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CALIFORNIA LIFER NEWSLETTER™

CLN FOUNDER IN NEAR FATAL ACCIDENT

On August 25th, while driving in his hometown of Walnut, CA., Donald "Doc" Miller, long-time lifer advocate and founder of the California Lifer Newsletter, was involved in a violent automobile collision. Miller suffered a broken neck and a severe stroke. After more than a month in a trauma center (while in a coma most of the time), in September, Miller was transferred to a rehab facility and completed nearly six weeks of intensive therapy. On October 10, Doc finally went home. Doc intends to resume his work on lifer issues and litigation, and expresses his gratitude for the steadfast support of dozens of lifers, attorneys, and other friends, during his ordeal.

State Court Case

By John Dannenberg

Editor's Note: The commentary and opinion noted in these decisions is not legal advice, but the observations and opinion of the columnist only.

CA SUPREME COURT GRANTS REVIEW IN TWO LIFER WRITS CLAIMING PAROLE CREDITS FOR EXCESS INCARCERATION

In re Johnny Lira (#)
2011 WL 6034460 (published)
CA6 No. H036162 (December 6, 2011)

In re John Batie (#)
2012 WL 2947642 (published)
CA4(1) No. D059794 (July 20, 2012)

On October 17, 2012, the California Supreme Court granted review on two lifer writs reaching conflicting conclusions as to whether, when, and how much credit against one's parole tail is due after one has suffered a wrongful reversal of a Board grant by the Governor. While both cases involve pre-1983 commitment offenses (therefore *not* invoking PC 3000.1), the logic used by the courts below may give rise to reconsideration of denial of wrongful excess incarceration for offenses occurring *after* January 1, 1983.

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FAD LAWSUIT UPDATE

As previously reported in CLN (#45 June, 2012, #46 August 2012) attorney Keith Wattley filed in suit in April, 2012 against CDCR and BPH seeking "declaratory and injunctive relief under constitutional, statutory and regulatory law against officials of the California Department of Corrections and Rehabilitation (CDCR) and its Board of Parole Hearings (BPH) for applying unlawful procedures to consider his [sic] suitability to for parole."

Wattley is challenging the BPH's Forensic Assessment Division (FAD) and its thoroughly flawed emulations in the name of inmate Sam Johnson in particular, but on behalf of all lifers in general. Life Support Alliance has been a staunch adversary of the FAD and gives full support and all assistance possible to Wattley in this effort. Below is an update from Wattley, relating the present position of the action.

> *[T]he Board filed a motion to dismiss the action on the grounds that all the defendants have immunity from being sued (they don't) and that the Board's psych policies don't violate any federal constitutional rights (which they do). Our opposition to their motion to dismiss is due on September 20, and then the hearing on the motion is in Department 9 of the United States District Court, Sacramento, on October 4 at 10:00 am.*

As CLN went to press a ruling had not yet been handed down, but could be decided at any time.

We absolutely still need input from prisoners! We really need prisoners and their attorneys to give us information on how the Board has responded (or not) to their written challenges to the contents of psychological evaluations, especially those containing substantial errors.

Below are the points and issues on which Wattley still seeks input from lifers and their attorneys. If you experienced any of these issues in your hearing or psych evaluation please send details of your experience to Wattley at the noted address.

Please relate the details of your experience with the FAD psychologists' evaluations in your case, which the Board then relies on at your parole suitability hearings. Issues may involve, for example:

- Factual errors in the evaluations;
- Requests to speak to the psychologist again;
- Requests for witnesses to be contacted
- Efforts to have errors corrected;
- Risk assessments which are contrary to several previous assessments
- Requests to have the interviews tape recorded;
- Requests to have the psychologist present at your hearing;
- Comments by the Board that a report was inaccurate;
- The psychologist gave you a diagnosis of Antisocial Personality Disorder even though you had little or no previous criminal or delinquent history;
- You were denied parole when the psychologist assessed your overall risk as "low" or
- 'moderate";
- Your written comments or response to an inaccurate psych evaluation did not make it into the Board packet or were not seen by the hearing panel;
- Efforts to correct or oppose approval of the Board's proposal to adopt the new FAD psych evaluations;
- Any other issues.

Keep a copy of what you mail including your documents
Please direct your correspondence to:

Keith Wattley
UnCommon Law
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Oakland, CA 94607.

PUBLISHER'S NOTE

***

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.

HOUSEKEEPING

Herewith a few bits of information and policy that we hope will assist our subscribers and readers in communicating with CLN and Life Support Alliance (LSA), making all our lives a bit easier.

CLN and LSA share the same address: PO Box 277, Rancho Cordova, Ca. 95741. All correspondence should go to this address, but please indicate if your comments or inquiries are for CLN or for an issue involving LSA. This is most important for change of address notifications.

We receive many letters from our subscribers questioning when CLN is published. For the record, CLN will remain a bi-monthly publication, with issues printed in February, April, June, August, October and December. If you don't receive a January or July issue of CLN—that's because there wasn't one published that month.

CLN is a paid subscription publication.Rates and subscription forms are available on next to last page of this issue. Please note, if you are paying for your subscription in postage stamps these should be 80 Forever stamps, sent without tape or staples, please.

CLN is not available on-line.

Back issues from the past 12 months are available for $5 each issue. However, we cannot send a series of single issues. The back issue service is meant to accommodate those individuals who wish to have a specific issue, not provide a year's worth of CLN's one copy at a time. To mail a single issue requires additional staff time and first class postage and thus costs considerably more than those issues sent on a bulk mail permit.

LSA's newsletter, Lifer-Line, is a monthly, free publication. If you have a friend or family member who can receive Lifer-Line via email to print and send to you, that is our preferred method of delivery, as a cost saving measure. However, if that is not an option for you we will add you to our mailing list. Donations of stamps for Lifer-Line are appreciated, but not required.

Please do not send SASE. We do not buy stamps for cash.

When you contact us by mail please keep in mind our staff is minuscule and all volunteer. We process upward of 200 inmates letters and inquires each month, a daunting task for a few people. Please allow us time. We will respond as soon as possible, but writing us twice in two weeks on same issue will not speed the reply.

As stated elsewhere, we are not attorneys and CLN is not meant as legal advice, nor can we provide copies of legal cases or opinions. We endeavor to answer all question sent to us, but those involving a specific prisoner or issue related to an individual or requiring extensive research will be returned with a letter explaining we lack the resources, financial or time, to handle these requests. We will not contact outside persons for you or provide message or pen pal service. That is not our mission.

In order to help finance the costs of publication, California Lifer Newsletter accepts advertising from a various prison-related businesses and individuals. These advertisements in no way constitute an endorsement of these concerns by CLN or Life Support Alliance Education Fund (LSAEF).

LSAEF does provide, free of charge, a list of attorneys specializing in lifer litigation who we believe provide high quality representation to lifers. This list is compiled and maintained completely apart from advertising concerns and is available to any lifer or family member requesting it. Our inclusion of attorneys on this list is based on information received from our subscribers and other lifers on the performance of their attorneys and our own observations at parole hearings. We actively seek input from prisoners on the actions of their attorneys, state appointed and private.

Similarly, we do not endorse or guarantee any business concern advertised in CLN. We do wish to be informed, however, if prisoners feel they have been unfairly treated or scammed by any of these businesses.

The large numbers of prisoner transfers now underway due to classification changes are creating a tidal wave of address change notifications to CLN. Our all-volunteer staff are working hard to keep up with these changes and we ask the patience of our readers in this effort. Please be aware, many magazines may take up to 3 months to effectuate address changes and these companies have a paid staff devoted solely to this effort. Your forbearance is appreciated.

LSAEF is a non-profit, tax deductible 501(c) 3 organization that is dependent on modest donations and the funds derived from subscriptions and advertising in CLN to finance CLN and our educational activities.

When writing to us please include your name and address information in the body of your letter, as envelopes can become separated from letters. And please include your housing assignment in the address, as this, CDC promises us, will help speed your mail to you.
Yes, we laughed too.

Federal Court Cases

by John E. Dannenberg

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

NINTH CIRCUIT: 3RD STRIKER DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS TOLD BY COUNSEL TO REJECT A SIX-YEAR PLEA BARGAIN

Miles v. Martel

(___ F.3d ___)
USCA (9th Circuit) No. 10-15633
(September 28, 2012)

The Ninth Circuit granted habeas corpus relief to a California 3-Strike prisoner who complained that when his attorney told him to reject a six-year plea agreement and take an open plea (where he was unwittingly subject to 3-Strikes and got 25-life), he was denied effective assistance of counsel under the Sixth Amendment.

Tyrone Miles, with two prior robberies under his belt, was later charged with one count of burglary and three counts of check forgery. In the course of talking with his appointed attorney before trial, Miles believed that he was not facing a third strike situation. Although offered a six-year determinate sentence deal, he was advised by his attorney to reject it and "bargain harder." That process involved entering an open plea, which backfired. The court did not dismiss a prior strike as he had hoped, and instead sentenced him to 25-life for a forged check. Miles' appeals and attacks on the bad advice of his attorney were rejected in the state courts.

Miles' federal district court habeas petition was denied because "he did not demonstrate prejudice" at his sentencing. On appeal to the Ninth Circuit, he claimed that under *Strickland v. Washington*, 466 U.S. 668 (1984), he was denied effective assistance of counsel during plea bargaining. Miles contended that deficient performance by counsel caused him to forego the opportunity to plead guilty under more favorable terms. He requested an evidentiary hearing so that he could prove his allegations because the state court denied him the opportunity to do so.

Recently, in *Lafler v. Cooper,* 132 S. Ct. 1376, 1388 (2012), the U.S. Supreme Court recently recognized that the Sixth Amendment right to counsel "extends to the plea-bargaining process. During plea negotiations defendants are entitled to the effective assistance of competent counsel."
Lafler, 132 S. Ct. at 1384.

Applying *Lafler* here, the Ninth Circuit reasoned

> This is not a close case—according to Miles's allegations, [his attorney] Meyer performed deficiently. The complaint alleges two prior felony convictions against Miles and provides the statutory reference to the three strikes law. The possibility that Miles could be sentenced to at least 25 years to life is clear and explicit on the face of the complaint. In spite of this obvious risk, Miles alleges that Meyer told him that an offer of six years was "too much," and stated that he thought Miles could get a better offer, never mentioning the possibility of a three strikes sentence. Taking the allegations as true, we conclude defense counsel's failure to warn Miles was not only erroneous, but egregious, considering the discrepancy between the plea offer ,and Miles's sentencing exposure.

The court held:

> We hold that under the circumstances presented here, remand for an evidentiary hearing is not only permitted but required. Whether Miles's allegations are true or not is not known. His allegations are plausible, however, and if true they state a claim for habeas relief. Accordingly, we reverse the district court's denial of Miles's habeas petition, and remand for an evidentiary hearing in district court.

Any three-strikers who were given a worse sentence after being advised by counsel to reject a lesser plea bargain should read this case to determine if they "have action."

