Volume 12 Number 6 CLN #72 November / December 2016

CALIFORNIA LIFER NEWSLETTER

YOUR LAST CLN ISSUE

If you did not receive the Sept/Oct issue of California Lifer Newsletter (Number 71) or did receive it, but the label on your copy omitted your CDCR # and housing assignment—we know, and we're on it.

It was a glitch in the printing/mailing operation that caused some, but apparently not all, CDCR numbers and some select housing designations to be dropped from the address label. Since that issue came out we've been fielding calls and letters from inmates and family alerting us to the problem and reminding us (not that we need it) of the importance of that CDCR number. We get it, and we're fixing it.

If you're on the CLN subscription list and didn't get the Sept/Oct issue, please let us know and we'll do our best to get you a replacement copy mailed right away. And yes, we do have a current subscription list, for those of you free-thinkers out there who might see this as an opportunity to get a 'freebie.'

Thanks for alerting us to the problem, and for your patience while we correct the situation.

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CALIFORNIA LIFER NEWSLETTER

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State and Federal Court Cases

by John E. Dannenberg

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

GILMAN V. BROWN U.S. SUPREME COURT

STATUS REPORT

Gilman v. Brown

USSC Application No. 16A155

USDC (N.D. Cal.) Case No. 05- 00830-LKK-CKD

[Ninth Circuit Court of Appeal Case Nos. 14-15613, 14-15680]

The US Supreme Ct. has placed the consideration of the Petition for Certiorari on its January 7, 2017 calendar. *See State.... pg 2*

COURT CASES (in order)

Reviewed in this Issue:

GILMAN V. BROWN
IN RE ROY BUTLER
IN RE JOEVONE ELSTER
IN RE RAYMOND LAMBIRTH
IN RE ANTHONY COOK, JR

PROP. 36 CASES
PEOPLE V. ALFREDO PEREZ, JR.
PEOPLE V. LARRY PAGE
PEOPLE V. JESUS NAVARETTE
PEOPLE V. CLYDE MALLETT
PEOPLE V. ANDREW MOFFETT

….from State pg. 1

STATUS OF *IN RE ROY BUTLER*

In re Roy Thinnes Butler

CA Supreme Court No. S237014
___Cal.App.4th___; CA1(2); A139411
May 15, 2015

On November 16, 2016, the CA Supreme Court granted review. This has the procedural effect of depublishing the original opinion. However, the Petition for Review was apparently predicated on a narrower set of issues than the entire Court of Appeal opinion; this may narrow the scope of the Supreme Court's review. On December 6, 2016, the Court granted the State's request for an extension of time to file its Opening Brief until January 17, 2017.

RICHARD SHAPUTIS FINALLY FOUND SUITABLE!

Richard Shaputis, the subject of two published decisions by the California Supreme Court on lifer parole suitability determinations, was finally found suitable for parole. The following is taken from comments prepared by his attorney, Diane Letarte.

Mr. Richard Shaputis was finally found SUITABLE by the Board of Parole Hearings' 2-member Panel in Chino (CIM) at his Subsequent Parole Hearing #9 and 2nd Elderly Parole Hearing on November 1, 2016.

> Inmates who are 60 years of age or older and who have been incarcerated for 25 years or more are eligible for the Elderly Parole Program. Mr. Shaputis is now 80 years old and has served approximately 30 years on his 17 to - Life sentence. During the 1st Elderly Parole Hearing (2015) Mr. Shaputis was denied 3 -years and then returned for an earlier hearing under the Administrative Review (AR) in 2016.
>
> In the 2015, the Board gave only lip service to Mr. Shaputis' diminished physical condition. During the 2nd Elderly Parole in 2016, Commissioner Zarrinnam and Deputy Commissioner Desai truly followed the Three Judge Panel in the Plata/Coleman class action lawsuit that ordered the new elderly parole process.

See Status….pg 4

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 nonprofit, 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 nonpolitical but not nonpartisan. 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

www.lifesupportalliance.org

ON REFLECTION

Seven years on, where we are and where we're going

Every once in a while, we've found it pays to stop for a moment, take a look around and ask ourselves, 'What are we doing and where are we going? Are we on track, are we accomplishing our mission, how can we do more?' And the end of the year is a good time for that reflection.

So where are we, Life Support Alliance, as an organization? Still in the forefront of lifer advocacy, and growing. We remain the only organization dedicated to lifers, and, lately, those who, through changing laws, will appear before a parole panel. Parole is a complicated and difficult process, made even harder by the emotions rampant on all sides.

We've made it our mission to understand that process and pass that information and understanding along to all parties in the equation; prisoners, families, victims' groups, government officials and the public in general. Knowing that there is a process to becoming suitable for parole, there are markers, recognizable goals and proven paths, provides hope to families and prisoners alike.

Understanding the arduous process required to become suitable reassures officials and the public that lifers who parole are indeed, reformed and ready to be contributing members of society, no longer a cohort to be feared, shunned or rejected. Along the way, we've developed a myriad of working relationships with parties from government agencies to other groups to a wide variety of individuals. We continue to inform as well as be informed.

What are we doing? More than ever. Newsletters, position papers, legislative and confirmation hearings, parole hearings, Capital and committee meetings have now been joined by an expanding litany of programs presented at prisons, directly to lifers. This, for us, is where the rubber meets the road; bringing what we've learned directly to the end user—you. And once you're home, we've still got your back, helping with parole issues, family harmony and someone to call for help and connection.

Where are we going? Forward, ever forward. Despite the unsettled political climate in some areas we are intent on maintaining the progress accomplished and continuing down that progressive path. There are still battles to be fought, some we know about, some that are sure to appear in the coming months and years. We take nothing for granted and are ever alert. And tenacious. And stubborn. And questioning. And vociferous.

Are we accomplishing our mission? Yes, but that mission keeps broadening, so we continue to expand to keep up. We continue to believe the FAD needs a leash, or at least some accountability. New, enigmatic reasons to deny parole continue to pop up at hearings and in transcripts, reasons that need defining, substantiation and monitoring. And new ideas for projects and programs to take directly to prisoners continue to materialize, ideas that need research, planning and boots on the ground to bring to reality.

And the challenges aren't always dealing just in the dealing with CDCR. There is a great lack of knowledge and understanding about lifers in the general public, something we face every day and address each time and in each situation we encounter. Most recently, in acquiring a new office space for our growing family of volunteers, we ran into landlords unwilling to lease space to an organization who dealt with 'those people' and insurance companies who wouldn't insure any group dealing

with 'criminals.' Or children, or the elderly. Go figure.

So, we take nothing for granted and are ever alert. And tenacious. And stubborn. And questioning. And vociferous.

And there have been changes along the way. Almost 3,000 lifers are now free on parole, an unheard-of number only a few years ago, and several hundred more will join them this year and next, if the grant rate continues at its current 30+/-. Family visits for lifers, and LWOPs are being restored, something we and others have been fighting for the last 20 years.

CDCR is on verge of revamping the point and classification system, making it possible for inmates who are programming, who have turned the corner in understanding themselves and what it takes to parole, to get to institutions where programs are actually available. The current state administration is intent on making more changes in sentencing and incarceration and appears ready to defend those changes against possible interference from the national level.

Seven years ago, the idea of an organization focused on helping lifers, the brain-storm of 2 individuals, was curiosity, something unheard of. We counted our 'members' on one hand and faced an amused, dismissive attitude from some of the 'suits' we met. Now our newsletters alone reach about 3,000 individuals directly, we have a place at the table for information and policy and our approach of learning and study before offering comment or complaint has produced an atmosphere of mutual respect, interchange and results.

Is the change slow, frustrating and sometimes stupefying? Yes, all of those and more. But change is possible, we've proven that, we've seen it. And more importantly, we've seen the new attitude in the prisons, the hope, the willingness to learn, to work, to achieve among the lifer population.

And we can't wait to see more of that, to be a part of it.

From status….pg 2

That ruling required giving special consideration to

an eligible inmate's advanced age,

long-term confinement, and diminished physical condition.

The 2016 Panel commented about the "elephant in the room;" looking face-to-face at Mr. Shaputis (not a cold transcript). They described he was old, frail, walking with a cane (mobility impairment), hearing impaired (both ears), vocal chord impaired (whispered through the whole hearing), had liver problems, amputated thumb, and was unassigned due to his physical impairments. The Commissioner commented that it would practically be impossible for Mr. Shaputis to be an unreasonable risk of danger, if released.

Although one of the 2016 Commissioners had a bit of a problem with the limited verbal expression of "insight" and remorse - he did find the commitment offense as described by Mr. Shaputis to be plausible. The other panel member did seem to find that Mr. Shaputis admitted to murdering his wife (not an accident) even though Mr. Shaputis stated that he was playing with the real gun like it was a toy. *See ruling……pg 5*

From ruling……..pg 4

Additional relevant suitability factors were brought forward. They included:

- ALL of Mr. Shaputis' Psychological Risk Assessments concluded he was a LOW risk of violence, if released to the community.
- His 30 years of incarceration without any Rule Violations i.e. CDC-115s or CDC-128s.
- No Confidential file memo.
- His sobriety since 1987, subsequent to the fatal shooting of his wife.
- His realistic Parole Plans, including several transitional homes, and;
  His marketable skills.

The decision of the Board is subject now only to Governor Brown's review.

BPH LIFER PAROLE SUITABILITY DENIAL OVERTURNED BY APPELLATE COURT FOR WANT OF ANY EVIDENCE TO SUPPORT DENIAL

In re Joevone Elster

CA2(1); B270217
December 9, 2016

See BPH….pg 6

From BPH….pg 5

Joevone Elster, the brother of a former lifer, was denied parole by the BPH at his fourth suitability hearing. He petitioned the Superior Court of Los Angeles County on habeas corpus. The Hon. William C. Ryan, Judge, who hears all Los Angeles County lifer habeas petitions, and grants relief only sparingly, denied Elster's petition. Elster took his petition to the Second District Court of Appeal, which granted relief.

> Joevone Elster (Elster) was convicted by a jury in 1989 of one count of first degree murder and one count of second degree robbery, each count with an enhancement pursuant to Penal Code section 12022, subdivision (a), as a principal armed with firearm. Elster was sentenced to a prison term of 32 years to life, and his conviction and sentence were affirmed by this court on May 8, 1992. He now challenges the October 15, 2014 decision of the Board of Parole Hearings (Board) finding him unsuitable for parole. After reviewing the record before us we conclude that the evidence supporting the Board's decision does not rationally support a conclusion that Elster is currently dangerous. Accordingly, we grant the petition and remand to the Board for further proceedings.

The Court recounted significant factors in Elster's record. For one, they noted that he was 22 at the time of the offense. But they also found the Board's recitation of his overall record inconsistent with the requisite evidence of current dangerousness. First, they summarized Elster's in-prison conduct.

> Elster has never had a disciplinary violation in prison. The Board acknowledged this, stating "[i]t's certainly of note to the Panel and not lost on the Panel is the fact that Mr. Elster has not received a single 115 or 128 and consideration was given to that." He maintains a classification score of 19, which one of the Board members described as "as low as it can be, given the commitment offense."
>
> The psychological evaluation relied upon by the Board, discussed below, stated that "[s]ince his incarceration began in 1989, Mr. Elster has received no CDCR-115 disciplinary actions or CDCR-128-A custodial counseling chronos. As such, he has demonstrated nothing less than stable and exemplary behavior."
>
> Elster has not participated in gang activities since incarcerated. He is certified and works as a peer mentor for the prison's substance abuse program.
>
> In 2013, Elster obtained an Associate of Arts degree from Lassen Community College, with a 3.75 grade point average and Presidential Honors.

The Court's review of Elster's parole plans as presented to the Board also seemed inconsistent with a finding of current dangerousness.

The Board stated its approval of Elster's "realistic parole plans," which include entering the HealthRIGHT 360 Substance Abuse residential program, which provides transitional support with therapy, vocational training, substance abuse support, and employment assistance. As a backup, he plans to enter the Options Recovery Services, a transitional housing facility. Elster's brother, Jerry, and sister-

in-law, Miki, have offered Elster a place to live in their home. Jerry is a former life prisoner who was paroled in 2009, and is the founder of an organization called The Ripple Effects, which works on violence prevention. Elster also provided the Board with two letters offering him employment, as well as a letter from Project Rebound, offering support to help former prisoners attend San Francisco State University. The letter states that Project Rebound has evaluated Elster's transcripts and has determined that he will have completed the requirements for admission to San Francisco State University once he takes one college-level math course. The organization states that it has a campus wide support network for Elster that includes transportation to and from the university, food stipends, and other money for personal needs.

The all-important psychological evaluations by BPH forensic specialists did not support a finding of dangerousness, either. Of note here to all lifers is the Court's observation of the reliance on earlier psych evals when the new hearing is the result of the grant of a Petition to Advance.

The 2015 hearing came about as a result of a petition to advance. As such, Elster was not re-evaluated prior to the 2014 hearing. The Board commented on this, stating that Elster's prior hearing took place on March 28, 2012. "You were given a three-year denial. You did file a Petition to Advance, and that was approved on 5/12/14, and that's what brings us here today, which it's only a few months. You would have had your hearing around March of next year or before, so it's a few months early." The effect of the hearing taking place as a result of a petition to advance was that the Board relied upon a 2011 CRA conducted by Kristina Reynoso, PhD, Forensic Psychologist, BPH Forensic Assessment Division. As discussed above, Dr. Reynoso stated that Elster "has demonstrated nothing less than stable and exemplary behavior" since his incarceration. However, she also determined that Elster "has no job currently," "remains in contact with a brother who had known criminal problems and by virtue of his incarceration, he associates with other criminals." She further observed that "he has no pro-social friendships in the community at this time" and that there "are antisocial features to Mr. Elster's personality." Dr. Reynoso concluded that Elster represents a "moderate or average risk of violence. He presents with risk factors that will likely warrant periodic monitoring, specialized intervention or risk reduction strategies."

This conclusion, which stems from Elster's score on a Psychopathy Checklist - Revised (PCL-R) appears to have been based almost exclusively on precommitment factors such as "grandiose components to his personality as he felt the rules did not necessarily apply to him in the past and he committed crimes for his own personal satisfaction with no regard for the feelings or well-being of others," "[h]is lifestyle was characterized as stimulation-seeking given his engagement in gangs, drug dealing and engaging in other forms of criminal conduct for profit, as well as associating with others who led criminally-driven lifestyles," that he "had very little interest in earning money through legal means and was easily bored by a conventional lifestyle," that he "engaged in deceptive behaviors (infidelity; drug dealing; criminal activity; initially lying about involvement in life crime) for his benefit." The current factors listed were that "there is an indication that he has played on the generosity of his romantic partners to some extent to receive goods he reportedly needs in prison" and that "parole plans at this point are not entirely encompassing." ....

Elster retained an independent expert,

Dr. Karen Franklin, to complete a psychological evaluation in 2013, before the hearing. Dr. Franklin's report reached a conclusion that Elster presents a "very low risk to reoffend." In addition to completing her own evaluation of Elster, Dr. Franklin provided commentary to the Board about perceived deficiencies in Dr. Reynoso's evaluation, including that Dr. Reynoso's CRA placed too much weight on historical and precommitment factors.

> Elster also provides a copy of a 2008 evaluation prepared in connection with a prior parole hearing by CDCR Forensic Evaluator Robert E. Record, Ph.D. Dr. Record's evaluation states that Elster scored in the "very low" range for psychopathy, the "very low" range for risk of recidivism, the "low" range for future violence based on the fact that he does not have a major mental illness or personality disorder, accepted responsibility and his role in the life crime, and has not had disciplinary violations in prison. It states that he has increased risk factors for violence and that should he utilize alcohol or drugs while on parole, it would increase his risk of violence.

The Board's denial relied on "the usual" factors, which were observed by the Court.

