institutions may have noticed another new item in visiting of late. Already accustomed to being strip searched on the way out of visiting prisoners in a now select number of prisons (but soon to be system wide) are now being checked with the latest is Transportation Security Administration-like equipment—an ion scanner that will "detect the presence of drugs on hands and articles of clothing of inmates," according to the NCDOM.

Another part of Sec. Beard's pet project to "establish a comprehensive drug and contraband interdiction program by implementing various drug and contraband interdiction strategies to prevent them from entering institutions," ion scanners "are non-invasive devices that simultaneously test for a wide range of narcotics in seconds, detecting their presence on hands, articles of clothing, mail, and other objects." Reports began coming to LSA in early October of ion scanners in use on those inmates leaving visiting in a few prisons.

According to the NCDOM the tests will be performed by "wipe areas that the scan subjects would frequently touch with their hands (i.e., the front and back of their hands, front pockets, belt buckles, watch bands, shirt buttons, hair ornaments, and shoelaces).Operators shall not swipe a subject's buttock, groin, or breast areas." Well, that last part is reassuring.

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The machines will also be used on mail and packages, as well as a nebulously defined "Department property brought onto institution grounds." Only one positive result from the scanner is enough for an inmate to be subjected to a UA, as the new regulation claims an "inability to be inadvertently contaminated with drug residue from a secondary source." Packages and mail exhibiting positive results will be turned over to ISU for follow up investigation.

How sensitive are the ion scanners? The feds seem enamored with them, and according to attributable reports, traces of drugs were detected on paper money volunteered up for demonstration by a senate staffer at a recent prison visit.

Not surprising. As long ago as 1994 court findings reported that about 75% of paper money commonly in circulation retained detectable traces of cocaine while other studies claim as much as 92% of bills were contaminated with cocaine as well as traces of morphine, methamphetamine and PCP.

Didn't someone once say, "Money is the root of all evil?"

• •

VISITING REALLY GOING TO THE DOGS

Coming soon, to a prison visiting room near you.

In an undisguised attempt on the part of the Department of Corrections to surreptitiously implement procedures that are punitive, demeaning and frightening to the visiting public CDCR recently served notice that, via emergency regulation implementation, visitors and prisoners are now suddenly subject to even greater scrutiny, all because the Secretary of Corrections believes (quite wrongly) that visitors are responsible for the majority of contraband drugs entering California prisons. To combat this scourge Sec. Jeffery Beard suddenly decided an emergency exists in visiting and, with a mere 5 days' notice to the public, is attempting to push through the use of dogs and state of the art (maybe) technology to find those hordes of visitors smuggling in contraband.

The characterization of these proposed changes as necessary on an 'emergency' basis is without documentation and support. Although the proposal notes the Secretary of Corrections may initiate operational changes on an emergency basis the introduction of canine search procedures, absent an declaration of imminent or pending security threats, seems to us an over reach of the Secretary's power. No emergency involving contraband introduction has been specified or alluded to, much less verified.

Visitors to prisons have long been subject to close scrutiny and passage through metal detectors but the addition of canines into the process is a quasi-Gestapo tactic directed at frightening and discouraging the public from visiting inmates housed in California's state prisons. Although the new notice claims the dogs handlers will be trained in recognizing the dogs' 'alert' signal, no mention is made of any required training in public interaction relating to the presence of large dogs in close proximity to individuals or small children who may harbor a fear of such animals. Indeed, all the canine breeds mentioned for use in this process (including German Shepherds) are large and muscular, with an intimidating presence. Since it is the nose and training of the canine that is important in detecting alleged contraband, the size of the breed should be of tertiary importance; thusly, the department could use smaller canine breeds, which are less frightening and intimidating but similarly trained.

The dogs are trained to "alert" by sitting once they detect to odor of drugs. Should the canine 'alert' to possible contraband, visitors are REQUIRED to submit to an unclothed body search. If a visitor refuses such degradation they are refused normal visiting, based on nothing but guilt by assumption, and while proficient, canines are not infallible and to require such Draconian measures on the basis of such weak indication is both outrageous and excessive.