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U.S. DISTRICT COURT DENIES HABEAS RELIEF WHERE "SOME" EVIDENCE SUPPORTED CDC-115 GUILTY FINDINGS

Guerra-Shaner v. Felker (#)

(Unpubl.)
USDC (ED Cal) No. 09-2820 GEB CHS P (June 9, 2011)

The U.S. District Court for the Eastern District of California denied the 28 U.S.C. § 2254 habeas corpus petition of Matthew Guerra-Shaner, wherein Guerra-Shaner sought to

EDITORIAL

LAW OR VENGEANCE; SOCIETY CANNOT SERVE BOTH

Crime victims groups continue to berate the Board of Parole Hearings commissioners for what they term a "lowering of standards" in considering who is suitable for parole. At the Aug 7th BPH Executive Board Meeting representatives from two victims groups attempted to embarrass and browbeat the board about the fact that some lifers are actually achieving parole.

Not satisfied with thrashing the commissioners, one victim's spokesperson exhorted the governor for "removal [of the governor] as the final filter" in keeping lifers in prison indefinitely. In the five minutes allowed each individual to speak to the board members Christine Ward, representing Crime Victims Action Alliance, managed to accuse the board of "lowering the standards" needed to parole six separate times.

She also claimed victims groups were "appalled" in 2006 when 266 lifers were granted parole dates and lamented her group's expectation that 600 lifers may achieve parole this year. Even if true—and we certainly hope so—at 4,800 to 5,000 hearings a year, the release of even 600 lifers would mean the parole rate would hover around 12%, hardly the 50+% alluded to in statute.

Ward asserted—wrongly—that "nearly every grant given" will result in a former prisoner re-offending and being re-committed to prison. This claim is patently false on its face, as all statistics on paroled lifers, from California and nationwide, show lifers recidivate at a barely registering .58%--less than a percentage point. Even CDCR admits in the 20 years ending in 2012 when an accumulation of about 1000 prisoners convicted of first or second degree murder were paroled, none has returned to prison for a life crime and only 8 of the 1000 have returned to prison at all.

Ward castigated the commissioners for "how lenient this board has become," and finally reverted to the favorite obfuscation tactic of DAs and victims groups, a recitation of one un-identified prisoner's crime and history, trotted out in an attempt to paint all lifers not only with the same brush, but with an old, worn-out and no longer useful brush.

In the last 60 seconds of her allotted time she accused the board of "devaluing the crime" at hearings and three more times worked in her mantra of "lowering standards." Ward's cohort from yet another victims' group basically asked the board to walk on water and be "100% sure" that no one granted parole would recidivate. No one, not even the BPH's vaulted Forensic Assessment Division, can give total assurance of human conduct; but given the above noted statistic, it would seem paroled lifers as a group are pretty close to that 100% goal.

Neither victims' representative mentioned suitability factors or the need for the board to follow legal precepts in considering parole, but seemed intent only on making sure the commissioners understood the once and future position of their organizations: no parole, not now, not ever, for no one. Suitability and rehabilitation are not words in their lexicon.

In the two-plus years that Life Support Alliance has been attending Executive Board meetings, beginning within a few months of our founding, we have missed but a single board meeting (and that because we were testifying in the State Senate on prison-related legislation). In those early months of our attendance, victims groups were always present, and at each meeting gave nearly the same soliloquy, appealing to the emotions of the board.

We quickly discovered no one was there to speak for the other side, not just life term prisoners, but for clear-headed adherence to the law. And so that has become an important part of our mission, to speak truth to power, balancing the emotional appeal of victims groups with a reminder to the board that the chance to parole is a promise made in the law and suitability is not determined by emotion, no matter how heart-felt and lingering, but by present circumstances and fact.

We continue to believe and have the empirical evidence to support our position, that lifers are the safest group of inmates to release, and that those long-incarcerated, well programming, rehabilitated and thus suitable lifers should be granted the second chance set forth in the law. What it comes down to is this: are we a society of law, or are we a society of vengeance?

If we intend to run our society by law, then lifers must be permitted to parole on the terms and conditions set forth in those laws. If, on the other hand, we intend to disregard those laws in favor of self-perpetuating and never-ending vengeance and retribution, then we are destined to failure on many levels; moral, practical and fiscal.

Laws are laws, and if we as a society are prepared to condone the punishments and consequences meted out to those convicted of violating those laws, we must also be prepared to accept the events and cessation of punishments when individuals are either acquitted of transgressions or have paid the price prescribed in the law. And if that price includes imprisonment with the expectation of eventual release on parole, then that is what it must be: release on parole when suitable, devoid of emotionally or politically based exceptions, extensions or ex post facto requirements.

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overturn a CDC-115 where he was found guilty of attempted murder, for stabbing another inmate in the back on July 5, 2006, with an inmate manufactured weapon. Guerra-Shaner received a 15 month SHU term and 360 days loss of credits.

After exhausting state court remedies, Guerra-Shaner pled to the federal court that he was denied due process because there was insufficient evidence to support a stabbing, and that the confidential informant's report came four months after the incident. As to the stabbing, at the state administrative appeal and court level, the medical evidence was stated to be a minor abrasion or scratch, which was inconsistent with a puncture wound from a stabbing. The confidential informant was found to be reliable.

At the federal court level, Guerra-Shaner's burden was higher. Rather than ask for a finding that there was insufficient evidence (as at the state level), he now needed to show that there was not "some" evidence to support the disciplinary finding. The federal court found that the 15 pictures taken of the injury and the confidential informant's report did amount to "some" evidence, and therefore federal habeas relief was unavailable.

The Senior Disciplinary Officer, upon an independent review of the file, reduced the 115 from attempted murder to battery on an inmate.

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Guerra-Shaner v. Felker (#)

(Unpubl.)
USDC (ED Cal) No. 09-2822 JKS
(February 10, 2012)

The U.S. District Court for the Eastern District of California denied the 28 U.S.C. § 2254 habeas corpus petition of Matthew Guerra-Shaner, wherein Guerra-Shaner sought to overturn a CDC-115 where he was found guilty of attempted murder, for stabbing another inmate on August 3, 2006, with an inmate manufactured weapon. Guerra-Shaner received 360 days loss of credits.

After exhausting state court remedies, Guerra-Shaner pled to the federal court that he was denied due process because there was insufficient evidence to identify him as the assailant, and that the confidential informant's report was not reliable. As to the identity challenge, distinctive tattoos were noted and relied upon, although they were not found in Guerra-Shaner's tattoo file. The confidential informant was found to be reliable, since other parts of his testimony "had been proven true."

The federal habeas court denied Guerra-Shaner's request for an evidentiary hearing, noting that he had not requested one at the state level, indicating that any such concern had thus been waived. When Guerra-Shaner challenged the sufficiency of the *weight* of the evidence, the court denied the petition, holding that

> Reduced to its basic premise, Guerra-Shaner's argument is that the necessary elements of the offense, as determined under California law, were not proven by the preponderance of the evidence. The fatal flaw in Guerra-Shaner's argument is that preponderance of the evidence is not the applicable standard. The applicable standard by which federal habeas courts are bound in reviewing state prisoner disciplinary findings is whether "there is any evidence in the record that could support the conclusion reached by the disciplinary board." Neither the state courts nor this Court are permitted to independently assess the credibility of the witnesses or re-weigh the evidence. In this case, although it was not articulated, the inference to be drawn from the SHO's decision is that he found the confidential informant to be credible and the statement made by Inmate ***** not to be credible. Applying the some evidence standard, this Court cannot find that the decision of the Lassen County Superior Court was either contrary to or an unreasonable application of Hill, or an unreasonable determination of the facts in light of the evidence presented to that court.

The lesson from these two similar cases is that unless you win your 115 at the disciplinary hearing or on administrative appeal, your chances of later overturning a guilty finding are slim unless there was in fact *zero* evidence.

U.S. DISTRICT COURT CONTINUES TO DENY HABEAS RELIEF ON LIFER UNSUITABILITY CHALLENGES

Neasman v. Swarthout (#)

(Unpubl.)
USDC (ED Cal) No. 11-0259 MCB
EFB P (September 12, 2012)

Life has not gotten better for federal habeas petitioners seeking review of their challenged parole denials. Since *Swarthout v. Cooke*, 562 U.S. ___ (2011) (per curiam) came down a year ago, federal courts have looked in vain for any way to salve the plight of lifers who were denied relief in state court. The present case only serves to illustrate that at this later time, no crack in the *Swarthout* dam has emerged that would encourage anyone to waste the $5 for a federal habeas petition on this topic.

Eddie Neasman was sentenced in 1991 to 25-life for the murder of his wife, plus 4 years for the use of a gun. At his July 2009 parole hearing, he was denied seven years. The Board based its denial on his lack of AA/NA programming since 1995, the involvement of substance abuse at the time of the crime, and the absence of any parole plans. He claimed in his petition that there was "no evidence" of his current unsuitability.

The district court was bound by *Swarthout*.

> However, the United States Supreme Court has held that correct application of California's "some evidence" standard is not required by the federal Due Process Clause. Cooke, 131 S.Ct. at 861. Rather, this court's review is limited to the narrow question of whether the petitioner has received adequate process for seeking parole. Id. at 862. ("Because the only federal right at issue is procedural, the relevant inquiry is what process [petitioner] received, not whether the state court decided the case correctly.") Adequate process is provided when the inmate is allowed a meaningful opportunity to be heard and a statement of the reasons why parole was denied. Id. at 862–63 (federal due process satisfied where petitioners were "allowed to speak at their parole hearings and to contest the evidence against them, were afforded

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> access to their records in advance, and were notified as to the reasons why parole was denied"); see also Greenholtz, 442 U.S. at 16.
>
> Here, the record reflects that petitioner was present at his 2009 parole hearing, that he participated in the hearing, and that he was provided with the reasons for the Board's decision to deny parole. Pursuant to Swarthout, this is all that due process requires. Accordingly, petitioner is not entitled to relief on his due process claims.

Neasman also complained that the Board's concern that he had not continued AA/NA, which he claimed he dropped on religious concerns, violated his First Amendment rights. The court disagreed, noting that the Board was only suggesting the *type* of substance abuse programs he should take, and that they were not *coercing* him to take AA or NA, specifically, to gain parole.

As to Neasman's challenge to the seven-year denial on ex post facto grounds re Marsy's Law, the court denied relief. It noted the existence of the on-going class-action *Gilman v. Fisher* case (E.D. Cal, No. 05-00830 LKK GGH P), of which he was a de facto member. But the court also ruled that in its opinion, Marsy's Law, as applied here, did not violate his constitutional protection against ex post facto laws.

Finally, the court denied Neasman's request for an evidentiary hearing, wherein he wished to offer more recent evidence of his parole plans. Because the court would, in any event, be restricted to that record that was before the Board at the time of the hearing, any such evidence, even if material, was untimely and could not be considered.

Accordingly, Neasman has no action in federal court. His sole remedy is to petition the Board for an earlier hearing under PC § 3041.5((b)(4)), if he can demonstrate that he has now overcome defects they held against him at his last hearing.

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PRISONER § 1983 SUIT DISMISSED FOR FAILURE TO STATE ACTIONABLE CLAIMS

Nguyen v. Bartos (#)

(Unpubl.)
USDC (ED Cal) No. 10–1461 WBS KJN P (August 20, 2012)

Tri Nguyen, at High Desert State Prison, was suffering from an abscessing tooth. He filed a medical treatment form, noting his great pain from a bleeding and pus-draining gums. A reviewing nurse gave him Ibuprofen for the pain, and placed him on the call list for dental treatment.