[T]he Board issued its decision, concluding that factors supporting a finding of unsuitability were that Elster committed the commitment offense in a very atrocious, heinous manner; that he had a high level of culpability, as the ring leader; that "there was an unstable social history before incarceration"; that Elster "did walk away from some rather unique opportunities" pre-incarceration, including college and the military; that the motivation for the offense was not only greed but retaliation against his former employer; and that a minimal amount of money was received as a result of the robbery. The Board acknowledged that it may not rely solely on historical factors in denying parole, and stated that it "must consider whether other circumstances, coupled with the above immutable circumstances, would lead to the conclusion that [Elster does] pose a continued threat to public safety."

Applying this requirement, the Board cited Elster's lack of "insight, and specifically, the aspect of your insight that dealt with the planning of this particular event." The Board asserted that Elster minimized his role in the planning, and that after it was completed he "left [his] partners there and went to a location to wait to split up the loot." They discussed his prior attempts to commit the crime and "that would have perhaps sent a signal to you that this was not meant to be." The Board highlighted that the crime partners were lured into the enterprise by Elster with the false promise that the robbery would result in proceeds near $50,000. The Board expressed concern about "your current level of insight into the aspects and causative factors of the offense, that you deliberately exposed others, including your crime partners, to greater risk than you yourself chose to have." The members also cited Dr. Reynoso's CRA, adopting the conclusion that Elster presented a statistically moderate risk to reoffend in the free community, although they acknowledged that "this was a bit of a dated Psychological Report" due to the petition to advance.

The Board stated that some factors supported a finding of suitability, including that Elster did not have a significant history of violent crime, is at an age that reduces the probability of recidivism, and "does have realistic parole plans, going to the HealthRIGHT 360 program in San Francisco," and that Elster "has not received a single 115 or 128" while incarcerated.

The Court found the Superior Court's reasons for its denial inconsistent with the record.

In May 2015, Elster filed a petition for writ of habeas corpus in the superior court. The superior court issued an order to show cause, ultimately concluding that the record contained some evidence to support the Board's determination that Elster would present an unreasonable danger to public safety. The court found that the record did not support the Board's conclusion that Elster lacked insight into the commitment offense, but determined that the Board, despite the flaws in the Board's findings, would have reached the same decision absent the error.

Elster challenged his denial of parole to the Appellate Court as being devoid of evidence or a nexus to current dangerousness.

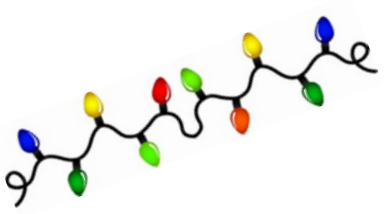
Elster contends that the Board's denial of parole was arbitrary and capricious, in violation of section 3041 and its implementing regulations, and due process of law. He contends that no evidence supports the Board's conclusion that Elster is presently unsuitable for parole, and that the Board failed to articulate a rational nexus between the record evidence and the unsuitability determination. We agree.

The Attorney General argued that the Board's denial of parole is supported by Elster's lack of insight, and by Dr. Reynoso's CRA. The Court, however, went into a lengthy factual review and analysis to show the absence of a nexus of such alleged lack of insight to current dangerousness. This summary provides a great starting point for lifers wishing to argue their case on this issue.

The Attorney General cites the Board's finding that Elster "did not exhibit adequate insight into the causes for his actions that ultimately culminated in murder and determined that Elster downplays his role as a leader and the influence he had over his accomplices. [Citation.] The Board noted that Elster acknowledges himself as the leader, but the Board found that Elster downplayed the extent to which he lured his accomplices into committing the crime by exaggerating the amount of money they would be robbing and then exposing them and the general public to great risk of danger while keeping himself relatively safe from harm."

The Board's statements about Elster's lack of insight, however, are not supported by evidence at the hearing or before the Board. To the contrary, the hearing transcript contains multiple instances of Elster's acceptance of responsibility and lengthy discussion of his role as a leader who initiated the life crime and recruited his crime partners, as well as the causative factors. At the hearing, one of the commissioners commented during Elster's testimony that "it's become pretty clear to me from the record and also from what you've said today that you feel you were in a position of leadership in this crime."

Moreover, "lack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness." (*In re Shaputis* (2011) 53 Cal.4th 192, 219 (*Shaputis II*).) Even assuming that Elster failed to show insight into the factors that caused him to commit the life crime, the decision does not provide any nexus between that fact and an assertion that Elster is currently dangerous. In *Shaputis II*, the inmate's lack of insight, after a lengthy history of domestic violence culminating in the shooting death of his second wife was demonstrated by "psychological reports . . .; his own statements about the shooting, which failed to account for the facts at the



scene or to provide any rational explanation of the killing; his inability to acknowledge or explain his daughter's charge that he had raped her; and his demonstrated failure to come to terms with his long history of domestic violence in any but the most general terms." (*Id*. at p. 216.) In evaluating whether an inmate evidences insight in the crime, the *Shaputis II* court discussed the interplay between the regulations, which do not explicitly discuss insight but instead "direct the Board to consider the inmate's 'past and present attitude toward the crime' ([Cal. Code] Regs., [tit. 15,] § 2402, subd. (b)) and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense' (Regs., § 2402, subd. (d)(3)). These factors fit comfortably within the descriptive category of 'insight.'" (*Id*. at p. 218.) Here, the Board does not connect its asserted finding of a lack of insight with current dangerousness. "Evidence 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 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." (*In re Ryner* (2011) 196 Cal.App.4th 533, 548–549.) No such evidence is presented here.

As the court of appeal stated in *In re Hunter* (2012) 205 Cal.App.4th 1529, "[t]he Board has not articulated a rational basis supported by 'some evidence' to support its conclusion that Hunter will pose an unreasonable risk to public safety if paroled. There is no evidence that his mental state (including his remorse, acceptance of responsibility, or insight) indicates current dangerousness. Nothing in the record links his life crime, com

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From As the court…..pg 10

> mitted in 1984, with an assessment that he will pose an unreasonable danger if now granted parole. Nor has the Board articulated or do we see a rational nexus between the 2008 disciplinary event and a risk of future violence. In short, the record fails to provide any rational basis for finding Hunter unsuitable for parole." (*Id*. at p. 1544.) The record here similarly fails to provide any rational basis for finding Elster unsuitable for parole based on a connection between the asserted lack of insight and a conclusion that Elster is currently dangerous.

The Court went on to review the Superior Court's denial based on risk assessment. The appellate court specifically found that a "moderate" risk assessment was not, standing alone, grounds for a finding of unreasonable risk.

> The Attorney General also argues that Dr. Reynoso's evaluation, including the statement that Elster presents a "moderate or average risk of violence," provides sufficient evidence to support the Board's conclusion that Elster is currently dangerous. "A psychological evaluation of an inmate's risk of future violence is information that also 'bears on the prisoner's suitability for release' [citation] but such assessment does not necessarily dictate the Board's parole decision. It is the Board's job to assess current dangerousness and parole must be denied to a life prisoner 'if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.' " (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.) As with the discussion of insight, above, this standard was not satisfied. The report's "moderate risk" conclusion, which stems from Elster's score on the PCL-R, was based almost exclusively on precommitment factors such as "grandiose components to his personality as he felt the rules did not necessarily apply to him in the past and he committed crimes for his own personal satisfaction with no regard for the feelings or well-being of others," "[h]is lifestyle was characterized as stimulation-seeking given his engagement in gangs, drug dealing and engaging in other forms of criminal conduct for profit, as well as associating with others who led criminally-driven lifestyles." These precommitment factors are insufficient to establish a nexus to current dangerousness, especially in the context of his exemplary prison conduct record.

The absence of the Board's consideration of youth offender status for the 22-year old Elster also troubled the Appellate Court.

> Finally, we note that Elster was 22 years of age at the time he committed the life crime. Recent legislation provides additional instruction for a Board considering parole for an offense committed by a person who had not yet attained 23 years of age: "[w]hen a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c); see *People v. Franklin* (2016) 63 Cal.4th 261, 277.) The decision does not reflect the Board's consideration of this factor, and—particularly in light of the decision's heavy reliance on precommitment factors and the life crime, as well as the failure to identify a nexus to current dangerousness—the decision does not provide "some evidence" supporting a finding of unsuitability.

Accordingly, the Appellate Court found that the record from the BPH hearing did not contain

any evidence consistent with Elster's *current* dangerousness.

> For these reasons, although our review " 'is limited to ascertaining whether there is some evidence in the record' " to support the Board's decision, we conclude that the record lacks some evidence—even a " 'modicum' " of evidence—to support a finding of unsuitability for parole. (*Shaputis II, supra*, 53 Cal.4th at p. 210, quoting *In re Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

The Court ordered relief, consistent with due process.

> The petition for a writ of habeas corpus is granted and the decision of the Board of Parole Hearings is hereby vacated. The Board is directed to conduct a new parole suitability hearing consistent with due process of law and with this decision. (*In re Prather* (2010) 50 Cal.4th 238, 244.)

Absent any *new* evidence of dangerousness, it appears the Board is bound to grant Elster parole. And upon his subsequent review, the Governor will be hard pressed to find "some evidence" of current dangerousness in the record with which to reverse the Board, when the Court of Appeal has already found that there isn't any.

CDC 602 INMATE APPEAL FORM IS DEEMED TIMELY FILED IF IT IS PLACED IN THE PRISON'S OUTGOING MAIL BOX WITHIN 30 DAYS

In re Raymond Lambirth

---Cal.App.4th ---; CA6; H041812
November 21, 2016

Although the subject of this case is not just a lifer issue, it is important to lifers because CDC insulates itself from addressing legitimate Form 602 inmate appeals that may affect a lifer's record before the Board – by the highly suspect procedure wherein it both chooses when to empty inmate mail boxes containing such appeals, and when it declares it "received" the appeal. In this published case, the Court of Appeal slapped down CDC for its offensive process. Not addressed is whether any relief from *past* such miscreance on the part of CDC will be given retroactive relief.

> Petitioner Raymond Louis Lambirth seeks habeas relief directing California's Department of Corrections and Rehabilitation (CDCR) to rescind its cancellation of his administrative appeal as untimely and to consider it on the merits. Lambirth submitted his appeal within the 30-day period, but the CDCR cancelled his appeal because it had received his appeal after the expiration of the 30-day period. We hold that the CDCR may not deem a prisoner's appeal untimely when the appeal was submitted within the 30-day period even if the CDCR received the appeal after the expiration of the 30-day period. Accordingly, we grant the requested relief.

Raymond Lambirth was denied visiting with a child because CDC alleged he had some prior conviction in his record that restricted him from such visitation. Lambirth complained that that was just plain wrong – he never had any such prior. He asserted his complaint properly by filing a Form 602 inmate appeal. However, CDC claimed he filed it later than 30 days after his visitation rejection notification, and therefore CDC would just dismiss his appeal, permanently. Lambirth went to court to gain relief.

The Superior Court had denied Lambirth habeas relief, so he took it to the Court of Appeal. They reviewed the history.

> Lambirth submitted his appeal "via intrainstitutional mail" on April 23, 2014. This was one day after he received Miley's response and 29 days after his March 25, 2014 annual review. CTF stamped the appeal "RECEIVED APR 25, 2014 CTF-Appeals." This was 31 days after Lambirth's annual review. CTF cancelled the appeal pursuant to section 3084.6, subdivision (c)(4) because "[t]ime limits for submitting the appeal are exceeded . . . ." (Italics and boldface omitted.)
>
> Lambirth challenged the cancellation. He argued that his appeal was timely under section 3084.8 because he "submitted" it within 30 days of the action complained of. He also contended that the appeal was timely under section 3084.6 because the visiting restriction was "ongoing." CTF's second-level response stated that "the issue under appeal, visiting restrictions, took place during his annual review on 03/25/2014. This action was taken thirty-one (31) days before the appeal was received in the Inmate Appeals Office." "Appellant had Thirty (30) days after the action taken to appeal the issue" and "failed to follow directions as stated on the CDCR 128-G Form and the regulations . . . ."
>
> Lambirth challenged CTF's second-level response. The third-level response from the CDCR stated that "departmental rules require that appeals are received by the Appeals Office within 30 days, [sic] to utilize the date put on a CDCR Form 602, Inmate/Parolee Appeal Form by an appellant would create unenforceable time limits." (Italics added.) The CDCR also rejected Lambirth's alternative argument. It asserted that "the appeal was concerning classification

See CDC 602….pg 14

From CDC 602….pg 13

> action taken during [Lambirth's] Annual Review on March 25, 2014," so "[t]he issue is . . . not considered ongoing, as there was a clear date of occurrence."
>
> Lambirth unsuccessfully petitioned the superior court for a writ of habeas corpus. The court ruled that the evidence indicated that CTF's appeals office received Lambirth's appeal 31 days after his annual review, while section 3084.8 required him to " 'submit the appeal within 30 calendar days of . . . [t]he occurrence of the event or decision being appealed' . . . ." "CTF either took or renewed the challenged classification action at the time of the review and petitioner appeared at the review. CTF acted in accord with regulations in rejecting the appeal."

But pending this petition, CDC proceeded arrogantly to only tighten the screws on Lambirth, ultimately thereby bringing the roof crashing down on its own head. It did so by denying a subsequent appeal on the same subject, but based on a newer CDC act of visiting rejection, by holding that the new appeal (which was filed well within 30 days) was automatically held to be illegally late, based on the *original* appeal's alleged tardiness years before!

> Lambirth's request for habeas relief was pending in this court when the time for his 2015 annual review arrived. At his April 7, 2015 pre-annual interview with his correctional counselor, Ms. Palmer, and at the April 14, 2015 annual review, Lambirth again raised the visiting restriction issue. When the restriction was not removed, he submitted a new appeal on May 3, 2015. Prison officials cancelled that appeal "due to missed time constraints," and Lambirth challenged the cancellation. The cancellation was upheld at the second level of review because the visiting restriction was "imposed on the appellant pursuant to a committee action dated 10/30/09." The CDCR's third-level response stated that "[p]ursuant to departmental regulations, an appellant must submit the appeal within 30 calendar days of the event or decision being appealed. The appellant appeared before the Unit Classification Committee on October 30, 2009, when the non-contact visiting restriction was applied. The visiting restriction was applied on a specific date and is not considered ongoing. Relief in this matter at the Third Level of Review is not warranted."

After restating CDC's 15 CCR § 3084 et seq. regulations on inmate appeals, the court proceeded to examine them and show how CDC misinterpreted them.

> Prison officials interpreted the regulations to mean that an inmate appeal is not timely unless it is **received** by CTF's appeals office within 30 calendar days of the event or decision being challenged. But the regulations speak in terms of *filing* and *submission* of an inmate appeal. (E.g., §§ 3173.1, subd. (g) [inmates may "file a grievance"], 3084.1, subd. (g) [inmates must "adhere to appeal filing time constraints"], 3084.8, subd. (b)(1) [an inmate "must submit the appeal within 30 calendar days"], 3084.2, subd. (b)(2) [inmates "shall submit their appeal documents in a single mailing"], 3084.2 ["Appeal Preparation and Submittal"], 3084.6, subd. (c)(4) [an appeal may be cancelled if "[t]ime limits for submitting the appeal are exceeded"].) The CDCR's operations manual similarly refers to the filing and submission of appeals. (CDCR Operations Manual, Article 53 [Inmate/Parolee Appeals (Rev. 7/29/11)], § 54100.16 [Fixed Time Limits], p. 530 [inmate appeals must be "filed within 30 calendar days of the occurrence of the event or decision being appealed or of the inmate or parolee's knowledge of the action or decision being appealed . . . ."], § 54100.6 [Appeal Preparation], p. 525 ["The inmate . . . shall not

> delay submitting an appeal within established time limits if unable to obtain supporting documents . . . .”].)

“Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies.” (*Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292.) “Our primary aim is to ascertain the intent of the administrative agency that issued the regulation.” (*Butts v. Board of Trustees of the California State Univ.* (2014) 225 Cal.App.4th 825, 835 (*Butts*).) “We start with an analysis of the plain language of the regulation.” (*Ibid.*) “We give the regulatory language its plain, commonsense meaning. If possible, we must accord meaning to every word and phrase in the regulation, and we must read regulations as a whole so that all of the parts are given effect.” (Ibid.) Courts “often resort to dictionaries in construing the language of statutes and regulations.” (*County of Sacramento v. State Water Resources Control Bd*. (2007) 153 Cal.App.4th 1579, 1592.) “If the plain language . . . is clear and unambiguous, our task is at an end and there is no need to resort to the canons of construction or extrinsic aids to interpretation.” (*Butts*, at p. 838.) When the intent cannot be discerned from the language of the regulation, “ ‘ “we may look to a variety of extrinsic aids, including the purpose of the regulation, the legislative history, public policy, and the regulatory scheme of which the regulation is a part. [Citation.]” [Citation.]’ ” (*Butts*, at p. 837.)

> Although “submit” and “file” may have different meanings in certain contexts, the regulations at issue here use the terms “submit” and “file” interchangeably. And the timeliness provision explicitly requires an inmate to “submit” an administrative appeal within 30 calendar days of the event or decision complained of. (§ 3084.8, subd. (b)(1).) Under these circumstances, it is clear that the regulations did not intend to distinguish between the submission and the filing of an appeal.

“Submit” is not defined in the regulations. Merriam-Webster’s Collegiate Dictionary defines the verb “submit” as “to present or propose to another for review, consideration, or decision.” (Merriam-Webster’s Collegiate Dict. (11th ed. 2009) p. 1244.) Webster’s Third New International Dictionary similarly defines “submit” as “to send or commit for consideration, study, or decision.” (Webster’s 3d New Internat. Dict. *supra*, p. 2277.) We conclude from these definitions that the plain, commonsense meaning of “submit” entails sending rather than receipt. Such an interpretation is consistent with the regulation authorizing inmates to “submit” their appeals by mail. (*Andres, supra*, 244 Cal.App.4th at p. 1392; § 3084.2, subd. (b)(2).) It is also consistent with the directions on the CDCR form 602 (Inmate/Parolee Appeal), which tell the inmate, “[y]ou must *send* this appeal and any supporting documents to the Appeals Coordinator (AC) within 30 calendar days of the event that lead [sic] to the filing of this appeal.” (Italics added.)

Furthermore, the prison delivery rule provides that an inmate’s delivery of a document to prison authorities is deemed a constructive *filing* of the document. In *People v. Slobodion* (1947) 30 Cal.2d 362, 367 (*Slobodion*), our high court held that a pro se inmate’s notice of appeal from his criminal conviction was constructively filed when he *delivered* it to prison authorities for forwarding five days before the statutory deadline, notwithstanding that the court clerk received it six days after the deadline. (*Id.* at pp. 366-367.) The court noted that the inmate was “by reason of his imprisonment” and pro se status “wholly dependent on the prison employees for effecting the actual filing” and “[o]bviously . . . powerless to prevent any delay which might ensue after he delivered . . . his notice of appeal” to them for forwarding to the court. (*Id.* at pp. 366.) The *Slobodion* court also stated that “[w]hile in perfecting his appeal ‘a convicted defendant serving a term of imprisonment . . . has no greater or addi-

tional rights because he is acting as his own attorney than if he were represented by a member of the bar' [citation], neither . . . will he be deemed to have fewer rights." (*Id.* at p. 367.) The court observed that a contrary conclusion would deny the inmate equal protection of the law. (*Slobodion*, at p. 368.)

In *Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106 (*Silverbrand*), the California Supreme Court extended the prison delivery rule to appeals in civil cases, finding "no sound basis" for maintaining one rule for criminal appeals and another for civil appeals. (*Id.* at p. 110.) It explained that "the United States Supreme Court rules do not distinguish between civil and criminal cases and instead apply the federal 'prison mailbox rule' to the filing of *any* document." (*Id.* at p. 122.) Other state and lower federal courts had followed suit by extending the prison delivery rule "to a broad range of filings by self-represented prisoners, including complaints, petitions for postconviction relief, motions, and other filings." (*Id.* at pp. 123-124, fns. omitted.)

In *Andres*, the Court of Appeal extended the prison mailbox rule to a pro se inmate's filing of an administrative appeal. (*Andres, supra*, 244 Cal.App.4th at p. 1396.) Andres testified at an evidentiary hearing that he put his administrative appeal into an envelope addressed to the prison appeals coordinator and "mailed it via institutional mail between 4:30 and 8:30 p.m. on January 25," which was five days after the incident complained of. (*Id*. at p. 1387.) He received no response. Concerned that the first appeal would be mishandled, Andres mailed another appeal to the warden on February 19, this time using "legal mail." (*Ibid.*) The warden forwarded that appeal to the appeals office, which received it on March 1 and cancelled it as untimely. (*Andres*, at p. 1390.) The appeals coordinator testified that the timeliness of inmate appeals was determined by the date they were received "because otherwise 'inmates [could] backdate their appeals.' " (*Id*. at p. 1389.) He testified that the appeals office never received Andres's January 25 appeal and that it cancelled the February 19 appeal because "it was 'mailed' per the log . . . more than 30 days after the January 20 incident" complained of. (*Andres*, at pp. 1386, 1390.)

The trial court concluded that the January 25 appeal was timely filed when Andres " 'put it in the mailbox within 30 days' " of the action complained of. (*Andres, supra*, 244 Cal.App.4th at p. 1391.) The Court of Appeal affirmed, concluding that substantial evidence supported the trial court's finding. (*Id*. at p. 1395.) The court "independently conclude[d]" that there is "no requirement in the applicable regulations that an inmate must submit an administrative appeal through a secured collection box or similar system, or frankly, through any specific type of mail or delivery system, in order for the appeal to be deemed properly submitted. Rather, section 3084.8, subdivision (b) merely provides that an inmate 'must submit the appeal within 30 calendar days of . . . [¶] . . . [t]he occurrence of the event or decision being appealed.' " (*Andres*, at p. 1396.) The court concluded that "Andres timely submitted his January 25 appeal when he mailed it that same day to the appeals coordinator via institutional mail." (*Ibid.*)

> We agree with the result in *Andres* and find it consistent with both the regulatory language and the rationale underlying the prison delivery rule. We conclude that the uncontradicted evidence in this case compels the same result. The Attorney General affirmatively admits in her return that "on or around April 23, 2014, Lambirth submitted an administrative appeal requesting removal of the child visiting restriction, which was received by the appeals office on April 25, 2014." Lambirth's sworn declaration unambiguously states that he submitted his appeal via intrainstitutional mail on April 23, 2014. Under the prison delivery rule, Lambirth's appeal was timely submitted within the 30-day period contemplated by the regulations.

(*Silverbrand, supra*, 46 Cal.4th at p. 110; § 3084.8, subd. (b)(1).) Prison officials misinterpreted the regulations when they concluded otherwise.

After considering and rejecting the State's other arguments on mootness, due process, and discretion, the Court ordered CDC to reverse its earlier rejections of Lambirth's appeals and to hear the issues.

> The petition is granted. The CDCR is directed to (1) vacate the decision cancelling Lambirth's administrative appeal from the action taken at his March 25, 2014 annual review and the decisions upholding the cancellation at the second and third levels of review, and (2) consider the administrative appeal on the merits.

THE COURTS CONTINUE TO GRANT RETROACTIVE RELIEF FROM THE JUDGMENT OF CONVICTION FOR THE NARROW CLASS OF LIFERS CONVICTED OF ***PREMEDITATED*** FIRST DEGREE MURDER, ***AND*** **WHOSE JURY WAS INSTRUCTED ON THE "NATURAL AND PROBABLE CONSEQUENCES" THEORY OF GUILT**. IF YOUR CASE FITS ***BOTH*** OF THESE FACTORS, YOU SHOULD SEEK COUNSEL TO RETROACTIVELY ATTACK IT.

P. V. CHIU AGAIN APPLIED RETROACTIVELY: AN AIDER AND ABETTOR MAY NOT BE CONVICTED OF FIRST DEGREE PREMEDITATED MURDER UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE.

P. v. Leobardo Hernandez

CA2(3); B266206
October 4, 2016

In another case involving a lifer convicted of first-degree **premeditated** murder under the "**natural and probable consequences**" doctrine, the error of such a conviction – as held recently by the CA Supreme Court in *People v. Chiu* – was retroactively reversed and remanded.

> A jury convicted Leobardo Hernandez of the first degree willful, premeditated, and deliberated murder of Juan Frias, and it found true gang and firearm allegations. At trial, it was undisputed that Hernandez was present at the scene of the murder, but that he was not the shooter. The trial court instructed the jury on two forms of aider and abettor liability: a direct aiding and abetting theory and a natural and probable consequences theory. During closing arguments, the prosecutor argued the jury could convict Hernandez of first degree murder under either theory of liability. Hernandez argues, and the People concede, that, in light of the California Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), the trial court prejudicially erred when it misinstructed the jury as to the mental state required for aiding and abetting a first degree premeditated murder. We agree and reverse Hernandez's conviction. Upon remand, the People shall have the option of accepting a reduction of Hernandez's conviction to second degree murder or retrying Hernandez on the first degree murder charge under a legally valid theory of culpability.

Hernandez was tried by a jury for murder, along with three firearm enhancements and a gang enhancement. Significantly for this appellate review, at trial, no evidence was presented that Hernandez was the shooter in Frias' murder; rather, the People relied entirely on aiding and

abetting principles in pursuing Hernandez's conviction. The appellate court first reviewed how the case was presented to the jury, via its instructions.

> The trial court instructed the jury on two forms of aiding and abetting liability under which it could convict Hernandez of first degree murder: a direct aiding and abetting theory and a natural and probable consequences theory. Under the direct aiding and abetting theory, the court instructed the jury it could convict Hernandez of first degree murder if it found: (1) the perpetrator committed the crime; (2) the defendant knew that the perpetrator intended to commit the crime; (3) before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and (4) the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. The court further instructed that "[s]omeone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." The trial court instructed the jury it alternatively could convict Hernandez of first degree murder under a natural and probable consequences theory if it found: (1) the defendant is guilty of assault with a firearm; (2) during the commission of the crime of assault with a firearm a coparticipant in that assault with a firearm committed the crime of murder; and (3) under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault with a firearm. The court further instructed that "[a] natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the assault with a firearm, then the commission of murder was not a natural and probable consequence of assault with a firearm." The court also instructed on the elements of assault with a firearm.

The appellate court then recounted how Hernandez' trial attorney compounded the error by conceding that Hernandez could be convicted of first degree murder, even though he was not the shooter, under the aider and abettor theory.

> During closing argument, the prosecutor did not argue Hernandez was the direct perpetrator of Frias' murder. Rather, she argued only that he was guilty of murdering Frias as an aider and abettor. Specifically, she told the jury it could convict Hernandez under either of the two theories of aider and abettor liability the court instructed on. While the prosecutor relied primarily on a direct aiding and abetting theory, she told the jury that it did not need to go so far as finding Hernandez intended to aid and abet a murder, so long as it found he intended to aid and abet an assault with a firearm, the natural and probable consequence of which was murder.

The trial court sentenced Hernandez to a total term of 50 years to life in prison, consisting of 25-life for the first degree murder conviction, plus a consecutive term of 25-life for the firearm enhancement. Relying on *Chiu*, Hernandez appealed.

The parties agreed that *Chiu* required reversal here.

> Hernandez contends, and the People agree, the trial court erred when it instructed the jury on the natural and prob-

able consequences doctrine as a basis upon which it could convict him of first degree premeditated murder. Hernandez also argues, and the People also agree, the court's error requires reversal of his conviction because there is nothing in the record to demonstrate the jury relied on a valid theory of liability when it found him guilty of first degree premeditated murder. ...

In *Chiu*, the California Supreme Court held aiders and abettors may be convicted of first degree premeditated murder under direct aiding and abetting principles, but not under the natural and probable consequences doctrine. (*Chiu, supra*, 59 Cal.4th at pp. 158-159.) The court explained the purpose of the natural and probable consequences doctrine in the murder context is to deter persons from aiding or encouraging the commission of offenses that would naturally, probably and foreseeably result in an unlawful killing. (*Id*. at p. 166.) While that purpose is furthered by holding a defendant culpable for second degree murder, the court reasoned, it is not served in the context of first degree murder, which requires a mental state of premeditation and deliberation that is uniquely subjective and personal. (*Ibid*.) That is so, the court explained, because "[t]he connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above-stated [purpose] of deterrence." (*Ibid*.) Direct aiding and abetting principles, however, do not raise the same issue. "An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the means rea required for first degree murder." (*Id.* at p. 167.)

This, then, led the court to consider the appropriate remedy.

The defendant in Chiu initiated a brawl during which one of his friends grabbed a gun and killed one of the brawl's other participants. (*Chiu, supra*, 59 Cal.4th at pp. 160-161.) There was conflicting evidence about whether the defendant had instructed his friend to grab the gun and shoot the victim. (*Id*. at p. 160.) The trial court instructed the jury that it could convict the defendant of first degree murder if it found he either directly aided and abetted the murder or aided and abetted the target offense of assault or disturbing the peace, the natural and probable consequence of which was murder. (*Ibid*.) Because the record indicated the jury may have relied on the natural and probable consequences doctrine in convicting the defendant of first degree premeditated murder, the court reversed the defendant's conviction, explaining it could not conclude beyond a reasonable doubt the jury relied on a different and legally valid theory. (*Ibid*.) The court held the appropriate remedy for the court's instructional error was to offer the People the opportunity to accept a reduction of the defendant's conviction to second degree murder or to retry the defendant for first degree murder, under a legally valid theory of culpability. (*Ibid*.)

We agree with the parties that the trial court erred when it instructed the jury that it could convict Hernandez of first degree premeditated murder under a natural and probable consequences theory. Here, the court's instruction erroneously permitted the jury to convict Hernandez of first degree murder even if it found he did not act willfully, deliberately, and with

premeditation. (*Chiu, supra*, 59 Cal.4th at p. 167.)

> We also agree with the parties that the court's error requires us to reverse Hernandez's conviction for first degree premeditated murder. "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu, supra*, 59 Cal.4th at p. 167.) Although there was evidence from which the jury could have found Hernandez guilty of first degree premeditated murder under direct aiding and abetting principles, the prosecutor relied on the natural and probable consequences doctrine at trial in arguing Hernandez's guilt. She told the jury during her closing argument that it did not need to rely on direct aiding and abetting principles, so long as it found Frias' murder was the natural and probable consequence of the target crime, assault with a firearm. There is nothing in the record that demonstrates beyond a reasonable doubt that the jury relied on a direct aiding and abetting theory, as a opposed to the natural and probable consequences theory, when it reached its verdict. Accordingly, we must reverse Hernandez's conviction for first degree murder. (*Id*. at pp. 167-168.)

The Court's order left the State two options: reduce the conviction to second degree or retry on a legally valid theory of first degree murder.

> The judgment is reversed and the matter is remanded in accordance with *Chiu, supra*, 59 Cal.4th 155, for the People either to accept a reduction of Hernandez's conviction to second degree murder or to retry Hernandez for first degree murder under a legally valid theory of culpability. If the People accept a reduction of his conviction, the trial court is directed to resentence Hernandez.

IF YOU WERE A YOUTHFUL OFFENDER AND GOT LWOP (OR A FUNCTIONAL EQUIVALENT), YOU ARE ELIGIBLE FOR A REMANDED HEARING IN THE TRIAL COURT TO MAKE A RECORD OF MITIGATING YOUTH CIRCUMSTANCES FOR AN EVENTUAL PAROLE HEARING

In re Anthony Cook, Jr.

CA4(3); G050907
October 11, 2016

In 2009, the conviction of petitioner Anthony Cook, Jr., for two counts of murder, one count of attempted murder, and firearm enhancements were affirmed. Later, by petition for writ of habeas corpus, he challenged his sentence of 125 years to life in prison. Cook, who was 17 years old when he committed the crimes, contended his sentence was unconstitutional under *Miller v. Alabama* (2012) 567 U.S. [132 S.Ct. 2455] (*Miller*) and, as relief, asked to be resentenced.