The proposed regulation change condescendingly refers to "occasions when legitimate circumstances exist that may result in a positive canine alert." Those instances being the completely legal consumption of lawful medical products, be those prescribed medications containing codeine or even legally prescribed and consumed marijuana, now legal in California. Although the language of the proposal maintains these instances would be 'occasional' the reality is likely to be far more often than occasional. Additionally, no mention is made of how long canines are allegedly able to detect such substances; a few days following consumption? A few hours? Weeks? And what of the residual trace of drugs found on most paper money circulating today?

It appears visitors may be required to come prepared with their entire pharmacological history documented, to present to CDCR custody staff. Where are HIPPA considerations in this requirement?

And while employees, vendors, contractors and volunteers are subject the same passive canine searches as visitors, but notes that, should these individuals trigger and 'alert,' they will be subject only to a "patdown search by same gender supervisory staff in a private setting." This differentiation between visitors and staff thusly places visitors in a second class citizenry status, bearing the burden of guilt until proven innocent.

Since there have been few documented incidents of visitors attempting to transport large amounts of contraband into prisons, but there have been numerous, well documented and media reported episodes of staff, including custodial staff, being convicted of or admitting to, bringing massive amounts of contraband into prisons, this Draconian requirement for one group while leaving another, at least equally suspect group virtually unscathed, is ludicrous on its face. A not insignificant number of former CDCR staff, again including custody officers, are now serving prison terms of their own for contraband trafficking.

The proposed change to regulations seem clearly aimed at making visiting inmates in California prisons more difficult and onerous than even the current conditions demand. Visitors often come from other states, even other nations and will be unaware of the need to bring doctor's verification of prescription medications—and, should those verifications be in a foreign language, is CDCR staff equipped to verify the veracity of those documents, or will such visitors be refused entrance because of staff ignorance and intransigence?

While these 'emergency regulations' were noticed to the public a mere five days before they were due to go into effect, LSA/CLN was able to file comment and objection on the issue, concluding our multi-page objection with the statement;

"This blatant attempt by the Department of Corrections to put the onus for its own failure to secure the institutions under its control and hold staff accountable is reprehensible and legally actionable. The Department's declared motive to foster family unity and its admission that family contact and support is one of the best preventative measures for recidivism are at total odds with these proposed regulations. The under-handed manner in which these changes were fraudulently presented as an emergency add to the egregious conduct of the Department. These unnecessary and punitive changes and should be prohibited from being enacted."

We were not alone in filing objections. Large numbers of individuals who visit at prisons and other advocacy groups also weighed in, including, by some reports, over 500 letters reaching CDCR in one day. But we have few illusions that these objections, valid and cogent as they may be, will prevent CDCR from barking up this inherently wrong tree.

Maybe those visiting should try bringing doggie treats.

NO I.D. HELP FOR LIFERS—YET

Newly enacted legislation provides for CDCR to oversee a joint project with the Department of Motor Vehicles to provide official state identification cards (a different animal from the state IDs issued to prisoners) to departing inmates, it appears, at least initially, that the program will not include lifers. AB 2308, authored by Mark Stone (D-Santa Cruz), while a good step in the right direction, falls short of really assisting all released prisoners in obtaining an ID card, a step even the bill's author acknowledges is basic to reentry.

Under provisions of the bill, signed by the Governor and due to go into effect January 1, 2015, CDCR would ensure that all inmates within 120-210 days of release from a designated reentry hubs enter into the process of obtaining a valid ID. But, there are some 'qualifications' for participation in this that exclude lifers.

Starting with the 120-210 day period—while lifers found suitable are theoretically within 120 days or so of release, in practicality, until the Governor acts or doesn't, lifers really don't know when they will be released. Additionally, the bill restricts application to those who "previously held a California driver's license or identification card, who ha[ve] a useable photo on file with the DMV that is not more than 10 years old, who ha[ve] no outstanding fees due for a prior California identification card, and who ha[ve] provided certain other information verified by the DMV, including, among other things, the inmate's true full name and date of birth. "

So OK, most lifers can provide their true name and date of birth (see C-file) but few who are about to parole have been down less than 10 years and therefore, even if they previously had a valid California DL or ID card, no longer have a sufficiently recent picture on file. Nor do most have their Social Security cards, and though they might possibly remember their number there is no proof that the number they provide is correct.

