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CALIFORNIA LIFER NEWSLETTER™

State and Federal Court Cases by John E. Dannenberg

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

CA SUPREMES DECLINE TO REVISIT BUTLER SETTLEMENT CASE

In re Roy Butler

CA 1(2); Case No. A139411
CA Supreme Ct. Case No. S217611
July 30, 2014

The California Supreme Court declined to transfer to itself the settled case below, which was an agreement between the BPH and petitioner Butler to determine a lifer's term at his/her initial suitability hearing (or the next scheduled hearing, whichever comes first). In that agreement, the BPH agreed to promulgate appropriate new regulations; the appellate court retained jurisdiction for one year to hold the Board accountable.

It would appear pointless on its face for the Court to review a matter that was *agreed* to below by the parties' formal settlement. But pointless isn't a word in the vocabulary of the Sacramento County and San Diego County district attorneys. In what can perhaps be described as unmitigated bluster, each of those two filed transfer requests with the Supreme Court, post-settlement below, even though the court action below *did not originate in their counties.*

No one questions the First Amendment rights of these parties to speak out, even if only as spoilers, in matters external to their own electorate. But these parties are well known to LSA – they robotically object to *anything* favorable to lifers' efforts to gain parole. The fact that 99.5% of paroled lifers don't recidivate doesn't dissuade their fervent assaults. It would be a refreshing change of course indeed if these parties instead *joined* the lifers they renounce, by gaining "insight" through anger management training.

STAY VACATED BY DISTRICT COURT IN *GILMAN V. BROWN*; MATTER PASSED TO 9TH CIRCUIT; 9th CIRCUIT GRANTS STAY PENDING APPEAL

Gilman v. Brown

USDC (N.D. Cal.)
Case No. 05- 00830-LKK-CKD
[Ninth Circuit Court of Appeal Case No. 14-15613]
July 22, 2014
August 12, 2014

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COURT CASES (in order)
Reviewed in this Issue:

***Gilman* from pg 1**

In *Gilman*, the U.S. District Court had found the exercise of the Governor's parole-grant reversal power to be an ex post facto law, as applied to lifers whose crimes predated that law. Pending the state's appeal of that ruling, the District Court had issued a stay. However, on July 22, 2014, the District Court dissolved its stay, effective in 21 days, to permit the Ninth Circuit to issue (or not) its own stay pending appeal. If the Ninth Circuit declined to issue a stay, the District Court ruling would have to be followed, unless the state further petitioned that matter to the en banc Ninth Circuit and/or to the U.S. Supreme Court. The text of the District Court's order is reported below.

> This court previously entered its judgment in this case, but stayed the judgment pending the resolution of any appeal. [Fn. 1.] However, as plaintiff points out in their pending Motion To Enforce Judgment, no party filed a motion requesting that this court issue a stay pending appeal under the applicable standards. f In their opposition, defendants assert, among other things, that if the matter is not stayed, Defendants agree with Plaintiffs that a 21-day stay is proper so that Defendants may seek a stay from the Ninth Circuit. [ ].
>
> Accordingly, (1) Plaintiff's motion is GRANTED; and (2) that portion of the court's order and judgment [ ] that issued a stay pending appeal is hereby vacated, effective 21 days from the date of this order, so that a stay may be sought from the Ninth Circuit.

Fn. 1: The court stated that "[t]his order is stayed for 31 days, and goes into effect immediately thereafter, unless a timely appeal is filed,." [ ]. Accordingly, if a timely appeal was filed, the stay would remain in effect until the appeal was resolved.

The state obliged the District Court the next day by filing an emergency stay application in the Ninth Circuit. On August 12, 2014, the Ninth Circuit granted a stay, pending issuance of mandate in the case (i.e., when it becomes final as to *all* appeals, including to the U.S. Supreme Ct.).

> Appellants' emergency motion to stay the district court's February 28, 2014 order is granted. See *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The district court's February 28, 2014 order is stayed pending the issuance of the mandate in appeal Nos. 14-15613 and 14-15680. Appellees' request for new briefing schedule is denied as unnecessary. The following briefing schedule governs: the first brief on cross-appeal by appellants is due September 22, 2014; the second brief on cross-appeal by appellees is due October 22, 2014; the third brief on cross-appeal by appellants is due November 21, 2014; and the optional cross-appeal reply brief by appellees is due within 14 days after service of the third brief on cross-appeal. [9202320] [14-15613, 14-15680]

Therefore, as to the Governor's power to reverse, it's business as usual for some time to come.

PUBLISHER'S NOTE

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

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

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

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

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EDITORIAL

LIFE SUPPORT ALLIANCE

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Governor Brown, August 8, 2014

Although you declared, last year, that the prison crisis was over, surely you, as well as the public, prison advocates and certainly the 3 federal judge panel, know that the crisis is most certainly not over. And although your administration and the legislature have made considerable strides, via legislation and various acts of legerdemain, in addressing overcrowding, the larger issue, who should we incarcerate and for how long, remains.

So it puzzles me, and many other prisoner advocates, when you continue to refuse to release clearly reformed, rehabilitated and undisputedly transformed prisoners, granted parole by your own Board of Parole Hearings. Yes, these life term inmates have committed the most serious of crimes. But they are also the most serious about rehabilitation, life change and becoming productive citizens. This group, alone of all the prisoner cohorts, MUST engage in the deep introspection, self-examination and the true personal change we hope to see in all those subjected to society's correction.

They have proven that change before your own appointees on the Parole Board, often more than once. And it is undeniable that these men and women, many of whom have served decades in prison for crimes committed in their youth, do not recidivate, reoffend or continue to prey on society.

The number of paroled lifers returned to prison for another crime over the last 20 years is in the single digits—and none for a similarly violent offense. No other group of released prisoners, whether from local correctional facilities, state prisons, probation, programming or parole, can match the stellar performance of paroled lifers in remaining offense free and contributing to society.

Yet you refuse to sanction their release. In 2013 you repudiated 100 men and women found suitable to return to society by the parole board, your parole board. This year it appears you are on track for a similar performance. That is an additional 200 souls still in California's overcrowded prisons who could be safely released, cutting expenses and above all, proving we are a society of law coupled with humanity.

And while your reversal missives often chastise these lifers for their 'lack of insight' or 'failure to understand' the reason for their long-ago crime, we believe it is you, Governor Brown, who exhibits a habitual lack of insight and understanding, even obstinacy. You repeatedly criticize those who you refuse to release for being unable to explain why they committed the life crime, even in the face of turmoil, chaos and upheaval in their lives at the time. You ask, why did they turn to crime to cope, when others in similar situations did not?

Editorial

Our question to you, Governor, is: do you really expect an answer? Criminologists, sociologists, psychiatrists, therapists, doctors, lawyers and pastors have been searching for the answer to that question for ages. If anyone could provide that answer, society's ills could be cured. There is no simple or single answer and to expect such demonstrates a lack of understanding of crime and society at the most basic level. So much for your understanding.

As for insight; you have before you simple documents, words on paper and nothing else to convey to you the essence of the person under consideration. You cannot look into their faces, see their emotions, read the deep and real remorse reformed lifers carry with them forever. These are the things your parole board commissioners witness, evaluate and understand before finding a lifer suitable for parole. That, Governor, is insight you lack.

And then there is trust. By refusing to allow these lifers to parole (where, by the way, they are firmly supervised) you declare your mistrust of them. That, perhaps, we could understand. But you also thusly declare your mistrust of your own appointees, as each and every one of the 12 current members of the Board of Parole Hearings has been appointed or re-appointed by you, personally. If, Governor Brown, you do not trust these men and women to make serious, considered decisions, why in the world would you appoint and then reappoint them? If you don't trust them, remove them, or allow them to do the job you evidently, at one time, thought they could be trusted with. Micro-managing and second guessing those in whom you have publically proclaimed your trust via gubernatorial appointment is unseemly, unwise and, hopefully, will be held unlawful under litigation currently in the courts.

But you can prove us wrong. You can show your understanding, insight and trust of your agents and your own judgment by curtailing your parole reversals, allowing those life term inmates granted parole by the Board of Parole Hearings to return to society, as the law promises to those who prove their suitability.

That, perhaps, would be the most understanding and insightful act of your governorship.

Vanessa Nelson-Sloane, Director
Life Support Alliance
Prisoner Advocate, Taxpayer and Voter

Cases cont. from pg. 2

"SOME EVIDENCE" SUPPORTS BOARD'S 5-YEAR DENIAL

In re Jose Rodriguez

CA4(1) No. D064772
June 25, 2014

Jose Rodriguez, sentenced to 16-life in 1997 for 2nd degree murder with the use of a weapon, was denied parole for 5 years in 2013 based upon the Board's finding that his explanation of the events surrounding his offense continue to evolve over time, including during his latest hearing, and that therefore he did not demonstrate remorse and insight sufficient to convince the panel that he appreciated why he committed the offense.

A divided panel of the Court of Appeal found that there was "some evidence" to support the Board's action, and denied his petition. While it wasn't persuaded that "egregiousness" of the offense demonstrated *current* dangerousness, per se, it found that lack of insight did.

> The Board additionally based its decision on concerns about the level of Rodriguez's acceptance of responsibility and insight into what caused him to kill Field. An inmate's acceptance of responsibility and development of insight are also appropriate considerations in determining parole suitability. (Cal. Code Regs., tit. 15, § 2402, subd. (d)(3); *Shaputis I, supra*, 44 Cal.4th at p. 1246.) Moreover, an inmate's lack of insight into and understanding of the behavior underlying the commitment offense can support a conclusion

***Rodriguez* from pg. 5**

the inmate is currently dangerous. (*Shaputis I*, at p. 1260.) Indeed, the California Supreme Court has specifically recognized "the presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (*Shaputis II, supra*, 53 Cal.4th at pp. 218.)

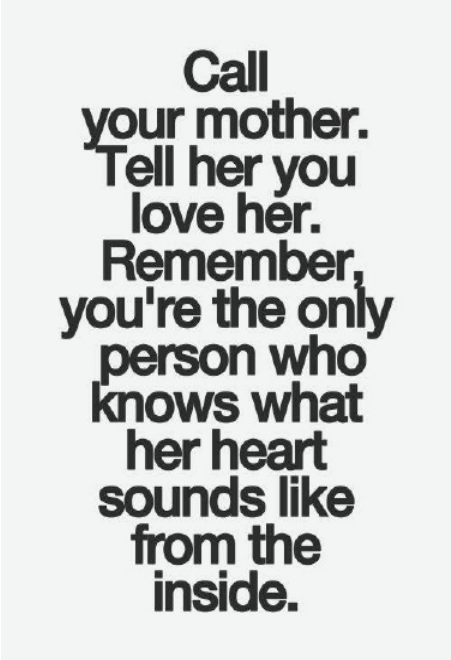
Expressions of remorse and demonstration of insight will vary from inmate to inmate and there are no special words for an inmate to articulate in order to communicate he or she has committed to ending a previous pattern of violent or antisocial behavior. (*Shaputis I, supra*, 44 Cal.4th at p. 1260, fn. 18.) While Rodriguez acknowledged responsibility and articulated remorse for his crime, his version of events has continued to evolve over time, which, in the Board's view undermined his general credibility. It also suggested he was still grappling with what happened and why. The comprehensive risk assessment supported the Board's view. The assessment described his insight as "generally fair," which connotes both that he possesses some insight and that there are additional gains for him to make. The assessment also stated he tended to portray himself in an overly favorable and defensive manner, he needed to enlist the aid of a trusted third party to help him improve his insight, and he needed to explore unresolved anger issues.

Consistent with the assessment's characterization of his portrayal of himself, Rodriguez attempted to shift some blame to Field's wife at the parole hearing by claiming she coerced him into starting their affair and badgered him into continuing it despite his better judgment. He also attempted to minimize his actions by claiming Field goaded him into a homicidal rage by insulting his masculinity. Given these circumstances, we conclude there is at least a modicum of evidence to support the Board's conclusion Rodriguez was currently dangerous because he had not accepted full responsibility and did not possess adequate insight into why he murdered Field.

The court also denied Rodriguez' claim that Marsy's Law [expanding parole denial intervals] was ex post facto as applied to him. While the court decided this based upon current case law, it would appear not to be a forceful claim in any event, because Rodriguez could have been denied 5 years under *either* pre- or post-Marsy's law standards.

A petition for review in the California Supreme Court has been filed.

* * * * *



COURT OF APPEAL RETROACTIVELY REVERSES SECOND DEGREE FELONY MURDER CONVICTION RESULTING FROM SHOOTING AT AN UNINHABITED DWELLING

In re Michael Hansen

___Cal.App.4th ___;
CA 4(1); Case No. D063549
July 7, 2014

This case concerns a narrow issue that might provide an avenue for some lifers to reopen their long final appeals. The situation presented is for one convicted of second-degree felony murder, where the homicide resulted from shooting into an uninhabited building.

In 1994, in this same petitioner's case, the California Supreme Court held that a death that resulted from shooting into an uninhabited building *could* constitute a second-degree felony murder, and that it was proper to so instruct the jury. (*People v. Hansen* (1994) 9 Cal.4th 300, 311.) However, in 2009, the California Supreme Court expressly overruled that holding. (*People v. Chun* (2009) 45 Cal.4th 1172, 1199.) Hansen lately filed a habeas corpus petition in the Superior Court, requesting he be accorded retroactive relief, and have his second-degree murder conviction vacated. The trial court agreed, and granted his petition.

On the State's appeal, a divided panel of the Court of Appeal upheld the trial

***Hansen* from pg. 6**

court's ruling. While all three justices agreed that the law (*Chun*) now overrode earlier case law (*Hansen*), one justice disagreed on what judicial standard of error should be required to grant such relief.

> My principal point of departure is the majority's application of the harmless-beyond-a-reasonable-doubt standard of review for prejudice. Although our California Supreme Court has not considered what standard to apply when, as here, we are engaged in collateral review of a final judgment, we should adopt and apply the more deferential "grave doubt" harmless error standard of review, which governs consideration of similar trial errors when found in federal habeas proceedings

On August 15, 2014, the State petitioned the CA Supreme Court for review. Since the issue revolves around two prior rulings of the CA Supreme Court, it is quite possible they will hear the case. CLN reports on this case at this time only to alert potential candidates whose crimes mirror Hansen's that retroactive relief from their convictions might become available if Hansen's writ survives review.

TWO COURT DECISIONS ANALYZE LWOP RE-SENTENCING

In re Haneef Shaheed

CA 4(1); Case No. D065031
July 23, 2014

In an unusual concession, the CA Attorney General agreed that recent decisions by the U.S. Supreme Court (*Miller v. Alabama* (2012) __ U.S. __, 132 S.Ct. 2455) and the CA Supreme Court (*People v. Gutierrez* (2014) 58 Cal.4th 1354) require resentencing for petitioner Shaheed based on the fact that he was only 16 when sentenced to LWOP, and that the sentencing court did not have the benefit of the new case law. Because the matter was conceded, the writ was issued without even the issuance of an Order to Show Cause.

> In 1998, a jury convicted petitioner Haneef Shaheed of first-degree murder, kidnapping during a carjacking, and kidnapping for robbery. The jury also found true the special circumstances that the murder was intentional and committed for financial gain, committed by lying in wait, committed during a robbery, and committed during a kidnapping. The court sentenced Shaheed to life without the possibility of parole pursuant to Penal Code section 190.5, subdivision (b). Shaheed was 16 years old at the time he committed the crimes.
>
> In his petition for writ of habeas corpus, Shaheed contends that Penal Code section 190.5 violates the Constitution's Eighth Amendment's prohibition on cruel and unusual punishment. Shaheed's petition is premised on a recent Supreme Court decision, *Miller v. Alabama* (2012) __ U.S. __, 132 S.Ct. 2455 (*Miller*), which held that a state statute imposing a mandatory sentence of life imprisonment without parole for those under the age of 18 that commit murder violates the Eighth Amendment and that sentence may be imposed only after the court considers the "distinctive attributes of youth" and how those attributes "diminish the penological justifications for imposing the harshest sentences on juvenile offenders." (*Id*. at p. 2465.)
>
> At the time Shaheed filed his writ petition, the California Supreme Court was reviewing the same question raised by Shaheed: whether existing authority interpreting section 190.5, subdivision (b) as creating a presumption in favor of a sentence of life without parole violates the Eighth Amendment to the United States Constitution under the principles announced in *Miller*. (*People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*).)
>
> We stayed further proceedings involving Shaheed's petition pending the final outcome of Gutierrez. In its decision, the Supreme Court held that Miller precludes an interpretation of 190.5 as creating a presumption of life without parole and that previous sentencing determinations premised on that presumption require resentencing. (*People v. Gutierrez, supra*, 58 Cal.4th at p. 1390-1391.)
>
> After the Supreme Court filed its decision, we requested an informal response from the Attorney General regarding the effect of *Gutierrez* on Shaheed's petition. In response, the Attorney General concedes that relief should be granted and the case remanded for resentencing.
>
> The Attorney General recognizes relief is warranted. When Shaheed was sentenced in 1998, the trial court applied

***Shaheed* from pg. 7**

governing authority to construe Penal Code section 190.5 as establishing a presumption in favor of a sentence of life without parole and found no basis for reducing the sentence. (Exh. M, p. 367.) As discussed in Gutierrez, although we do not fault the trial court for dutifully applying the law as it stood at the time, that presumption raises serious constitutional concerns that require a remand for resentencing.