In *In re Cook* (Apr. 6, 2016, G050907) (nonpub. opn.), the appellate court denied his petition for writ of habeas corpus. It concluded, based on *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718], that *Miller* applied retroactively to cases on collateral review, but that recently enacted Penal Code §§ 3051 and 4801 had the effect of curing the unconstitutional sentence imposed. In July 2016, the California Supreme Court granted Cook's petition for review of and transferred the matter back to the appellate court with directions to vacate its decision and consider, in light of *People v. Franklin* (2016) 63 Cal.4th 261, 268–269, 283–284 "whether peti-

tioner is entitled to make a record before the superior court of 'mitigating evidence tied to his youth.'"

Following transfer, the appellate court considered the matter in light of *Franklin* and, in accordance with that opinion, affirmed the sentence but remanded with directions to the trial court to grant Cook a hearing at which he could make a record of mitigating evidence tied to his youth. The appellate court explained the controlling law that required this result.

> We noted in *Cook, supra*, G050907, it was undisputed that Petitioner's sentence of 125 years to life was a de facto sentence of life without the possibility of parole and that, when sentencing Petitioner, the trial court did not consider his age, youthful attributes, and capacity for reform and rehabilitation. We concluded that *Miller* applies retroactively to matters on collateral review. (*Montgomery v. Louisiana, supra*, 577 U.S. __ [136 S.Ct. 718].) As a consequence, we concluded, Petitioner's sentence was unconstitutional under *Miller, supra*, 567 U.S. at page __ [132 S.Ct. at page 2460] and *People v. Caballero* (2012) 55 Cal.4th 262. (*Cook, supra*, G050907.) But we were compelled by *Montgomery v. Louisiana, supra*, 577 U.S. __ [136 S.Ct. 718] to conclude that Penal Code section 3051 cured the constitutional error in sentencing by giving Petitioner the right to a parole hearing after serving 25 years of his sentence. (*Cook, supra*, G050907.)

In *Franklin, supra*, 63 Cal.4th at page 269, the defendant was 16 years old when he shot and killed the victim. A jury convicted the defendant of first degree murder and found true a personal firearm discharge enhancement. (Id. at p. 268.) The defendant was sentenced to two 25 year to life sentences, giving him a total sentence of life in state prison with the possibility of parole after 50 years. (*Ibid.*) The California Supreme Court concluded that Penal Code sections 3051 and 4801 mooted the defendant's claim that the sentence was unconstitutional because "those statutes provide [the defendant] with the possibility of release after 25 years of imprisonment (Pen. Code, § 3051, subd. (b)(3)) and require the Board of Parole Hearings (Board) to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity' (id., § 4801, subd. (c))." (*Franklin, supra*, at p. 268.)

The California Supreme Court also concluded, however, that the defendant had raised "colorable concerns" over "whether he was given adequate opportunity at sentencing to make a record of mitigating evidence tied to his youth." (*Franklin, supra*, 63 Cal.4th at pp. 268 269.) The court explained: "The criteria for parole suitability set forth in Penal Code sections 3051 and 4801 contemplate that the Board's decisionmaking at [the defendant]'s eventual parole hearing will be informed by youth related factors, such as his cognitive ability, character, and social and family background at the time of the offense. Because [the defendant] was sentenced before the high court decided *Miller* and before our Legislature enacted [Penal Code sections 3051 and 4801], the trial court understandably saw no relevance to mitigation evidence at sentencing. In light of the changed legal landscape, we remand this case so that the trial court may determine whether [the defendant] was afforded sufficient opportunity to make such a record at sentencing. This remand is necessarily

limited; as section 3051 contemplates, [the defendant]'s two consecutive 25-year-to-life sentences remain valid, even though the statute has made him eligible for parole during his 25th year of incarceration." (*Id*. at p. 269.)

If, after remand, the trial court were to determine the defendant did not have sufficient opportunity to make a record at sentencing, then "the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in [Penal Code] section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence." (*Franklin, supra*, 63 Cal.4th at p. 284.) "[The defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors ([Pen. Code,] § 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Ibid*.)

> Petitioner argues he should be given the opportunity to make a record in the trial court of mitigating factors related to his youth. He asserts, "the record of [his] characteristics and circumstances at the time of the offense is bare bones at best, with the probation officer's report consisting of less than a half page of 'personal history'; as opposed to ensuring a full an accurate record, the report noted that the information in that personal history section was 'not independently verified.'"
>
> We agree with Petitioner. In *Franklin, supra*, 63 Cal.4th at page 284, it was "not clear" whether the defendant "had sufficient opportunity to put on the record the kinds of information that [Penal Code] sections 3051 and 4801 deem relevant at a youth offender parole hearing." Here, in contrast, it is clear that Petitioner was not given sufficient opportunity to make such a record. Petitioner's sentence was imposed before the decision in *Miller* and before enactment of Penal Code sections 3051 and 4801. We noted in *Cook* that the trial court, when sentencing Petitioner, did not consider his age, youthful attributes, and capacity for reform and rehabilitation. (*Cook, supra*, G050907.)
>
> Thus, rather than direct the trial court to make the determination whether Petitioner had sufficient opportunity at sentencing to make a record of "information that will be relevant to the Board as it fulfills its statutory obligations under [Penal Code] sections 3051 and 4801" (*Franklin, supra*, 63 Cal.4th at pp. 286-287), we will direct the trial court to conduct a hearing at which Petitioner will have the opportunity to make such a record.

Accordingly, the court reaffirmed Cook's sentence but remanded the matter with directions to the trial court to grant him a hearing at which he could make a record of mitigating evidence tied to his youth.

PROP. 36 CASES

USE OF MOTOR VEHICLE AS DEADLY WEAPON BARS PROP. 36 ELIGIBILITY

People v. Alfredo Perez, Jr.

---CA 4th ---; CA5; F069020
September 29, 2016

In this published case, the appellate court reversed the superior court below, which had not barred Alfredo Perez from resentencing relief under Prop. 36, where his new conviction involved use of a motor vehicle as a weapon.

Alfredo Perez, Jr., was convicted by jury of assault with force likely to produce great bodily harm, a violation of Penal Code section 245, former subdivision (a)(1). The jury further found he suffered two prior strike convictions (§ 667, subds. (b)-(i)) and served two prior prison terms (§ 667.5, subd. (b)). On May 4, 1995, he was sentenced to a total of two years plus 25 years to life in prison.

After [Prop. 36] went into effect, Perez filed a petition for recall of sentence and request for resentencing. The People opposed the petition on the ground, inter alia, that Perez was armed with (and actually used) a deadly weapon [a motor vehicle] during the commission of his offense.

See Prop 36….pg 24

From Prop 36….pg 23

Following a hearing, the trial court found Perez eligible for resentencing, and that resentencing him would not pose an unreasonable risk of danger to public safety. The court granted the petition and resentenced Perez as a second strike offender.

The State appealed, and the appellate court reversed – reinstating his life sentence.

> We hold an inmate is armed with a deadly weapon within the meaning of clause (iii) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667 and clause (iii) of subparagraph (C) of paragraph (2) of subdivision (c) of section 1170.12 (hereafter referred to collectively as "clause (iii)") when he or she personally and intentionally uses a vehicle in a manner likely to produce great bodily injury. On the evidence found in the record of conviction, defendant used a vehicle as a deadly weapon. He is, therefore, ineligible for resentencing pursuant to section 1170.126, subdivision (c)(2). Accordingly, we reverse the trial court's order granting defendant's petition.

The appellate court analyzed Perez' current offense, Penal Code § 245.

> "As used in section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029 (*Aguilar*).)
>
> Although a vehicle is not a deadly weapon per se, it can become one, depending on how it is used. (See, e.g., *People v. Oehmigen, supra*, 232 Cal.App.4th at pp. 5, 11 [the defendant purposefully drove his car at police vehicle]; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1183 [the defendant deliberately raced vehicle through red light at busy intersection and collided with another vehicle, causing injury to another]; *People v. Golde* (2008) 163 Cal.App.4th 101, 109 [the defendant accelerated toward victim at about 15 miles per hour three or four times as victim ran back and forth to avoid vehicle]; *People v. Russell* (2005) 129 Cal.App.4th 776, 779, 781-782 [the defendant knowingly and intentionally pushed victim into path of oncoming vehicle]; *People v. Wright* (2002) 100 Cal.App.4th 703, 705, 707-709 [the defendant intentionally drove pickup truck close to persons with whom he had contentious relations].

The question of intent was also examined by the appellate court.

> Defendant argues the record of conviction must establish he intended to use the vehicle as a deadly weapon. ... We tend to agree with D.T. (See *People v. Aznavoleh, supra*, 210 Cal.App.4th at pp. 1183, 1186-1187 [setting out elements of assault and assault with a deadly weapon in case involving use of vehicle].) Even assuming such an intent must be shown, however, it is established by the record of conviction in the present case. Sanchez yelled " 'Stop

the vehicle' " three times as the vehicle was moving in reverse, yet defendant then drove the vehicle forward "at a great speed." Sanchez only managed to pull his arm free shortly before defendant drove out of the store parking lot onto Blackstone without even stopping at the stop sign.

Then, the court went to main issue at bar, and found that because Perez personally used the vehicle as a deadly weapon in commission of the assault, he was armed with a deadly weapon during the commission of his current offense and so was ineligible for resentencing under section 1170.126.

It has long been the law that "[a] person is 'armed' with a deadly weapon when he simply carries a weapon or has it available for use in either offense or defense. [Citation.]" (People v. Stiltner (1982) 132 Cal.App.3d 216, 230; see Blakely, supra, 225 Cal.App.4th at p. 1051.) Here, because defendant personally used the vehicle as a deadly weapon, he necessarily had it available for use and so was armed with it during the commission of his current offense, since "use" subsumes "arming." (See, e.g., People v. Strickland (1974) 11 Cal.3d 946, 961; People v. Schaefer (1993) 18 Cal.App.4th 950, 951; People v. Turner (1983) 145 Cal.App.3d 658, 684, disapproved on other grounds in People v. Newman (1999) 21 Cal.4th 413, 415, 422-423, fn. 6 & People v. Majors (1998) 18 Cal.4th 385, 411.)

The question, then, is whether voters intended clause (iii) to encompass arming based on personal use as a deadly weapon of an object that is not a deadly weapon per se. The trial court found defendant's use of the motor vehicle in the present case was "not the anticipated use of a deadly weapon contemplated by [section] 1170.126." Reviewing this question of law independently, we disagree.

" 'The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted' [citation], 'and to have enacted or amended a statute in light thereof' [citation]. 'This principle applies to legislation enacted by initiative. [Citation.]' [Citation.]

"Where, as here, 'the language of a statute uses terms that have been judicially construed, " 'the presumption is almost irresistible' " that the terms have been used " 'in the precise and technical sense which had been placed upon them by the courts.' " [Citations.] This principle . . . applies to legislation adopted through the initiative process. [Citation.]' [Citation.]" (*Blakely*, *supra*, 225 Cal.App.4th at p. 1052.)

In light of the foregoing, we conclude the electorate intended "armed with a . . . deadly weapon," as that phrase is used in clause (iii), to mean carrying a deadly weapon or having it available for offensive or defensive use. (*See Blakely, supra*, 225 Cal.App.4th at p. 1052.) When the object at issue is a deadly weapon per se, simply carrying the object or having it available for use is sufficient to render a defendant ineligible for resentencing under the Act. By contrast, where, as here, the object is not a deadly weapon per se, merely carrying the object or having it available for use will not, without more, be enough to bring a defendant within the scope of clause (iii). Here, however, defendant actually and personally used the object as a deadly weapon. Because enhancing public safety was a key purpose of the Act, despite the fact the Act " 'diluted' " the three strikes law somewhat (*Blakely, supra*, 225 Cal.App.4th at p. 1054),

we conclude the electorate did not intend to distinguish, under such circumstances, between objects that are deadly weapons per se and those whose characterization as such depends upon the use to which they are put. (See generally *People v. Osuna, supra*, 225 Cal.App.4th at pp. 1034-1038 [discussing Act's purpose and voters' intent].)

In its split decision, a majority of the court voted to reinstate Perez' life sentence.

The order granting the petition for recall of sentence, recalling the previously imposed sentence pursuant to Penal Code section 1170.126, and resentencing defendant is reversed. The matter is remanded to the trial court with directions to find defendant ineligible for resentencing, deny the petition, and reinstate defendant's original sentence.

JOHNSON RELIEF REQUIRES NEW PROP. 36 HEARING

People v. Larry Page

CA6; H041765
October 20, 2016

In 2000, Larry Page was convicted of five felony offenses and sentenced to indeterminate terms of 25 years to life for each count, pursuant to the Three Strikes law. In his direct appeal of the conviction, the total sentence was reduced to 75-life, plus 5 years. In 2013, Page filed a petition for a recall of his sentence under Prop. 36. The trial court denied his petition, and he appealed.

Page contended that remand was required because the trial court erroneously denied his petition as to *all* of his current convictions on the grounds that *one* of his current convictions was a serious or violent felony. The State agreed. Accordingly, the court reversed the trial court's order and remanded it.

On November 22, 2013, defendant filed a pro per petition for recall of sentence pursuant to section 1170.126, subdivision (b). Defendant sought resentencing on count 2 (extortion) and count 5 (attempted driving or taking a vehicle).

The trial court denied defendant's petition in an order filed on December 5, 2013, reasoning that defendant was ineligible for resentencing because one of his current convictions—his first degree burglary conviction (count 16)—was a serious felony. (See §§ 1170.126, subds. (e)(1), 1192.7, subd. (c)(18).)

The appellate court considered Page's claim of *Johnson* error.

In *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), the California Supreme Court held that section 1170.126 "requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a Three Strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that

the inmate remains subject to a third strike sentence of 25 years to life." (*Johnson, supra*, at p. 688.) Under *Johnson*, the trial court erred by denying defendant's petition as to all of his convictions based on the fact that his first degree burglary conviction was a serious felony.

Defendant contends he is eligible for resentencing on count 5 (attempted driving or taking a vehicle) because the arming allegation associated with that count was stricken and because the evidence in the record compels a finding that he was not armed in the commission of that offense. (See §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Defendant contends that he is potentially eligible for resentencing on count 17. As defendant acknowledges, that determination depends on issues such as whether the assault was committed with a deadly weapon (see § 1192.7, subds. (c)(23) & (c)(31)) and whether the trial court has discretion to impose the term of 25 years to life for the burglary (count 16), which was originally stayed pursuant to section 654.

We will remand this matter to the trial court for consideration of defendant's arguments as to his eligibility for resentencing on counts 5 and 17. We note that even if one or more of defendant's convictions is eligible for resentencing, the trial court may still deny defendant's petition if it finds that resentencing him "would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

The appellate court also provided guidance for the superior court's "factfinding" in its new hearing.

Defendant contends that when determining his eligibility for resentencing, the trial court may not engage in "judicial factfinding" and is limited to considering "the bare elements" of the convictions. He argues that the trial court is precluded from making "post hoc" determinations about the conduct underlying his prior convictions, based on principles in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Shepard v. United States* (2005) 544 U.S. 13 (*Shepard*), and *Descamps v. United States* (2013) 570 U.S. ___, 133 S.Ct. 2276 (*Descamps*).

As several courts have concluded, "[*Apprendi*] and its progeny do not apply to a determination of eligibility for resentencing under section 1170.126." (*People v. Johnson* (2016) 244 Cal.App.4th 384, 390, fn. 6; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1039-1040; see also *People v. Berry* (2015) 235 Cal.App.4th 1417, 1428 [finding of ineligibility for resentencing does not expose defendant to any potential increase in his sentence]; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1060 (*Blakely*), quoting *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304 [U.S. Supreme Court " 'opinions regarding a defendant's Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt do not apply to limits on downward sentence modifications due to intervening law' " such as proceedings to determine whether the petitioner satisfies the criteria in section 1170.126, subdivision (e)]; cf. *Dillon v. United States* (2010) 560 U.S. 817, 828-829 [no Sixth Amendment right to jury in downward sentence modification proceeding].)