On the morning of his dental appointment, he was not dressed and asked the C/O for time to dress. The C/O came back in 10 minutes and Nguyen wanted more time to brush his teeth. The C/O allegedly asked Nguyen if he was refusing his ducat, and Nguyen allegedly said, "yes."
Remaining in pain until he was rescheduled, Nguyen finally got the diagnosis that his tooth could not be saved, and was scheduled for its removal. After removal, his mouth healed.

Nguyen sued under 42 U.S.C. § 1983 alleging cruel and unusual punishment for not taking him to the dentist earlier. This was ultimately denied because the tooth was way beyond saving, and any delay did not affect the outcome.

His complaint that the C/O was abusive in arguing with him at the time of his original ducat was dismissed because there was no evidence that the C/O knew he was violating any constitutional right of Nguyen when he was unable to timely get Nguyen ready for escort.

Nguyen also complained that the C/O did not return his ID card to him after the extraction, and that Nguyen could not move about the prison without it. Nguyen further alleged that the C/O threatened to write him a CDC-115 to mess up Nguyen's hoped-for transfer, which was in process. Nguyen claimed this was retaliation for complaining about the C/O's behavior in not taking him on time to his dental appointment. These allegations were either not supported by undisputed facts, or failed to state a claim under controlling U.S. Supreme Court case law.

Finally, Nguyen claimed his due process rights were violated when his fully executed retaliatory 115 wasn't delivered to him at his new housing at Salinas Valley State Prison, to enable him to file a timely 602. The court dismissed this because the C/O, the named defendant in all these claims, had nothing to do with the mailing of his 115 paperwork.

Nguyen, whose TABE reading score was 2.9 and language score was 1.5.1, was not appointed counsel. The court responded:

> The undersigned is sympathetic to plaintiff's limited English language and reading skills. However, the court does not have the resources to appoint counsel for every prisoner with limited English language and reading skills who files a civil rights action. Having again considered the issue, the undersigned finds that appointment of counsel is not warranted.

The moral of the story is that when you believe that you have been unfairly treated by CDC staff, it is nigh unto impossible to overturn any writeup that results from your "differences" with staff, in the federal court realm. For anyone who believes he or she

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nonetheless has a "good case" against "the man" for deliberate indifference to one's constitutional rights, it would behoove them to read the within case *before* filing (at a cost of $350 filing fee) a civil rights action in federal court.

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FEDERAL HABEAS SEEKING NEW BPH HEARING BASED ON REDACTED C-FILE INFO DEEMED NOT RIPE

Ricchio v. BPH (#)
(Unpubl.)
USDC (ED Cal) No. 12–1318 LJO DLB
(September 11, 2012)

In a record-setting 29 days, the Eastern District federal court denied Linda Ricchio's 28 U.S.C. § 2254 habeas petition (without prejudice) where she had sought a new parole hearing properly excluding recently redacted "false and inaccurate information" in her C-file.

Ricchio, doing 27-life on a first degree murder, had been denied parole 5 years in 2007, and seven years in 2011. Her state court petitions challenging the denials were denied. But Ricchio was busier than just with her habeas challenges. In a recent 42 U.S.C. § 1983 civil rights complaint, she succeeded in gaining injunctive relief to have the specified deleterious material redacted from her C-file.

However, the timing of her civil relief and her habeas petitions was mismatched, in that she won the civil relief *after* her parole hearings had been held. Of course, hearings, and court challenges to them, are necessarily based on the record that was before the Panel. For that reason, the federal court saw immediately that it was without jurisdiction to consider the merits of Ricchio's challenge to the Board's denials, because her claims were not ripe. (As a side note, the court chastised Ricchio for bringing *both* her 2007 and 2011 denials in the same petition; each denial was based on a different factual record, and the two cannot be retrospectively thusly "merged.") The court also noted that upon a later reappearance in the federal court, Ricchio must divulge the deleted information in order for the court to determine if it amounted to a due process violation, as she had claimed.

Happily, Ricchio has another avenue. She can request an advanced hearing under PC § 3041.5(b)(4) to properly consider her suitability without the now-redacted spurious material. In fact, the Attorney General has already requested such a hearing for Ricchio, in light of the settlement in her civil rights action to redact her C-file.

Accordingly, Ricchio's hard-won reward in gaining the injunctive relief in her civil suit is giving her the benefit of a new hearing based upon a fair record. Any challenge to the Board's new decision will have to begin afresh in the state courts.

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STATE CASES

State Court Cases
by John E. Dannenberg

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

ACCOMPLISHED JAILHOUSE LAWYER'S SUCCESSFUL SUPERIOR COURT WRIT REVERSED BY 6TH DCA

In re Arcadio Acuna (#)
2012 WL 3757557 (unpublished)
CA6 No. H037335 (August 30, 2012)

Arcadio Acuna, during 30 years of incarceration serving a sentence of 8 years plus three consecutive life terms for kidnapping, has self-taught himself much about litigation. He successfully overturned a gang-validation label in the Del Norte County Superior Court, only to have it reinstated by CDC years later. Most recently, he won a victory in Santa Clara County Superior Court when challenging the 10 year denial the Board gave him at his initial parole hearing in 2010. But the Sixth District Court of Appeal reversed, finding "some evidence" to support the Board's denial reasons.

> Acuna challenged the Board's decision in the superior court, which granted his habeas corpus petition and ordered the Board to conduct a new hearing. The court faulted the Board for "repeatedly misappl[ying] the nexus rule by denying parole based on a 'nexus' between [Acuna's] crime and his even older criminal history." The Board "turned the nexus rule on its head," the court asserted, "by giving the crime independent 'weight' and then looking backwards, instead of forwards in time, from the life crime." This was "such a fundamental error," the court concluded, that "notwithstanding other evidence in the record, it cannot be seen as harmless." (Italics added.) The court found the Board's and Dr. Lehrer's reliance on Acuna's current gang validation "[a]dditionally problematic," since a validation made "for reasons of internal security, does not automatically translate into evidence of current dangerousness."

The appellate court focused on the Board's reliance on the psych evaluation, which rated Acuna "moderate-high" risk overall. The Board was concerned that Acuna's past substance abuse was not currently protected against relapse because Acuna devoted himself to self-help, including his study of the law, rather than participating in groups such as AA or NA. Accordingly, the Board found "some evidence" that Acuna lacked insight into his past substance abuse.

The Board also focused on Acuna's gang revalidation in 2007, notwithstanding his insistence that he has no such activity any more, calling him therefore "procriminally oriented."

In reversing the superior court, the Sixth District summarized its findings.

> The superior court's suggestion that the gang validation and Dr. Lehrer's reliance on it were not "reliable" enough "to pass muster in the context of parole suitability" was error. " 'Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of [the Board]....' " (*Shaputis II*, *supra*, 53 Cal.4th at p. 210.) "While the evidence supporting a parole unsuitability finding must be probative of the inmate's current dangerousness, it is not for the reviewing court to decide which evidence in the record is convincing. [Citation.] Only when the evidence reflecting the inmate's present risk to public safety leads to but one conclusion may a court overturn a contrary decision by the Board or the Governor. In that circumstance the denial of parole is arbitrary and capricious, and amounts to a denial of due process." (*Shaputis II*, at p. 211.)
>
> It cannot be said here that the evidence led to "but one conclusion." (*Shaputis II*, *supra*, 53 Cal.4th at p. 211.) Although the Board did not expressly articulate a nexus between Acuna's lack of substance abuse programming and "fundamental misunderstanding" of NA and AA, his minimization of and lack of insight into his crimes, his lack of credibility, and his unfavorable psychological report, the additional link to current dangerousness that those factors provided was implicit in its decision. Acuna went on a crime spree, kidnapping three people at gunpoint, stealing two of their cars, their money, and their credit cards, all the while screaming at his accomplice to kill them. His only insight was that he acted out of "fear and panic" and "wasn't thinking straight." He may have been "in a cocaine-induced state" as well. The psychological report and Acuna's statements at the hearing evidenced a lack of insight into his crimes and their causes, only "limited" understanding and insight into his substance abuse issues, a demonstrated inability to follow institutional rules, and a moderate to high risk of violent recidivism. The Board's implied conclusion from all of the evidence is obvious: until Acuna sufficiently understands the underlying causes of his actions, addresses his substance abuse issues, demonstrates an ability to follow society's rules by following institutional rules, and severs his gang ties, he remains currently dangerous.

Acuna can apply yet for an earlier hearing, upon a showing that the concerns addressed by the Sixth District have been fairly addressed. His current age of 60 is a factor pointing to reduced likelihood of recidivism.

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3RD STRIKER HAS REMITTITUR RECALLED BECAUSE OF INEFFECTIVE COUNSEL ON APPEAL

In re Paul Downing (#)
(unpublished)
CA2(5) No. B120629 (September 13, 2012)

Paul Downing was sentenced to 25-life on a Three-Strikes conviction in 1998. His attorney had filed a notice of appeal, but never followed up on it; the appeal was accordingly dismissed. In the intervening years, Downing was treated for mental problems at Atascadero and in state prison. He lately sought to have his appeal reinstated so he could challenge his life sentence.

Normally, the procedure is to ask the appellate court for a "recall of remittitur" in the underlying case. But because of the long delay, this was denied. Upon application to the CA Supreme Court, an order was given to the Second DCA to reconsider Downing's application. The Second DCA now found that Downing's appellate counsel had been ineffective, and that he lost his right of appeal

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through the fault of counsel. Accordingly, the court recalled the remittitur and reinstated Downing's appeal, notwithstanding the long delay in brining this request.

> The People allege that even if Downing has shown sufficient diligence, it has been prejudiced by the delay between the 1998 dismissal of the appeal and the 2009 filing of the first motion to recall the remittitur. It asserts that prejudice "militates against granting relief." Notably, Downing does not dispute that allegation in his traverse. However, the eleven year delay described by the respondent is not substantially different than the almost eight year delay present in *Grunau*. (*Grunau*, supra, 169 Cal.App.4th at p. 1001.) The court there found that even a delay of eight years may not bar an order recalling the remittitur. (Id. At p. 1007.) The equities are in Downing's favor, as he persisted in seeking to vindicate his appellate rights despite repeated setbacks.

This case is noteworthy for anyone who might be in the same situation: a notice of appeal of their conviction was filed, but the attorney dropped the ball, causing the prisoner to lose his right of appeal by default. While *Downing* is not published, it is instructive to anyone who suffered a similar fate on appeal, and may wish to challenge it even long after the fact.

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VARIATION FROM "OFFICIAL VERSION" OF THE CRIME DOES NOT ESTABLISH "NEXUS" TO CURRENT DANGEROUSNESS

In re Adam Sanchez (#)

2012 WL 3765431 (___Cal.App. 4th ___)
CA4(3) No. G046189 (August 31, 2012)

Adam Sanchez, then 16, drove by and shot a rival gang member in 1993 who was riding on a bicycle; the victim was paralyzed. First in YA, and later in CDC, Sanchez maintained his criminal gang-mentality – until in 1998, when he was disciplined for holding a fellow gang member's knife, in his rectum. He was also prosecuted, and received a two year determinate term to served after his life sentence.

At his 2010 parole hearing, he was denied based largely on variances in the facts of what happened. He accepted full responsibility, but the Panel took his variances on the degree of his gang affiliation with that of "the official record" to evidence of continuing minimization, and therefore indicia of current dangerousness. At odds with the Panel's conclusion was Sanchez' psych evaluation, which rated him low risk in all test categories.

Sanchez took his case to the superior court, which denied his habeas petition.