We may grant relief without issuing an order to show cause or writ of habeas corpus when the petitioner's custodian concedes the requested relief must be granted. (*People v. Romero* (1994) 8 Cal.4th 728, 740, fn. 7.) Because of the Attorney General's concession, we conclude no useful purpose would reasonably be served by issuance of an order to show cause and/or plenary disposition of the matter. The conviction is vacated. The matter is remanded to superior court for resentencing consistent with *Miller* and *Gutierrez*.

Although this decision is not published, the case law upon which it relies is. Similarly situated juvenile LWOP prisoners should file resentencing petitions.

People v. Victor Garrett

___Cal.App.4th___;
CA (3); Case No. C067436
June 30, 2014

In another juvenile offender resentencing application, the Court of Appeal held that the fact of the juvenile offender's entitlement to a youth offender parole hearing after 25 years of incarceration did not cure the constitutional error in his de facto LWOP sentence for nonhomicide offenses.

Victor Garrett, a 17-year-old minor, was tried as an adult and convicted of multiple robberies. The jury found the firearm allegations true, following which the trial court sentenced him to 74 years and 4 months to life. On ap-

***Garrett* from pg. 8**

peal, he contended that his sentence constituted cruel and unusual punishment because he was only 17 at the time.

The Court of Appeal agreed, and remanded his case to the trial court for resentencing consistent with *People v. Caballero* (2012) 55 Cal.4th 262. The Court held that Garrett's LWOP-equivalent sentence was unconstitutional because the trial court failed to consider the mitigating factors announced by the U.S. Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48 and *Miller v. Alabama* (2012) 132 S.Ct. 2455.

Although PC § 3051(b), added by Senate Bill 260, entitles Garrett to a youth offender parole hearing during his 25th year of incarceration, this does not cure the constitutional error. Under the controlling case law, the sentencing court is required to evaluate the mitigating circumstances in a juvenile offender's crime and in his life when selecting the initial punishment. "The statutory promise to have a future parole board review an improperly considered sentence does not cure the constitutional error." (See also *People v. Gutierrez* (2014) 58 Cal.4th 1354.)

The Court of Appeal disagreed with *People v. Gonzalez* (2014) 225 Cal.App.4th 1296 on this issue. Remand here was required to permit the trial court to resentence Garrett to a term that does not violate his constitutional rights and provides him with a meaningful opportunity for release.

The heart of the Court's analysis is reported here in full to allow other juvenile LWOP-equivalent prisoners to evaluate if they might also be eligible for relief.

B.
Garrett's Sentence is the Functional Equivalent of a Life Sentence without Parole

In sentencing Garrett, the trial court relied on the probation officer's report. Although the probation officer's report states Garrett was 17 at the time of the offenses, it does not consider his mental or emotional development either as it related to his culpability or the appropriate sentence for his crimes. The trial court stated that "it is, I think, a tragedy that someone as young as yourself . . . is involved in this situation." However, the trial court did not take into account the factors of mental and emotional maturity articulated by the *Graham* and *Miller* courts in imposing its sentence on Garrett.

At the time of his sentencing, Garrett was 19 years old. With approximately 2.5 years of presentence custody credits, Garrett's sentence would have made him eligible for parole at about 90 years of age. At the age of 90, Garrett will have little opportunity to become a contributing member of society. (Fn. 1.) (*Caballero, supra,* 55 Cal.4th at p. 266.) This sentence constitutes the functional equivalent of a life-without-parole term.

Fn. 1. Even with the 15 percent "good time" credits provided by section 2933.1, Garrett will not become eligible for parole until after he turns 82 years of age. (See § 667.5, subd. (c)(9) [including robbery among violent felonies for which custody credits are limited under section 2933.1, subdivision (a)].)

C.
Senate Bill No. 260 (2013-2014 Reg. Sess.) Does Not Cure the Constitutional Error in Sentencing

The Legislature responded to *Miller, supra*, __ U.S. __ [132 S.Ct. 2455] and *Caballero, supra*, 5 Cal. 4th 262 by passing Senate Bill No. 260 (2013-2014 Reg. Sess.), which became effective on January 1, 2014. The Legislature noted the bill "recognizes that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society." (Sen. Bill No. 260, § 1 (2013-2014 Reg. Sess.).) The Legislature declared, "[t]he purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in [*Caballero*] and the decisions of the United States Supreme Court in [*Graham*], and [*Miller]*. It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established." (Sen. Bill No. 260, § 1 (2013-2014 Reg. Sess.).)

To effectuate the Legislature's intent, Senate Bill No. 260 (2013-2014 Reg. Sess.) added section 3051 to the Penal Code, which requires the Board of Parole Hearings to conduct youth offender parole hearings during the 15th, 20th, or 25th year of incarceration. (§ 3051, subd. (b).) A youthful offender whose

***Garrett* from pg. 9**

sentence is a term of 25 years to life or greater is "eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (§ 3051, subd. (b)(3); Sen. Bill No. 260, § 4 (2013-2014 Reg. Sess.).) In conducting youth offender parole hearings under section 3051, the Board of Parole Hearings is required 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 of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).) If the youthful offender is found suitable for parole by the Board of Parole Hearings, he or she must be released even if the full determinate term originally imposed has not yet be completed. (§ 3046, subd. (c).)

In light of Garrett's newly enacted entitlement to a youth offender parole hearing during his 25th year of incarceration, the Attorney General argues Garrett's sentence "is constitutional because he now has a realistic opportunity to obtain release from prison during his lifetime." We conclude remand for resentencing is compelled by the Eighth Amendment.

In *Caballero*, the California Supreme Court concluded: "Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under Graham's nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board." (*Caballero, supra*, 55 Cal.4th at pp. 268-269, italics added.)

Even though Senate Bill No. 260 (2013-2014 Reg. Sess.) provides what may be considered a "safety net" providing a juvenile offender the opportunity for a parole hearing during his or her lifetime, the new legislation does not substitute for the sentencing court's consideration of all individual characteristics of the offender. In *Miller*, the United States Supreme Court held imposition of punishment for crimes committed as a juvenile constitutes a task "demanding individualized sentencing . . . ." (*Miller, supra,* ___ U.S. at p. ___ [132 S.Ct. at p. 2467].) After noting its earlier decisions requiring consideration of the mitigating and aggravating factors unique to each case of sentencing for crimes committed as a minor, the *Miller* court emphasized that, "[o]f special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the 'mitigating qualities of youth.' " (*Id*. at p. ___ [132 S.Ct. 2455, 2467], quoting *Johnson v. Texas* (1993) 509 U.S. 350, 367, italics added.) Consequently, Senate Bill No. 260 does not render Garrett's claim moot.

We are aware of a contrary conclusion reached in *People v. Gonzalez* (2014) 225 Cal.App.4th

***Garrett* from pg. 10**

1296, 1311 (*Gonzalez*). Gonzalez involved a youthful offender who was sentenced to serve 50 years to life in prison. (*Id*. at p. 1302.) The *Gonzalez* court relied on Senate Bill No. 260 (2013-2014 Reg. Sess.) in rejecting the defendant's argument his sentence constituted cruel and unusual punishment. (*Id.* at pp. 1300-1301.) The *Gonzalez* court concluded that "[Senate Bill No.] 260 . . . cured or rendered moot any error under *Miller* in the sentencing hearing Gonzalez received." (*Id.* at p. 1312.) *Gonzalez* further concludes the "incarceration, although lengthy and under a mandatory sentence, does not implicate *Miller's* per se ban on mandatory [life imprisonment without possibility of parole (LWOP)] terms for juveniles. He similarly falls outside *Caballero*'s holding that de facto LWOP terms may be tantamount to an LWOP for constitutional purposes. Simply put, under the new legislation, Gonzalez does not face the prospect of [serving life in prison without the possibility of parole]. Therefore, *Miller* does not apply, and neither does Caballero's recognition that a lengthy term of years may amount to an LWOP sentence." (*Gonzalez*, at p. 1309.)

We disagree with *Gonzalez* because the penalty selection that comports with *Miller* and *Caballero* must be undertaken in the first instance by the sentencing court. (*Miller, supra*, ___ U.S. ___ [132 S.Ct. at p. 2467]; *Caballero, supra*, 55 Cal.4th at p. 268-269.) Regardless of whether the new statutory scheme enacted by Senate Bill No. 260 (2013-2014 Reg. Sess.) may eventually convert a mandatory life sentence to one with possibility of parole, the United States and California Supreme Courts have clearly required the sentencing court to consider the factors of youth and maturity when selecting the initial punishment. The statutory promise to have a future parole board review an improperly considered sentence does not cure the constitutional error.

The possibility that Garrett will have a board of parole undertake an evaluation 25 years after his sentencing is not a substitute for the trial court's evaluation at sentencing. Although the trial court is not required to articulate the analysis of *Miller, supra*, ___ U.S. __ [132 S.Ct. 2455], *Graham, supra,* 560 U.S. 48, and *Caballero, supra*, 55 Cal.4th 262 as it relates to every youthful offender, each youthful offender is entitled to a sentence that passes muster under the Eighth Amendment. Moreover, a properly imposed sentence by itself can prove instructive in indicating the trial court's conclusions about the youthful offender's level of development, culpability, and other relevant factors. When youthful offenders must ultimately show achievement of sufficient growth and maturity to secure release on parole, they will need to refer back to the circumstances that existed at the commission of the crimes and were apparent to the trial court at sentencing. (*Caballero, supra*, 55 Cal.4th at pp. 268-269.) Without a proper evaluation by the trial court, youthful offenders will be deprived of their constitutionally guaranteed evaluation at the time of their sentencing and again when attempting to meet their burden during the much later youth parole hearings. (*Ibid*.) Consequently, we adhere to the guidance of the United States and California Supreme Courts that the sentencing court must engage in the proper evaluation of the appropriate punishment for a youthful offender. (*Miller, supra,* ___ U.S. ___ [132 S.Ct. at p. 2467]; *Caballero, supra*, 55 Cal.4th at p. 268-269.)

The question of whether remand for resentencing must be ordered in this case is additionally informed by the California Supreme Court's recent examination of constitutionally deficient sentencing for youthful offenders in *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*). Gutierrez involved consolidated cases in which two defendants, Gutierrez and Moffett, each separately committed special circumstance murder while 17 years old. (*Id*. at p. 1360.) The trial courts imposed LWOP sentences on each defendant under section 190.5, subdivision (b), which had been construed to create a presumption in favor of LWOP sentences for special circumstance murders committed by 16- and 17-year-old offenders. (*Ibid.*) In *Gutierrez*, the California Supreme Court harmonized section 190.5, subdivision (b), with Eighth Amendment protections by holding trial courts have discretion to sentence a youthful offender to serve 25 years to life or LWOP with no presumption in favor of the LWOP option. (*Id.* at pp. 1371-1379.)

Because the defendants in *Gutierrez* had been sentenced under the prior, prevailing presumption

***Garrett* from pg. 11**

in favor of LWOP, the Supreme Court held that resentencing was required. (58 Cal.4th at pp. 1361, 1379.) In so holding, the *Gutierrez* court rejected the Attorney General's argument that the recent enactment of section 1170, subdivision (d)(2), "removes life without parole sentences for juvenile offenders from the ambit of Miller's concerns because the statute provides a meaningful opportunity for such offenders to obtain release." (*Gutierrez, supra,* 58 Cal.4th at p. 1386.) Section 1170 allows a youthful offender to petition the court to recall the sentence after serving 15 years. (*Id.* at p. 1384 [noting also that the youthful offender, if not initially successful, may petition again after 20 and 24 years have been served].) The *Gutierrez* court explained that the United States Supreme Court in "Graham spoke of providing juvenile offenders with a 'meaningful opportunity to obtain release' as a constitutionally required alternative to—not as an after-the-fact corrective for—'making the judgment at the outset that those offenders never will be fit to reenter society.' (*Graham*, at p. 75 [130 S.Ct. at p. 2011], italics added.) Likewise, *Miller*'s 'cf.' citation to the 'meaningful opportunity' language in *Graham* occurred in the context of prohibiting 'imposition of that harshest prison sentence' on juveniles under a mandatory scheme. (*Miller*, at p. __ [132 S.Ct. at p. 2469].) Neither *Miller* nor *Graham* indicated that an opportunity to recall a sentence of life without parole 15 to 24 years into the future would somehow make more reliable or justifiable the imposition of that sentence and its underlying judgment of the offender's incorrigibility 'at the outset.' (*Graham*, at p. 75 [130 S.Ct. at p. 2011].) [¶] Indeed, the high court in *Graham* explained that a juvenile offender's subsequent failure to rehabilitate while serving a sentence of life without parole cannot retroactively justify imposition of the sentence in the first instance: 'Even if the State's judgment that *Graham* was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset.' (*Graham, supra*, 560 U.S. at p. 73 [130 S.Ct. at p. 2011], italics added.) By the same logic, it is doubtful that the potential to recall a life without parole sentence based on a future demonstration of rehabilitation can make such a sentence any more valid when it was imposed. If anything, a decision to recall the sentence pursuant to section 1170(d)(2) is a

***Garrett* from pg. 12**

that is, a sentence that, although undoubtedly lengthy, provides him with a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' (*Graham*, 560 U.S. at p. ___ [130 S.Ct. at p. 2030].)" (*Caballero, supra*, 55 Cal.4th at p. 273 [Werdegar, J., conc.].)

DISPOSITION

... We reverse the judgment as to Garrett and remand for resentencing consistent with *People v. Caballero, supra*, 55 Cal.4th 262.

This case is not over. Petitions for review were filed in early August by both the petitioner and the Attorney General. Since this review questions opposing conclusions of law reached in published Court of Appeal rulings, it is very likely to gain the CA Supreme Court's review.

* * * * *

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

The following cases illustrate evolving interpretations of the Three Strikes lifer law, as well as Prop. 36-based attempts to gain resentencing. While many frivolous petitions continue to flood and clog the courts, there have been some illustrative decisions which are reported in this issue to inform the growing Three Strikes lifer population. Most importantly, we begin with a significant California Supreme Court ruling, which, if it is accorded retroactive application, could affect the second and third strike sentencing of many current prisoners.

CALIFORNIA SUPREME COURT HOLDS THAT ONE "ACT" CANNOT COUNT AS MORE THAN ONE STRIKE

People v. Darlene Vargas

___Cal.4th ___;
CA Supreme Ct. No. S203744
July 10, 2014

In a far-reaching decision that recognized the intent of the voters when enacting the Three-Strikes law, the California Supreme Court ruled that when a repeat offender commits a new offense, and has a "prior" singular act which was counted as more than one strike (because it broke more than one law), the sentencing court must strike the "strikes" (beyond the first "strike") that result from multiple convictions arising from the single criminal act.

> We consider in this case whether two prior convictions arising out of a single act against a single victim can constitute two strikes under the Three Strikes law. We conclude they cannot.

In so ruling, the Court observed that the intent of the voters was to deter criminal *acts* by previous offenders, not to increase punishment according to how the act was prosecuted. The Court first summarized the background and related cases, to distinguish the issue at bar.

> The consequences in this state of repeated criminal conduct changed dramatically in 1994. First the Legislature, and then the electorate, introduced into this state's jurisprudence what is now known collectively as the Three Strikes law. Under that law, if a defendant reoffends after having suffered a first qualifying felony conviction, a doubled sentence is mandatory. If, after having suffered two qualifying felony convictions, an offender commits a third qualifying felony, the Three Strikes law presumes he or she is incorrigible and requires a life sentence. "Sentence enhancement based on recidivism flows from the premise that the defendant's current criminal conduct is more serious because he or she previously was found to have committed criminal conduct and did not thereafter reform." (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1024.) The typical third-strike situation thus involves a criminal offender who commits a qualifying felony after having been afforded two previous chances to reform his or her antisocial behavior, hence the law's descriptive baseball-related phrase, " 'Three Strikes and You're Out.' " (*People v. Hazelton* (1996) 14 Cal.4th 101, 104.)

Despite this paradigm, situations have occurred that have challenged the assumption that an offender has had two prior opportunities to reform. For example, in a case in which an offender's two previous qualifying felony convictions were for crimes so closely connected in their commission that they were tried in the same proceeding, we held that such convictions can nevertheless constitute two separate strikes because the Three Strikes law does not require that prior convictions, to qualify as strikes, be brought and tried separately. (*People v. Fuhrman* (1997) 16 Cal.4th 930.) Similarly, in a case in which the offender's previous two crimes could not be separately punished at the time they were adjudicated

***Vargas* from pg. 13**

> because they were committed during the same course of conduct (§ 654), we held such close factual and temporal connection did not prevent the trial court from later treating the two convictions as separate strikes when the accused reoffended. (*People v. Benson* (1998) 18 Cal.4th 24 (*Benson*).)
>
> The instant case presents a more extreme situation: Defendant's two prior felony convictions—one for robbery and one for carjacking—were not only tried in the same proceeding and committed during the same course of criminal conduct, they were based on the same act, committed at the same time, against the same victim. As we explain, because neither the electorate (§ 1170.12) nor the Legislature (§ 667, subds. (b)–(i)) could have intended that both such prior convictions would qualify as separate strikes under the Three Strikes law, treating them as separate strikes is inconsistent with the spirit of the Three Strikes law, and the trial court should have dismissed one of them and sentenced defendant as if she had only one, not two, qualifying strike convictions.