> We follow the reasoning of the above cases and conclude that the trial court's determination of defendant's eligibility for resentencing does not implicate the holdings of *Apprendi, Shepard*, or *Descamps*. Thus, the trial court is not limited to considering "the bare elements" of the convictions; the court may consider "the record of conviction." (See *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1338; cf. *Blakely, supra*, 225 Cal.App.4th at p. 1063 [existence or nonexistence of disqualifying factors is determined by court's examination of "relevant, reliable, admissible portions of the record of conviction"].)

MEXICO MURDER CONVICTION IS NOT A SERIOUS FELONY UNDER CALIFORNIA LAW

People v. Jesus Navarette

CA5; F069534
October 27, 2016

On direct appeal of his conviction, Jesus Navarette challenged the trial court's finding that his prior conviction for a homicide offense in the State of Sinaloa, Mexico, constituted a serious felony within the meaning of the serious felony sentence enhancement statute, as well as the three strikes law. The appellate court concluded that, under applicable state and federal law, the trial court's finding as to Navarette's prior conviction was not supported by substantial evidence. Accordingly, it struck the trial court's finding. Not addressed here, but worthy of legal pursuit, is the question of retroactivity of this question for already-convicted Three-strikers whose foreign conviction was used as a "serious" felony prior for sentencing purposes.

Navarette was convicted of a number of offenses arising from a domestic incident with his ex-girlfriend. A prior serious felony enhancement and a strike prior were found true based on Navarette's 2006 murder conviction in Mexico. Navarette appealed, arguing that the Mexican offense did not include all the elements of murder in California and therefore the evidence was insufficient to support the prior serious felony enhancement and strike prior.

The appellate court agreed. "To qualify as a serious felony, a conviction from another jurisdiction must involve conduct that would qualify as a serious felony in California." (*People v. McGee* (2006) 38 Cal.4th 682.)

The elements of murder in Mexico are different and broader than in California. In Mexico, the prosecution does not need to prove malice aforethought; committing an intentional or imprudent act is sufficient. Furthermore, in Mexico, the prosecution does not bear the burden of disproving self-defense beyond a reasonable doubt. The People incorrectly asserted that the trial court was free to evaluate the record of the Mexican offense to determine that it included all the elements of murder under California law.

The appellate court found otherwise.

> Navarette contends the Mexican offense does not include the element of malice aforethought or an element requiring the prosecution to prove that the killing was unlawful, i.e., that Navarette did not act in justifiable self-defense. Focusing on the latter point, the People do not dispute that Navarette bore the burden to prove he acted in self-defense and, as a consequence, the absence of justifiable self-defense was not an element of the crime. Nonetheless,

the People argue that the sentencing court could still properly have found, based on the facts of the Mexican proceedings and certain findings reflected in an appellate opinion from that case, that the prior homicide offense included all the elements of murder under California law.

For the reasons discussed below, we find the type of factfinding advocated by the People is foreclosed under both applicable state and federal case law, i.e., *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*), as well as *Descamps v. United States* (2013) 133 S.Ct. 2276 (*Descamps*), on *Apprendi* grounds. (*Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).) Accordingly, we conclude the trial court's determination that the Mexican offense included all the elements of murder under California law is not supported by substantial evidence. In turn, we find the People have failed to sustain their burden to prove all the elements of the sentencing enhancements alleged pursuant to section 667, subdivision (a)(1), and the three strikes law. Consequently, we strike the trial court's true findings on the enhancement allegations, reverse the judgment, and remand the matter for resentencing consistent with this opinion.

CLN alerts any current Third-striker whose *foreign* conviction was used as a "serious" felony prior for strike purposes, to seek counsel to evaluate whether the elements of that foreign crime equate to the California equivalent criminal elements of that offense, and thus whether that "strike" was legal.

LATE FILING OF PROP. 36 RESENTENCING PETITION PERMITTED, WHERE GOOD CAUSE WAS SHOWN

People v. Clyde Mallett

CA4(3); G047080
October 28, 2016

Clyde Mallett was convicted of possessing cocaine base for sale, and was sentenced to 28-life, primarily as a result of two "strike" priors for robbery and attempted robbery. He appealed, and obtained some relief. He then applied for Prop. 36 resentencing relief. Although it was initially denied, under *People v. Conley* (2016) 63 Cal.4th 646, the matter was ordered remanded for reconsideration of resentencing, *based on timing commencing after the appeal.*

On November 7, 2012, the Reform Act became effective while this appeal was still pending. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), 1170.126.) Under the prior "Three Strikes" law, a defendant with two or more strike priors who was convicted of any new felony would receive a sentence of 25 years to life. (Former § 667, subd. (e)(2)(A).) The Reform Act amended the Three Strikes law. Now, a defendant who has two or more strike priors is to be sentenced pursuant to paragraph one of section 667, subdivision (e)—i.e., as though the defendant had only one strike prior—if the current offense is not a serious or violent felony as defined in section 667.5, subdivision (c), or section 1192.7, subdivision (c), unless certain disqualifying factors are pleaded and proven. (§ 667, subds. (d)(1), (e)(2)(C).)

The Reform Act also allows a person who is "presently serving" an indeterminate life sentence under the Three Strikes law to petition to have his or her sentence recalled and to be

resentenced as a second strike offender, if the current offense is not a serious or violent felony and the person is not otherwise disqualified. (§ 1170.126.) However, the trial court may deny the petition even if those criteria are met, if the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subds. (a)-(g).) Accordingly, under section 1170.126, resentencing is discretionary, while sentencing under section 667, subdivision (e)(2)(C), is mandatory.

Defendant contends that upon remand for resentencing, the trial court must sentence him pursuant to section 667, subdivision (e)(2)(C). He argues that section 667, subdivision (e)(2)(C), is an ameliorative sentencing statute which presumptively applies to all criminal judgments which were not yet final as of its effective date, and that there is nothing in the language of the Reform Act which overcomes the presumption. The Attorney General contends that section 667, subdivision (e)(2)(C), applies prospectively only, i.e., to defendants who are first sentenced on or after November 7, 2012. She argues that it does not apply to defendant because he is "presently serving" a third strike sentence within the meaning of section 1170.126, subdivision (a), and that his only remedy is to petition for relief under that statute.

Again, in our original opinion, we agreed with defendant and directed the trial court to resentence him according to section 667, subdivision (e)(2)(C), on remand. However, in *People v. Conley, supra*, 63 Cal.4th 646, the California Supreme Court held that the Reform Act does not authorize automatic resentencing of eligible defendants whose judgments were not yet final on the effective date of the act. (*Conley*, at pp. 661-662.) Rather, such defendants must petition for resentencing as provided for in section 1170.126, subdivision (b). (*Conley*, at pp. 661-662.)

Here, defendant's appeal was pending on the effective date of the Reform Act. Further, defendant's current offense is not a serious or violent felony and he is not otherwise disqualified. (See *Mallett I, supra*, G045094.) Thus, under Conley, defendant may petition for resentencing as provided for in section 1170.126, subdivision (b). Under that section, defendant "may file a petition for a recall of sentence, within two years after the effective date of the act that added this section [November 7, 2012,] or at a later date upon a showing of good cause." (§1170.126, subd. (b).) We find good cause for the late filing of the petition.

DISPOSITION

The judgment is affirmed. The superior court is directed to accept for filing a petition submitted by defendant pursuant to section 1170.126 on or before one year after this opinion becomes final.

JUVENILE LWOP SENTENCE UPHELD

People v. Andrew Moffett

CA1(5); A143724
December 7, 2016

Unfortunately, not all juvenile LWOP sentences are reduced on appeal. This case reports one such rejection of a juvenile offender by the Court of Appeal. CLN reports this in greater detail because of the increasing number of juvenile LWOP cases that have come under scrutiny recently.

> In 2005, four days before turning 18, Andrew Lawrence Moffett committed an armed robbery, during which his accomplice, Alexander Hamilton, shot and killed a police officer. A jury convicted Moffett of, among other things, first degree murder with felony-murder special circumstance; in 2008, the trial court sentenced Moffett to life imprisonment without the possibility of parole (LWOP), plus an additional 24 years on the remaining charges and enhancements. In Moffett's first appeal, we reversed the peace officer special circumstance for insufficient evidence of intent to kill (Pen. Code, § 190.2) and remanded for resentencing. (*People v. Andrew Lawrence Moffett* (Nov. 9, 2010, A122763) [nonpub. opn.].) On remand, the court again sentenced Moffett to the same term of LWOP plus 24 years.
>
> In Moffett's second appeal (*People v. Andrew Lawrence Moffett* (2012) 209 Cal.App.4th 1465), we remanded for resentencing pursuant to the constitutional standards announced in *Miller v. Alabama* (2012) 132 S.Ct. 2455 (*Miller*). The California Supreme Court granted Moffett's petition for review, consolidated his case with a companion case, and "remand[ed] for resentencing in light of the principles set forth in *Miller* and this opinion." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1361 (*Gutierrez*).)
>
> On remand, the trial court considered the factors outlined in *Miller* and *Gutierrez*, and imposed LWOP plus an additional 23 years. In this — his third — appeal, Moffett contends the court erred by imposing LWOP after considering the *Miller* factors, and that his sentence violates the federal and state constitutional prohibitions on cruel and unusual punishment. ... We affirm.

First, the court rejected Moffett's abuse of discretion complaint.

> Moffett's first claim is the court erred by imposing LWOP. Numerous cases have summarized the evolution of the law regarding sentencing of juvenile offenders, and we need not restate it here. (See, e.g., *People v. Franklin* (2016) 63 Cal.4th 261, 273-275; *People v. Bell* (2016) 3 Cal.App.5th 865, 873-874.) "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*." (*Gutierrez, supra*, 58 Cal.4th at p. 1379.) The *Miller* factors are: (1) a juvenile offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds [the juvenile offender]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of [the juvenile offender's]

participation in the conduct and the way familial and peer pressures may have affected him"; (4) whether the juvenile 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'"; and (5) "the possibility of rehabilitation." (*Miller, supra*, 132 S.Ct. at p. 2468; see also *Gutierrez, supra*, 58 Cal.4th at pp. 1388-1389.)

Miller "requires a trial court, in exercising its sentencing discretion, to consider the 'distinctive attributes of youth' and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' before imposing life without parole on a juvenile offender. [Citation.]" (*Gutierrez, supra*, 58 Cal.4th at p. 1361, citing *Miller, supra*, 132 S.Ct. at p. 2465.) Here, the question for the trial court was whether Moffett "can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults. [Citation.]" (*Gutierrez, supra*, 58 Cal.4th at p. 1391.)

The trial court considered this question and determined there was not "a realistic chance" Moffett could be rehabilitated and that he fit "into that small category of juvenile defendants where life without the possibility of parole is the appropriate sentence." This conclusion was not an abuse of discretion. "A court's exercise of discretion will not be disturbed on appeal absent a showing that the court acted in an arbitrary, capricious, or patently absurd way, resulting in a manifest miscarriage of justice. [Citation.] . . . 'A "'decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge."'"' [Citation.]" (*People v. Blackwell* (2016) 3 Cal.App.5th 166, 199-200 (*Blackwell*) ptn. for review pending, ptn. filed Oct. 9, 2016, S237862.)

Here, the court considered the *Miller/ Gutierrez* factors, including Moffett's age and Dr. Schoenfeld's description of Moffett as naïve, immature, and impulsive. The court also observed Moffett was "sociable, careful, accurate," possessed self-control, and that Moffett's role in planning and executing the robbery demonstrated he was not impulsive or immature. After recounting the circumstances of the murder in detail, the court observed Moffett's actions were "not those of an irresponsible or impulsive child, nor were they the product of peer pressure or coercion by others or surprise. They were the very adult, very violent acts of a young man who showed no regard for the impact of his actions on the victims in this case." Next, the court considered Moffett's family and home environment — including his father's criminal history and the domestic violence between his parents — but noted "there is little" evidence Moffett had an abusive or dysfunctional home environment. Moffett was raised by his grandparents and described his childhood as "happy and healthy." There was "no information" Moffett witnessed domestic violence between his parents, or that "it affected his childhood growing up."

Third, the court examined the circumstances of, and Moffett's participation in, the murder. It noted "this event started with a car theft" that Moffett carefully planned. He traveled to Contra Costa County in violation of a court order and obtained weapons, masks, and a getaway car "ahead of time . . . evidence of careful planning

as opposed to an impulsive, spur-of-the-moment event. This indicates prior thought and planning . . . as opposed to impulsive behavior . . . ." Moffett put a loaded gun to the cashier's head and threatened to shoot a bystander. The court noted it was "unknown . . . exactly where Mr. Moffett was when Officer Lasater was shot, [but Moffett] had gun residue on his hand when he was apprehended which tells us that he either shot a gun or was in close proximity to one when it was fired." Moffett's shoe print was approximately 10 feet from where Officer Lasater's "unfired weapon was found, where he fell fatally wounded. And Mr. Moffett's cell phone was found where Mr. Hamilton had hidden in the tall weeds, along with numerous expended shell casings."

Fourth, the court — which had "the opportunity to both observe Mr. Moffett during the proceedings and engage in conversations with him during several in camera discussions" — described Moffett as "intelligent, observant, logical, and . . . able to express himself well." The court noted there was no indication of a plea offer or reduction in charges, nor evidence Moffett was not able to assist his counsel in the case. Finally, the court considered the possibility of rehabilitation, commending Moffett on obtaining his GED and high school diploma while incarcerated, and noting Moffett expressed remorse. The court, however, observed there was not a "realistic chance of rehabilitation" because Moffett had an extensive juvenile record involving weapons and violence, had been provided numerous opportunities within the juvenile system to reform, but his criminal behavior escalated. Officer Lasater's murder was committed while Moffett was on probation.

"The trial court was well aware that it had discretion to sentence [Moffett] to 25 years to life or LWOP and that the latter sentence should be reserved for the '"rare juvenile offender whose crime reflects irreparable corruption."' [Citation.] In selecting LWOP as the appropriate sentence, based primarily on [Moffett']s circumstances and the heinous nature of the offense, the trial court did not abuse its discretion." (*Blackwell, supra*, 3 Cal.App.5th at p. 201.) Moffett's argument to the contrary is unpersuasive, and his alternate view of the evidence does not demonstrate the court abused its discretion by imposing LWOP.

> Moffett suggests the court's failure to refer to his "twice-diminished culpability" should invalidate the LWOP sentence. We are not persuaded. In our 2012 prior opinion, we directed the trial court to give "appropriate weight to the fact that [Moffett] was a non-killer convicted under the felony-murder rule." (*Moffett, supra*, 209 Cal.App.4th at p. 1477.) At the October 2014 resentencing hearing, the trial court did so, noting Moffett "was not the shooter," implicitly considering his "'twice-diminished moral culpability' when making its sentencing decision." (*Id*. at p. 1478; see also *Gutierrez, supra*, 58 Cal.4th at p. 1389 ["'"juvenile offender who did not kill or intend to kill has a twice diminished moral culpability"'"].)

Moffett contends two recent decisions — *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718] (*Montgomery*) and *People v. Padilla* (2016) 4 Cal.App.5th 656 (*Padilla*) — require reversal of the LWOP term. In *Montgomery*, the United States Supreme Court held *Miller* applies retroactively on collateral review. In reaching that conclusion, the *Montgomery* court observed, "Because *Miller* determined that sentencing a child to [LWOP] is excessive for all but '"the rare juvenile offender whose crime reflects irreparable corruption,"' [citation], it rendered [LWOP] an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth. . . . [¶] . . . Before

Miller, every juvenile convicted of a homicide offense could be sentenced to [LWOP]. After *Miller*, it will be the rare juvenile offender who can receive that same sentence. . . . *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." (*Montgomery*, at p. 734.)