> The [trial] court denied the petition, mentioning in its brief ruling "the crime itself," Sanchez's "criminal past," his "violation of probation," and his "involve[ment] in the gang activity and lifestyle from the age of 15." The court also noted, "although [it was] not specifically mentioned" in the Board's decision, Sanchez's 2005 rule violation, but the court did not acknowledge the Board appeared to accept Sanchez's explanation the incident consisted of horseplay for which he assumed responsibility or, in any event, that the Board previously viewed his prison misconduct as relatively "light" overall.

Upon Sanchez' subsequent petition to the Fourth DCA, the court took a different view. The court noted that;

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Here, the Board denied Sanchez parole on grounds he minimized his role in the offense and his gang at that time, thereby demonstrating ongoing "criminal thinking that is actually fortified or reaffirmed within the gang culture that, you know, you try to avoid responsibility, shirk your responsibility...." The Board found Sanchez posed a current risk of danger if released while still in the throes of this "criminal mentality," and also found Sanchez's unstable social history and the nature of the commitment offense made him unsuitable for parole.

The Board, however, reached these conclusions by enshrining the appellate opinion on direct review as "the official record that is recognized ... not only by this Panel," but also "past Panels [and] future Panels...." The Board erred in requiring "official record" fealty (see *Twinn*, *supra,* 190 Cal.App.4th at p. 466), but, more importantly, the discrepancies between Sanchez's account and the appellate opinion did not evidence continuing dangerousness. The Board reasoned that because Sanchez denied the so-called official account, he was shirking his responsibility for his offense and his gang entrenchment, and his lack of insight therefore posed a continuing threat to public safety. ...

The Board incorrectly suggested Sanchez had to hew to an "official record" of the shooting, and we conclude this misunderstanding tainted the proceedings. Apart from Sanchez's inconsequential deviations from the so-called official version of events in the appellate opinion, the record cannot be reconciled with the conclusion Sanchez minimized his responsibility. Thus, the required "nexus between the evidence and the ultimate determination of current dangerousness" (*Shaputis II*, *supra*, 53 Cal.4th at p. 221) is absent.

The court reasoned that whatever minor variances existed between Sanchez' statement of what he did and that "enshrined" in the "official version," they were not inherently incredible or implausible.

> Here, in contrast, the parole decision did not turn on the plausibility of Sanchez's account or more fundamentally on whether he posed a current danger if released, but instead on the Board's mistaken enshrinement of an official version of the offense. That misstep left no meaningful room to evaluate Sanchez's credibility or his insight, remorse, or manifest responsibility for his offense because no deviation from the official script would be tolerated. The error thus prevented any meaningful evaluation of the evidence and led instead to the unsupported and therefore arbitrary conclusion Sanchez rejected responsibility for his actions.

Finally, the court rejected the Panel's conclusions that the crime itself, and Sanchez' prior social history, supported the denial of parole.

> The Board's conclusions Sanchez's commitment offense and social history required denying parole are also unsupported. The presiding commissioner mentioned the commitment offense in a passing remark: "The commitment offense, I'll just throw that in there because that's the reason we're all here and it does tie, I think, to the whole mentality that you display or convey to this Panel in that this was certainly a gang-motivated crime, senseless." The Board also apparently concluded Sanchez's two probation failures 17 years earlier constituted an "unstable social history." But "immutable facts such as an inmate's criminal history" or the "circumstances of the offense" do not by themselves demonstrate an inmate "continues to pose an unreasonable risk to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1221, original italics.)

Accordingly, the court granted the petition and ordered the Board to give Sanchez a new hearing.

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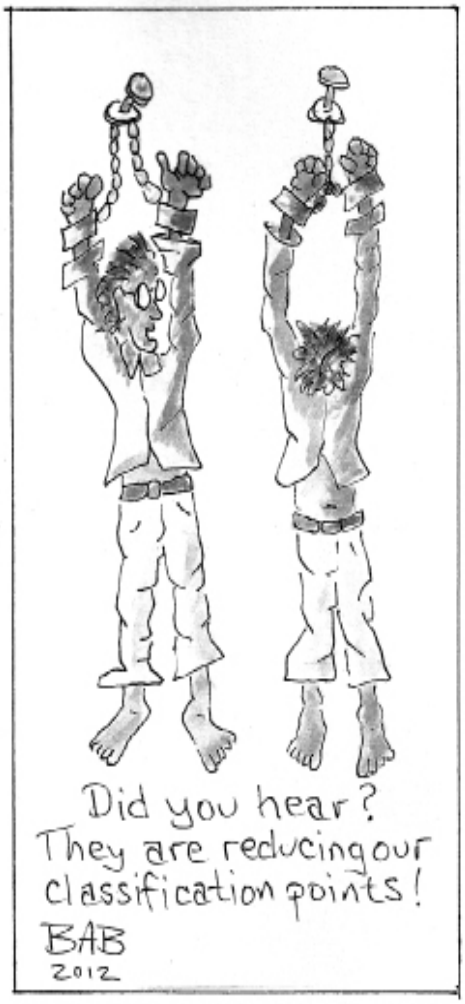

4TH DCA REFUSES TO LET STATE ABANDON APPEAL; FINDS "SOME EVIDENCE" TO UPHOLD PAROLE DENIAL

In re Denise Shigemura (#)
(unpublished)
CA4(1) No. D060974 (September 27, 2012)

22-year old Denise Shigemura had associates who dealt drugs. Things got worrisome among her crowd, and she and others decided to "take out" a meddlesome individual whom they believed threatened their lifestyle. In May 1991, while Denise drove the car the victim had been lured into, a crime partner strangled the victim from behind, with a rope. They later stopped by the side of the freeway, dumped the body, and struck the victim's head with a tire jack just to make sure she was dead. Denise took a plea to 1st degree murder and 25-life; her crime partner got LWOP for the special circumstance of laying in wait.

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At her 2010 parole hearing, the Panel denied parole because they didn't believe she had actually grappled with what she had done. Her story was that she was "paralyzed" by what was going on, and basically blotted it from her mind. The DA argued vigorously against this, claiming she was a very willing planner and co-participant in both the fact and manner of the murder.

Upon her petition to the San Diego Superior Court,

> The trial court granted the petition. The trial court stated: "In petitioner's case, the Board's findings that her statements lacked insight and that she did not truly understand her role in the crime or the nature of her actions are unsupported by the record and inconsistent with the weight of the evidence in the record. . . . Here, petitioner's insight was shown by the record and does not indicate current dangerousness."

Shigemura's psych evaluation was supportive.

Shigemura was examined by a psychologist. According to the psychologist, Shigemura blames her low self-esteem, the peers she chose, and her fear of Jurado for her participation in Holloway's death. Shigemura stated: "I blame myself a lot . . . for being there and not stopping it."

With respect to Shigemura's exploration of the commitment offense and her ability to come to terms with its underlying causes, the psychologist stated: "Ms. Shigemura has had many years to contemplate her crime. She has demonstrated a commitment to self-reflection and self-improvement, as evidenced by years of participation in educational programs, therapy and self-help groups. She appears to have given the commitment offense a great deal of thought. She has explored the ways in which she allowed the offense to take place, including succumbing to negative peer influence; depression (including feelings of hopelessness, lack of motivation or drive, and low self-esteem); passivity and lack of assertiveness skills; problematic substance use; and failure to ask for help. She expressed guilt and remorse for having contributed to the victim's death. Ms. Shigemura is not using the fact that she was a relatively passive participant in the offense as an excuse to minimize her level of responsibility in the crime nor does she question her sentence."

At the time of oral argument, the Board asked the court to withdraw its appeal of the superior court grant of the writ. The 4th DCA refused to do so.

> Shortly before we heard argument in this case, the warden asked that her appeal be dismissed. At argument we inquired of counsel for the warden what, if any, grounds supported the warden's request for dismissal. Counsel was unable to provide us with any information with respect to the warden's request. Because of the seriousness of the life crime, the importance of the board's role in protecting public safety and the extreme deference courts must accord board decisions, we deny the warden's request for dismissal. We note: "After the record on appeal is filed, dismissal of the action based on abandonment or stipulation of the parties is discretionary, rather than mandatory. [Citations]. 'We have inherent power to retain a matter, even though it has been settled and is technically moot, where the issues are important and of continuing interest.' [Citation.]" (*City of Morgan Hill v. Brown* (1999) 71 Cal. App.4th 1114, 1121, fn. 5; see also Cal. Rules of Court, rule 8.244.)

The Board had found that Shigemura's refusal to deal with the specifics of what she was thinking while the victim was being strangled next to her was evidence of her failing to deal with her ability to participate in such violence, and hence amounted to "lack of insight." The 4th DCA found this dispositive.

> Considered together, Shigemura's benign view of the plan to kill Mynett, her continuing feeling Holloway "asked too many questions" and her description of her emotional paralysis at the time Holloway was being killed in her presence suggests that even 21 years after the life crime, Shigemura is still engaged in a great deal of

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rationalization of and detachment from her role in Holloway's death. Shigemura's agreement with the plan to kill Mynett, her role as driver of the car with Jurado sitting behind Holloway, her active participation in moving, retrieving and cleaning the car, and then creating an alibi for her missed curfew are totally at odds with her continuing portrayal of the crime as something which simply happened in her presence and without her active assistance. These aspects of the record provide ample evidence Shigemura lacks insight into the life crime and her role in it.

In this regard, the panel chair's criticism of Shigemura's belief that if she had only just intervened she could have stopped Holloway's murder was fully warranted. Contrary to Shigemura's repeated assertions, she was not a detached observer who would have been willing or able to intervene and prevent the murder. Rather, the record shows Shigemura was a very willing participant in helping Jurado and, sadly, had no meaningful desire or ability to prevent Holloway's death.

We recognize there are statements in the record in which Shigemura expresses remorse and regret for her role in the life crime, an understanding that her profound feelings of worthlessness contributed to her decision to renew a relationship with Jurado following her release from federal custody, as well as acknowledgement that the events leading to Holloway's death were spinning out of control. A trier of fact could reasonably find these statements and the psychologist's positive appraisal outweigh the deficiencies we have identified and demonstrate Shigemura has sufficient insight into the life crime. However, as we have indicated, we are not empowered to resolve or reweigh such an evidentiary conflict. Rather, we are limited to determining whether there is some evidence in the record to support the board's determination Shigemura lacks insight into the life crime. We have found such evidence of her lack of insight.

As in *Shaputis II*, Shigemura's lack of insight into the life crime is a significant factor in determining whether she is a current threat to public safety and sufficient to support the board's ultimate decision denying her application for a parole date. Thus, the trial court erred in granting's Shigemura's petition.

Accordingly, the court reversed the trial court's grant of the petition below.

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OVERLY GENEROUS TRIAL COURT RELIEF, REVERSING BPH DENIAL, TRASHED BY 3RD DCA

In re Harjot Takhar (#)

(unpublished)

CA3 No. C068467 (August 28, 2012)

Harjot Takhar took a plea to two concurrent terms of second degree murder. In 1992, he and his accused crime partner Manpareet Gill entered a home to supposedly "scare" the residents. Instead, Gill purportedly shot both victims, and he and Takhar then proceeded to rob the house. They were identified by a tip a year later. Gill went to trial, but was *acquitted*.

Takhar was denied parole in 2010 by the Board. He petitioned the trial (Sutter Superior) court challenging the denial, which the court granted. The Board appealed, and the 3rd DCA reversed the trial court, finding it had made an impermissible reweighing of the evidence.