In touting his bill prior to passage Assemblyman Stone noted that the state budget bill contained $2 million to fund the ID project. What the Assemblyman neglected to mention was that that $2 million was a 'one-time' (we hope) grab from the Inmate Welfare Fund.

LSA will be working with legislative contacts in hopes of adjusting the guidelines to qualify inmates' participation to include lifers, who, after all, constitute the inmate cohort most in needs of this service.

Stories of Justice

INNOCENCE REVEALED

Just days before CLN went to press two long-term California prisoners, exonerated after decades in prison, were released and rejoined their families and the world. Susan Mellen, who served 17 years on an LWOP sentence for murder, was released from a Torrance courtroom after Superior Court Judge Mark Arnold said he believed she was innocent and her conviction and imprisonment was a situation in which "I believe in this case the justice system failed."

A few days later Roeling Adams, down 28 years after a murder conviction, was released from San Quentin, having been granted parole after producing documentation that he had been wrongly identified as the killer. Following the grant of parole the Governor's office announced Brown would take no action on the decision, thus clearing the way for Adams' release.

Although vastly different in circumstances, both convictions relied on identification of the individuals by alleged witnesses who later, and even at the time, proved to be of dubious reliability. Mellen was identified by a habitual liar and police informant so notorious for her fabrications that public defender's office kept a file on her. Also contributing to the miscarriage of justice were an incompetent attorney representing Mellen and a possibly over-zealous LAPD investigator who was apparently told to the unreliability of the witness by chose to forge ahead.

Following Mellen's conviction a trio of local gang members, first identified as suspects by the police before the alleged witness tagged Mellen, were convicted and confessed to the killing. Mellen's case was pursued by Deirdre O'Connor of Innocent Matters.

For Adams the road to prison began with gang involvement but culminated in wrongful identification as the killer of one man and the attempted killer of another. Although he provided an alibi for his actions at the time of the killing he was convicted on the strength of supposed eyewitness testimony. That accuser subsequently recanted his statements and identified the true perpetrators.

But that was of no help to Adams, who continued to serve his life sentence and appear before the parole board with a claim of innocence. Involvement by the California Innocence Project (CIP) produced a declaration from the original witness, which CIP and Adams' attorney, Jeffrey Taft, presented at a parole hearing. Commissioners were apparently convinced enough of the authenticity of those statements that Adams was granted parole.

"One of the leading causes of wrongful conviction is misidentification," said Justin Brooks, Director of the California Innocence Project. Adams plans on residing in transitional housing until he acclimates to the new world he's reentered.

As for Mellen, she has rejoined her family, noting "I was in prison, but I didn't let prison live in me. I wanted to be free no matter what."

TO WHOM IT MAY CONCERN

As issues, from gubernatorial parole reversals to new attorneys to commissioner reappointments, continue to move onto our radar and information on these issues moves to our readers via the newsletters we often mention, in thanks, the names of some of our volunteers and board members. From time to time we even publish an article by one of our supporters or workers and give full attribution to that individual.

And, often we get letters from prisoners addressed to those mentioned individuals in care of LSA. So perhaps a bit of education is in line here.

Most of those who volunteer and work with LSA do so out of commitment to the cause of lifers, and have at least one, and sometimes more, lifers of their own to worry about. And most don't work at our small office in Sacramento—if they did, we'd have no room to breathe.

So while we will forward your on point letter to someone involved in a specific subject, please don't write to those whose names you see in LSA/CLN with anything other than pertinent questions or information. We open all mail and pass along those that warrant additional consideration and action by our extended supporters and staff.

Don't write asking for a pen pal, to explain your crime and ask for individualized attention or help from one of our little group. Don't ask us to interpret your sentence (we aren't lawyers), advise you on hiring and attorney (we can't give legal advice) find you transitional housing (we can send you a list, but the rest is up to you) or become your surrogate family. And for heaven's sake, don't send mash notes!