Darlene Vargas was convicted in 1999 of two different crimes, robbery and carjacking, that evolved from her commission of a single act: forcibly taking the victim's car. In a subsequent burglary prosecution, both the robbery and the carjacking convictions were used as strike priors. Here, the trial court was required to dismiss one of the two strike priors, because using both convictions as strikes is inconsistent with the intent underlying the Three Strikes law, which punishes recidivist behavior while allowing three chances before imposing the harshest penalty (life). Under the facts of this case, Vargas committed just one criminal act, not two, which resulted in two convictions; she does not pose a greater risk to society within the meaning of the Three Strikes law simply because the Legislature has chosen to criminalize her act in different ways.

The Court then focused on the issues to be decided.

> The issue we decide today is whether the trial court should have dismissed one of defendant's two prior felony convictions, alleged as strikes under the Three Strikes law, where both convictions were based on the same act. The question has two potential aspects: First, when faced with two prior strike convictions based on the same act, is the trial court required to dismiss one of them? Second, assuming the sentencing court retains discretion to dismiss a strike or not, did the trial court here, on the facts of this case, abuse its discretion by declining to dismiss one of defendant's two strikes? Because we find the first question dispositive, we need not continue and discuss whether the trial court abused its discretion.

The baseball analogy of the Three Strikes law, as it would be understood by the voters, was not lost on the Court, and guided its eventual decision.

> Given this information, the voting public would reasonably have understood the "Three Strikes" baseball metaphor to mean that a person would have three chances—three swings of the bat, if you will—before the harshest penalty could be imposed. The public also would have understood that no one can be called for two strikes on just one swing. Permitting the trial court below to treat defendant's 1999 robbery and carjacking convictions as separate strikes—despite the fact they were based on a single criminal act—would do just that, and thus contravene the voter's clear understanding of how the Three Strikes law was intended to work. Given the obvious twinning of the language used in the legislative version of the Three Strikes law, we discern no different intent with that version of the law.

The Court found that under the facts of Vargas' case, the prior convictions for both robbery and carjacking, arising out of one singular act, could not, in a subsequent criminal prosecution, count as more than one strike. Accordingly, it reversed the judgment below, and remanded for resentencing under the two-strikes provision.

In reviewing the *Vargas* case as to how it might apply to *current* Three-Strikers, two questions remain open.

One, were the underlying "strikes" in your case from only one act? It is a relatively rare occurrence, in this writer's opinion. A typical case arises, for ex-

***Vargas* from pg. 14**

ample, from a perpetrator getting high on drugs, and then assaulting someone while indisputably thus "high." But the felony possession of drugs by itself does not cause one necessarily to therefore assault someone. The two crimes charged in this hypothetical example, both resulting in convictions, could each count as strikes.

Two, if your case's appeal became final before *Vargas* was decided, can you go back and reopen your case to claim, "me, too?" It is quite likely that there are Three-Strike lifers in prison whose second and third strikes arose from a single act. If you are in that posture, you should contact an attorney to file a habeas petition for you. Applying new case law retroactively is not automatic, and must be decided by the courts. The matter is of widespread importance, and should, for maximum chances for all concerned, therefore be taken to the courts by an attorney rather than by a jailhouse lawyer.

* * * * *

TWO CURRENT OFFENSES COULD BOTH RESULT IN 3RD STRIKE SENTENCES EVEN THOUGH ONE WAS NOT A CURRENT VIOLENT OFFENSE

Craig v. Superior Ct.

CA 2(6); Case No. B250309
July 22, 2014

James Craig filed a petition for writ of mandate under PC § 1170.126 (Prop. 36 or the Three Strikes Reform Act of 2012), attempting to appeal from an order denying his post-judgment petition to recall *a portion* of his 1995 Three Strikes 55-year-to-life sentence for first degree residential burglary (Pen. Code, § 459) and carrying a dagger (former § 12020, subd. (a), now § 21310).

Craig's argument was that the crime of carrying a dagger was itself not a listed offense eligible for a third strike, and that that portion of his sentence should be vacated. But the overarching provision of Prop. 36 law was that if in the commission of an offense, the petitioner was "armed," that event overrode any other mitigating circumstances, as regards three-strike sentencing.

> The Court of Appeal found that carrying a dagger amounted to being armed, and that that made his dagger-possession conviction strikeable.

In 1995, Craig committed a residential burglary. He was arrested two weeks later with a double-edged knife, a dagger, on his person. He was convicted of first degree residential burglary (count 1; § 459) and possession of a dagger (count 2; § 12020, subd. (a)), with special findings that he suffered four prior strike burglary convictions and a prior serious felony conviction. (§ 667, subd. (a).) The trial court sentenced Craig to two consecutive 25-year-to-life terms plus five years on the serious felony enhancement (§ 667, subd. (a)), resulting in an aggregate sentence of 55 years to life state prison. In 1996, we affirmed the sentence in an unpublished opinion. (B098935 [Op. by Yegan, J., Stone, P.J., and Gilbert, J., concurring].)

After the voters approved Proposition 36 on November 6, 2012, Craig filed a petition to recall the 25-year-to life sentence on count 2 only on the theory that possession of a dagger is not a violent/serious felony conviction. (§ 1170.126, subd. (b).) On February 14, 2013, the trial court denied the petition stating: "Mr. Craig was convicted of first degree burglary in this case, a 'strike' offense, and is therefore not eligible for resentencing under Penal Code section 1170.126. (See Pen. Code, section 1170.126(e)(1).)"

The Attorney General argues and, as indicated, the trial court ruled, that Craig is ineligible for section 1170.126 relief if one of the commitment offenses is a serious or violent felony. (See In re Martinez (2014) 223 Cal. App.4th 610, 620 [court considered all felonies that led to any indeterminate sentence].) Craig concedes that he does not qualify for resentencing relief on the conviction for residential burglary. But Craig received a consecutive 25-year-to-life term for possession of a dagger which is not a violent or serious felony. (See *In re Jorge* M. (2000) 23 Cal.4th 866, 875 [unlawful possession of a dagger is a wobbler].) He seeks relief on count two.

The Court of Appeal then reframed the question of law before it.

> Stated another way, "there are two parts to [Proposition 36]: the first part is prospective only, reducing the sentence to be imposed in future three strike cases where the third strike is not a serious or violent felony (Pen. Code, §§ 667, 1170.12); the second part is retrospective, providing similar, but not identical, relief for prisoners already serving three strike sentences in cases where the third strike was not a serious or violent felony. (Pen. Code, § 1170.126.)" (*People v.*

***Craig* from pg. 15**

Superior Court (Kaulick), *supra,* 215 Cal.App.4th at p. 1292.)

Craig's petition addresses the second part of Proposition 36 which, in pertinent part, provides that a prisoner serving an indeterminate term of life under the pre-Proposition 36 version of the Three Strikes law may be eligible for resentencing where the third felony conviction is not a serious or violent felony. (*Kaulick, supra*, 215 Cal.App.4th at p. 1296.) If the resentencing eligibility criteria are satisfied and none of the disqualifying exceptions apply, the trial court determines whether resentencing (i.e., imposition of a Two Strikes determinate term) would pose an unreasonable risk of danger to public safety. (1170.126, subd. (f); *Kaulick, supra*, 215 Cal.App.4th at p. 1296.)

The Court went on to rely on *People v. White* to find Craig similarly situated, in denying resentencing relief.

In *White, supra*, 223 *Cal.App.4th 512*, officers saw White throw a loaded firearm into the back of his truck during a police surveillance of White's residence. White was convicted of possession of a firearm by a felon (§ 12021, subd. (a)) and sentenced as a Three Strikes offender to 25 years to life. After the voters approved Proposition 36, White petitioned the court under section 1170.126 to recall his life sentence and resentence him as a second strike offender. The trial court denied the petition on the ground that White was armed with a firearm within the meaning of the armed-with-a-firearm exclusion when he committed the offense. (*Id*., at p. 522.)

The Court of Appeal affirmed. "[A] trial court may deny section 1170.126 resentencing relief under the armed-with-a-firearm exclusion even if the accusatory pleading, under which the defendant was charged and convicted of possession of a firearm by a felon, did not allege he or she was armed with a firearm during the commission of that possession offense." (*Id*., at p. 527.) Citing the Proposition 36 Voter Information Guide, the White court concluded that Proposition 36 is intended to provide resentencing relief to low-risk nonviolent inmates serving life sentences for petty crimes such as shoplifting and simple drug possession. (*Id*., at p. 526.) "White's current offense of being a felon in possession of a firearm - when viewed in light of the fact that he was armed with the firearm during the commission of that offense - cannot be deemed a petty or minor crime for purposes of the Reform Act." (*Ibid*.)

The holding and analysis in *White* applies here. Craig was convicted of unlawful possession of a dagger and was armed with a dangerous weapon during the commission of the offense. The armed-with-a-deadly-weapon exclusion applies because Craig was in physical possession of the dagger and had ready access to it. (*People v. White, supra*, 223 Cal.App.4th at pp. 523-524.) The armed-with-a-dangerous-weapon exclusion does not require that the arming be anchored or tethered to an offense which does not include simple possession. (*Id*., at p. 527; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032 ["facilitative nexus" between the arming and the possession of firearm not required].) Although section 1170.126 is a remedial statute, we do not sit as a "Super Legislature," at liberty to add to or narrow the armed-with-a-deadly-weapon exclusion. (See e.g., *Unzuetta v. Ocean View School Dist*. (1992) 6 Cal. App.4th 1689, 1699.) We also do not sit as a "super electorate."

"ARMED" ALLEGATION, FOR 3RD STRIKE RESENTENCING PURPOSES, CAN BE DRAWN FROM FACTS OF *ACQUITTED* CHARGES

Lowe v. Superior Ct.

___Cal.App.4th___;
CA 3; Case No. C073942
July 25, 2014

In another case (published) interpreting the "armed" allegation as applied to third-strike sentencing, the Court of Appeal held that facts in the record on charges of which the petition had been acquitted, could nonetheless be used to enhance charges of which he was convicted.

Convicted of being a felon in possession of a firearm and sentenced under the "Three Strikes" law more than 15 years ago, petitioner Floyd Lowe (defendant) recently filed a petition for resentencing under the Three Strikes Reform Act of 2012. The trial court denied the petition because defendant was armed with a firearm and intended to cause great bodily injury when he possessed the firearm.

Treating defendant's appeal from the denial of his petition for resentencing as a petition for writ of mandate, we conclude the trial court did not err. We hold that:

(1) prior dismissal of two counts of second degree murder and acquittal on one count of assault with a firearm did not preclude the trial court from deciding, with respect to the petition for resentencing, that defendant was armed with a firearm and intended to cause great bodily injury when he committed the

***Lowe*-from pg. 16**

> felon-in-possession offense; (2) defendant's petition for resentencing did not invoke a Sixth Amendment right to jury trial on whether he was armed with a firearm or intended to cause great bodily injury; and (3) the trial court's factual findings in response to the petition for resentencing did not implicate double jeopardy.

Lowe had been convicted of several offenses, some of which were reversed on appeal, and for which he was not retried. Nonetheless, on his Prop. 36 resentencing application, the trial court found facts developed in Lowe's trial supported the armed allegation it used to deny Prop. 36 relief.

> The trial court based its denial of the petition for resentencing on the facts as they were developed at trial. With the evidence viewed in the light most favorable to the jury verdicts and the trial court's findings, those facts are as follows:
>
> Defendant, with an accomplice, entered an apartment at night by kicking in the front door. A struggle ensued with the occupants of the apartment, and defendant implored his accomplice to shoot one of the occupants. During the struggle, several shots were fired. Eventually, defendant took the gun and pointed it at an apartment occupant. Defendant pulled the trigger, but the gun did not fire because it was empty. An occupant of the apartment and defendant's accomplice both died of gunshot wounds. (*People v. Lowe, supra*, C029375.)
>
> Defendant does not deny that these facts support findings that, during the commission of the felon-in-possession crime, defendant was armed with a firearm and intended to cause great bodily injury. Instead, as discussed below, defendant asserts the trial court could not rely on those facts in the hearing on the petition for resentencing.

After rejecting Lowe's argument on collateral estoppel and res judicata issue preclusion, the Court went on to explain how it could nonetheless rely on facts developed at trial.

> Furthermore, as a practical matter, neither a jury nor a court has ever concluded that defendant was not armed with a firearm or intended to cause great bodily injury when he committed the felon-in-possession offense. The jury actually convicted defendant of assault with a firearm and two counts of second de-

***Lowe* from pg 17**

> gree murder. On appeal, we reversed the assault with a firearm conviction because there was no evidence defendant encouraged or facilitated his accomplice's assault on one of the apartment's occupants who was not killed. (*People v. Lowe, supra*, C029375.) We reversed the two second degree murder counts because the instructions allowed the jury to rely on an improper theory of second degree murder. *(Ibid.)* Neither of these holdings implicated whether defendant was armed with a firearm or intended to cause great bodily injury. In other words, there is no inconsistency between past court and jury findings and the current court finding that defendant was armed with a firearm and intended to cause great bodily injury.

As to Lowe's complaint that the Court relied upon facts which attached to charges of which he was *acquitted*, the Court was not persuaded.

> Finally, defendant argues that the jury's true finding of being armed with a firearm did not survive reversal of the counts (assault and murder) to which they were attached. That observation is beside the point. The trial court in considering defendant's petition for resentencing did not rely on the jury's findings; it made its own. It did not resurrect the counts and enhancement allegations on which judgment had been entered against the People; it looked to the actual evidence at trial. (See *People v. Guerrero* (1988) 44 Cal.3d 343, 354-355 [in determining facts underlying prior convictions, court may look to entire record of conviction].)
>
> The prior proceedings did not preclude the trial court from finding that, in committing the felon-in-possession offense, defendant was armed with a firearm and intended to cause great bodily injury.

The Court went on to deny Lowe's claim of a Sixth Amendment right to a jury trial on the armed allegation, and his double jeopardy claim.

* * * * *

"ARMED" ALLEGATION, FOR 3RD STRIKE RESENTENCING PURPOSES, MUST BE REDETERMINED, FROM THE FACTS ADDUCED AT TRIAL

People v. Acevedo.
CA4(2); Case No. E058557
August 4, 2014

In November 2009, the CHP stopped Acevedo's car for erratic driving. Acevedo failed field sobriety tests and was arrested for DUI. Prior to towing his vehicle, a loaded .38 revolver was found stuffed between the driver's seat and the car's center console.

Acevedo was charged with possession of a firearm by a felon (former § 12021, subd. (a)(1)); possession of ammunition by a felon (former § 12316, subd. (b)(1)); misdemeanor resisting arrest (§ 148, subd. (a)(1)); misdemeanor driving under the influence (Veh. Code, § 23152, subd. (a)); misdemeanor driving with a blood alcohol content over 0.08 (Veh. Code, § 23152, subd. (b)); and misdemeanor driving on a suspended license (Veh. Code, § 14601.1, subd. (a)). The information further alleged that Acevedo had suffered two prior serious and violent felony convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and four prior prison terms (§ 667.5, subd. (b)).

A jury found Acevedo guilty of the felon in possession of a firearm and possession of ammunition charges. He then pled guilty to all of the misdemeanor charges. In a bifurcated proceeding, the trial court found the prior allegations to be true. He was sentenced to a total determinate term of four years plus an indeterminate term of 25 years to life in state prison as follows: a term of 25 years to life for the felon in possession of a firearm, plus one year for each of the four prior prison term allegations; his sentence on the felon in possession of ammunition was stayed pursuant to section 654.

Acevedo filed a petition for resentencing under Prop. 36, PC § 1170.126. The People opposed on grounds that he was statutorily ineligible because he was armed with a firearm during the commission of the crime and that he posed a risk to public safety.

The trial court declined to make the connection between the proximate location of the gun to Acevedo, and a finding of "*armed with while,*" – the language of the three strikes statute – based on those facts.

> The prosecutor replied that defendant was pulled over for driving under the influence and had a gun in the car that was within

***Acevedo*-from pg. 18**

> his control and possession. The court responded, "Yeah, so I'll accept those facts. I'll rule against you today . . . the statute is pretty clear and it specifically itemizes a language of 'armed with while.' So that's why I'm comfortable that if he has it in the car while he's drunk, he may be stupid, but not 'armed with while.'"

Accordingly, the trial court granted the petition, finding Acevedo eligible for resentencing under section 1170.126, and resentenced him to the upper term of six years for felon in possession of a firearm, plus four one-year terms for the four prior prison term enhancements, for a total aggregate term of 10 years; the sentence for felon in possession of ammunition was stayed pursuant to section 654.

The Court of Appeal first interpreted the Three Strikes law to determine

> Under the plain language of the armed-with-a-firearm exclusion, defendant is ineligible for resentencing relief as a second strike offender if his life sentence was "imposed" because "[d]uring the commission of the current offense, [he] . . . was armed with a firearm." (§§ 667, subd. (e)(2)(C)(iii) & 1170.12, subd. (c)(2)(C)(iii), both cross-referenced in § 1170.126, subd. (e)(2).)

But the ultimate concern was as to the meaning of "armed with a firearm."