> The trial court [found] there was "insufficient evidence to support the Parole Board's decision to deny parole...."
>
> In its order to show cause, the court noted that Takhar has committed no violent acts while in prison. As to the Board's concern that Takhar's pattern of misbehavior in prison was evidence that Takhar would be unable to be a law–abiding citizen, the court stated Takhar's willingness to break rules to please others was irrelevant because Takhar did not know Gill intended to murder the Bonos.
>
> Having decided that there was no connection to be made between the murders and Takhar's rule violations in prison, the court stated that the rule violations were nonviolent and relatively minor.
>
> Finally, the court listed several positive factors that the Board failed to mention in its order: (1) an "impressive" letter to the family of the victims, (2) remorse and acceptance of responsibility, (3) involvement in the prison's hospice program, (4) completion of a vocational certificate in radiologic technology, as well as training as an auto mechanic, and (5) viable exit strategies.
>
> The court concluded: "In the opinion of this Court, the factors in favor of granting [Takhar] parole far outweigh the reasons for denying it. The Board did not give due consideration to all the relevant legal factors. Considering all relevant legal factors, this Court can find no evidence that [Takhar] is a current threat to public safety."
>
> The trial court vacated the Board's June 2010 denial of parole and "remanded to the Board to hold a new hearing within 30 days and to find Takhar suitable for parole unless new and additional evidence shows that Takhar is a current threat to public safety."

Takhar had numerous property crime priors, which resulted in probation. He was on probation at the time of the murders. He considered those earlier crimes relatively minor, and was dismissive of them at the Board. But between April 2007 and June 2008, he also had a prison record of four property-related writeups, notably including several "purchases" of stolen prison food items (10 lbs of chicken at a time) using an excessive number of canteen ducats, out of sequence. Those writeups were not considered by the FAD psychologist in his 2009 Board evaluation, however.

Noting this, the Board found the "bad" outweighed the "good" in his prison record.

> The Board acknowledged Takhar's outstanding work history, educational efforts, participation in self–help programs and his exemplary volunteer work with the supportive care services. However, the Board found Takhar's mental state and current attitude toward the murders weighed against finding him suitable for parole. Takhar continued to display a pattern of willfully violating rules

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consistent with his pattern of willfully violating the law prior to the murders. The Board noted his violations were within a relatively short period of time and involved similar behavior. The Board also found Takhar lacked sufficient insight into the causative factors of his criminal conduct, including his unwillingness to see the parallels between his self–justification of both the rules violations and the events leading up to the murders. The Board found the March 5, 2009, report by Dr. Thacker was favorable but inconclusive, in that it did not address the second serious write–up Takhar received and "did not address what appears in this case to be a fairly recently demonstrated propensity to violate institutional regulations in serial fashion." The Board expressly noted that Takhar had received two serious write–ups, the most recent in 2008 and four minor write–ups, also most recently in 2008. The Board found Takhar's behavior "evidence[d] a pattern of conduct related to an inability to follow lawful orders and/ or take direction or comply with the law as you know it and explained it ... today." The Board also found Takhar's past criminality involved alcohol and narcotics violations, included multiple failed grants of probation, at the time of the murders Takhar was on probation for offenses which involved alcohol or narcotics, and the murders were especially heinous and committed for a trivial purpose.

Reviewing the bidding, the appellate court found that the Superior Court had simply made the error of *reweighing* the evidence. The 3rd DCA itself found plenty of support for the "some evidence" needed in the record to uphold the Board's denial.

Here, in concluding Takhar was currently dangerous, the Board relied on: (1) Takhar's current mental state and attitude toward the crime; (2) his lack of insight into the causative factors of his criminal conduct, including his unwillingness to draw "obvious parallels" between his past criminal conduct and current institutional violations; (3) his continuing pattern of violating rules within a relatively short period of time; (4) the inconclusive nature of the psychologist's report; (5) Takhar's prior criminality and previous failures on probation; and (6) the heinous nature of, and trivial motive for, the murders.

Takhar takes issue with each factor relied upon by the Board individually. We need not resolve each individual challenge, as "[w]e may uphold [the Board's] decision, despite a flaw in its findings, if the [Board] has made clear it would have reached the same decision even absent the error. [Citation.]" (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1100.) Here, the Board's decision makes clear the primary bases for the denial of parole were Takhar's current mental state and attitude toward the murders, his lack of insight into the causative factors of his criminal conduct, including his unwillingness to see parallels between his institutional misconduct and the events leading up to the murders, and his inability to follow lawful orders or comply with the law or rules as he knows them. The Board's references to the commitment offense and the inconclusive nature of the psychological evaluation were " 'peripheral to [the Board's] decision and did not affect the outcome.' " (*In re Reed* (2009) 171 Cal.App.4th 1071, 1087, quoting *In re Dannenberg*, *supra,* 34 Cal.4th at p. 1099.) Accordingly, we will focus our analysis on the reasoning and factors critical to the parole denial.

The inmate's understanding, current mental state and insight into factors leading to the murders are highly probative "in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (*Shaputis II*, *supra*, 53 Cal.4th at p. 218; *In re Lawrence*, *supra*, 44 Cal.4th at p. 1227.)

With respect to the murders, Takhar and Gill went to the Bonos' house "only" to play a prank. Takhar did not think about what they were doing. Even after he learned Gill had a firearm, he thought Gill would "only" shoot in the air. Takhar knew Gill's possession of the firearm was illegal and that he was violating his probation just by being with an illegally armed Gill. Also, Gill said he was going to use the gun to rob the Bonos. Nonetheless, Takhar did not think about any consequences, and he ignored the "red flags" that should have prompted him to prevent further criminal conduct. He just wanted to get to a party. By Takhar's own account, "there were several events in which 'red flags should have been going off for me and they didn't.' "

Similarly, with respect to his institutional misconduct, Takhar knew his conduct was wrong and a violation of the rules. But, since it was "only food", he did not think the consequences would be severe. In fact, he thought "if I get caught with this, the worst thing that's going to happen is, I'm going to get another 128." So, when he saw opportunities to violate the rules, he took them. Even after two violations, Takhar "didn't give too much thought as to" the amount of ducats he had accumulated, almost four times more than he was permitted to have. As with the events leading up to the murders, despite warnings about his misconduct, no "red flags" went off. As to both the murders and the institutional violations, Takhar knew his conduct was wrong and either illegal or in violation of rules. In spite of that knowledge, he chose to proceed and satisfy his own desires, irrespective of the consequences of his behavior.

There are other parallels between Takhar's past criminal history and his current institutional misconduct. Over the course of about two years, in violation of the law and conditions of probation, he engaged in a number of theft and property crimes. In the course of committing one of those crimes, Takhar's friend murdered two people, resulting in Takhar's no contest plea to two second degree murders. After the murders, he rationalized and minimized his behavior, telling himself he did not do anything.

Now, while in prison, over the course of two years, Takhar has again engaged in theft and property type offenses with a similar disregard for rules. He acknowledged his thinking in committing these violations was criminal thinking and that he had knowingly purchased stolen property. Nonetheless, he insisted he had not committed willful criminal behavior. Rather, he had "only" made mistakes. But buying stolen goods is, in fact, willful criminal behavior. (Pen.Code, §§ 7, 496.) Takhar's prison conduct demonstrates he continues to act

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without considering the consequences of his action or inaction, and minimizes his misconduct. This type of thinking, or lack of thought, contributed significantly to the murders. Contrary to Takhar's claims, there are parallels between his recent institutional misconduct and his past criminal history and these parallels support the Board's conclusion that he lacks insight into the causative factors leading to the life offense. Moreover, there is a rational nexus between Takhar's lack of insight and minimization of both his criminal misconduct and his rules violations and his current dangerousness. (See *In re Lazor* (2009) 172 Cal.App.4th 1185, 1203.)

It is difficult to comprehend the point made by the trial court in its order that Takhar's inability to obey the rules in prison is irrelevant to his ability to obey the laws on parole. The court stated: "The Board expressed concern that [Takhar's] food infractions suggest a tendency to please his friends even when it requires him to break the rules. The Board extrapolates that this behavior is akin to [Takhar's] behavior on the night of the murders, when he accompanied his friend to the victims' home. Yet, as articulated by the original prosecutor, there is no evidence to suggest [Takhar] had reason to believe his friend was planning to commit murder."

It appears the court did not see that Takhar's breaking of rules in prison he deemed unimportant is a moral defect and character deficiency that was also manifest in Takhar's aiding and abetting Gill to commit an armed robbery and, ultimately, murder against two people Takhar knew Gill held a grudge. Takhar admitted to the Board that there were "red flags" that should have stopped him from aiding Gill, yet he continued to aid Gill. Likewise, in prison, he is willing to break rules—that is, commit crimes—he deems less important even though he knows the rules.

The appellate court came down decisively against Takhar's claims of no evidence. While one can make a good case for his reformation based on his extensive self-help programming, it was his "helping himself" to kitchen vittles to support his cell cooking that hurt him ultimately. The court found that the Board acted within its proper discretion to find that behavior a "red flag" auguring against Takhar's current suitability.

A parole suitability determination, and assessment of the current risk to public safety, includes an analysis by the Board of whether "the inmate will be able to live in society without committing additional antisocial acts." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 655; *In re Roberts* (2005) 36 Cal.4th 575, 590; *In re Sturm* (1974) 11 Cal.3d 258, 266.) For a life prisoner on parole, the inability "to comply with the reasonable controls imposed by the parole agent is an antisocial act." (*In re Reed*, *supra*, 171 Cal.App.4th at p. 1085.) There is a rational nexus between a demonstrated unwillingness or inability to adhere to the reasonable conditions of parole and a current threat to public safety. (*Id*. at p. 1075.) Thus, "where the Board's denial–of–parole decision rests on identified facts probative of a current unreasonable risk that the inmate will not adhere to these [parole] conditions, we must uphold it." (*Id*. at p. 1082.) This is particularly true where, as here, the murders were committed when the inmate was on probation.

Takhar's misconduct within prison, his own relaxed sense of self–discipline, and repeated tendency not to think about the consequences of his action and inaction "undermin[e] confidence in his ability to follow the reasonable directions of his parole agent." (*In re Reed*, *supra*, 171 Cal.App.4th at p. 1085.) When combined with Takhar's past history of probation violations and the circumstances of the murders, these factors are some evidence of an unwillingness or inability to comply with rules and laws and provide a rational nexus to a finding that Takhar is a current threat to public safety.

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CDC'S *BLANKET* APPLICATION OF 2000 FT. SEX OFFENDER HOUSING RESTRICTION IN SAN DIEGO COUNTY ENJOINED

In re William Taylor, et al. (#)

(___Cal.App.4th ___)
CA4(1) No. D059574 (September 12, 2012)

The Fourth DCA upheld the San Diego County Superior Court's ruling that CDC's *blanket* application of a 2000' housing restriction for sex offenders, pursuant to "Jessica's Law," was overbroad and unconstitutional, as administered.

The nature of the 150+ habeas petitions in San Diego County was that no matter what the sex offender's crime was, he or she was automatically banned from housing within 2000' of parks and schools. The purpose of this restriction, according to CDC, was to protect the areas where *children* study and play in the county. However, many sex offender registrants' commitment offenses have nothing to do with children. Hence, there was no logical reason to apply such a 2000' restriction to them.