In *Padilla*, a jury convicted the defendant of a murder he committed when he was 16 and the trial court sentenced him to LWOP. In a petition for writ of habeas corpus, the defendant sought resentencing in light of *Miller*; he submitted "several reports and declarations regarding his potential for rehabilitation and conduct while in prison[,]" including one report opining he "had 'great potential' for rehabilitation[.]" (*Padilla, supra*, 4 Cal.App.5th at p. 669.) The trial court held a resentencing hearing and reimposed the LWOP term. (*Id*. at p. 659.) Following that ruling, the United States Supreme Court decided *Montgomery*. (*Ibid*.)

The *Padilla* court examined *Miller* and *Montgomery*, noting: "The application of *Miller* in state collateral review proceedings thus targets a specific question—that is, whether the juvenile offender's crime arose from irreparable corruption, rather than transient immaturity—the focal point of which is the existence of '"permanent incorrigibility."' [Citation.] [¶] . . . [¶] In our view, the stringent standard set forth in *Montgomery* cannot be satisfied unless the trial court, in imposing an LWOP term, determines that in light of all the *Miller* factors, the juvenile offender's crime reflects irreparable corruption resulting in permanent incorrigibility, rather than transient immaturity. . . . In view of *Montgomery*, the trial court must assess the *Miller* factors with an eye to making an express determination whether the juvenile offender's crime reflects permanent incorrigibility arising from irreparable corruption." (*Padilla, supra*, 4 Cal.App.5th at pp. 672-673, fn. omitted.)

Padilla reversed and remanded for a new resentencing hearing, concluding the trial court "exercised its discretion in resentencing . . . without the guidance provided by *Montgomery* [.]" (*Padilla, supra*, 4 Cal.App.5th at p. 659.) The *Padilla* court explained: "In reimposing the LWOP term, the court neither stated that appellant was irreparably corrupt nor made a determination of permanent incorrigibility. Rather, the court focused on the circumstances of the crime, without reference to the evidence bearing on appellant's possibility of rehabilitation. In short, in resentencing appellant, the court did not apply the substantive rule *Montgomery* has now stated *Miller* established." (*Id*. at pp. 673-674.)

Neither *Montgomery* nor *Padilla* alter our conclusion. Here, the trial court considered the *Miller* factors in great detail. At the resentencing hearing, the court noted: "The question is whether [Moffett] can be deemed at the time of sentencing to be irreparably corrupt beyond redemption and, thus, unfit ever to reenter society. . . ." It determined Moffett was not a "juvenile offender whose crime reflects unfortunate yet transient immaturity" that there was not "a realistic chance of rehabilitation in this case," and that Moffett fit "into that small category of juvenile defendants where life without the possibility of parole is the appropriate sentence." This is not a situation like the one in *Padilla*, where the court focused on the circumstances of the defendant's crime without considering the evidence supporting the possibility of rehabilitation and without making a determination of incorrigibility. (*Padilla, supra*, 4 Cal.App.5th at pp. 673-674.) Nor is Moffett like the defendant in *Padilla*, who offered substantial evidence supporting the possibility of rehabilitation. (*Id*. at pp. 669-670.)

See Moffett .....pg 40

Board's Information Technology System

Commissioners Summary
All Institutions
September 01, 2016 to September 30, 2016

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	CHAPPELL	FRITZ	GARNER	GROUNDS	LABAHN	MINOR	MONTES	PECK	ROBERTS	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**25**	**31**	**33**	**27**	**0**	**28**	**26**	**28**	**15**	**30**	**32**	**34**	**143**	**452**	**0**	**452**
Grants	6	4	9	5	0	2	7	5	0	8	6	7	0	59	0	59
Denials	16	20	17	14	0	19	13	18	11	15	18	17	0	178	0	178
Stipulations	1	5	2	3	0	5	3	4	3	2	2	6	0	36	0	36
Waivers	0	0	0	0	0	0	0	1	0	0	2	1	38	42	0	42
Postponements	1	2	4	3	0	1	3	0	0	1	2	3	96	116	0	116
Continuances	1	0	1	2	0	1	0	0	1	4	2	0	0	12	0	12
Tie Vote	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	9	9	0	9

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

Subtotal (Deny+Stip)	**17**	**25**	**19**	**17**	**0**	**24**	**16**	**22**	**14**	**17**	**20**	**23**	**0**	**214**	**0**	**214**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	9	19	9	12	0	12	12	9	10	10	9	11	0	122	0	122
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	4	4	6	3	0	5	4	7	4	4	10	7	0	58	0	58
7 years	3	2	4	2	0	6	0	1	0	2	1	4	0	25	0	25
10 years	0	0	0	0	0	1	0	5	0	1	0	1	0	8	0	8
15 years	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**0**	**2**	**1**	**38**	**42**	**0**	**42**
1 year	0	0	0	0	0	0	0	1	0	0	2	1	23	27	0	27
2 years	0	0	0	0	0	0	0	0	0	0	0	0	8	8	0	8
3 years	0	0	0	0	0	0	0	0	0	0	0	0	4	4	0	4
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**	**4**	**3**	**0**	**1**	**3**	**0**	**0**	**1**	**2**	**3**	**96**	**116**	**0**	**116**
Within State Control	0	1	4	1	0	0	1	0	0	0	2	0	88	97	0	97
Exigent Circumstance	1	0	0	2	0	1	1	0	0	0	0	1	3	9	0	9
Prisoner Postpone	0	1	0	0	0	0	1	0	0	1	0	2	5	10	0	10

Board's Information Technology System

Commissioners Summary
All Institutions
October 01, 2016 to October 31, 2016

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	CHAPPELL	FRITZ	GARNER	GROUNDS	LABAHN	MINOR	MONTES	PECK	ROBERTS	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**28**	**23**	**24**	**18**	**15**	**20**	**21**	**22**	**27**	**24**	**25**	**23**	**110**	**380**	**7**	**373**
Grants	10	1	5	4	3	3	6	3	5	3	13	8	0	64	0	64
Denials	12	16	17	10	10	13	11	12	17	11	11	10	0	150	7	143
Stipulations	2	1	0	4	2	0	1	6	4	7	0	2	0	29	0	29
Waivers	1	1	0	0	0	0	0	1	0	1	0	3	22	29	0	29
Postponements	3	4	2	0	0	2	2	0	0	0	1	0	78	92	0	92
Continuances	0	0	0	0	0	2	1	0	1	2	0	0	0	6	0	6
Tie Vote	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	10	10	0	10

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

Subtotal (Deny+Stip)	**14**	**17**	**17**	**14**	**12**	**13**	**12**	**18**	**21**	**18**	**11**	**12**	**0**	**179**	**7**	**172**
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	7	14	7	6	8	9	7	11	12	9	8	3	0	101	5	96
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	6	1	7	4	4	3	5	5	7	8	2	4	0	56	2	54
7 years	1	2	3	0	0	0	0	1	1	1	1	4	0	14	0	14
10 years	0	0	0	3	0	1	0	0	1	0	0	0	0	5	0	5
15 years	0	0	0	1	0	0	0	1	0	0	0	1	0	3	0	3

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**1**	**0**	**0**	**0**	**0**	**0**	**1**	**0**	**1**	**0**	**3**	**22**	**29**	**0**	**29**
1 year	1	1	0	0	0	0	0	1	0	0	0	3	11	17	0	17
2 years	0	0	0	0	0	0	0	0	0	1	0	0	7	8	0	8
3 years	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0	3
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	**3**	**4**	**2**	**0**	**0**	**2**	**2**	**0**	**0**	**0**	**1**	**0**	**78**	**92**	**0**	**92**
Within State Control	2	4	1	0	0	1	1	0	0	0	0	0	74	83	0	83
Exigent Circumstance	1	0	1	0	0	1	0	0	0	0	1	0	0	4	0	4
Prisoner Postpone	0	0	0	0	0	0	1	0	0	0	0	0	4	5	0	5

NEW YEAR, NEW VISITS, SAME OLD REGS

Old regs in place, for now, but visits expected to start in the new year.

In late November Life Support Alliance contacted sources in the Department of Corrections for the definitive word on when, oh when, will family visits for lifer and LWOP inmates really begin? These are reliable sources, who appear to be getting questions on this issue just about as often as we are.

Our conversation was pretty wide-ranging, and while not attributable, those we spoke with are both in positions to know what's going on and have, in our experience, been up-front and dependable. As everyone knows, nothing with CDCR is easy, and any sort of change is a major undertaking. While the changes to visiting have been in the works for some time now, it's still a work in progress.

But after our conversations with officials at CDCR we can report this: it looks like visits will actually begin about the end of January, initially under the current guidelines for who can participate as now found in Title 15. And before everyone has a heart attack--please understand--these are the interim guidelines, not the final regulations.

CDCR will be issuing a memo to officially allow prison staff to begin the process for lifers and LWOPs, as a bridge until the long-awaited regs are officially approved and in place. The process for getting those regs approved is rather long and arduous and not without conflict, so in order to get things rolling it will probably be done at first via memo, with the changed regs, which will allow more individuals to participate, coming as soon as they can be discussed, commented on, approved and put in place.

The discussion at CDCR now is about how to be inclusive, so that many of those who now, under existing regs, are barred from family visits, will be allowed to do so once the new regs are in place--this is for those who perhaps had a drug charge long ago, but since have been clean, those whose victim was a

minor and they, too were a juvenile, as some examples. Again, the intent is to be as inclusive as possible and since getting the regs in place is proving to be more difficult than anticipated, the memo extending existing criteria to lifers and LWOPs is a stop-gap measure.

We should see the actual regs, hopefully by the end of December, but there is a public comment/ amendment process that takes a while after they are unveiled, as well a few other considerations that could delay implementation of the new regs, including possible actions by certain groups of 'stakeholders.' A memo, CDCR's time-honored way of creating a 'work around,' will allow the visits to begin with as little continued delay as possible.

Once the memo is issued it will be binding on all prisons, no one institution will be allowed to opt out of participation. Basic criteria include the visiting family must be immediate family/step-family, and legal spouses. While there is no required length of time a prisoner must be married before being allowed a family visit, they must, indeed, be legally married.

Some institutions are allowing lifers and LWOP to submit applications for family visits, acknowledging the inevitable, most are not. Some counselors are confirming family visits will be starting, some still in denial. But it is happening.

And it is important to remember that there will be a waiting list for the available family visiting units. Depending on the individual prison, the number of units available and the number of visits requested, that waiting list time will vary. Although the state budget contained funds to authorize the change in regulations, it did not provide any additional funds to rehabilitate, reclaim, restore or create more visiting units. Those concerns will need to be addressed in the up-coming budget years.

…AND A SIDE BAR TO THAT REGS ISSUE….

On a related issue, the equally long-awaited change to classifications scores and point indexes, the word, from the same sources-who-would-know, is in line with the change in regs for family visits… waiting on the tedious, continuous and often contentious regulation change process. However, because of the complexity of the new regs and the far-reaching impact they will have, this situation can't be so readily addressed by a memo, so it must be regs.

However, our sources at CDCR affirm that the close custody situation is getting ' a hard look,' with an eye to changing that restrictive policy, perhaps via combining Close A and Close B into one Close Custody designation and/or shortening the time required under that designation. Wardens will also be encouraged to give over-rides to well-programming inmates that will allow those men and women to transfer to a lower security level than their points would normally indicate. Again, these over-rides and exceptions will be behavior based, and those who are showing good programming and progress will be the ones to benefit.

Plans are also underway to change the ways and time lines for inmates to achieve point reduction-- currently even exemplary behavior can only reduce point levels by 8 points per year, making it almost mathematically impossible for some, who racked up numerous points in their early years inside, to decrease their points and get to a lower level prison. That will change, too, according to our sources, allowing more points to be deducted each year, based on programming and accomplishment. This would allow those prisoners who have made the decision to improve their situation and chances at parole a realistic opportunity to do so.

Time line for these regs is sometime in the spring, at best estimation, but many wardens, aware of the changes coming, are already signing off on over-rides for lower level prisons. As to whether the point threshold for Level III, II and I will change, that remains to be seen, but not much seems to be off the table at this point. But as usual, not everyone has yet received the message and boarded the train.

This point process will also include LWOP inmates--and there is some talk of some lifers being to be housed in secure Level I facilities. But this is only early speculation.

Many changes coming and so far, they look pretty positive, for our point of view. The most encouraging thing is the attitude in Sacramento---a new tone, looking at what works for inmates, what is rehabilitative and what makes a positive difference. Let's make sure it keeps heading in that direction.

A BAKER'S DOZEN, PLUS ONE OF COMMISSIONERS

In the works since the state budget was passed in mid-summer, Governor Brown finally made it official just before Thanksgiving (coincidence?) and appointed two new commissioners to the Board of Parole Hearings, expanding that body's number, for the first time, from 12 members to 14. The two new (well, semi-new) members are expected to help deal with what could be quite an influx on prisoners into the parole cycle as the result of new legislation and the natural progress of many third strikers toward their first hearing date.

We say 'semi-new' because both appointees are not new faces to inmates in parole hearings, both having been Deputy Commissioners for several years, and one an inmate attorney before joining the BPH DC cadre. Herewith are the newest members of the BPH:

Patricia Cassady, 64, of Concord, has been a deputy commissioner since 2013. She was an associate chief deputy commissioner at the Board of Parole Hearings from 2005 to 2013, where she served as a deputy commissioner from 1995 to 2004. Previously she was in private practice from1988 to 1995. Cassady earned a Juris Doctor degree from the John F. Kennedy University College of Law. Cassady is a Democrat.

Troy Taira, 56, of Alameda, has been a deputy commissioner since 2015. Taira was special assistant inspector general in the California Office of the Inspector General from 2013 to 2015 and administrative law judge in the Office of Administrative Hearings, the California Department of Social Services from 2011 to 2012, and staff counsel and prosecutor for the U.S. Coast Guard from 1992 to 2009. He was also a senior staff attorney at the U.S. Department of Homeland Security from 1992 to 2009 and a defense attorney in the Fresno County Public Defender's Office from 1991 to 1992. His Juris Doctor degree was earned at from the University of California, Davis School of Law. Taira is a Democrat.

Parole commissioners' salaries begin at $142,095 per year and require Senate confirmation. New commissioners usually go through about 6 weeks of training, including sitting as a non-voting member of several parole panels before taking the presiding chair themselves. Prisoners who have experienced either Cassady or Taira as DCs at their hearings are invited to send their comments and impressions to LSA prior to confirmation hearings for the two new commissioners.

From Moffett …..pg 34

> Here, the court considered the limited evidence supporting the possibility Moffett could be rehabilitated, and determined there was not a "realistic chance of rehabilitation" and that Moffett was not a "juvenile offender whose crime reflects unfortunate yet transient immaturity." We conclude the court did not abuse its discretion by resentencing Moffett to LWOP.

Finally, the appellate court found against Moffett's challenge re cruel and unusual punishment.

> Here, the LWOP sentence, "though undoubtedly harsh, does not shock the conscience and is not disproportionate" to Moffett's culpability. (*Blackwell, supra*, 3 Cal.App.5th at p. 202.) Moffett was convicted of first degree murder with special circumstances. This crime, "viewed in the abstract, is perhaps the most serious offense under California law, and the facts of this particular case do not remove it from this category." (*Ibid*.) As described in detail above, Moffett planned the armed robbery and gave Hamilton the gun used to kill Officer Lasater. He was an active participant in the robbery: he pointed a loaded gun at the cashier, and threatened to kill a bystander. Moffett is not, as he claims, like the "immature 17-year-old defendant in Dillon who shot and killed his victim in a panic and was sentenced to life in prison despite the views of the judge and jury that his sentence was disproportionate to his moral culpability." (*People v. Williams* (2015) 61 Cal.4th 1244, 1290.)
>
> "LWOP may be 'an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth' [citation], but the record before us does not compel the conclusion [Moffett] falls within that class. Although he was [four days] short of the age of majority when he committed the murder in this case, his criminal history as a juvenile was extensive. In light of his history and the very serious nature of his crime, [Moffett] has not demonstrated that his LWOP sentence is disproportionate to his individual culpability." (*Blackwell, supra*, 3 Cal.App.5th at p. 202.) We conclude the court did not impose cruel and unusual punishment in violation of the state constitution. (*Ibid*.)