Defendant argues that he could not be armed with a firearm during the commission of his possession of that firearm, because the language "during the commission of the current offense" in the Reform Act requires an additional tethering offense to trigger that exclusion provision. Defendant further maintains that "[n]o defendant convicted of the stand-alone offense of possession of a firearm under section 12021, subdivision (a) has ever been found to have been 'armed' in the course of that crime." We reject defendant's arguments.

Where the record establishes that a defendant convicted of possession of a firearm by a felon was armed with the firearm, i.e., he had a firearm capable for

***Acevedo*- from pg 19**

> ready use, during the commission of that offense, the armed-with-a-firearm exclusion applies and the defendant is not entitled to resentencing relief under the Reform Act. We therefore rejected defendant's argument that the plain language of the armed-with-a-firearm exclusion requires that the arming be anchored or tethered to an offense which does not include possession.

Having thus ruled on the law, the Court turned to the facts. It found that the record before it was incomplete. Accordingly, it reversed the trial court's relief under Prop. 36, but remanded the case to that court.

> In sum, we conclude that, where the trial record establishes the prosecution's case was based on the theory a defendant convicted of possession of a firearm by a felon was physically armed with the firearm or had ready access to that firearm during the commission of that offense, the armed-with-a-firearm exclusion applies and, thus, a defendant is not entitled to resentencing relief under the Reform Act.
>
> We will reverse the order granting defendant's petition for a recall of his life sentence and for resentencing as a second strike offender under the Reform Act, and remand the matter to allow the trial court to conduct an adequate inquiry of the trial record to determine whether defendant was physically armed with the firearm.

WHEN SENTENCED TO TWO *CONCURRENT* 25-LIFE SENTENCES, RESENTENCING FOR JUST ONE OF THEM IS A MOOT ISSUE

People v. Alvarez

CA2(8); Case No. B255010
June 24, 2014

Roy Alvarez petitioned the court for resentencing under Prop. 36. In 2009, he was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) and attempted criminal threat (§§ 422 & 664). It was also found true that had three convictions for serious felonies under the "Three Strikes" law. He was sentenced to 42 years to life: 25 years to life as a base sentence on each of the two counts, based on the prior strikes (§ 667, subd. (e)(2)(A)(ii)), the terms to run concurrently, plus 15 years consecutive for three prior serious felony convictions (§ 667, subd. (a)(1)), plus two additional years for prior prison terms (§ 667.5, subd. (b)).

Alvarez argued that PC § 1170.126 exclusion for a prior violent/serious felony should only apply to one of his two 25-life counts. The Court found this to be irrelevant.

> One court has held that when an inmate's commitment offenses include both a serious or violent felony and a felony that is not serious or violent, the inmate is eligible for resentencing on the felony that is neither serious nor violent. (*In re Machado* (2014) 226 Cal.App.4th 1044.) Even if that principle is correct, its application would not help defendant, because the sentences imposed for his commitment offenses were concurrent, not consecutive.

Accordingly, the Court found no arguable issues and denied the appeal.

* * * * *

DENIAL OF PROP. 36 RESENTENCING PETITION REQUIRES A HEARING TO RESOLVE UNADJUDICATED FACTS

People v. Reginald Bradford

___Cal.App.4th___;
CA3; Case No. C073339
July 15, 2014

In 1999 Reginald Bradford was convicted of three counts of second degree burglary and four counts of petty theft with a prior. (Pen. Code, §§ 459, 666.) The jury acquitted him of robbery. (§ 211.) The trial court found he had five prior felony convictions for which he had served prison terms, including two residential burglaries that were strikes under the three strikes law. (§§ 459, 667, subds. (b)-(i), 667.5, subd. (b), 1170.12.) Bradford received four consecutive terms of 25 years to life pursuant to the three strikes law, and an additional four years for the enhancements. The judgment was affirmed on appeal

Recently, Bradford filed a petition to recall the sentence and for resentencing under PC § 1170.126. The trial court denied the petition, finding him ineligible for relief based on a statutory exclusion that applies if "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person."

Bradford **from pg 20**

(§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) The trial court reviewed facts recited in Court of Appeal's opinion affirming the original judgment and concluded petitioner was armed with a deadly weapon, a pair of wire cutters. This appeal followed, and the Court reversed the superior court below and remanded for a new hearing.

> The question is whether the trial court erred in finding petitioner ineligible for resentencing based on evidence petitioner had a pair of wire cutters at or near the time of the "current" offenses, meaning the commitment offenses in the case of a petitioner seeking resentencing. We answer this question in the affirmative. We conclude that the trial court must determine the facts needed to adjudicate eligibility based on evidence obtained solely from the record of conviction. The petitioner has no right to a jury trial or to a formal hearing but must be provided an opportunity to be heard before the court determines ineligibility based on unadjudicated facts. Because it is not supported by the evidence, we shall reverse the trial court's determination that petitioner was ineligible for resentencing under the provisions of Proposition 36.

The Court of Appeal noted that an inmate is ineligible for resentencing if his or her current sentence was imposed for certain offenses, including offenses during the commission of which the defendant was armed with a deadly weapon. By referring to facts about the commission of the commitment offense, this eligibility exception requires the trial court to make factual findings related to conduct that is not limited to a review of the offenses and enhancements of which defendant was convicted. A "trial court must be careful to avoid making a precipitous decision [on the issue of eligibility] without input from the parties." "[I] f the petitioner has not addressed the issue and the matter of eligibility concerns facts that were not actually adjudicated at the time of the petitioner's original conviction (as here), the trial court should invite further briefing by the parties before finding the petitioner ineligible for resentencing."

The Court found the trial court *did* properly consider the record below, but failed to allow the parties to brief the matter prior to decision, and closed with advice to potential petitioners on this legal point.

In summary, we conclude the trial court properly considered evidence contained in the record of conviction to decide whether, "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Additionally, the trial court should have solicited briefing by the parties before concluding petitioner was ineligible for resentencing on the facts here. That said, it would be prudent for a petitioner filing a petition for resentencing under Proposition 36 to anticipate the eligibility determination by briefing potential issues before the trial court makes its determination.

DISPOSITION

The trial court's order concluding petitioner was ineligible for resentencing based on his possession of wire cutters is reversed. The matter is remanded to the trial court for consideration of whether to resentence petitioner under the remaining provisions of section 1170.126.

There were two concurring opinions that raised separate doubts regarding the burden of proof in such a hearing. This published case may earn the scrutiny of the California Supreme Court, before the dust settles.

Cases **- from pg 21**

IN PROP. 36 RESENTENCING DENIAL BASED ON DANGEROUSNESS, "UNREASONABLE RISK OF DANGER" IS NOT IMPERMISSIBLY VAGUE; PREPONDERANCE OF EVIDENCE IS THE BURDEN OF PROOF

People v. Mark Flores

___Cal.App.4th___;
CA2(6); Case No. B250829
July 8, 2014

Mark Flores was convicted of vehicle theft, a nonserious and nonviolent offense. (Veh. Code, § 10851, subd. (a).) He admitted allegations of one prior prison term (§ 667.5, subd. (b)) and two prior serious or violent felonies within the meaning of California's three strikes law. (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) He was sentenced to 25 years to life plus one year for the prior prison term.

Flores lately petitioned the trial court to reduce his 25-year-to-life sentence and resentence him as a second-strike offender. The trial court denied relief impliedly finding that he was outside the "spirit" of Prop. 36. Flores mounted a facial challenge to the law. He contended that the phrase "pose an unreasonable risk of danger to public safety" is unconstitutionally vague. In addition, he contended that the trial court erroneously required the People to prove his dangerousness by a preponderance of the evidence instead of beyond a reasonable doubt. The Court of Appeal disagreed.

> Appellant appears to believe that if the challenged phrase is impermissibly vague, we would strike the exception and all inmates would automatically be entitled to relief if the latest offense was not a serious or violent offense. This would "overrule" the voters and be the height of judicial activism. We do not sit as a "super Legislature." (See *Unzueta v. Ocean View School Dist*. (1992) 6 Cal.App.4th 1689, 1699.) We also do not sit as a "super electorate."
>
> We answer the contention on the merits. The word , "unreasonable," is not impermissibly vague. In 1977 our United States Supreme Court noted that, in *Cameron v. Johnson* (1968) 390 U.S. 611, 615-616, the California Supreme court had rejected a "vagueness attack on a Mississippi statute which prohibited ' "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouse." ' " (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 303.) Our Supreme Court continued: "Justice Brennan, writing for the Cameron court, observed: 'Appellants . . . argue that the statute forbids picketing in terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." [Citation.] But . . . [t]he terms "obstruct" and "unreasonably interfere" plainly require no "guess[ing] at [their] meaning." Appellants focus on the word "unreasonably." It is a widely used and well understood word and clearly so when juxtaposed with "obstruct" and "interfere." We conclude that the statute clearly and precisely delineates its reach in words of common understanding.'"

As to the question of the proper burden of proof in a trial court evaluation of "unreasonable risk of danger," the Court of Appeal sharply rejected Flores' contentions.

> Appellant argues that the trial court erroneously required the People to prove dangerousness by a preponderance of the evidence. Appellant maintains that "dangerousness is a fact that . . . must be submitted to the jury and found beyond a reasonable doubt." The *Kaulick* court considered this issue at length. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1301-1306.) It concluded that dangerousness "need not be established by proof beyond a reasonable doubt to a jury." (*Id.*, at p. 1303.) The court held that "the proper standard of proof is preponderance of the evidence." (*Id.*, at p. 1305.) The court reasoned: "'The retrospective part of the Act is not constitutionally

***Flores* from pg 22**

required, but an act of lenity on the part of the electorate. It does not provide for wholesale resentencing of eligible petitioners. Instead, it provides for a proceeding where the original sentence may be modified downward. Any facts found at such a proceeding, such as dangerousness, do not implicate Sixth Amendment issues. Thus, there is no constitutional requirement that the facts be established [to a jury] beyond a reasonable doubt." (*Id*., at pp. 1304-1305.)

Appellant asserts that this statement of law in *Kaulick* was "mostly . . . dicta." It "was not dicta because it was responsive to the issues raised on appeal and was intended to guide the parties and the trial court in resolving the matter following . . . remand. [Citation.]" (*Garfield Medical Center v. Belshe* (1998) 68 Cal.App.4th 798, 806.) In the introduction to its opinion, the *Kaulick* court said that it "will discuss several issues likely to arise on remand, including the prosecution's burden of proof on the issue of dangerousness." (*Kaulick, supra*, 215 Cal.App.4th at p. 1286.)

Appellant is critical of the *Kaulick* opinion. We think it is well written, correct, and could serve as a model for opinion writing. He has not persuaded us that *Kaulick* was wrongly decided. We decline the request to disagree with the *Kaulick* opinion. We reject his contention that, "[e]ven if not compelled by Sixth Amendment concerns, this court should hold that the finding [of dangerousness] must be made by a beyond a reasonable doubt standard."

Accordingly, the Court of Appeal affirmed the superior court's rejection of Flores' Prop. 36 resentencing petition.

CONVICTION OF "FELON IN POSSESSION" CONSTITUTES "BEING ARMED WHILE COMMITTING THE OFFENSE"

People v. Kenneth Elder

___Cal.App.4th___;
CA3; Case No. C073731
July 15, 2014

Also on July 15, 2014, the Third Appellate District Court published this ruling on the question of how the crime of "felon in possession" satisfies the Prop. 36 exclusion of eligibility for resentencing.

Elder was sentenced to a 25-years-to-life third-strike sentence for his 1995 offense of unlawful possession of a gun by a felon. He lately petitioned for resentencing under the Strike Reform Act (Prop. 36), alleging his commitment offense was neither serious nor violent. The trial court found him ineligible because he was "armed" during the commission of the commitment offense. Elder appealed.

The factual record came from Elder's appeal.

> We come to the gist of the case. The trial court, apparently on its own motion, cited from our summary of the evidence in defendant's direct appeal from his conviction for his commitment offense. We had noted that in the course of executing a search warrant on a Wednesday in June 1994 for an apartment, the members of a multiagency task force found defendant outside the front door. He admitted living there. Among the occupants was defendant's young child. Inside the apartment was a loaded gun on a shelf of an entertainment center. Another gun was in an unlocked safe in a bedroom. Police also found a photograph of defendant (on film manufactured in March 1994) holding a gun identical in appearance to the gun on the entertainment center shelf. At trial, defendant contended the guns belonged to another occupant of the apartment (whom he later married), and that he was actually only a weekend visitor in general to her apartment rather than another occupant. (*People v. Elder, supra,* C020780, slip opn. at pp. 2-3 & fn. 2.) The present trial court concluded this established beyond a reasonable doubt that defendant either actually possessed the guns or had at least joint dominion and control over them, under conditions in which the guns were readily available for his use. Therefore, his commitment offense involved being armed during the commission of unlawful gun possession as a felon, and was not an eligible offense for resentencing.

The Court of Appeal explained: "A defendant is armed if the gun has a facilitative nexus with the underlying offense." The question is "whether possessing a gun can constitute being armed with the gun during the possession." The offense of felon in possession of a gun requires actual or constructive possession. If the gun is readily accessible for offensive or defensive use, the defendant is armed during the possession. The facts reflect Elder was armed during his offense.

Accordingly, Elder's petition was denied.

Cases **- from pg 23**

ATTEMPTS OF "SERIOUS" OR "VIOLENT" FELONIES (EXCEPT HOMICIDE) DO NOT BAR PROP. 36 RESENTENCING

People v. (---)

___Cal.App.4th___;
CA2(5); Case No. B253467
July 10, 2014

An important point of law was decided in this case: while specified "serious" or "violent" felonies act as a bar to Prop. 36 resentencing, attempts of such crimes (with the exception of murder) do not.

The Court of Appeal held that a prior conviction for attempted forcible oral copulation does not disqualify a 3rd striker from Prop. 36 resentencing because it is not listed as a sexually violent offense in Welfare and Institutions Code section 6600, subdivision (b).

In 1997, defendant was convicted of several nonserious felonies. The jury found two prior serious felonies true, a robbery and attempted forcible oral copulation (Pen. Code, §§ 664, 288a, subd. (c)(2)(A).) He received two concurrent 25-years-to-life third-strike terms. Lately, defendant sought resentencing under Prop. 36. The trial court denied the petition, finding the attempted forcible oral copulation prior rendered him ineligible for resentencing.

The Court of Appeal reversed. Under PC § 1170.126, an eligible defendant serving a life third-strike term for a nonserious felony may petition for resentencing as a two-strike offender. Once a defendant is found to be eligible for resentencing, the trial court must evaluate whether resentencing the defendant would pose an unreasonable risk of danger to the public. One of the disqualifying factors is that the defendant suffered a prior sexually violent offense, as defined in Welfare and Institutions Code, section 6600, subdivision (b). While section 6600, subdivision (b) includes section 288a in its list of offenses, section 6600 does not include attempts, only completed offenses (except attempted homicide). The matter was remanded for the trial court to determine whether resentencing defendant would pose an unreasonable risk of danger to the public.

CLN suggests that 3rd strikers reexamine their underlying qualifying priors to see if they were based on completed acts, or just attempts of those acts (other than murder). If they were just attempts, they should seek counsel for a petition for resentencing.

WHEN DENYING PROP. 36 RELIEF BECAUSE OF DANGEROUSNESS, TRIAL COURT MUST EXPLAIN WHAT INFORMATION IN THE RECORD SUPPORTED THAT DECISION

People v. Manning

___Cal.App.4th___;
CA2(3); Case No. B247919
July 5, 2014

In 1996, Schacobie Manning pled guilty to commercial burglary, possession of a forged instrument and possession of a forged driver's license, and admitted having suffered two prior serious felony convictions within the meaning of the Three Strikes law (Pen. Code, §§ 459, 475, 470, 667, subds. (b)-(i)). Manning was sentenced to state prison for a term of 25 years to life.

Manning petitioned the trial court under Prop. 36 for resentencing. The trial court denied his petition on the grounds that Manning had a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv), making him ineligible for resentencing.

On appeal, Manning contended that the trial court erred because his two prior convictions are not enumerated excluding offenses nor violent sex offenses within the meaning of Penal Code section 1170.126.

The Court of Appeal remanded for further proceedings. The elements of Manning's crime do not establish that it is a disqualifying offense under 1170.126, subdivision (e)(3). However, a trial court may look at the entire record of conviction to determine whether a non-disqualifying prior offense involved conduct that renders an inmate ineligible for resentencing under section 1170.126. Here, the appellate court could not be certain what materials the trial court considered before denying the petition, or what its precise reasoning was for finding Manning ineligible for resentencing. Therefore, remand was appropriate to allow both Manning and the prosecutor to demonstrate that the offenses either did or did not involve disqualifying conduct. Further, the trial court must specify the records it relied on and reasons for concluding that the prior offenses were or were not disqualifying.

***Cases* from pg. 24**

ANY CONSTITUTIONAL ERROR IN 100-LIFE JUVENILE SENTENCE RENDERED HARMLESS BY NEW LAW GRANTING PAROLE HEARING IN 25 YEARS

People v. Saetern

___Cal.App.4th___;
CA3; Case No. C066929
July 17, 2014

In yet another published decision on the question of unconstitutionality of a juvenile being sentenced to the equivalent of an LWOP sentence, the Court of Appeal found that error, if any, was harmless, given the recent law granting a parole hearing so such an individual after 25 years.