The prejudice of CDC's blanket application is huge. Approximately 97% of affordable multi-tenant housing (i.e., apartments, motels, boarding homes) in San Diego County lie within such a 2000' perimeter. In essence, the blanket application had the effect of banning any sex offender from having affordable housing. Nonetheless, paroled to the county, they had to live somewhere. Typically, they became homeless and ever more dependent on public services that are most available near downtown San Diego – a place near which they may not live.

The appellate court agreed with the superior court that CDC could assign such restrictions, if justified by case factors, on a case-by-case basis. The restriction could be more or less than the 2000' number, based on permissible considerations. The court explained:

> Glynn and Taylor are registered sex offenders because each of them committed a sex crime against an adult; there is no hint of pedophilia in their histories. The exclusion of parolees with backgrounds similar to Glynn and Taylor from living near schools and parks does not substantially protect children, but as the record here shows, it has tremendous impact on such parolees' rights and liberty without bearing a substantial relation to their crimes. As in the cases of Glynn and Taylor, it prevented them from living with family members. In Taylor's case, it also decreased his proximity to needed services and treatment. By banning all sex offenders, the absolute residency restriction of Jessica's Law, when enforced as a parole condition, imposes a substantially more burdensome infringement on constitutional rights than is necessary to protect children from sex crimes. As such, the blanket enforcement of section 3303.5(b) as a parole condition in San Diego County has been unreasonable and constitutes arbitrary and oppressive official action.

As noted by the trial court, its orders do not prohibit CDCR from individually enforcing the residency restriction of Jessica's Law as a parole condition for registered sex offender parolees in San Diego County. The orders merely disallow CDCR from blanket enforcement of the residency restriction. Parole agents retain the discretion to regulate aspects of a parolee's life, such as where and with whom he or she can live. (§§ 3052, 3053, subd. (a).) Agents may, after consideration of a parolee's particularized circumstances, impose a special parole condition that mirrors section 3303.5(b) or one that is more or less restrictive. It is only the blanket enforcement—that is, to all registered sex offender parolees without consideration of the individual case—that the trial court prohibited and we uphold.

The next step is to challenge CDC on its blanket requirement for all sex offenders to wear GPS ankle bracelets. Under the logic of *Taylor*, it makes no sense to "follow" such parolees' movements for those with no prohibited areas to avoid.

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CDC'S GANG "VALIDATION" PROCESS HELD INSUFFICIENT. 4TH DCA SPRINGS INMATE FROM ASU; ORDERS FILE EXPUNGED

In re Robert Villa (#)

(___Cal.App.4th ___)

CA4(1) No. D060817 (September 27, 2012)

In a published decision, the Fourth DCA carefully reviewed CDC's gang validation process as applied to inmate Villa, and found that the evidence proffered by CDC was insufficient to support validating Villa. Accordingly, the court order his release from ASU and his file expunged, including as to any notifications made to other law enforcement agencies.

Villa had been "validated" as a Mexican Mafia gang member on the basis of three "source items," plus the word of a "confidential informant." One of the "source items" was his possessing the chronos of another inmate who was a gang member *while Villa was helping him with legal work*, a permitted activity, and with the papers having been approvingly given to Villa via the law librarian. The other two "source items" allegedly tied him to "the Mexican Mafia" in general, but fell far short of identifying a *person* who was a gang member that he affiliated with, as was required by applicable regulation. Finally, the "confidential informant" information was, upon *in camera* inspection, not legally valid to hold against Villa. The informant identified others that Villa was allied with, but *none of those was a validated gang member*. Thus, the informant did not provide the requisite "direct link" as required by CDC regulations.

The court first explained its reasoning as to the "source items":

> Section 3163 explicitly permits an inmate to assist another inmate in filing legal documents. As part of this

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assistance, either inmate is authorized to possess documents relating to the preparation of legal documents. Here, Villa was in possession of Encalade's chronos that were used to validate Encalade as an associate of the Mexican Mafia. He was given the chronos by the law library officer to assist Encalade in his appeal. If Villa possessed the chronos to assist Encalade as sanctioned under section 3163, the chronos cannot then serve as a source item under section 3378 to validate Villa as an associate of the Mexican Mafia. A contrary determination would subject Villa to a penalty for possessing documents he is permitted to have under another regulation. Here, the record does not indicate that the CDCR considered Villa's explanation for possessing the chronos in light of section 3163. Its failure to do so renders its reliance of the third source item arbitrary, capricious, and unreasonable.

Even without Encalade's chronos, the CDCR still had three source items from which to validate Villa as an associate of the Mexican Mafia. None of these sources, however, provided a "direct link" from Villa to another person, specifically a former or current validated associate or member of the Mexican Mafia. The CDCR decided to require this "direct link" to be to a specific person, not the gang in general. (See § 3378, subd. (c)(4).) Had it intended the "direct link" to be satisfied by showing merely a link to the gang in general, the regulation would state as much. It does not, and we cannot read such words into the regulation without any indication that the CDCR intended the requirements of section 3378, subdivision (c)(4) to be satisfied by a "direct link" to the gang in general as opposed to a specific gang member or associate as the language expressly requires. Without a source item to fulfill the "direct link" to a person as required under section 3378, subdivision (c)(4), the CDCR's validation of Villa as an associate of the Mexican Mafia is not supported by "some evidence." Accordingly, we have no choice but to grant the relief requested.

The court then explained its reasoning as to the confidential document:

As such, the critical question becomes, does the confidential memorandum directly link Villa to a person who is a validated member or associate of the Mexican Mafia. We determine that it does not.

The confidential memorandum includes the identity of the informant. He is not a "current or former validated member or associate of the [Mexican Mafia]" or "an inmate/parolee or any person who is validated by the department within six (6) months of the established or estimated date of activity identified in the evidence considered." Consequently, the confidential informant himself cannot satisfy the requirements of section 3378, subdivision (c)(4) as a "direct link."

The confidential memorandum indicates that the informant named additional inmates, besides Villa, who also serve on the "Mesa." None of these inmates, however, are validated members or associates of the Mexican Mafia. Thus, these individuals do not satisfy the "direct link" requirement under section 3378, subdivision (c)(4). There is no other mention of members or associates of the Mexican Mafia, validated or otherwise, in the confidential memorandum.

In short, there is nothing in the confidential memorandum that links Villa to another validated member or associate of the Mexican Mafia. Hence, the confidential memorandum cannot serve as the "direct link" to satisfy the requirements of section 3378, subdivision (c)(4).

The court's disposition was stern and unambiguous:

Let a writ of habeas corpus issue directing the CDCR to (1) expunge Villa's validation as an association of the Mexican Mafia prison gang, (2) report the expungement to all gang-related law enforcement databases and clearinghouses to which the original validation was reported previously, and (3) cease housing Villa in the ASU based on gang validation.

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37-YEAR LIFER TELLS BOARD HE HAS NOTHING NEW TO SAY; 6TH DCA SUSTAINS HIS 15 YEAR DENIAL

In re George White (#)

2012 WL 3867284 (unpublished)
CA6 No. H036936 (September 6, 2012)

Thirty-seven year veteran lifer George White (age 62), whose death sentence was commuted in the 70's to life, represented himself at his 2010 parole hearing. He came without his "packet" and told the Panel he had not read it, since he had "lived all of it."

White admitted he shot the victim because she alleged owed him $10,000 for drugs, but told the Panel he had no answer to their question how that would aid him to get repaid. He admitted it was an execution-style slaying; that he was sorry for the victim and her family; and that if the state had executed him, he would have got what he deserved. But now that he has life, he's asking for another chance, and he's "done his time."

Years earlier, White had taken AA for 18 years and he earned a Dry Cleaning vocational certificate. But he had little else to show for his long incarceration. Although he only had one sustained CDC-115, his psych evaluation rated him moderate-high for risk of future recidivism if released. This was based in part on his extensive prior criminal record, much of which was in his juvenile years, beginning at age 12.

The Board denied parole to White for 15 years, finding that he posed an unreasonable risk of danger if released from prison. The Board cited the following factors in support of its denial: the commitment offense;2 White's prior escalating criminal history and failure to profit from prior efforts to correct his criminality; his lack of insight into the crime, as documented in the 2009 psychological evaluation which also found White presented a moderate to high risk of violent recidivism; his unrealistic parole plans; and his failure to participate in self-help since his last parole hearing.

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> The Board recommended White remain discipline free, upgrade his vocational skills when available, participate in available self-help programs and cooperate in completing a clinical evaluation. The Board cautioned White that he could not return to his next parole hearing "and say 'I've done my time. Let me out.' " The commissioner concluded by telling White, "You gave the worst presentation I've had the privilege to sit before in a long time. You were not prepared. You need to be—This stuff is about you. And I knew this stuff cover to cover because that's my job, and you come in here—It was pathetic, to be honest with you."

White petitioned the Santa Clara Superior Court regarding his 15-year denial, claiming the Panel failed to articulate a nexus between the commitment offense and the conclusion that White posed a current risk to public safety. The court granted the writ.

> The superior court issued an order to show cause and, on May 4, 2011, granted the petition, faulting the Board for misapplying In re Lawrence (2008) 44 Cal.4th 1181 (Lawrence). The Board was ordered to provide White a new hearing within 100 days, "comporting with due process and the 'nexus' test of Lawrence, rather than the 'weight' test of *Dannenberg* (*In re Dannenberg* (2005) 34 Cal.4th 1061).

The Sixth DCA found the superior court's decision flawed.

> The superior court's order vacating the Board's decision was founded on its conclusion that the Board had ignored the new " 'nexus' test" set forth in *Lawrence* and had instead utilized the " 'weight' test of *Dannenberg*." In reaching this conclusion, however, the superior court focused almost exclusively on the Board's discussion of the commitment offense and failed to acknowledge the myriad other factors listed by the Board which supported its conclusion that White was unsuitable for parole. This was error.

In its review, the Sixth DCA found that the record supported the Board's finding that White's criminal history disfavored parole, that White had "lack of insight" as determined by the psychological evaluation, that White's parole plans were unrealistic, and that he had failed to participate in self-help since advised to do so at his last hearing. Accordingly, the court found

> [b]ased on this record, there is sufficient evidence to support the Board's conclusion that White is presently dangerous and unsuitable for parole at this time

and reversed and remanded to the superior court to enter a new order denying the petition.

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COURT ANALYZES PC § 1054.9, WHICH ALLOWS LWOPS TO SEEK POST-CONVICTION DISCOVERY MATERIALS FOR A PETITION TO VACATE JUDGMENT

Tholmer v. Superior Ct. (#)

2012 WL 3089758 (unpublished)
CA3 No. C069723 (July 31, 2012)

California law (Penal Code § 1054.9) provides for a prisoner sentenced to death or life without the possibility of parole (LWOP) to file a post-conviction habeas petition seeking to vacate the judgment. § 1054.9 has no time limit. While this is not news, a recent case provides an excellent tutorial review of this penal code provision that is recommended reading for affected prisoners.

Lionel Tholmer was convicted of three 1993 murders and the jury recommended the death penalty. Citing "lingering doubts," the trial court overrode the jury and sentenced Tholmer to LWOP instead. Eighteen years later, Tholmer sought material from his trial to try to reconstruct an evidentiary trail that could become the basis for a habeas petition seeking to vacate the judgment.