Of course, this litigation is not necessarily the last word. Moffett still has avenues open in the California Supreme Court and the federal courts. But for others fighting similar issues as Moffett, the above analysis offers a sobering study on how case factors can be applied to the law.

LAST MINUTE UPDATE ON COMMISSIONERS

As CLN was going to press we received word that there may be yet another vacancy on the newly-expanded 14-member Board of Parole Hearings. Commissioner Ali Zarrinam, first appointed by Gov. Brown in 2012 and just recently re-appointed to his seat, is reportedly stepping into a newly created positon to oversee and train Deputy Commissioners.

While no official announcement has yet been made, we deduce something is afoot, noting that the Agenda for the December monthly Executive Board Meeting contains an item, "Update on Commissioner Ali Zarrinnam." That, coupled with the fact that Zarrinnam's picture and bio no longer appear on the BPH webpage of active commissioners, was something of a hint.

Zarrinnam, an intelligent, tough but fair commissioner, was known for frequent, probing and insightful questions to those making training or informational presentations to the board at monthly meetings. His grant rate was squarely in the mid-range of commissioners, and while always pleasant and courteous to all parties in hearings, he had little tolerance for those inmates with a claim of innocence.

His departure as a commissioner means Gov. Brown has yet another seat to fill to bring the board up to the recently approved 14-member level. On the whole, Zarrinnam will, we feel, be missed as a commissioner and our hope is that the Governor will find and appoint a similarly astute individual.

PROPOSED REGULATORY TEXT

Proposed additions are indicated by underline and deletions are indicated by ~~strikethrough~~.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS

CHAPTER 3. PAROLE RELEASE

Article 14. Parole Consideration Hearings for Youth Offenders is ***added*** to read as follows:

ARTICLE 14. PAROLE CONSIDERATION HEARINGS FOR YOUTH OFFENDERS

§ 2440. Youth Offender Defined.

(a) A youth offender is an inmate who meets all of the following criteria:
(1) The inmate committed his or her controlling offense prior to reaching age 23;
(2) The inmate was sentenced to a determinate term or a life term with the possibility of parole;
(3) The inmate is currently incarcerated for the offense or group of offenses that includes the controlling offense; and
(4) The inmate is not ineligible based on any factors listed in subdivision (c) of this section.

(b) For purposes of determining whether an inmate qualifies as a youth offender, the "controlling offense" is the single crime or enhancement for which any sentencing court imposed the longest term of imprisonment.

(c) Inmates who committed their controlling offense prior to reaching age 23 are ineligible for parole under this article if one or more of the following factors exist:
(1) The inmate is serving a sentence of death or life without the possibility of parole;
(2) The inmate was sentenced on the controlling offense for a prior felony conviction under Penal Code sections 1170.12 or 667(b)-(i);
(3) The inmate was sentenced on the controlling offense for a one-strike sex offense under Penal Code section 667.61;
(4) The inmate was convicted of any offense after reaching age 23 for which "malice aforethought" is a necessary element of the offense; or
(5) The inmate was convicted of any offense after reaching age 23 for which the inmate was sentenced to a life term of any length.

(d) If two or more offenses carry identical sentence lengths and are the inmate's longest terms of imprisonment, the controlling offense shall be determined as follows:
(1) If none of the sentences were imposed pursuant to Penal Code section 1170.12, subdivisions (b) through (i) of section 667(b)-(i), or section 667.61, the controlling offense is whichever offense the inmate committed first in time.
(2) If one sentence was imposed pursuant to Penal Code section 1170.12, subdivisions (b) through (i) of section 667(b)-(i), or section 667.61, the controlling offense is that offense.

(3) If more than one sentence was imposed pursuant to Penal Code section 1170.12, subdivisions (b) through (i) of section 667(b)-(i), or section 667.61, the controlling offense is whichever of those offenses the inmate committed first in time.

(e) If a sentence on an offense is imposed pursuant to Penal Code section 1170.12, subdivisions (b) through (i) of section 667, or section 667.61, but the offense is not the controlling offense, this shall not be the basis for ineligibility under subdivision (c) of this section.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Sections 667, 667.61, 1170.12, 3051(a), and 3051(h), Penal Code.

§ 2441. Youth Offender Determinations.

(a) Youth offender determinations by the department are subject to the appeal process found in California Code of Regulations, Title 15, sections 3084-3084.9. Inmates contesting a youth offender determination by the department must submit a CDCR Form 602 Inmate Appeal to Correctional Case Records Services of the department under that appeal process.

(b) Youth Offender Determinations Defined. Correctional Case Records Services of the department determines whether an inmate qualifies as a youth offender as defined in section 2440 of these regulations, and calculates the Youth Parole Eligibility Date (YPED) as defined in subdivision (c) of this section for all inmates who qualify as youth offenders. For purposes of this article, both determinations are referred to as "youth offender determinations."

(c)(1) A YPED is the earliest date on which a youth offender is eligible for a parole consideration hearing pursuant to Penal Code section 3051, subdivision (b). A youth offender's YPED is set according to the following criteria:
(A) If the controlling offense is a determinate term of any length, the YPED is the first day after the youth offender has completed 14 continuous years of incarceration;
(B) If the controlling offense is a life term of less than 25 years to life, the YPED is the first day after the youth offender has completed 19 continuous years of incarceration; or
(C) If the controlling offense is a life term of 25 years to life, the YPED is the first day after the youth offender has completed 24 continuous years of incarceration.

(2) For purposes of subdivision (c), "incarceration" means detention in any city or county jail, local juvenile facility, state mental health facility, Division of Juvenile Justice facility, or department facility.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Section 3051, Penal Code.

§ 2442. Youth Offender Determination Review by the Board.

(a)(1) If an inmate is not eligible as a youth offender under section 2440, subdivision (c), as determined by Correctional Case Records Services, and the inmate has received a Third Level Response from the department to his or her Form 602 Inmate Appeal challenging the determination, the inmate may submit a one-time request for review by the board.
(2) If an inmate has been deemed eligible as a youth offender by Correctional Case Records Services but disagrees with the department's calculation of his or her YPED, and the inmate has received a Third Level Response from the department to his or her Form 602 Inmate Appeal challenging the calculation of the YPED, the inmate may submit a one-time request for review by the board.

(b) A request under subdivision (a) of this section for review by the board of a youth offender determination shall be submitted in writing by the inmate.

(c) In submitting a request for review by the board of a youth offender determination, the inmate shall submit a copy of the Third Level Response from the department to his or her Form 602 Inmate Appeal, the absence of which shall result in the automatic return of the request.

(d) In submitting a request for review by the board of a youth offender determination, the inmate is encouraged to submit the following documents:
(1) A brief explanation of the reason for requesting review;
(2) A copy of the inmate's birth certificate; and
(3) A copy of all the inmate's sentencing documents, in particular all the abstracts of judgment issued by all courts that have sentenced the inmate.

(e) The Chief Counsel shall review the inmate's request and send its written response to the inmate no later than six months after receipt of the request.

(f) If the Chief Counsel determines that a change in youth offender status or YPED is warranted, the board shall issue a miscellaneous decision explaining the reasons for its determination. The board shall forward a copy of this decision to Correctional Case Records Services of the department.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Section 3051, Penal Code.

§ 2443. Scheduling of Hearings.

(a) Youth offenders shall be scheduled for their initial parole consideration hearings within six months following their YPED unless the youth offender is entitled to an earlier parole consideration hearing pursuant to any other provision of law.

(b) Subsequent parole consideration hearings shall be scheduled for youth offenders in accordance with Penal Code 3041.5(b)(3).

(c) Notwithstanding subdivisions (a) or (b), when a youth offender's earliest possible release date (EPRD) is calculated to occur prior to the date on which the youth offender will complete his or her 15th year of incarceration, the board shall not schedule a hearing.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Sections 3041.5 and 3051, Penal Code.

§ 2444. Youth Offender Factors.

(a) Diminished Culpability of Youths as Compared to Adults. The diminished culpability of youths as compared to adults includes, but is not limited to, consideration of the following factors:
(1) The ongoing development in a youth's psychology and brain function;
(2) The impact of a youth's negative, abusive, or neglectful environment or circumstances;
(3) A youth's limited control over his or her own environment;
(4) The limited capacity of youths to extricate themselves from dysfunctional or crime-producing environments;
(5) A youth's diminished susceptibility to deterrence; and
(6) The disadvantages to youths in criminal proceedings.

(b) Hallmark Features of Youth. The hallmark features of youth include, but are not limited to, consideration of the following factors:
(1) Immaturity;
(2) An underdeveloped sense of responsibility;
(3) Impulsivity or impetuosity;
(4) Increased vulnerability or susceptibility to negative influences and outside pressures, particularly from family members or peers;
(5) Recklessness or heedless risk-taking;
(6) Limited ability to assess or appreciate the risks and consequences of behavior.
(7) Transient characteristics and heightened capacity for change;

(c) Subsequent Growth and Increased Maturity of the Inmate While Incarcerated. The subsequent growth and increased maturity of the inmate while incarcerated includes, but is not limited to, consideration of the following factors:
(1) Considered reflection;
(2) Maturity of judgment including, but not limited to, improved impulse control, the development of pro-social relationships, or independence from negative influences;
(3) Self-recognition of human worth and potential;
(4) Remorse;
(5) Positive institutional conduct; and
(6) Other evidence of rehabilitation.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Sections 667, 667.61, 1170.12, 3051, Penal Code; *Graham v.*

Florida (2010) 560 U.S. 48, 130 S.Ct. 2011; Miller v. Alabama (2012) 132 S.Ct. 2455; People v. Caballero (2012) 55 Cal.4th 262, 282 P.3d 291, 145 Cal.Rptr.3d 286; Moore v. Biter (2013) 725 F.3d 1184; Roper v. Simmons (2005) 543 U.S. 551; People v. Franklin (2016) 63 Cal. 4th 261; Montgomery v. Louisiana (2016) 136 S. Ct. 718.

§ 2445. Comprehensive Risk Assessments

When preparing a risk assessment under this section for a youth offender, the psychologist shall also take into consideration the youth factors described in section 2444 and their mitigating effects. The psychologist's consideration of these factors shall be documented within the risk assessment under a unique heading from the remainder of the report.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Sections 3041.5 and 3051.

§ 2446. Parole Consideration Hearings.

(a) Panels shall conduct parole consideration hearings for youth offenders in compliance with the requirements for initial and subsequent parole consideration hearings described in this chapter and Penal Code sections 3040, et seq.

(b) In considering a youth offender's suitability for parole, the hearing panel shall give great weight to the youth offender factors described in section 2444: (1) the diminished culpability of youths as compared to adults: (2) the hallmark features of youth: and (3) any subsequent growth and increased maturity of the inmate.

(c) The panel shall review and consider any written submissions that provide information about the youth offender at the time of his or her controlling offense, or the youth offender's growth and maturity while incarcerated, from a youth offender's family members, friends, school personnel, faith leaders, or representatives from community-based organizations.

(d) A hearing panel shall find a youth offender suitable for parole unless the panel determines, even after giving great weight to the youth offender factors, that the youth offender remains an unreasonable risk to public safety.

(e) If a hearing panel finds a youth offender unsuitable for parole, the panel shall impose a denial period in accordance with Penal Code section 3041.5, subdivision (b), paragraph (3).

(f) Nothing in this article is intended to alter the rights of victims at parole consideration hearings.

Note: Authority cited: Section 12838.4, Government Code; and Sections 3051(e), 3052, and 5076.2, Penal Code. Reference: Sections 3041, 3041.5, 3046(c), 3051, and 4801(c), Penal Code; *In re Lawrence (2008) 44 Cal.4th 1181, 1214.*

COMMENTS TO BPH COMMISSIONERS RE: PROPOSED YOPH REGS

As noted, LSA found the proposed regulations dealing with YOPH hearings to be less than stellar; herewith, our comments made to the board prior to their vote on the draft regulations, which passed.

We have several concerns with the regulations as proposed, and suspect several other individuals and groups share many of our concerns, which should tell the board that these areas have yet to be dealt with in a satisfactory manner.

I'll mention a select few here, in particular Section 2444 c (5) stated as 'positive institutional conduct.' We strongly feel this should be worded to note a pattern of improving institutional conduct, as this wording, and many hearings, fail to recognize and allow for the fact that when many YOPH inmates enter prison they are still under those hallmarks of youth that prevent them making good decisions. One does not instantly become smart simply because one ends up in a Level IV adult prison at the age of 18, 19 or 20.

In fact those same issues are still in play, perhaps more so in the stress of being a relative youngster on the mainline. Not to mention the fact that even past the age of 23, when patterns of behavior have become habits, those habits are all the individual may know.

It would seem more in line with the intent of the legislation, and indeed the science, to acknowledge and evaluate a pattern of improving behavior, as maturity develops.

Section 2445-we would like to see all factors of youth addressed by clinicians under the unique heading, individually, at least by mention, not simply lumped together under a 'unique heading' that ends up being not much of a consideration, at least from the YOPH CRAs we've been collecting.

Section 2446 (b)—just what is the great weight standard commissioners are to use in considering how the factors of youth impacted any given inmate's involvement in the life crime?

What does Great Weight mean, in real and explainable terms? We get questions on this issue continually from inmates, both by mail and in person, when we speak in prisons. And we have no answer, because, we too, wonder just what 'great weight' means.

We also note that in closed session last month the commissioners received information on the assessing great weight, so it appears we are not the only ones wondering just how that phrase is actually put into practice. We believe it would be very helpful to all parties in this equation if there were a clearer understanding and explanation of this. If not in these regulations, where we think it really belongs, then perhaps in the form of an administrative directive—something everyone could read, understand and refer to.

And certainly, this standard should also apply when determining the length of denial—and that we have yet to see any consideration or standard explained.

For these reasons and others, we urge the board to table these regulations for more discussion and consideration.

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BOARD BUSINESS

The October and November Executive Meetings of the Board of Parole Hearings saw presentations from a variety of entities, from the Division of Rehabilitative Programs, to the head of the FAD to Human Rights Watch. The presentations themselves ran the gamut from cursory to informative to protracted. Also on the agenda, the adoption of YOPH regulations by the board.

In something of reverse order, after having been presented with a draft of the YOPH regs in October, and hearing some abbreviated public comment at that time, the board in November consider a slightly re-vamped version of the regs presented in October and vote on acceptance. Which they did, despite concerns expressed by several individuals and groups, including LSA. The draft regs and our concerns, which were shared and voiced by other individuals and groups, are detailed elsewhere in this issue.

In October Elizabeth Calvin of Human Rights Watch and Heidi Rummel of the USC Gould School of Law Post-Conviction Project alerted the board to preliminary findings of their study on the effect of YOPH on parole grants and hearings. Calvin and Rummel provided a bit of perspective on why YOPH laws were important, informing the board that in 2014 there were roughly 6,500 inmates in California prisons who were under the age of 18 at the time of their crime.

Calvin and Rummel noted that about 80% of the time District Attorneys refer juveniles accused as a crime to be tried as adults; when judges make that decision, the percentile of those referred as adults drops to 20% of those accused. Though the presentation was done prior to the recent election, those figures underscore the importance of the passage of Prop. 57, which took the power to make those referrals out of the hands of prosecutors and back in the purview of judges.

Also of note was Rummel's information to the commissioners that preliminary reviews of YOPH hearings show that even when the hallmarks of youth are recognized and acknowledged in the hearing, they are not predictive of a finding of suitability. Calvin, the Senior Advocate in the Children's Division at Human Right Watch, noted that adolescents are 'fundamentally, constitutionally different from adults,' and that YOPH hearings really should be a special hearing, not just a segment of a standard parole hearing.