Saetern was sentenced to a total term of 100 years to life for a murder of a pregnant woman that he committed at age 14. On appeal, Saetern argued that the sentence was the functional equivalent of life without possibility of parole, and the trial court failed to consider the factors of youth set forth in *Miller v. Alabama* (2012) 132 S.Ct. 2455. The State countered that consideration of the factors in *Miller* is only required where the sentence is LWOP or the functional equivalent, and that recently enacted PC § 3051 (SB 260) resolves any constitutional infirmity because it offers the possibility of parole after 25 years.

The Third District Court of Appeal agreed. Under PC § 3051, Saetern will be eligible for a youth offender parole hearing once he serves 25 years of his sentence. Because § 3051 offers a meaningful opportunity to obtain parole and grants Saetern more favorable relief than he could obtain on remand, any constitutional error in the sentence was rendered harmless. The court declined to follow *People v. Garrett* (2014) 227 Cal.App.4th 675, a recent decision by another panel of the Third District.

This case will no doubt be granted review by the California Supreme Court, which is already considering the same issue in *In re Alatriste* (2013) 220 Cal. App.4th 1232, rev. gtd. (S214652), and in *In re Bonilla* (2013) 220 Cal.App.4th 1232, rev. gtd (S214960).

WHAT WE NEED

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

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

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

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

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

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

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

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

BPH

BOARD BUSINESS JUNE AND JULY

Commissioners and observers at the summer months BPH Executive meetings enjoyed a pretty fast turnaround, with a relatively short agenda both months. Other than items covered elsewhere in this issue of CLN the only new business for the board's consideration were new procedures for substitution of counsel, some housekeeping considerations and cleaning up some definitions.

Under new guidelines for substitution of counsel if an inmate requests and accepts appointment of state counsel to represent them at a parole hearing and later wishes to change to private counsel the inmate must, at least 45 days prior to the hearing date, submit a new BPH Form 1003 signed by both the inmate and the selected private attorney. The counselor must note on the form that he or she is prepared to proceed with the hearing at the scheduled date and time.

If counsel if prepared to proceed the request will be granted. However, should the retained attorney not be able to proceed at the appointed date and time for any reason it will be up to the discretion of the hearing office to determine of the inmate "engaged in a good faith, diligent effort to obtain the substitution of attorneybefore the scheduled date" and thus grant the change in counsel.

Should a prisoner change his/her mind about working with a state attorney and decide to proceed in pro per the Form 1003 must again be submitted, signed by the inmate alone. If the legal representation is found to be required for any reason under ADA requirements such a request will be denied, regardless of the timeliness of the request. If submitted later than 45 days before the hearing and the inmate is deemed capable of representing himself but is not ready to proceed at the appointed date the 'hearing officer' will determine if there is good cause to postpone the hearing. And, should that self-representing prisoner decide, after waiving his right to representation by counsel, that he does, after all, want a state attorney, yet another Form 1003 signed by the inmate must be submitted.

There are additional stipulations to this new directive, but suffice to say, what the board is attempting to impress on prisoners is, consider your counsel options carefully, make up your mind (at least 45 days prior to your hearing date) and be prepared to live with the consequences of that decision, because you may be stuck with what you thought you wanted. Once again, as with many forms required for virtually all things CDC, if your correctional counselor or state attorney does not have the required Form 1003, we here at LSA/CLN do.

The commissioners were also updated on the 'classification conversion' of Deputy Commissioners, who, beginning Jan. 1, 2015, will be re-classified to the level of Administrative Judges. Although the reason for this change was not specified it appears that this level of government employment requires the applicant to be an attorney; thus, going forward in 2015 newly hired DCs must be attorneys. Apparently there are currently only a few active DCs who would not fall under this provision and those individuals will be 'grandfathered' into the ranks until their retirement. Their eventual replacements, however, must qualify to hold the rank of Administrative Judge.

The only other changes of note were newly streamlined and cohesive definitions for such terms as: Base Term," "Life Term Start Date (LTSD) and "proposed" versus "verified life" term.

As always, at the end of each meeting day the board sets aside a brief segment for comments from the public. LSA is the only sure-fire participant in this portion of the day. We never fail to bring to the board's attention some facet of the lifer situation we feel is worthy of notice and consideration. From time to time we are followed by comments from victims' groups, who usually make the point that too much is being done for prisoners.

And so it was recently, when the comment was offered to the commissioners that too many programs, organizations and people were offering too much to inmates to try and assist them in both becoming suitable for parole, but also effectuating reentry into the community. As it happens, on this occasion, LSA was the last to speak, our topic for the day being the challenges faced by paroling lifers and the need for CDCR to allow support groups to work with

***BPH* from pg. 27**

those individuals during their 4-5 months review period to alert them to some of the more subtle stumbling blocks and provide tools to negotiate them.

In summing up why this is important, we noted to the board:

And while reentry awareness sessions may be maligned by some as additional and unwarranted support for prisoners, we are mindful of the fact that parole grants are made in accordance with the law and support for returning prisoners, who have been found to have paid their debt through punishment, is in reality support for the health and growth of our communities and society.

EN BANC DECISIONS JUNE AND JULY

En banc decisions by the BPH during the June and July Executive Board meetings proved once again that simply being found suitable for parole may not be enough—you aren't out until you're on the other side of the gate. Behavior occurring after the board hearing or even coming to light after that hearing can cause a change in circumstance and outcome.

In June a trio prisoners who received grants at their hearings found those decisions in question and their release in jeopardy. The board voted to vacate the grant of parole given in March and schedule a new hearing for **Sue Hamby** on a referral by BPH chief counsel, in order to "ensure the inmate's case is considered in a manner consistent with other Board decisions and in the furtherance of public safety, as required by CCR, title 15, section 2042," which allows reconsideration of the decision if the review finds the panel acted on an error of fact or law.

The grants for **Paul Crowder** and **Henry Murray** were also recommended for a rescission hearings, Crowder behind a string of 115s he received after his grant and despite a plea from Crowder's friend and former lifer **Keith Chandler** that the board consider the circumstances of the events. Murray's loss of grant came on a recommendation from the Governor on "new information regarding the inmate's alleged misconduct in 2013 and alleged statements to his former girlfriend regarding his life crime." The Board ordered the allegations investigated and a report sent to the rescission hearing panel.

The en banc action on a split decision (tie vote) on the release of **Ronald Buenrostro** following a 3000.1 hearing went against the inmate, the entire commission voting to deny for a year. **Ronald White**, saw his denial in April, 2014 confirmed but will receive a new hearing solely to remedy an error in term calculation. Recall of sentence for compassionate release was recommended for **Gabriel Tristan.**

Two long-released former prisoners asked for and received the Board's endorsement of their petitions to Gov. Brown for pardons. **John Zech** and **Dolores Velasequez** submitted the requests, both speaking in their own behalf and outlining for the commissioners their now many years of contributions to society following long-past incarceration. While no one spoke in opposition to these applications, Assistant LA DA Alexis De La Garza, ever the cheery party goer, complained to the BPH that DA offices, while notified of pardon applications and ensuring en banc appearances, never received adequate information from the board on those long-past offenses, so could not evaluate the requests and express an opinion. Perhaps the LA DA's office needs more funding for research.

Things went a bit faster for en banc issues in July, when the majority of the cases referred were due to a technical glitch at hearings. A half dozen inmates, **Ronald Bolling, Carl Hancock, Jesse Hernandez, Chris Nepomuceno, James Noffsinger** and **Juan Panemeno** all received the same finding: "Disapprove the May [6-8], 2014, decision and schedule a rehearing on the next available calendar due to the Board's failure to comply with Penal Code section 3041.5(a)(4) (statutory requirement to record the hearing)."

In short, for a full week at Solano hearings were not recorded, as required for creation of the required transcript, due to faulty equipment (or possible theft of a

***En Banc*- from pg 28**

computer as reported). Sources indicate the above inmates were recipients of denials; those found suitable during that week, and there reportedly were some, did not see their decision vacated and thus will not have to go through another hearing. The BPH legal division, in cases of grants of parole wherein a transcript is not created, issues a Miscellaneous Decision noting the grant, date, individuals involved and reasons articulated for the grant.

The other two cases on the July en banc calendar also saw favorable results, **Humberto Franco** being recommended for recall of sentence under compassionate release and **Pete Hernandez** seeing his grant affirmed by the commission following an en banc referral by the Governor.

BPH Parole Grant Statistics Continue To Improve

Lifer, and statistician, Michael Brodheim gave close scrutiny to the Board's published parole hearing results for the 1st quarter of 2014 and provided us this "insight" into what's going on.

To understand these numbers, we first define the categories of results into grants, denials, stipulations, waivers, postponements, cancellations, and continuances. Stated more simply, a great number of scheduled hearings do not result in either a "grant" or a "denial." For example, for the 1st quarter, of 1180 hearings scheduled, 629, or roughly only 53% went on to a grant or denial conclusion. Of those 629, 244 were found suitable – 38.8%! Stated on an annualized basis, the grants amount to a rate of 990 per year.

The 385 denials amount to a rate of 61.2%. This surely is not the situation we've seen in recent years of a 98 - 99% denial rate, and is attributable to the new leadership at the top of the BPH, who, as attorneys themselves, have professionally chosen to follow the law, and case law, on lifer paroles.

But there is more to learn from the numbers. First, what is the meaning of stipulations and waivers? In most part, it is a concession by the parole candidate that he/she concedes they are not likely to be found suitable, possibly because of a recent 115 or other factor the Board would likely deny them for. In fact, the average stipulation was for 3.9 years, while the average waiver was for 1.7 years. Compared with the average denial for those who went through with their hearings, these numbers are better than the average denial interval of 4.4 years.

Then there is the "who" data. The number of grants in 1st quarter of 2014, by CDC index letter, were:
W# - 19; B# - 13; C# - 47; D# - 36; E# - 21; G# - 2; H# - 29; J# - 34; K# - 24; P# - 11; T# - 1; F# - 1.

From yet another perspective, one can determine the average hearing number where parole was finally granted. The average grant came at the 6th hearing; the median grant was at the 5th hearing.

As to the type of crime, for those granted parole, 82.4% were for murder (i.e., subject to Governor reversal), with the balance of 17.6% for other than murders. Which gets us to the last number, one not a "Board" statistic, namely, the Governor's reversal rate. That stands at about 20%. If this holds true for all of 2014, of about 800 murder-lifers that could be found suitable, perhaps 640 or so will go home this year.

Lifer Scheduling and Tracking System

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

	ANDERSON, JR	FRITZ	GARNER	GUERRERO	HOFFMAN	LABAHN	MONTES	PECK	RICHARDSON	ROBERTS	SMITH	TURNER	ZARRINNAM	SPLIT HG	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Hearing Totals*	31	26	36	23	0	30	39	30	21	33	35	36	29	318	687	35**	652
Summary of Suitability Hearing Results per Commissioner																	
Suitability Hrg Total	30	25	35	22	0	30	39	29	20	33	35	36	28	102	464	33	431
Grants	8	4	7	9	0	11	7	8	7	4	13	7	11	0	96	11	85
Denials	18	18	24	8	0	16	24	15	10	20	22	24	12	1	212	19	193
Stipulations	2	0	0	1	0	3	4	2	2	6	0	2	3	1	26	2	24
Waivers	0	0	0	0	0	0	0	1	1	1	0	2	0	27	32	0	32
Postponements	2	3	3	3	0	0	4	1	0	2	0	1	2	52	73	1	72
Continuances	0	0	1	1	0	0	0	2	0	0	0	0	0	0	4	0	4
Split	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	21	21	0	21
Denial Length Analysis per Commissioner (Summary of Denials and Stipulations)																	
Subtotal (Deny+Stip)	20	18	24	9	0	19	28	17	12	26	22	26	15	2	238	21	217
1 year	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1	0	1
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	8	10	12	4	0	12	10	11	5	10	7	10	9	2	110	9	101
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	6	8	9	5	0	6	11	5	5	14	13	9	5	0	95	9	86
7 years	4	0	2	0	0	1	5	1	2	1	2	6	1	0	25	3	22
10 years	3	0	0	0	0	0	2	0	0	1	0	1	0	0	7	0	7
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Waiver Length Analysis per Commissioner																	
Subtotal (Waiver)	0	0	0	0	0	0	0	1	1	1	0	2	0	27	32	0	32
1 year	0	0	0	0	0	0	0	1	1	0	0	1	0	13	16	0	16
2 years	0	0	0	0	0	0	0	0	0	0	0	1	0	5	6	0	6
3 years	0	0	0	0	0	0	0	0	0	1	0	0	0	6	7	0	7
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2
Postponement Analysis per Commissioner																	
Subtotal (Postpone)	2	3	3	3	0	0	4	1	0	2	0	1	2	52	73	1	72
Within State Control	0	1	2	2	0	0	1	0	0	0	0	1	0	38	45	0	45
Exigent Circumstance	2	2	0	0	0	0	1	1	0	0	0	0	1	2	9	0	9
Prisoner Postpone	0	0	1	1	0	0	2	0	0	2	0	0	1	12	19	1	18

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

06/27/2014 11:30 AM Page 1 of 1

Lifer Scheduling and Tracking System

Commissioners Summary
All Institutions
June 01, 2014 to June 30, 2014

Hearing Totals*	35	27	33	29	27	27	24	23	30	25	36	19	303	639	2**	637

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	BIETZ	CARTER	CUNNINGHAM	LABAHN	MONETTI	PECK	ROSENBERG	ROSSETTI	SMITH	TURNER	ZARUBNIAK	BPH STD	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	24	26	33	28	27	27	24	23	30	24	35	19	112	432	2	430
Grants	6	4	10	4	10	8	7	5	5	8	16	6	0	89	0	89
Denials	12	16	18	15	11	13	12	14	17	13	12	9	0	160	0	160
Stipulations	2	2	0	6	3	1	0	3	5	1	2	1	0	26	0	26
Waivers	0	0	2	0	0	0	0	0	0	0	2	0	36	40	0	40
Postponements	4	4	3	2	2	5	1	1	3	2	3	2	47	79	0	79
Continuances	0	0	2	1	1	0	4	0	0	0	0	0	0	8	2	6
Split	1	0	0	0	0	0	0	0	0	0	0	1	0	2	0	2
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	29	29	0	29

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

Subtotal (Deny+Stip)	14	18	18	21	14	14	12	17	22	14	14	10	0	188	0	188
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	8	7	10	15	10	8	8	8	10	8	8	6	0	104	0	104
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	2	8	5	6	3	6	5	5	9	5	5	2	0	63	0	63
7 years	4	3	1	0	1	0	1	2	2	1	0	1	0	16	0	16
10 years	0	0	0	0	0	0	0	1	1	0	0	1	0	3	0	3
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	0	2	0	0	0	0	0	0	0	2	0	36	40	0	40
1 year	0	0	1	0	0	0	0	0	0	0	2	0	20	23	0	23
2 years	0	0	1	0	0	0	0	0	0	0	0	0	8	9	0	9
3 years	0	0	0	0	0	0	0	0	0	0	0	0	6	6	0	6
4 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
5 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1

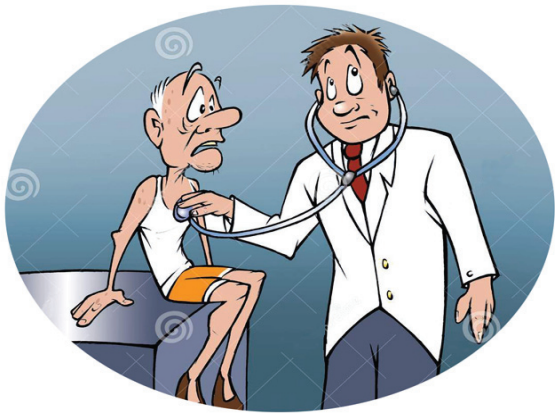
Postponement Analysis per Commissioner

Subtotal (Postpone)	4	4	3	2	2	5	1	1	3	2	3	2	47	79	0	79
Within State Control	2	0	2	2	0	2	1	0	2	0	1	2	39	53	0	53
Exigent Circumstance	2	2	0	0	1	3	0	1	0	0	0	0	0	9	0	9
Prisoner Postpone	0	2	1	0	1	0	0	0	1	2	2	0	8	17	0	17

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

BPH- **from pg 31**

MEDICAL PAROLE EXPANDED, MODIFIED



Expanded Medical Parole went into effect on July 1 with considerations and procedures to be followed in all medical parole hearings going forward. These medical conditions and considerations will not be applied to inmates sitting for regular parole hearings, regardless of age or other factors. For consideration under expanded medical parole the inmate must be approved for this process by the chief medical officer (CMO) at any institution.

Requests for consideration under medical parole may be made by the inmate, a family member or the inmate's primary care physician within the institution. The evaluation will be reviewed by the CMO the request then goes through classification and parole at the prison level before being forwarded, if approved at prison level, to Division of Adult Institutions which will prepare a board packet and refer the inmate to BPH for scheduling.

In order to be considered for expanded medical parole an inmate must meet the following criteria:

- Suffer from 'significant and permanent condition, disease or syndrome' which results in physical or cognitive (mental) debilitation or incapacitation.
- Qualify for placement in a (licensed) skilled care facility under assessment by the Resource utilization Guide IV (RUG 4) tool; more on this later.
- The prisoner is found not to be an unreasonable risk to public safety in said facility
- The prisoner is not condemned or LWOP.