He utilized § 1054.9 by filing a form habeas petition in the Yolo County Superior Court. After the matter was argued, that court denied relief. Tholmer then sought a writ of mandate in the Third DCA to order the trial court to follow §1054.9. The appellate court granted relief in part. In so doing, the court provided an informative legal summary of § 1054.9, which is reproduced below as a service to CLN's LWOP and Condemned Row readers.

> "The legislative history behind section 1054.9 shows that the Legislature's main purpose was to enable defendants efficiently to reconstruct defense attorneys' trial files that might have become lost or destroyed after trial." (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 897.) However, the language of section 1054.9 "does not limit the discovery to materials the defendant actually possessed to the exclusion of materials the defense should have possessed." (*In re Steele*, *supra*, 32 Cal.4th at p. 693.)

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"Accordingly, ... section 1054.9 [requires] the trial court, on a proper showing of a good faith effort to obtain the materials from trial counsel, to order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show either (1) the prosecution did provide at time of trial but have since become lost to the defendant; (2) the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence; (3) the prosecution should have provided at time of trial because the defense specifically requested them at that time and was entitled to receive them; or (4) the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them." (*In re Steele*, *supra*, 32 Cal.4th at p. 697.)

However, section 1054.9 requires the prosecution to disclose only materials currently in its possession. "[I]t includes only materials 'in the possession of the prosecution and law enforcement authorities,' which we take to mean in their possession currently. The statute imposes no preservation duties that do not otherwise exist. It also does not impose a duty to search for or obtain materials not currently possessed." (*In re Steele*, *supra*, 32 Cal.4th at p. 695.)

"[S]ection 1054.9 requires defendants who seek discovery beyond file reconstruction to show a reasonable basis to believe that other specific materials actually exist. Otherwise, a discovery request can always become ... a free–floating request for anything the prosecution team may possess." (*Barnett v. Superior Court, supra*, 50 Cal.4th at p. 899.) "[A] reasonable basis to believe that the prosecution had possessed the materials in the past would also provide a reasonable basis to believe the prosecution still possesses the materials. Petitioner need not make some additional showing that the prosecution still possesses the materials, a showing that would be impossible to make." (*Id*. at p. 901.)

"[W]hen the trial court denies a defendant's discovery request under section 1054.9 and the defendant seeks writ relief in the appellate court, the defendant must show the appellate court he would have been entitled to the materials he requested at time of trial. Absent such a showing, the defendant cannot carry his burden of showing the trial court abused its discretion in denying his discovery request." (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 363.)

Neither section 1054.9 nor the cases construing it require an inmate who seeks discovery of materials that were disclosed to the defense but have since been lost (i.e., materials for "file reconstruction") to make any showing of relevance of those materials to the inmate's anticipated habeas corpus petition.

But, when an inmate seeks to justify section 1054.9 discovery on the ground that the prosecution should have disclosed the material at trial under a duty imposed by statute (§ 1054.1, subd. (e)) or constitution (*Brady v. Maryland* (1963) 373 U.S. 83), the inmate must provide a specific explanation of how the material is exculpatory. (*Kennedy v. Superior Court*, *supra*, 145 Cal. App.4th at pp. 366–367, 370–371; see also *Barnett v. Superior Court*, *supra*, 50 Cal.4th at p. 901 ["If petitioner can show he has a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence"].)

"Where the defendant seeks to justify a discovery request based on a theory of third party culpability, the defendant must—at the very least—explain how the requested materials would be relevant to show someone else was responsible for the crime. Likewise, where the defendant seeks to justify a discovery request on the ground the requested materials would have been relevant to impeach a prosecution witness, the defendant must—at the very least—explain what that witness's testimony was and how the requested materials could have been used to impeach that testimony." (*Kennedy v. Superior Court*, *supra*, 145 Cal. App.4th at p. 372; see also *id*. at p. 389 [trial court did not abuse its discretion in denying section 1054.9 motion because inmate failed to show requested material "could have been used to impeach the trial testimony of [witnesses] or could have otherwise constituted exculpatory or favorable evidence subject to disclosure under *Brady* and/or section 1054.1(e)"].) However, to the extent the inmate seeks evidence he claims should have been disclosed at the time of trial under *Brady v. Maryland*, *supra*, 373 U.S. 83, he is not required to show the evidence is "material" within the meaning of *Brady,* i.e., "that it is reasonably probable the result would have been different had the evidence been disclosed." (*Barnett v. Superior Court*, *supra*, 50 Cal.4th at pp. 900–901.) We note that *Barnett* implicitly overrules *Kennedy* to the extent *Kennedy* holds that the inmate must show not only that the evidence is exculpatory but also that it is material under *Brady*. (See *Kennedy v. Superior Court*, *supra*, 145 Cal.App.4th at pp. 376–377, 379–382, 387–388, 392–393, 396–397.)

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COURT HAS NO AUTHORITY TO ORDER LIFER TRANSFERRED BACK FROM PRISON TO COUNTY JAIL, FOR *INVESTIGATIVE* PURPOSES

Swarthout v. Superior Ct. (#)

(___Cal.App.4th ___)

CA2(3) No. B241132 (August 16, 2012)

Culver City police wanted to investigate a lifer at Solano State Prison regarding possible new charges. The legal question was, could this be ordered?

On April 19, 2012, the Culver City Police Department sought an order for the temporary transfer of J.T. to the Los Angeles County Men"s Central Jail (L.A. Jail) for investigative purposes. The request for the order was made by means of an affidavit filed under seal. The affidavit sought the temporary transfer of J.T. in connection with the Culver City Police Department"s investigation of another crime, an investigation which purportedly could

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> not take place without the transfer of J.T. The Los Angeles Superior Court, which had no proceeding pending against or involving J.T., issued the order.
>
> The order was faxed to Warden Swarthout, who immediately contacted counsel in the Attorney General"s office. Warden Swarthout and the Attorney General took the position that the trial court lacked jurisdiction to issue the transfer order. Unable to resolve the matter informally with the deputy district attorney who was working on the current investigation, Warden Swarthout filed a request to reconsider and vacate the transfer order.

Warden Swarthout contended that there was no authority for the trial court's order. While there are statutes which provide for an order transferring a prison inmate to a county jail for *specific purposes* (Pen. Code, §§ 2620, 2621), the trial court"s order in this case did not fall within the scope of those statutes.

Stated another way, the trial court has the inherent power to order the production of a state prisoner for *judicial* purposes. But there is no authority to do so for *investigative* purposes. As the Second DCA noted,

> A court's inherent powers arise from the California Constitution, which vests the courts with the *judicial* powers of the state. The investigation of crimes, however, is an *executive* branch function. (*Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1542.) Without statutory authority, a court has no inherent powers to assist in the investigation of crimes. The trial court's issuance of the inmate transfer order for investigative purposes does not, in any way, further the court's ability to perform its judicial function. Thus, the court has no inherent authority to issue the transfer order in these circumstances.

Accordingly, the appellate court granted the writ of mandate, vacating the transfer order.

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STILL IN THE COURTS

SAN DIEGO: The Fourth District Court of appeals ruled recently that Prop. 86, the initiative passed by voters in 2006 that imposed residential restrictions on paroled sex offenders, violates the rights of those individuals, imposing restrictions so severe the parolees often end up living on the streets. The ruling comes as the result of litigation brought by attorney Ernest Galvan on behalf of four San Diego County parolees who had been unable to find housing as a result of the Prop. 83 restrictions.

One provision of Prop. 83 prohibits register sex offenders, regardless of whether or not their crime involved minors, from living with 2,000 feet of any school or park and has been construed to include bike trails. As a result of these restrictions the four individuals bringing the court action reported they had been reduced to living on the streets, sometimes at the suggestion of their parole officers. Two were reportedly living in an alley behind the parole office, as suggested by their PO, a third was living in riverbed with other similarly situated individuals, again at the suggestion of the PO, and the fourth was living out of a vehicle.

Following evidence of other individuals forced to live far from employment opportunities or access to medical and mental health care the court held that applying blanket residency restrictions without consideration of crime and circumstances (as applied in San Diego County) "excessive and unduly broad in relation to its purpose - namely, to establish predator free zones around schools and parks where children gather." As such the application constitutes "arbitrary and oppressive official action."

Although as of this printing the state has not announced if the Fourth District Court ruling will be appealed, if the decision stands it could have implications outside San Diego County. "It's broadly generalizable to the metropolitan Bay Area," said attorney Ernest Galvan.

SAN FRANCISCO: Yet to be decided as CLN goes to press is a challenge to the state's practice of a required DNA sample from everyone arrested for felony prior to any conviction. The Ninth US Circuit Court of Appeals recently closely questioned a Deputy Attorney General on the ramifications of requiring DNA from those who were merely arrested and not yet convicted.

While the state's position is that the collected DNA, which is retained by the state even if the individual is later cleared of any crime, has provided a valuable crime fighting tool and that built in safe guards protect the information from abuse. However, Judge Harry Pregerson characterized the mass collection of DNA "a terrible intrusion on privacy." Judge Raymond Fischer added that when police have a DNA sample "your whole history is ... in possession of the government."

While the state maintained the DNA collection was no more intrusive than collecting fingerprints the court noted that fingerprints may provide identification, but DNA provides much more, including information on medical conditions and heritage. However the 11 judges of the Ninth Circuit Court rule, and they did not indicate a timeline for that ruling, the entire issue is likely to eventually wind up before the US Supreme Court.

SIGNIFICANT PAST CASES IN LIFER LITIGATION

Herewith a brief summary of court decisions that have had significant and lasting impact on parole issues for California Lifers. Most of these actions were discussed in past issues of California Lifer Newsletter at the time of the individual decision. This summary is intended only as a quick reference guide, collated by subject, to assist lifers in their legal efforts. Please note, no analysis is here presented, simply the name and subject of the case.

CALIFORNIA SUPREME COURT

In re Shaputis (Shaputis II). This case verifies the insight, or lack thereof, of a prisoner into the causative factors of the crime is a probative consideration for public safety and therefore parole suitability. December 29, 2011 ___Cal.4th____,S188655; Court of App. No. D056825; 2011 WL 6821364 (Cal.), 12 Cal. Daily Op. Serv.137.

In re Shaputis (Shaputis I). If exists a "modicum" of evidence to support the finding of dangerousness by a BPH panel or governor, there is no further recourse in the appellate court. (2008) 44 Cal. 4th 1241.

In re Prather. Violation of due process of parole suitability by the BPH requires a new parole hearing, in line with due process. (2010) 50 Cal. 4th 238.

In re Lawrence. The parole board's decision that a life term prisoner remains dangerous and unsuitable for parole must be supported by "some evidence" and cannot be merely the opinion of the board members. (2008) 44 Cal.4th 1181.

In re Rosenkrantz. While the judicial branch of government is entitled to review findings of the parole board to ensure due process is followed, the court can only inquire into where there is some evidence in the record to support the Board's decision. (2002) 29 Cal.4th 616

APPELLATE COURT DECISIONS

Responsibility:

In re Wen Lee. In a reversal of a reversal, the court vacated the governor's reversal of the prisoner's parole grant. The court held the inmate's sincere acceptance of responsibility for the crime, while recent, was probative to suitability. It was the fact of acceptance and sincerity of that acceptance that was determinative, not the timing.
(2006) 143 Cal.App.4th 1400

In re Barker. As with the above case, the court held it is the attainment of an aspect of suitability, in this case rehabilitative programming and gains, that is important, not whether those gains are long-standing or recent. (2007) 151 Cal.App.4th 346.