This analysis substantiated results for YOPH hearings reported at every monthly Board Executive meeting, including the previous month, when BPH Executive Director Jennifer Shaffer noted that in the period from Jan. 1, 2014 (the inception of YOPH hearings) through Aug. 31, 2016 some 1,776 YOPH hearings had been scheduled, with 1,553 actually held. Those hearings held to completion resulted in 480 grants, roughly a 30% grant rate for hearings held. That is roughly the same percentile of suitability findings as in standard hearings in the same time period.

Both Calvin and Hummel urged the board to set a baseline behavior standard predicated on age and actions at the time of incarceration and then measure growth and progress since that time, using a set of guidelines and definitions.

Also appearing in October were representatives from the Division of Rehabilitative Programs, the agency responsible for increasing the number, kind and availability of programs for inmates within the prison system. Perhaps the biggest take-away from that presentation was the intent of DRP to provide all types of programs at all institutions, negating the need for inmates to transfer to a specific prison for a specific program and plans to make programs more accessible, but providing more funding for staff sponsors and, through negotiation and agreement with the various prisons, make more locations available for programs. Under this practice those areas not used 24/7, such as the library and visiting rooms, would be made available for self-help groups meeting in off-hours.

This, according to DRP Director

Jay Virbel, should stimulate both the availability of more programs at more institutions, and provide an answer to the lack of space concerns. DRP is also seeking to encourage the development of a greater number of programs in out-lying institutions (such as Pelican Bay, High Desert, Ironwood, etc.) through renewal and expansion of the Innovative Grant Program.

At the November meeting commissioners heard from Chief Counsel Jennifer Neill that the California Supreme Court had granted the board's request for review of the In Re Butler settlement, though there is no indication of when the court will rule. Under original terms of the settlement the BPH agreed to set base terms for all inmates at their initial or next board hearing, regardless of whether there was a finding of suitability. However, some 1,600 inmates who were denied parole in hearings held since that settlement did not see their base terms set.

Those inmates were primarily those who came under the guidelines of YOPH or elderly parole hearings and, since to qualify for those considerations inmates must have served a specific period of time, the board initially held that would be considered the base term. Attorneys for the class member in the suit objected, and the BPH agreed to set base terms at the conclusion of all hearings, regardless of whether or not it was a YOPH or elderly hearing.

The present legal discussion involves whether the BPH can set base terms for those 1,600 who did not see their terms set via issuance of Miscellaneous Decision, or whether the board must reschedule parole hearings for them. While waiting for the court's ruling the BPH is, indeed, calculating base terms for those in limbo and issuing Miscellaneous Decisions. Should the Court rule in favor of the BPH, they will be somewhat ahead of the game.

The November meeting was relatively pro forma, with the exception of a marathon presentation by Dr. Cliff Kusaj of the FAD. That unwieldy, 3-hour presentation, made in connection with the settlement of Johnson v Shaffer lawsuit is addressed elsewhere in this issue.

The other major topic of discussion in November were the new regulations for implementation by youth offender factors by the BPH. The text of those regulations, as well as our objections to them, are also detailed in this CLN issue. Despite objections by various organizations the commissioners voted to accept the presented version of the regulations.

That does not, however, mean that this is the last word. The regulations must be made available for public comment; and can be amended in the future.

EN BANC

Following an unfortunate pattern, the Board of Parole Hearings during En Banc considerations at their October and November business meetings refused, more often than granted, recall of sentence recommendations for those seeking 'compassionate release,' due to terminal illness. Of the 5 inmates seeking relief under this process the board refused four and granted a recommendation to only one.

Yes, you're right, that only equals four, and we said there were five up for consideration. The final applicant, **Johnny Weatherly**, died before he could be considered by the en banc process in November. So much for compassion.

Of the others, refused were **Robert Talamentz** (in October) and **Alfredo Lara** and **Edward Perez**. Although there were no speakers in favor of recall of sentence for any of those up for this consideration, the LA DAs office felt it necessary to oppose Perez' release, noting that even when arrested and convicted of the crime, Perez was suffering from cancer. See last sentence of previous paragraph for comment.

Alone of all the ailing prisoners seeking compassionate relief was **Anthony Napoli**, who was recommended for recall of sentence. As we have noted before, despite the fact that all inmates appealing for recall

of sentence under PC 1170 (e), less than half are granted that recommendation by the BPH.

In other en banc considerations the four inmates referred by the Governor for review of their grants by the entire 12-member (at that time) commission, it was a glass half-full/half-empty situation. In October **Steven Brigida** saw his July grant affirmed, but **Patrick James'** grant was referred for a rescission hearing. Brigida's parole was supported eloquently by his mother, whose report of his progress and stable support on release surpassed the usual objections and recitation of the crime presented by the Ventura County DA, who attempted to portray his crimes as outside the scope of youthful offender considerations.

James' parole was opposed by his victim and family, who related they would be quite happy if James spent the rest of his life term incarcerated. The decision to refer James for a rescission hearing was not unaminous, as the first vote taken during the board's deliberations was to affirm the grant. That motion failed to gain a majority of commissioners, but a follow up vote to refer for rescission was successful.

During November's en banc hearings two of the three grants referred by the Governor were ordered to rescission consideration. Only the grant to **Emiliano Lopez**, despite opposition from both the DA and perennial victim representative Christine Ward, was affirmed by the board. Speaking for Lopez, in addition to family, was Jacques Verduin.

Ward, via a letter reportedly from the victim's family, suggested Lopez' actions in exercising his right to appeal his sentence amounted to manipulation of the system. The Kern County DAs office surprised no one by opposing Lopez' release, recounting in detail the crime.

However, the grants for **Carl Burke** and **Angel Medina** were referred for rescission consideration. Both were opposed by the respective DAs and had no speakers in favor of their release.

NEW AG-NOMINEE XAVIER BECERRA

May become the 'face of resistance' to federal changes.

The man nominated by Gov. Brown to be California's next Attorney General, replacing Kamala Harris, recently elected to the US Senate, has vowed to be "vigorous" in defending California's many progressive policies in many areas, including prison reform, from possible federal interference under the expected new administration. Xavier Becerra, a US Congressman representing the district encompassing downtown Los Angeles since 1993, has accepted Brown's nod and now awaits confirmation by the State Senate.

Becerra, the son of immigrants, has signaled his readiness to stand the state's ground in reforms undertaken, saying, "If you want to take on a forward-leading state that is prepared to defend its rights and interests, then come at us." But at the same time the new AG-designate has adopted a wait-and-see attitude, adding, "We won't shy away from representing and defending what we stand for as Californians. But we're not out there to pick fights."

PROP. 57; QUESTIONS CONTINUE

Here's what we know, all we know.

Although plainly stated as a potential change to the state Constitution and laws as something that would affect only non-violent inmates, Prop. 57, which passed in the November election with a 64% approval margin, continues to be the source of some confusion and questions. And not just from inmates and families.

In conversations with CDCR sources we inquired about what impact, if any, this new change will have on lifers. And the answer was a firm…'we're not sure, yet.' It will, it appears, impact some, by not all lifers and for most the impact will be somewhat secondary.

Those most likely to be impacted will be second and third-strikers, especially those second strikers serving time for a non-violent strike/crime. Third strikers may also receive some secondary benefits from the increased credits provision of the new changes, which could possibly impact the timing of first parole hearings for those individuals.

As to other benefits for 'regular' lifers, that remains to be seen, though some changes in credit earning ability and impact is likely. It is, yet again, a case of what the regulations promulgated to enforce the new law will provide for. And that we don't, as yet, know.

Also up in the air are possible changes due to the passage of Prop. 64, now legalizing marijuana. Some prisoners, feeling they are serving sentences for actions that would now be legal, are asking the department when they can expect release. The answer to that is definitely don't roll it up just yet. However, research and contemplation on those possibilities is certainly afoot at CDCR but no one is ready yet to postulate on the eventual results.

Sources are more certain about looming changes due to the passage of Pro. 66, which not only speeds up the process for executing condemned inmates, but authorizes CDCR to house condemned inmates in institutions other than San Quentin and CCWF. When asked if this change was in the works, the answer was an unqualified no…don't expect any condemned inmate movements due to the passage of Prop. 66, for a number of reasons.

First, because the passage of 66 has not yet been officially certified by the Secretary of State; at last count, the initiative was passing by a razor thin margin of 50.9% to 49.1%. And even if the passage is eventually certified, within days of the election lawsuits were filed, including one with the California Supreme Court asking the court to throw out the wording of the initiative. Pundits expect a lengthy, and nasty, court battle, and officials at CDCR are not going to jump in any direction, until there is clear direction. So far now, the status of those on death row remains as it has been for the past several years.

As of now, this is as much as we know for certain. Exactly who will be affected and how we don't know and won't speculate, so please don't ask. We'll tell you all we know when we know it, but we won't guess. What we will do is provide updates in all newsletters as new developments are announced.

THOUGHTS ON PAROLE FROM ELSEWHERE

A 24-year member of the parole board in Rhode Island, in a new book on his tenure there, says that while some prisoners who are released may commit additional crimes, such events are "inherent risks of this kind of work (parole decisions)" and a risk society should accept. Frederic Reamer, now 63 and retired from parole decisions in early 2016, who says he developed "pretty good radar" about the veracity of prisoners before him, is currently a professor of social work at Rhode Island College.

His book, *On The Parole Board: Reflections on Crime, Punishment and Redemption*, says parole decisions are not simply intellectual exercises, but "work [that] requires deep looks at the personal, the very emotional quality of these cases. This is not mental gymnastics, trying to put all of this data into in an equation and reaching a decision. There's a lot of pathos, there's a lot of emotion and a lot of tears." He hopes to make the workings of parole boards in general more understandable, to "lift back the curtain" on those proceedings.

Parole systems throughout the country vary greatly by state and in general the parole system has faced considerable criticism, including from Marshall Project, which concluded following a months-long study most boards are secretive, not held to account and, significantly, overly cautious. A recent update of the Model Penal Code, which is written by respected legal scholars, called parole boards in general "failed institutions."

And while Reamer disagrees with this broad statement, he does acknowledge there are deficiencies. "Is there a great deal of room for improvement? Yes. Are some boards too conservative? Yes. Are some risk averse? I'm willing to believe that."

Nearly half the states in the nation keep parole files secret and one of the criticisms of many parole is that boards are staffed by unqualified individuals, appointed for political expediency. Nationwide parole boards have dominion over an astonishing 7.3 million adults, nearly 1 in every 31 individuals.

For Reamer, the most difficult cases were those wherein victims adamantly opposed the release of a prisoner, under any circumstances. "And then on the other side of the coin an inmate demonstrates genuine, profound, impressive insight, they've worked very hard at their issues," Reamer said. "When you try to boil down justice, what's the right thing to do in those instances?"

Recognizing the vulnerability of human decisions to error, Reamer acknowledges the possibility of any parole board making a mistake, but puts it in perspective. "The only way to prevent that happening [commission of another crime] is to never release anybody," he said. "It is a fact of life, I'm not happy about it, that some of these are not going to have good endings but on balance a system where people earn their way out of prison ... I truly believe in the long run enhances public safety".

YOUR PIECE OF THE ACTION

The Johnson v Shaffer case, challenging the Forensic Assessment Division's Comprehensive Risk Assessment practices, was settled some months ago, but of course lingering negotiations and bantering go on. As part of the settlement the BPH agreed that Dr. Cliff Kusaj, known to us as the Head Fad-er, would present a public presentation on the characteristics of lifers as recidivism risks and a summary of the results of CRAs administered in 2015, among other things.

As we have frequently reported before, Dr. Kusaj has said, in meeting public and private, a moderate risk assessment for a lifer is akin to a low risk assessment for any other prisoner cohort. Part of the settlement agreement was that he would put that assessment/opinion/estimation on public record.

And so he did, at the November business meeting of the BPH. For 3 hours he put that on record. And LSA was there. Through all of it. Taking notes, collecting copies. You're welcome.

Also part of the settlement was that this information would be available to the members of the class in the settlement—and that would be, in this case, both lifers and those long-serving prisoners who will now, under laws passed in the last few years, go to the parole board. Just how this information is supposed to get to you, we're not yet sure, as the good doctor presented a 26-slide power point presentation, not likely to be made available in its entirety to inmates. Even if you had a way to watch it.

The settlement agreement provided for Dr. Kusaj's notes to be made available, and much of the presentation to the board and public (mostly attorneys, staffers and LSA) was frankly repetitive, showing first opinions/statements and headings, followed by Kusaj's notes.

At present we're scanning the 26 pages into our computers, to be able to provide print outs to those who want them. And we'll try to provide not just a summary, but as much of the original wording and script as possible. We'll send it to those who wish to receive it—but because we anticipate many will want to benefit from the wisdom of Dr. FAD, and because even the compact version will be several pages in length, we're requesting at least 3 stamps accompany the request, and please, no SASE, as we'll have to use an oversize envelope to accommodate all the pages.

And the overall conclusion of the afternoon's festivities? Lifers (and other older, long-serving prisoners) are safer than any other prisoner cohort, recidivate less than any other group, and the FAD is doing a heck of a job. Well, we agree with the first two statements, anyway.

There was more, and we're still slogging our way through all the statistics, numbers, citations and … other stuff. When we surface, we'll report. In the meantime, to receive copy of the presentation, write us (PO BOX 277, Rancho Cordova, Ca. 95741, include stamps and ask for the Kusaj report. And good luck.

'TWAS THE NIGHT BEFORE (a prison) CHRISTMAS

(An abbreviated, customized version of the old favorite, with apologizes to W. Clement Moore)

T'was the night before Christmas and on all the yards
Not a creature was stirring, not even the guards
No stockings were hung, no yule logs were lit
Christmas in prison is pretty much s---

The inmates were huddled asleep in their beds
While visions of freedom danced in their heads
In Sacramento Jerry had donned his night cap
And just settled down for a quick power nap

When out in the yard there arose such a clatter
All sprang from their beds to see what was the matter
Inmates all crowded the windows to see
What the cause of all the alarm could be

The moon on the tips of the coiled razor wire
Twinkled and gleamed like sparks from a fire
When what to their wondering eyes should appear
But Santa and sleigh, minus reindeer

The lil' ol' driver, all smiling and bright
Brought a dozen elves to help him that night
More tight than sardines his helpers were stacked
Their faces familiar to some in the pack

"Now Anderson, Garner, Roberts, LeBahn
Fritz, Grounds and Turner, Montes, come on
Zarrinam, Chappell, Minor and Peck
Come on, dash this way you've got halls to deck"

He was dressed all in red from his head to his toes
(Surprised he got in with those gang-colored clothes)
Boxes from vendors he had strapped to his back
Walkenhorst, Union, and all the rat-pack

His eyes were a-twinkle and his dimples how merry
Inmates were laughing, guards looking wary
From the stump of a pipe he held tight in his teeth
Smoke (of some kind) hung around like a wreath

He spoke not a word but went straight to his work
Shook every hand and then turned with a jerk
And throwing his helpers into the sleigh
Flew over the wire toward breaking day

He stood in his sleigh and gave a sharp whistle
And away they all few like an unguided missile
Be we heard his chant as he flew on his way
"Merry Christmas to all and freedom one day!"

CORRECTION

Our apologies for those confused by errors in previous CLN editions relating to the cost of subscriptions. Yes, the rates are increasing, as of January 1, 2017. Unfortunately, all costs, printing, mailing and production have increased over the last few years.

We've endeavored to keep inmate costs as low as possible, however, CLN must be self-supporting and the present rate increase will make that goal more attainable. For those who renewed prior to Jan. 1, 2017 at the old rate, your renewal time will be honored. New rates:

Inmate subscriptions:

- $35-1 year
- $60-2 years
- $90-3 years.

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We apologize for any confusion and inconvenience.

CALIFORNIA LIFER NEWSLETTER

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