If you are a veteran as well as a prisoner, our Board Member Vic Abrunzo, himself a veteran, is taking on those issues; you can send your concerns to his attention and we'll be sure he gets them. Attorney surveys and educational surveys should go to the attention of our Office Manager. And for the record, we don't buy stamps or assist in package procurement.

Problems with 115s and prescribed drugs, to either Vanessa or Gail; visiting and medical issue, to Gail; comments on commissioners' conduct at hearings, to Vanessa. Board Member Bob Driscoll is working on regulation changes.

Please keep your letters short and to the point—we don't need to know the specifics of your crime, whether or not you feel you were wrongly convicted (that ship has sailed), or unfairly sentenced. Nor do we need a sermon from the lay preachers among you—though we appreciate your concern for our souls, please refrain.

And we do appreciate stamps, though SASE, unless requested for a specific purpose, are not as helpful. Please remember to put your name, CDC # and complete address in your letter, as envelopes often get separated. In other words, we'll help with any issue we can, but you can help us by keeping your correspondence cogent, factual and non-personal.

A Little Early for the HOLIDAYS.... but we promise to bring you more next month!

COMPREHENSIVE RISK ASSESSMENT
FOR THE BOARD OF PAROLE HEARINGS
FORENSIC ASSESSMENT DIVISION

IDENTIFYING INFORMATION
NAME AND CDCR #: Claus, Santa AX1234

DOB unknown, current age unknown

Controlling offense: Serial and habitual breaking and entering

County of Commitment: Every California County

Placement Score: 247points

MEPD: The Twelfth of Never

CDCR Forensic Evaluator: Dr. Paar T. Pooper

BACKGROUND INFORMATION: The offender is a poor historian of his past, claiming to have been born at the North Pole, remembering nothing of his childhood or events therein, He claims his family consists of elves and reindeer...

PSYCHOSEXUAL DEVELOPMENT AND SEXUAL ORIENTATION: Inmate Claus denies any sexual experiences or intimate relationships or interests. Clearly, this is outside the norm of society and therefore must be suspect in nature. Claims a close relationship with a "Rudy" or Rudolph. In this clinicians opinion the inmate is either attempting to hide or mask homosexual tendencies or animal attraction (zoophilia)

GANG AFFILIATIONS: The offender denies any gang ties or related activity, but it is noted in his confidential file that he appears to engage in gang-related slang, including such phrases as "Ho Ho Ho," and "To Allah Good Night," which in the latter instance may be a veiled threat of Jihad terrorism and in the former, a derogatory reference to females.

PROGRAMMING - Inmate Clause cliams no time for programming/self-help as he has "toys to make for the children"., possible abuse Fed. Law 2252. Refused LTOPP as it was "taking him away from tinkering"

SUBSTANCE ABUSE HISTORY: Mr. Clause denies any substance abuse issues, but has received several 115 RVRs for attempting to make egg nog in his cell. Nutmeg, a prime component of egg nog, can be smoked, may be addictive to some individuals, therefore the inmate's claims of no substance abuse issues should be viewed with suspicion under controlled setting.

PERSONALITY DISORDERS: Mr. Claus has a history of engaging in a pervasive pattern that would indicate the presence of a diagnosable personality disorder. His repeated efforts to befriend all individuals he encounters, inmates or staff, and to present them with gifts, indicates an Obsessive-Compulsive Personality Order and grandiose personality resulting in a number of of 115 RVRs for over familiarity over the course of his incarceration.

RISK ASSESSMENT: Inmate Claus' future functioning is limited by his diagnosis of a personality disorder, unclear ways that this might affect him in the future and lack of viable skills otherwise. Inmate Claus demonstrates a grandiose sense of self, maintaining "Christmas won't be the same without me." Although he presents few historical factors of risk his lack of insight into his reasons for entering countless homes at night and his failure to take responsibility for his actions, maintaining he was leaving, not taking items, indicates the inmate has an inadequate insight of his actions.

The inmate presents a HIGH risk of recidivism in the community but a LOW risk of violence. The mean of these two evaluations is a somewhat elevated risk of committing random acts of kindness. As such Claus clearly represents a risk to society. This risk would undoubtedly increase in the holiday season.

CALIFORNIA LIFER NEWSLETTER

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