Expanded medical parole hearings will be conducted in the same manner as medical parole hearings in the past, and can be done literally at the bedside of the inmate. All factors regarding suitability will be in play, including institutional behavior, programming, and a psych eval, also known as the Comprehensive Risk Assessment (CRA). For those patients with dementia or other mental afflictions, those will be considered and addressed in the CRA. Additionally the medical/mental condition of the prisoner will also be given consideration. All the same parties to a hearing will be notified, including commitment county DA, victims/next of kin and the inmate will be afforded a state-appointed, or privately retained attorney.

If parole is granted, the board may stipulate that as a condition of the grant the inmate be housed in a care facility able not only to meet the medical needs of the inmate, but also the security and safety needs of the public, as determined by the board. This could include a locked facility, one that restricts access to minors, restrictions on communication or GPS monitoring. All restrictions would be "rationally related" to the inmate's prior conduct/crime.

In the course of regular medical parole if an inmate was considered for medical parole, the board would expect to see from him/her parole plans that included appropriate housing/medical care arrangements before a grant was made. Under the expanded guidelines the grant will be made and at that point CDCR, in conjunction with DAPO, will identify approved facilities which meet all security and medical needs and secure placement. If no approved facility can be located within the 120 days review window afforded the BPH by statute, the grant expires and the inmate remains in CDCR custody.

***BPH*- from pg 32**

Once a medically paroled inmate is placed in a care facility he/she will be monitored by an assigned agent from DAPO, to insure compliance with all regulations of the facility, including any restrictions on alcohol and non-prescribed drugs. Violations of these restrictions could cause the board to impose further restrictions and/or placement in another facility.

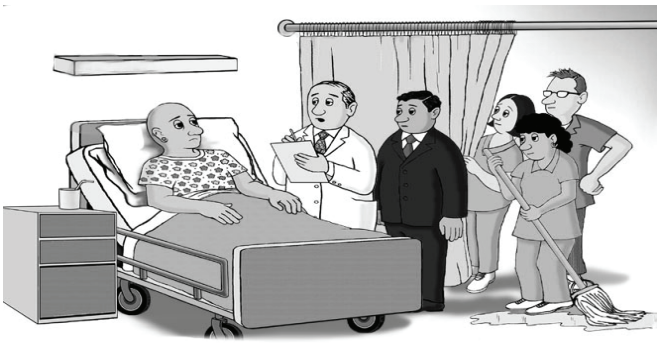
Part of evaluating the level of care needed by any ailing individual, inmate or not, is a 'tool,' and we all know how much CDCR loves evaluation 'tools,' called the RUG IV, or Resource Utilization Guide. The RUG divided Activities of Daily Living (ADL) into four basic groups of activities:

- Bed mobility; how the individual is able to change positions while in bed or 'alternative sleep furniture,' which we suppose could be considered a bunk in prison housing, as few really refer to them as beds,
- Transfer; moves between beds, chairs, standing, exclusive of using bathroom facilities
- Toilet use; rather indelicately phrased, but evaluates how well an individual can perform these necessary functions , including caring for catheter or ostomy bag if so needed
- Eating; measures not manners, but how the individual receives sustenance, including eating, tube or IV nourishment.

The extent to which anyone can self-sufficiently handle these tasks and the level at which they need assistance is measured on a point scale, less self-sufficiency and more assistance required receiving higher numbers. As in golf, this is one exercise in which the lowest number is the best number. Scores can range from 0 to a maximum of 16, with the higher range of scores indicating a greater need for skilled care and assistance. The higher the score, the more likely any given inmate is to be considered for expanded medical parole.

But a high RUG score alone will not guarantee parole to a care facility. The twin needs of proper treatment capabilities and sufficient security concerns are equally important, in the board's eyes, and both must be met. However, with the inclusion of RUG and language in the policy memorandum indicating cognitive or mental condition will now be considered as a health factor, BPH appears to be at last recognizing that some elderly inmates suffering from various forms and stages of dementia but otherwise in adequate physical condition to care for their daily needs, could and should be placed in facilities other than main line prisons.

To initiate consideration for medical parole an inmate, medico or family member may request evaluation by a prison physician, including performing a RUG IV assessment and completing a CDCR For 7478. Should this initial evaluation process be unsuccessful in securing a medical parole referral, there is an appeal process.



"No, they aren't medical students. It's just some of our staff that accessed your Electronic Medical Record and wanted to see that special tattoo."

WHAT THE BPH SHOULD KNOW ABOUT ELDER INMATES

And we know they know these things, because we've put all these factors on record

As mentioned in our reporting on elder parole considerations, the BPH commissioners and attending public were subjected to a tedious and nearly incomprehensible report from the FAD on the characteristics of older prisoners and their propensity to reoffend. It was 45 minutes of oxygen-sucking bombast that provided no real information and only confused the issue.

Following that adventure LSA presented what WE know about older prisoners.

What we know about older prisoners who are released is that they do not recidivate. And not just in California. The Center on Sentencing and Corrections in a 2010 study found nationwide the probability of recidivism and parole violations decreases with age, with those over 55 the least likely to reoffend and concluded older prisoners even if released before the end of a determinate sentence pose little risk.

We know that who is an 'elder' inmate differs from who is an 'elder' in the free world, with studies routinely showing many long-term prisoners are 7 to 10 years physically and mentally older than their free world counterparts.

We know that right now a lifer is three times more likely to be over the age of 65 than a non-lifer and twice as likely to be over 55, the age at which recidivism all but drops off the statistical charts.

We know that even the state's Legislative Analyst's' office predicts the number of older inmates will increase three-fold over the next 15 years and the cost of incarcerating older prisoners is up to 3 times the annual cost of keeping a younger, more dangerous prisoner locked up.

We know California has an unconscionable number of the aged locked up. There are 36 prisoners with A numbers still in custody, the oldest is 90 years old, with 4 in their 80s, 22 in their 70s and 9 in their late 60s. Some of these men have been locked up since before many of the BPH commissioners and attorneys were born.

And we know there are 7698 prisoners labeled with a B number, many who started their incarceration as early as 1966 and are still in custody. More than a dozen of these men and women are in their 80s. Even in the C numbers, who were incarcerated between 1978 and 1981, there are 3 prisoners 80 or over and in 90 year old. How dangerous can these octogenarians and nonagenarians possibly be?

And while some of these prisoners are probably LWOP, none are condemned. No one on death row has been incarcerated since prior to 1978, more than 20 years less than the longest non-condemned inmate still in custody. We'd like to have better statistics on this, but CDCR has not, until now, considered stats on geriatric prisoners of prime interest or concern.

BPH - Elder Parole cont.

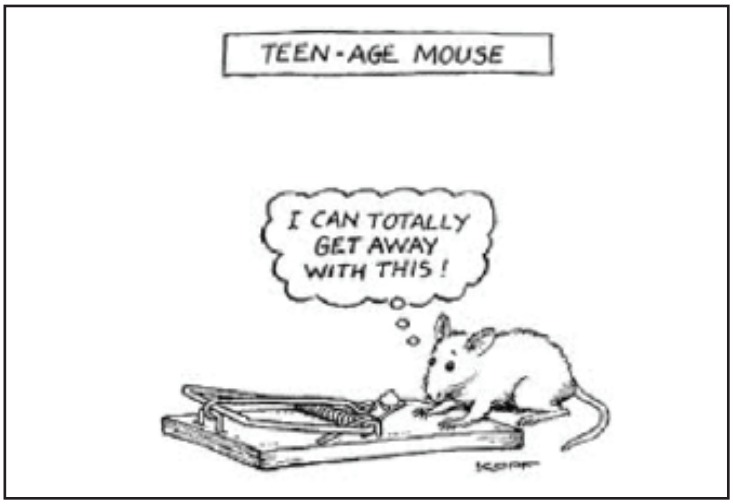
Virtually every study tells us that age reduces recidivism and risk. So does length of incarceration. Numerous studies of released prisoners, nation and worldwide, indicate that those who serve the longest sentences have the best success rates once released, especially lifers, who must accomplish so much personal change and growth and prove their suitability before release.

And yet "Life in Limbo", Stanford University's 2011 study of lifers and parole, found that neither the age of the potential parolee nor the length of time served was a statistically significant factor in predicting suitability findings. This data was mined from hearings between 2007 and 2010 and while we know much about the BPH has changed in the intervening 4 years we are anxious to see what the Board's newly instituted policies of elder parole and term setting will reveal in terms of how many aging inmates are still in custody long after their MEPD.

Under YOPH we now acknowledge that age, in this case young age, plays a major part in behavior and decision making. We believe it is time to apply the same standard in reverse to aging prisoners and make and co-occurring infirmities a significant part of the determination of current and future dangerousness.

UNDERSTANDING YOUR YOUNG BRAIN

At a recent Executive meeting of the Board of Parole Hearings commissioners and the public in attendance (which included LSA/CLN) were treated to a very rare event: a presentation that was not only informative, but interesting, engaging and very on topic with respect to parole hearings. Presented by Dr. Jennine Hall, Lead Clinical Trainer for the Colorado Division of Youth Corrections (DJJ, Colorado style), the topic at hand was "The Adolescent Brain."



Dr. Hall, a talented speaker and obviously very knowledgeable on her topic, appears to not only have found adolescents with brains, but studied them as well. Her brief, concise and very digestible report on why adolescent brains operate (or don't) the way they do and how that operation impacts decisions gave listeners a snap shot of the clinical factors that are the basis for YOPH considerations.

Her narration ran down, in layman terms, the development of the brain as individuals pass through adolescence from differences in brain development between male and female to how young brains perceive alcohol and drugs. A reading of this relative short report, while not able to convey the dynamism and enthusiasm of Dr. Hall for her subject, might well be good reading for those prisoners who come under SB 260. It also includes a bibliography of books on the subject that might prove additionally useful.

While the Board is now, by law, required to consider the lack of decision making skills by youth who commit crimes it could be used for those same individuals, now prisoners preparing for hearings, to have some of that understanding as well and be able to discuss their changes. While Dr. Hall's report is too lengthy to reprint in its entirety in CLN we will be happy to provide a copy to those prisoners who request the report and are good enough to send either a SASE or a single stamp along with their request.

Please send requests, along with the appropriate postage, to us at PO BOX 277, Rancho Cordova, CA. 95741, with the notation "Dr. Hall" on the envelope. If YOPH applies to you, or even if you were just on the other side of 18 at the time of your crime, this report could provide you with additional understanding to assist you in developing the 'insight' the board looks for. And for once, you'll a chance to see some of what the BPH commissioners are given as training.

State of California Board of Parole Hearings

Memorandum

Date : June 16, 2014

Subject: ELDERLY PAROLE PROGRAM

The purpose of this memorandum is to provide an overview of the new Elderly Parole Program. On February 10, 2014, the Three Judge Panel in the *Plata/Coleman* class action lawsuit ordered CDCR to finalize and implement a new parole process whereby elderly inmates will be referred to the Board of Parole Hearings (board) to determine suitability for parole. The procedures for the new Elderly Parole Program will affect parole suitability hearings scheduled on or after October 1, 2014.

Eligibility
Inmates who are 60 years or older and who have been incarcerated for 25 years or more are eligible for the Elderly Parole Program. Eligible inmates may be serving an indeterminate or a determinate sentence.

Scheduling of Hearings
Eligible inmates who are not currently in the board's hearing cycle (i.e., those who are serving a determinate term or serving an indeterminate term and have not yet had their initial parole suitability hearing), will be referred by CDCR to the board and scheduled for an initial suitability hearing.

Eligible inmates who are currently in the board's hearing cycle (i.e., those who have already had their initial suitability hearing or will have it before October 1, 2014) will be considered for a new hearing consistent with the California Supreme Court's decision in *In re Vicks*, meaning the board will initially focus its resources on those inmates who are most likely to be found suitable for parole. This will be accomplished through administrative review of the inmate's record by the board for possible advancement of the inmate's next hearing date, if the board finds a reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration of the inmate. Eligible inmates may also continue to petition to advance their next hearing pursuant to the provisions of Penal Code section 3041.5(d).

During the administrative review and the petition to advance processes, the board will give special consideration to eligible inmates' advanced age, long-term confinement, and diminished physical condition, if any. The board will also consider all other relevant information when determining whether or not there is a reasonable likelihood that consideration of the public and victim's safety does not require the additional period of incarceration of the inmate, including institutional behavior and input from victims and victims' next-of-kin. If an eligible inmate is denied parole, the denial length will be set pursuant to Penal Code section 3041.5(b)(4) ("Marsy's Law") for 3, 5, 7, 10, or 15 years.

BPH - Elder Memo

Risk Assessments
Inmates who are 60 years of age or older and who have served a minimum of 25 years and who are scheduled for a hearing on or after October 1, 2014, will receive a new or revised risk assessment, which will specifically address how the inmate's advanced age, long-term confinement, and diminished physical condition, if any, may impact the inmate's potential risk for future violence.

Panels and Procedure
Hearings will be conducted by two or three person panels; at least one panel member will be a Commissioner. All other parole suitability hearing procedures not impacted by the provisions outlined herein will be applied to elderly parole hearings.

Decision Review
Parole suitability hearing decisions for elderly parole inmates will be reviewed in the same manner as all other parole suitability hearing decisions.

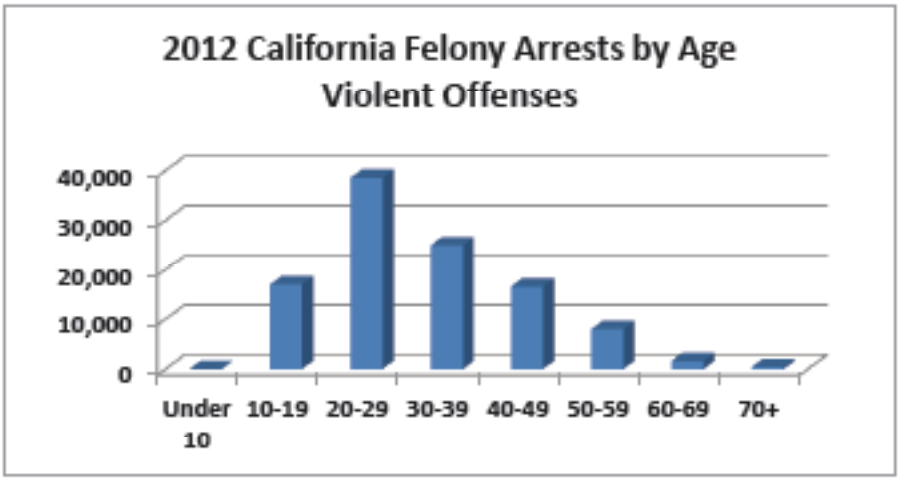
Term Calculations
Inmates who are found suitable for elderly parole and who are serving an indeterminate term will be released to parole when their grant becomes final (after all applicable reviews). Inmates who are found suitable for elderly parole and who are serving a determinate term will be released to parole when their grant becomes final.

Felony Arrest and CDCR New Admissions Data, by Age

In California, individuals age 60 or over were responsible for the lowest percentage of all felony arrests of all age groups in 2012, with the exception of children under the age of 10. Individuals age 60 or over were responsible for 1.9% of all felony arrests.

2012 California Felony Arrests by Age[i] - All Felony Offenses									
	Under 10	10-19	20-29	30-39	40-49[ii]	50-59[ii]	60-69[ii]	70+	Total
Number	79	67,459	151,827	100,480	68,542	32,980	7,454	986	429,807
% of Total	0.02%	15.70%	35.32%	23.38%	15.95%	7.67%	1.73%	0.23%	100.00%

The same is true for felony arrests for violent offenses. Californians age 60 or over were also responsible for 1.9% of all felony arrests for violent offenses.



2012 California Felony Arrests by Age[i] - Violent Offenses									
	Under 10	10-19	20-29	30-39	40-49[ii]	50-59[ii]	60-69[ii]	70+	Total
Number	13	16,993	38,537	24,969	16,616	7,995	1,632	414	107,169
% of Total	0.01%	15.86%	35.96%	23.30%	15.50%	7.46%	1.52%	0.39%	100.00%

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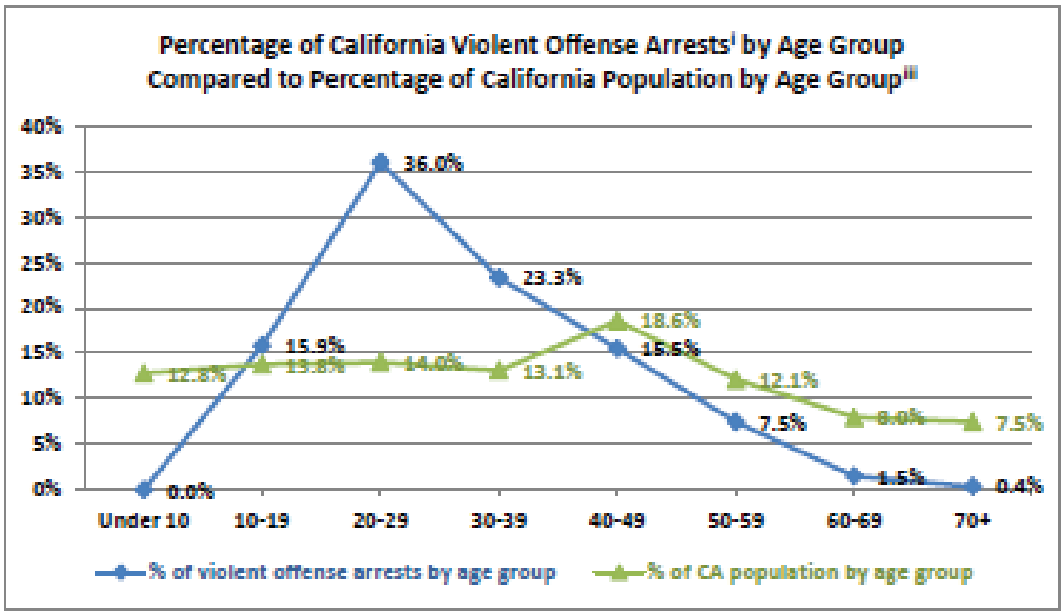
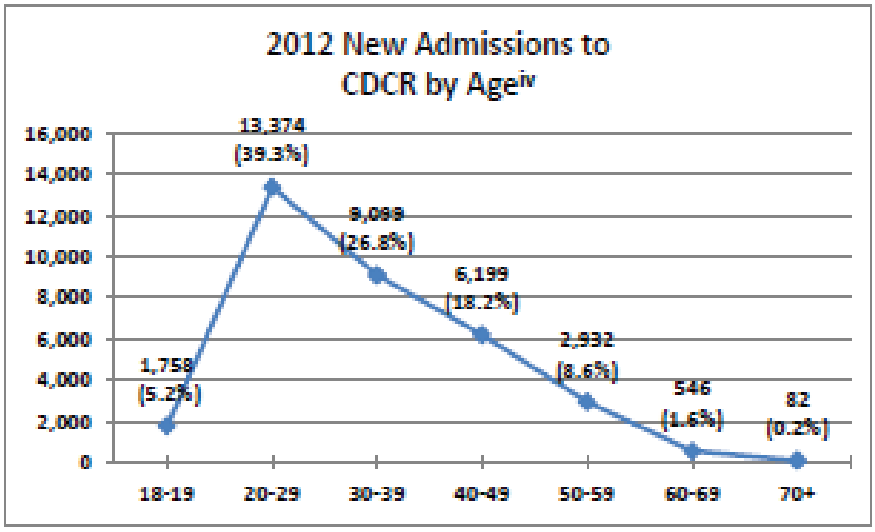
Felony Arrest and CDCR New Admissions Data, by Age

Californians age 60 or over represent 15.5% of the total California population (8.0% are age 60-69 and 7.5% are age 70 or older) and they represent 1.9% of the total number of arrests for violent offenses (1.5% and 0.4% respectively). In contrast, Californians between the ages of 20 and 29 represent 14.0% of the population and 36.0% of the arrests for violent offenses.

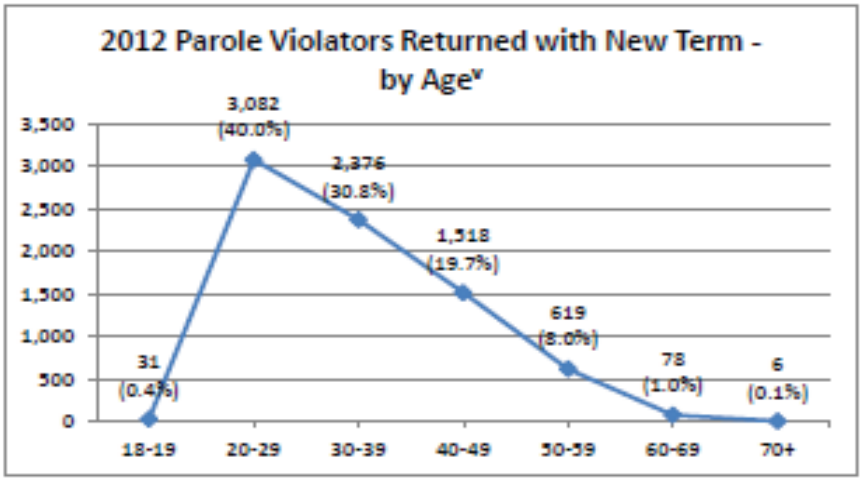


In 2012, CDCR received a total of 33,990 inmates as new felon admissions (including parole violators returning with a new term). Inmates age 60 or older represented 1.8% of all new admissions (1.6% were inmates between the ages of 60 and 69 and 0.2% were age 70 or older).



Felony Arrest and CDCR New Admissions Data, by Age

In 2012, CDCR received a total of 7,710 parole violators returning to prison with a new term. Parolees age 60 or over represented 1.1% of parole violators returning with a new term (1.0% were inmates between the ages of 60 and 69 and 0.1% were age 70 or older).



[i] Source: "Crime in California 2012" Kamala D. Harris, Attorney General, California Department of Justice, Table 33.

[ii] Because "Crime in California 2012" combines ages 40-69, statistical trends from "Arrest in the United States, 1990-2010" U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics were used throughout this report to estimate the breakdown of California data into uniform age groups (40-49, 50-59, 60-69).

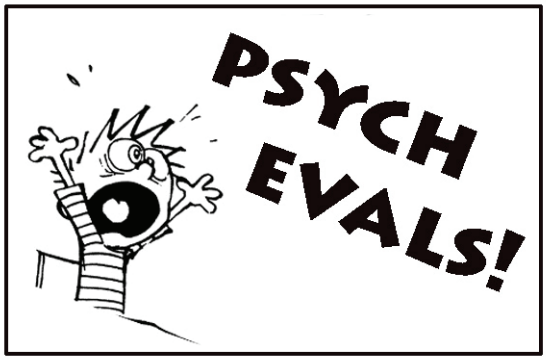
[iii] Source: "Age Groups and Sex: 2010," U.S. Census Bureau, 2010 Census, Summary File 1, Tables P12, P13, and PCT12.

[iv] Source: "Characteristics of Felon New Admissions and Parole Violators Returned with a New Term, Calendar Year 2012" Department of Corrections and Rehabilitation Offender Information Services Branch, Estimates and Statistical Analysis Section, Data Analysis Unit, February 2013, Table 3.

[v] Source: "Characteristics of Felon New Admissions and Parole Violators Returned with a New Term, Calendar Year 2012" Department of Corrections and Rehabilitation Offender Information Services Branch, Estimates and Statistical Analysis Section, Data Analysis Unit, February 2013, Table 13.

***BPH* - from pg 40**

NEW CRAs FOR YOPH AND ELDER-GOT YOURS?



With the implementation of new parole consideration modules (YOPH, Elder Parole, Expanded Medical parole) the BPH has indicated those falling under these guidelines would receive new Comprehensive Risk Assessments (CRAs, also fondly known as psych evals) to consider the impact these special circumstances have on an individual's risk to offend and/or return to violence. While LSA/CLN has had a long and continuing problem with CRAs in general, we are increasingly concerned with reports about how the new CRAs are being created by FAD clinicians.

What initially began as simply an update for YOPH inmates, something of an addendum to their CRA to reflect the impact their immaturity at the time of their crime had on their actions and decisions then, contrasted with their maturity at board time, has become a new full blown assessment, albeit using the same tools and the same personnel. And therein, we believe, lies at least part of the problem. Now that Elder Parole and expanded Medical Parole applicants will also be receiving new CRAs to reflect the respective considerations of those modules, we're becoming even more concerned, especially for those individual prisoners who may fall under both YOPH and Elder Parole guidelines.

Indeed, some of the CRAs done for YOPH considerations that inmates have been willing to share with us address the youthful factors in only a cursory manner and can then sometimes continue to claim the crime to be so heinous that it goes beyond youthful consideration. Others, while acknowledging the hallmarks of youth and their impact on decisions made at the time of the crime, then veer off into in-depth discussions of disciplinary history and even content of confidential files, often also received while the individual was still in the throes of 'young and stupid' to the point of negating any real consideration of youthful factors.

Our greater overall concerns remains the training and intent of the FAD members and their continued, if modified use, of the so-called evaluation 'tools,' including the HCR-20 (we don't care what version, it still isn't normed for lifers), the PCL/R and the Static 99. Questions for the latter 'test,' meant to be used to evaluate housing and treatment for sex offenders, often show up in the conversational aspect of many CRAs given to those who are NOT sex offenders. So far as we can tell the new CRAs meant to address various aspects of youth and elder risks, are little changed from the old or 'regular' CRAs and the various special concerns are, by in large, given only cursory and conversational consideration.

We hope to be able to explore these issues, as well as more basic issues involving the FAD, with BPH administration in coming months. In order to be prepared for this discussion, we're now beginning our research into just what these new CRAs look like. So we're asking for your help.

If you have fall under YOPH, elder or expanded medical parole guidelines and had a CRA which is supposed to address these areas, we're asking you to share those reports with us. We will redact any identifying information (except the name of the psych who created the report) and use what we glean from these CRAs only for our own research and learning. We need to be prepared with factual examples of questionable CRAs if we hope to foster reevaluation and change.

Several years ago when we asked prisoners to share their psych evals we were nearly overwhelmed with the response and we hope to be in the same position with this request. Be assured your information will be protected; you won't scare us, anger us or surprise us. The CRAs will be read by a small and select

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

number of researchers here at LSA/CLN (no more than 3 people) and only information useful to our overall goal noted.

As we have mentioned before, we can now access hearing transcripts via email, but CRAs are not in the same category and those we must seek from individuals. If you can send us a copy, great; if you can only send the original, please note that and we will return it to you—but be sure you specifically say you need the document returned.

BPH has stated those coming under the new guidelines will get CRAs to address those concerns, which means it's quite possible for an inmate to get two relatively back-to-back evals, one done by the FAD before the decision to re-evaluate all under the new modules and one done by the same FAD division in order to consider the new concerns. If you got not just one by two visits by the FAD, we'd like both results please.

CDCR

FROM OFFICIAL SOURCES

Straight from the horse's mouth, or at least from the official sanctums of CDCR, this is the story on increased good time credits, second striker parole options and future date expedited release. It ain't much, but it's what we got.

Increased credits: available to the nons; non-violent, non-sexual second strikers and minimum custody prisoners. Beginning in February, 2014 these categories of inmates can earn up to 33.3% good time credit (up from 20%) and have their sentences recalculated as a result. This resulted in June in the release of 691 prisoners an average of about 30 days early.

Granting of two-for-one credits for minimum custody prisoners remains under evaluation due to fire camp participation rates.

Non-violent second striker's parole after 50%: CDCR reports it has developed a "tentative policy" to identify qualifying prisoners, non-violent second strikers who have served at least 50% of their sentence. These inmates will be offered a parole hearing. Regulations to put the policy in place are in the draft phase and while no actual target date is given, but the state reports it expects to begin in "coming months."

Future release dates: Although as BPH legal counsel Howard Moseley has noted, this provision of the population cap action plan will affect a relatively small number of individuals, it is of immense interest to those affected and their families and is one of the top questions LSA/CLN fields from families.

From the decision to review these cases and create a process for release until the publication of the July compliance report a total of 11 inmates with future dates had been released. The process includes the following, once the inmates are identified:

"*The State will then review disciplinary histories as they may affect eligibility or warrant a rescission hearing. As part of the verification of eligibility, the State will identify any outstanding holds, detainers, warrants, or Thompson terms. The State has identified the following procedure for releasing eligible inmates: update and verify their parole plan, document the decision, and draft and issue a memorandum to institutions. Institutions will then process the inmate for parole.*"

***CDCR*- from pg 42**

"SWEEPING CULTURE CHANGE" *OR* *JUST WINDOW DRESSING?*

Once again CDCR officials, hoping to get ahead of possible court action and legal suits brought on by unconstitutional policies involving the treatment of state prisoners, have promised a "sweeping culture change," this time in the way mentally ill inmates are subjected to pepper spray. How sweeping this alleged change will be remains to be seen, but it is certainly not done simply because CDCR is concerned about the inmates.

Following the showing of a series of sickening videos showing mentally incompetent inmates reduced to near delirium and powerlessness following repeated dousing with pepper spray and the death of at least one prisoner in part related to this treatment, former federal district Judge Lawrence Karlton indicated his disgust with the policies and signaled his intent to require changes. Not being totally blind to the handwriting on the wall and Karlton's obvious revulsion at the evidence, CDCR promised to modify their policies on pepper spraying the mentally ill. How 18th century of them.

A recently filed 69-page report requires prison guards to consider alternatives to force in dealing with non-compliant, but non-violent mentally ill inmates and give prison mental health professionals more input into how such inmates are treated. Essentially, if custody staff and mental health staff disagree on the need for use of force the decision will be elevated to higher-level staff at the institution.

The new guidelines also prohibit the use of pepper spray or similar chemicals in prison mental health units in the course of what CDCR terms "controlled" use of force, such as when the issue is not so pressing that staff has the opportunity to warn the prisoner of possible use of force if they do not comply. This new policy can only be overridden by the warden, deputy warden or what are considered other higher level officers on duty. Thus the use of pepper spray and similar chemicals to force compliance for such infractions as refusing to remove hands from the food port would be prohibited, absent an order from an identified, verifiable person of authority, who must put his or her name on the dotted line, so to speak, and take responsibility for the consequences of such actions.

After the wrenching videos were shown in Karlton's open court CDCR began revamping and modifying the standards for peppery spraying mentally ill inmates to provide for what was termed a "cool off period" to allow staff to be certain the inmate understands and can possibly be persuaded to obey verbal orders. Inmate attorney Jeffrey Bornstein called the new change "a great first step. This seems to mandate more of a collaborative approach." Bornstein also singled out CDCR Director of Adult Institutions Michael Stainer, who Borstein said took the problems seriously enough to begin changes in policy even before Karlton's ruling declaring the previous policy unconstitutional.

As we have seen before and continue to watch play out CDCR often attempts to make policy changes from the top down. The problem, however, often isn't at the top, but at the 'boots on the ground' level, in the institutions, where whether from inadequate training and communication or sheer perversity of the COs those changes are only given lip service. So while the leaders at CDCR may be attempting to manage a 'culture change' and in fact be sincere in their efforts, the success of the change will not be guaranteed by their sincerity, but by how rigorously they enforce the change (which means accountability and consequences for those who can't/won't make the shift) and how willing they are to consider, investigate and act on instances brought to their attention of disregard of the new policies.

***CDCR*- from pg 43**

YOU ARE THE END USER OF CDC 'SERVICES'

And it's time your comments were heard

One of the problems seen time and again when CDCR rolls out new 'services,' 'programs' or 'policies' is that there is seldom any consideration for how these new changes will be utilized or impact the end user, which is usually the prisoner and often times extends to prison families. For example, we point to VPASS, meant to make visiting easier, and, after a few years of working the bugs out, finally may be reaching that goal. But initially and still at some institutions, VPASS was a glitch-filled nightmare for families trying to visit.

And the reason it was such a monumental balls-up at first roll out was that no one at CDCR thought to talk to the end users—prisoner families—about some of the pitfalls, problems and possibilities of visiting appointments. All of these were revealed in very short order and amid much frustration, finger pointing and missed visits. All because of that one missing component in planning, the input from the end users about what they need and what works.

As part of our constant efforts to monitor all things lifer and prisoner related LSA/CLN attends the periodic meeting of CROB-California Rehabilitative Oversight Board, the panel charged with monitoring the state's on-going and new rehabilitative programs, weighing them and making recommendations to the executive and legislative branches. Normally these meetings are a series of reports on reports, usually information on what has happened.

But the latest CROB meeting featured the results of a prison teacher survey that we found not only interesting, but we think should be used as a gateway to include that end user (prisoner) input on the educational programs and practices of CDCR. So we're going to try and pry open that gateway. The survey, initiated by the Service Employees' International Union, representing correctional educational staff, featured about 45 questions, roughly half of which, with a few minor adaptions offer prisoner-students the chance to comment on the educational offerings, availability and structure in their specific prison. We'll include those questions in this issue of CLN.

Response to the survey was not stellar, with only 347 out of 800 prison teachers sending in replies—about 41% and 3 prisons, FWF (Folsom Women's Facility), NKSP and CHCF not responding all. Surely, prisoners themselves will be more interested in their education. The survey sought responses about all academic as well as career technical education and asked respondents for comments on the programs and possible improvements.

Aside from procedural and logistical concerns, on which prisoners, and apparently teachers, can have little impact, most teachers supported college level education for inmates, primarily through the Voluntary Education Program (VEP) and put forth the problems they have in providing this level of education to prisoners. Primarily these issues appeared to be lack of materials and books, one instructor noting that college level classes "exist on paper. No college materials available." Lack of text books seems the major challenge, but support among teachers to expand the program availability was quite strong.

Now that CROB has heard from the providers of educational services at prisons, it's time for the panel to hear from the end users. Attached is a survey, questions contained therein culled and adapted from the survey used for teachers. This is your chance to comment and reflect on the educational opportunities and paths available to you through CDCR. And remember, education has been empirically shown to be a powerful positive tool in rehabilitation, which, lest we forget, is what that "R" is supposed to mean.

Take the survey (and not just lifers), mail to us at LSA/CLN and we'll make sure the results reach not only CROB, but the administration at Department of Rehabilitative Services (DRS) as well.

EDUCATIONAL SERVICES SURVEY

1. AT WHAT INSTITUTION ARE YOU HOUSED? _____
2. WHAT PROGRAMS ARE ENROLLED IN?
    a. Academic (GED)
    b. Career (VOC)
    c. Voluntary Education (VEP, College or correspondence)
3. WHAT IS YOUR CURRENT HOUSING
    a. GP
    b. Alternative Population (SNY, Honor Yard)
    c. Disciplinary Housing (AdSeg, SHU)
4. DO YOU HAVE ACCESS TO COLLEGE LEVEL CURRICULUM
    a. Yes
    b. No
    c. Not sure
    d. Yes, but self-pay
5. SHOULD CDCR EXPAND OPPORTUNITIES FOR STUDENTS TO RECEIVE COLLEGE LEVEL INSTRUCTION AND CREDIT?
    a. Yes
    b. No
    c. Not sure
6. HOW SHOULD THIS EXPANSION BE CARRIED OUT?
    a. Through the current VEP structure
    b. Through partnership with community college
    c. Through increase college coordinators working in the prisons
7. IN YOUR ACADEMIC OR VOC CLASSES DO YOU HAVE ADEQUATE
    a. Textbooks
    b. Classroom supplies
    c. Voc training materials
    d. Voc training equipment

8. HOW MANY CLASSES DO YOU TAKE THAT REQUIRE USE OF A COMPUTER
    a. 1 or more
    b. None
9. ARE COMPUTERS AVAILABLE FOR YOUR CLASSES
    a. No access to computers
    b. A few
    c. Computer lab
10. WERE YOU ASSIGNED TO YOUR CLASS THROUGH TABE SCORE?

11. WERE YOU MIS-ASSIGNED DUE TO TABE SCORE AND REDIRECTED?

12. WHAT IS THE MAIN REASON FOR ANY ABSENCES YOU MAY HAVE?
    a. Weather
    b. No gate pass
    c. Lockdown
    d. Medical
    e. Officer staffing issues
    f. No boots
    g. Lack of interest
    h. Other_____
13. HOW OFTEN ARE YOU ABSENT?
    a. 10% or less
    b. 25% or less
    c. 50% or more
14. ARE YOU INVOLVED IN EOP, DDP OR CCCMS?
15. SHOULD ALTERNATIVE EDUCATION MODELS BE AVAILABLE FOR SENIOR PRISONER-STUDENTS (Over 65 years old)
    a. Yes
    b. No
    c. Don't know

16. WHICH OF THESE VOC/EDUCATIONAL PROGRAMS WOULD YOU LIKE TO SEE REINSTATED?

a. Appliance Repair

b. Computers

c. Eyewear Manufacturing

d. Graphic Arts and Printing

e. Landscaping

f. Roofing

g. Drywall and Plastering

h. Dry Cleaning

i. Mill and Cabinet making

j. Drafting

k. Upholstery

17. WHAT EMPLOYABLE TRADES WOULD YOU LIKE TO SEE ADDED?

a.

b.

c.

d.

18. ARE YOU ALSO A PARTICIPANT IN

a. PIA

b. Support services job

19. IF YOU ARE A VEP STUDENT HOW MANY HOURS PER WEEK DO YOU HAVE ACCESS TO A TUTOR:

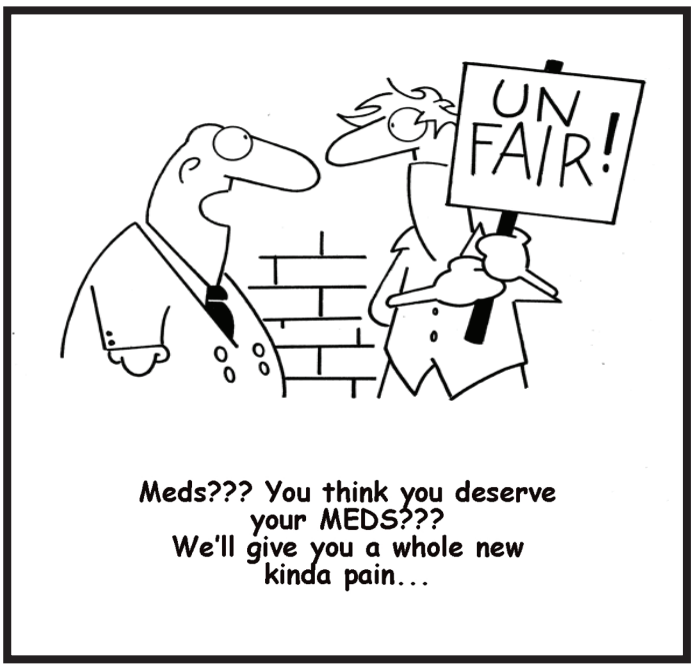
a. Less than 1 hour

b. 5-10 hours

c. More than 10 hours

20. YOUR COMMENTS:

115s BEHIND PRESCRIPTION DRUGS— WE'RE FIGHTING IT



Send us the documentation ASAP

Following several reports from inmates at more than one institution that they received RVRs for prescribed drugs behind random UA tests LSA/CLN has taken up the issue with CDCR, the federal receiver's office and the state legislature. All agree slapping inmates, most especially lifers, with 115s for taking CDC prescribed medications is against policy, wrong on every level and there is interest in official circles in righting that wrong.

But we can't fight this battle on hearsay, he-said-they-said or anecdotes. We've got to have the documentation and so we are turning to our inmate audience to provide us with the tools to help us help you.

If you've been tapped for a random UA, are taking prescribed drugs (and ONLY prescribed drugs) and received a 115 after testing positive, we need your paperwork. Send us EVERYTHING, from the 115 to any hearing decisions to any appeal actions pending or complete. Also any documentation available that you are prescribed the drugs that allegedly popped up in the RVR as well as comments or other information.

In short, just send it all to us and we'll sort out what we need. Send copies or originals, if originals you need back, please note so we can return them, and send them as soon as you can. And one more caveat: if you are augmenting your prescribed medications with anything else—we probably can't help you.

Lifer Family Seminars

****

LIFE SUPPORT ALLIANCE will be coming to a town near you! (well, at least near your family)

Workshop/Seminars

Remaining This Year

San Bernardino

BAY AREA/OAKLAND

Have Family Register by email or phone for updates on schedule

lifesupportalliance@gmail.com

(916) 402-3750

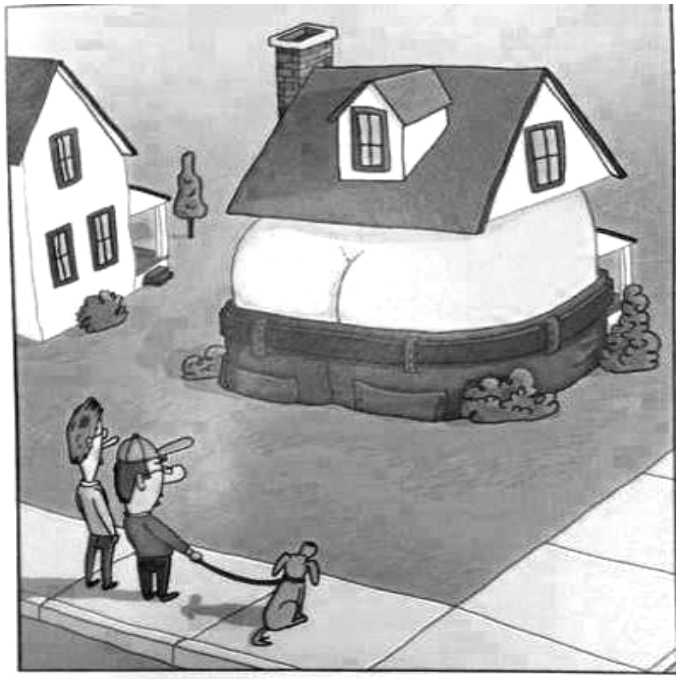
CDCR- **from pg 48**

POPULATION CAP UPDATE

As of July, 2014

Parsing words, shuffling inmates and requesting additional delays seem to be the hallmarks of CDCR's efforts to meet the population cap set by 3 federal judges, oh, so long ago. In latest figures released in mid-July the state reported the total number of inmates 'in adult institutions' was just over 116,000 with an additional 4,200+ in camps and twice that many, nearly 9,000, in out-state institutions.

The department's report listed all 35 (yes, that's right there are now 35 recognized prisons in California; and we thought the building was over) state-run institutions but noted in a tiny font footnote, "The Individual Design Capacity and Actual Population figures for California Correctional Center, Sierra Conservation Center and California Institute for Women include persons housed in camps. This population is excluded from the "Total housed in adult institutions." Which appears to mean, there are really more than 116,000 inmates still under state control but since they're in camps, we won't count them. Camps, prisons; to us, they seem pretty much the same.



"This used to be a really nice neighborhood, until that crack house ruined everything."

For perhaps the first time at least a couple of institutions are reportedly under design capacity. California Medical Facility (CMF) is listed as being at 87.9% and Folsom Women's Facility (a wholly separate female facility housed on and under the auspices of Folsom State Prison) comes in at 97% of capacity. Reports, however, appear to indicate FWF won't stay at 97% much longer as new bunks are being added.

California Health Care Facility in Stockton, although showing an actual population of nearly 1.500 inmates did not report a per cent age capacity, as new admissions to CHCF were halted recently by the federal receiver overseeing medical care when staffing and facilities at CHCF were found to be under acceptable limits. The department has reportedly initiated corrective action and expects to open an additional roughly 1,500 beds by the end of August, 2014.

So just how overcrowded are California prisons, despite all the sound and movement generated by AB 109 and other measurers? Top of the heap 'honors' go to CCWF, at 3,716 inmates and 185.4% of capacity. On the men's side, Mule Creek at 173.8% (2,955), comes in first, followed closely by Lancaster at 173.8% (3,577) with Wasco at 171.9% (5,130) and NKSP 171.2% (4,613) rounding out the top (bottom?) five. Nearly half the institutions reported levels of 150% or more.

Among those with the most, relatively speaking, room in addition to FWF and CMF are CMC, 111.6% (4,285), CRC, 112.7% (2,808) and Pelican Bay standing at 118.6% (2,822). And although it appears that the department, reporting an overall population to design ration of 141.1% as of early July, is in position to meet the Aug. 31, 2014 (extended by 2 months) deadline of 143% of capacity, it nonetheless doesn't appear the prison overcrowding crisis is over.

In a report to the judges accompanying the figures CDCR officials continued to tout their efforts to reduce the population via a variety of means from more out-sourced housing to expanded alternative custody programs to changes in parole process, via YOPH and elder parole.

LSA News

GETTING BIGGER WITH EVERY SESSION

Life Support Alliance's series of seminar for lifer families, "Doing Life as a Family," continues to grow with each event. Our latest seminar, held in Hawthorne, on July 26 saw just over 60 lifer families represented, covering the spectrum from those in for decades to those just starting down the long and difficult path.

Councilwoman Angie Reyes-English,

Great thanks and gratitude to some wonderful volunteers and sponsors, who made this the most successful seminar so far. Joyce Stewart performed yeoman service in finding a wonderful venue at the Hawthorne Memorial Center and Hawthorne Assemblywoman Angie Reyes-English kindly provided lunch for participants and other supportive services.

Joyce Stewart, Vanessa Nelson-Sloane,
Councilwoman Angie Reyes-English, Gail Brown

We're grateful to both these super ladies—Joyce for her commitment to helping and her resourcefulness and planning abilities (LSA staff and speakers have never had it so good—everything was ready when we arrived!) and Councilwoman English for her interest in recognizing and reaching out to a portion of her constituents who are not always acknowledged by their political representatives.

As usual, the day went quickly, as those in attendance heard from a gamut of speakers on subjects from how parole hearings work, to how to help their lifer prepare for suitability to what happens on parole. LSA staff and volunteers included both Director Vanessa Nelson-Sloane and Co-Director Gail Brown, former lifer David Sloane, now-discharged from parole lifer icon John Dannenberg and LSA Board of Directors member Vic Abrunzo.

Also offering insight and observations were lifer attorney Michael Beckman and John Bent, Parole District Administrator from the LA Mid-City district. Councilwoman English welcomed the participants and expressed her commitment to helping all segments of her constituents.

Parole Representative John Bent

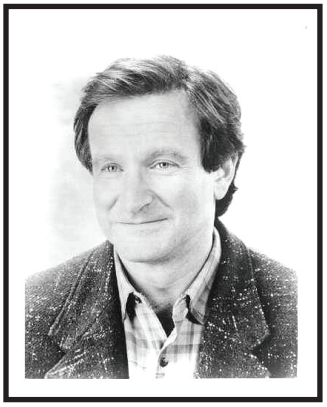
The Hawthorne meeting also featured the debut of our newest message delivery method—Life Support Alliance T-shirts bearing the message "Families Do the TIME Too" and our name. Already these T-shirts have shown up in several prison visiting rooms and we hope to see them show up in many more visiting rooms!

Additional seminars this year are in the planning stages for the Bay Area and the "Inland Empire," Riverside/San Bernardino area. Families who participate in LSA seminars come away not only with a wealth of information on life terms, parole and the prison environment, but also connections, network contacts and a renewed sense of available help and support.

John Dannenberg

Robin Williams

1951-2014



Good Will Hunting
Mrs. Doubtfire
Hook
Fisher King
Jumanji
Dead Poet's Society
Good Morning Vietnam
Aladdin
The Birdcage
Patch Adams
World According to Garp
Night at the Museum
What Dreams May Come...etc.

Quotable quotes:
Remembering Robin Williams' off beat wisdom

"A woman would never make a nuclear bomb. They would never make a weapon that kills, no, no. They'd make a weapon that makes you feel bad for a while"

"Most of all, I want to thank my father, up there, the man who when I said I wanted to be an actor, he said, 'Wonderful. Just have a back-up profession like welding.'

"You know what music is? God's little reminder that there's something else besides us in this universe; harmonic connection between all living beings, every where, even the stars."

You'll have bad times, but it'll always wake you up to the good stuff you weren't paying attention to. *-from Good Will Hunting*

"I went to rehab in wine country ... just to keep my options open," -- *Williams jokes about his stint in rehab.*

You must strive to find your own voice. Because the longer you wait to begin, the less likely you are to find it *- from Dead Poet's Society*

"Death is nature's way of saying, 'your table is ready."

"If heaven exists, let's hope there's laughter... maybe God saying "Two Jews walk into a bar...".."

"Goooooooood morning, Vietnaaaam!"

SURVEY SAYS…

It's almost time once again for one of those (infamous in some circles) LSA surveys, wherein we ask YOU, the ultimate end-user of CDCR 'services,' how they're doing. Yeah, we have a pretty good idea, but the whole point of the survey is to hone in on one area and get the facts, man, just the facts.

This time in the target zone are the state appointed attorneys. LSA/CLN did a similar survey a few years ago, a survey which enabled us to pin-point some of the stars of the state appointed roster, and some of the black holes as well. The recent change in the selection process for state attorneys brought in a whole new group of counselors, many of whom, at the time of their selection for a panel, had never done a parole hearing.

Those new attorneys, as well as the hold-overs from previous years, have now had several months to show their stuff to you, their clients. We hope this survey will be even more useful, since BPH has now initiated an actual discipline process whereby those who might shirk their duties might actually get thrown off a panel. We can but hope. And help, if possible.

Next issue of CLN will feature a survey form asking questions on particular aspects of your interaction with your state appointed counsel, as well as your take on their performance, or lack of, at the hearing. We also hope you'll give us feedback in your own words on any part of the attorney-client process you found good or bad. And you don't have to use the survey form—just send us your comments.

A few notes here: just because you were denied parole does not mean it was your attorney's fault. The responsibility to become suitable has always been and remains on the individual prisoner. But even if denied, your attorney could/should have been of help to you in preparing for the hearing as well as during the process.

Also, please don't forget to include the name of the attorney. Yes, we do get forms back without the name of the attorney included; not helpful. And we need particulars, don't just say he/she didn't do a good job. Did they meet with you before? Did they give you advice on how to present? Did you feel pressured to stipulate or postpone? Did they throw you under the bus to the DA or act as your counsel and guide? These are some of the things we'd like to know.

So start gathering your thoughts and pay attention to details during any interaction with your state counsel. Inquiring minds, ours, want to know. And in all honesty, the BPH is interested in attorney performance as well. And you know we'll share the info. What we won't share is any identifying information about you, unless you allow us to do so.

We hope to be plowing our way through mountains of responses after the next CLN.

Advice from 100 year old people.

-Pain is mysterious, and having fun is the best way to forget it.

-Don't be crazy about amassing material things. Remember: you don't know when your number is up, and you can't take it with you to the next place.

-Find a role model and aim to achieve even more than they could ever do.

-Even if you feel hatred, keep it to yourself. Don't hurt other people for any reason.

-Don't ever give up on love.

-Nobody else controls you.

- Be honest. I've rarely lied. And when you are honest with people, it comes back to you, and they are honest with you. It's too much work keeping up with a lie. You don't need the extra stress

-Travel while you're young and able. Don't worry about the money, just make it work. Experience is far more valuable than money will ever be.

-Don't compare. You'll never be happy with your life. The grass is always greener.

-Do one thing each day that is just for you.

-If you're positive you can get through it OK. When you think negatively, you're putting poison on your body. Just smile. They say laughter is the best medicine there is.

-Always listen to the other person. You'll learn something. Try to sit back, because you will learn a lot more listening to others than telling them what you know.

-Don't be a cheapskate.

-Take time to mourn what you've lost.

-Forgive.

CALIFORNIA LIFER NEWSLETTER

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