Insight:

In re Twinn. In another double reversal, the court found the Governor did not establish a 'nexus' between alleged lack of insight of the prisoner and current dangerousness. The court here established its opinion that lack of 'insight' into factors causing the crime is not evidence of current dangerousness. (2010) 190 Cal.App.4th 447.

In re Jackson. Here the court held a prisoner's contention of innocence did not show a 'lack of insight,' as stated by the Board in denial. The court cited Section of Title 15, which prohibits the board from requiring admission of guilt for suitability. (2011) 193 Cal.App.4th 1376.

In re Rodriguez. The Governor, citing lack of insight stemming from a psychological evaluation, reversed a grant of parole. The court, in reversing the Governor, once again articulated that simple 'lack of insight' was not in and of itself a determination of dangerousness. (2011) 193 Cal.App.4th 85

Past cases-Lifer litigation **from PG. 21**

Other issues:

In re Reed. Affirms that recent disciplinary write ups, even for minor transgressions, are valid 'evidence' of current dangerousness. (2009) 171 Cal.App.4th 1071.

In re Lira. Affirms prisoners whose parole grant is reversed by the governor and later re-instated via court or a second suitability finding are entitled to credit against their parole time for those months spent incarcerated between the first and second suitability finding. (2011) 102 Cal.App.4th 677.

The following decisions reversed denials of parole by the governor and/or parole board due to failure to state a nexus between the factors used to deny and current dangerousness.

In re Burdan (2008) 169 Cal.App.4th 1227

In re Gaul (2009) 170 Cal.App.4th 20

In re Palermo (2009) 171 Cal.App.4th 659

In re Dannenberg (2009) 173 Cal.App.4th 237

In re Powell (2010) 188 Cal.App.4th 1530

POLITICS

POLITICAL PARTIES DOUBLE TALK

ON PRISON ISSUES

It's all about semantics in party stands

At their recent convention in Tampa, Florida the Republican party approved a party platform that calls for mandatory minimums for certain crimes, supports the death penalty, opposes parole for "dangerous and repeat felons" and declares "criminals behind bars cannot harm the general public." They also applaud "new approaches" to combatting drug abuse, laud "faithbased institutions" that divert troubled youngsters and want more reentry systems.

The GOP also blasted the federal government for "overcriminilizatoin" of offenses and said should revoke federal agencies' ability to "the power to criminalize behavior," something the platform claims "has created tens of thousands of criminal offenses." We'd like a nexus of logic between these disparate positions, but sadly, we're at a loss as to how to reconcile them.

Over on the other side, the Democrats, aren't making much more sense. Their platform pledges to fight "inequalities" in the justice system, but backs the death penalty, unless it is applied in an "arbitrary" manner. They also call for community based programs to address at-risk youth and more emphasis on rehabilitation, effective counsel and DNA testing when "appropriate." Details apparently to be presented later. Maybe.

Cleary, leadership on such issues as sentencing, the death penalty, rehabilitation and parole is as lacking on the national level as Californians have found it to be at the state level.

REMINDER

Mailing address for
California Lifer Newsletter and Life Support Alliance
has recently been changed.

CLN/LSA
P.O.Box 277
Rancho Cordova, Ca. 95741

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NOVEMBER BALLOT BATTLES TAKE SHAPE

Death penalty and Three Strikes

go before the people—again

With the November election looming large in the telescope the opposing sides in the two issues most affecting lifers are starting to coalesce. Proposition 34, SAFE (Savings, Accountability, and Full Enforcement [for]) California Act, would abolish the death penalty, effective the day after the election, should this measure pass.

The result would be a change of sentence for the 725 death row inmates, who would overnight find themselves doing Life Without Parole and subject to some new conditions of confinement, including the requirement that they work at prison jobs, with their earnings, meager though they may be, ascribed to "any victim restitution fines or orders against them."

One of the prime movers behind Prop. 34 is Jeanne Woodford, former warden of San Quentin, and thus no stranger to death row inmates and ramifications of capital punishment, fiscal, emotional and preventive. Woodford is not the only unexpected face behind the pro-Prop. 34 signs; Don Heller, who helped pen the 1978 ballot initiative that reinstated California's death penalty now says "I made a terrible mistake 33 years ago," and Former LA District Attorney Gil Garcetti, not known to be soft on anything, least of all crime, are also backing the abolishment of the death penalty.

The measure also has the support of several social justice groups, as well as some police officers, murder victims' family members, even two individuals who served time under sentence of death before finally be exonerated. Other, more predictable supporters include the ACLU (Northern and Southern California, Imperial and San Diego counties), Death Penalty Focus and the Atlantic Advocacy Fund. And the Democratic party in California

Opponents are pretty predictable as well. The list reads like an alphabet soup of law enforcement, prosecutorial and conservative politicians, from the ACE Officers Research Association, Kern County Prosecutors Association, and a variety of DA and police groups. Even Republican Congressman Dan Lungren tossed in a spare $4,500+ from his "surplus funds." And the Republican party of California.

In an interesting twist, those in support of Prop. 34 and therefore against the death penalty have out-fundraised those wanting to retain the authority to kill, some $3 million to $40,000. Support for abolishing the death penalty may wax and wane, to some extent, with whatever high notoriety crimes are in the news on election day. In mid-July polls showed support and opposition to Prop.34 was a statistical tie at about 45% yes and 46% no.

However, in late July and early August two mass shooting made national news, one in a theatre in Colorado and the other in a Sikh temple in Wisconsin, both resulting in numerous innocent deaths. A poll taken after these two events reflected a change to 38% in favor and 52% opposed.

The fate of Prop. 36, in initiative to reform the 3 Strikes law, may be on more solid ground. Early summer polls indicated about 71% of voters supported the Prop.36, with more recent polls showing slight rise to around 78%.

The ballot initiative would change but not drop 3-strikes sentencing. If passed the changes would drop the automatic 25 years to life sentence for third strikers. Those convicted of third strike that was

POLITICS

non-violent, non-serious would still receive a stiff sentence, double the usually imposed for that particular category of crime.
Third strikes that were violent or sexual in nature would still call for a mandatory life term. Those facing a third felony conviction could also be sentenced to life if one of their previous convictions had been for murder, rape or child molestation.

The provisions of Prop. 36 that affect current lifers involve the possible resentencing of those presently serving a life sentence for a non-violent, non-serious third strike. While not a pass out of a life term, the provisions do provide the possibility of resentencing, if the prisoner meets a host of qualifications, including the nature of prior offenses, conduct while in prison and participation in rehab programs.

They would also have to serve twice the usual time for their conviction before they could petition their sentencing court for re-consideration of sentence. And the courts are under no obligation to agree to resentencing. It appears those who might achieve a resentencing hearing should be prepared to go through a process similar to a parole hearing but in a judicial setting. Not a cake walk, to be sure.

Should Prop 36 pass it has the potential to affect some 3,000 current lifers. In addition to the substantial fiscal savings estimated to be had if 3 Strikes is modified, application of life sentencing for a third strike conviction has been widely seen as unevenly applied, with a recent study by the Justice Policy Institute showing 75% of those California inmates serving life for a third strike conviction were from minority groups.

As with the proposal to abolish the death penalty the supporters of 3 Strikes Reform are something of a collection of strange bedfellows. Expectedly, some supporters (and major financial contributors) are aligned with more liberal issues, such as philanthropist and financier George Soros, the NAACP, and a pair of professors from Stanford University. But also signing on for the reform are a trio of District Attorneys (LA, San Francisco and Santa Clara counties), the Los Angeles Chief of Police and a coalition of members of both political parties.

In opposition to any change stands Mike Reynolds, who wrote the original 3 Strikes law, an assortment of police chiefs and DAs, the expected collection of victims' rights groups, Henry Nichols (author of Marsy's Law) and the California Republican Party.

Both Prop 34 and 36 require only a simple majority of yes votes to pass. It is important to remember that while the tenants of Prop 34 will begin the day after passage (and the death penalty will be no more) the provisions of Prop. 36 that could affect current lifers are not so automatic. There is no guarantee, even if the reform passes, that any current third strike lifer will immediately or even assuredly receive relief. But passage of Prop. 36 will at least offer up the possibility.

POLITICS

BROWN SIGNS SB 9 AND SB 542

JUVENILE LWOP & IWF BILLS

But vetoes AB 1270 to allow

media access to prisoners

In a last-minute cliff hanger Governor Brown signed into law two bills supported by prison reformers and advocates, including Life Support Alliance and CLN. SB 9, which will revamp Life With Out Parole sentences meted out to juveniles and SB 542, which will give prisoners and their advocates a say in how Inmate Welfare Monies are spent, were signed by Brown on September 30, the last day possible.

Perhaps the more dramatic of the two is SB 9, authored and sponsored several times over the last few years by Sen. Leland Yee (D-San Francisco) in stalwart and determined efforts to right what he and others perceived as an on-going miscarriage of justice. SB 9 will allow those who received an LWOP sentence before the age of 18 to request the courts review the case after 15 years, and possibly receive a new minimum sentence of 25 years to life. The bill would require the offender to show remorse and be working towards rehabilitation in order to submit a petition for consideration of the new sentence.

"SB 9 is not a get-out-of-jail-free card; it is an incredibly modest proposal that respects victims, international law, and the fact that children have a greater capacity for rehabilitation than adults," said Yee. "The neuroscience is clear – brain maturation continues well through adolescence and thus impulse control, planning, and critical thinking skills are not yet fully developed. SB 9 reflects that science and provides the opportunity for compassion and rehabilitation that we should exercise with minors."

"SB 9 becoming law speaks volumes for who we are as a society – that we value our children," said Yee. It is estimated SB 9 could potentially affect about 300 current prisoners. Earlier this year the US Supreme Court ruled mandatory LWOP sentences unconstitutional when applied to juveniles. That ruling has only an ancillary impact on California sentencing, where LWOP is not a mandatory sentence. The Supreme Court ruling, however, undoubtedly helped garner support for SB 9 in the legislature.

The second bill winning the governor's approval, SB 542, by Sen. Curren Price (D-Los Angeles) is an unexpected bonus to this year's legislative session. As originally presented, using the Inmate Welfare Fund (IWF) as a funding vehicle for services needed by those in county custody, SB 542 was initially opposed strongly by many groups, including LSA and CLN. However, to his credit, Sen. Price took the time to investigate not only the real purpose but also the status of the IWF and decided action was needed.

Sen. Price revamped SB 542 to provide much needed transparency and accountability to the IWF. Under the provisions of SB 542 individual prisons will consult the MAC/WAC committees and the local Inmate Family Council and/other advocacy groups to solicit input on how IWF monies at that institution should be used, including family visiting services and securing ID cards for those prisoners about to be released.

LSA came to support SB 542 after Sen. Price's revamping of the bill and, at the Senator's invitation, testified in favor of the bill in several legislative settings. It has been our position that those who provide the money for the IWF (prisoners and their families via purchases) and who the fund is supposed to benefit (prisoners) should have some say in what the fund is used for. Sen. Price noted, after visits to San Quentin and Folsom Prison to discuss the bill with inmates, that prisoners were knowledgeable not only of what the IWF was supposed to do, but what they needed at their various locations.

After the bills were passed by both houses of the legislature and reached the Governor's desk our members and supporters stepped up more than once to call for support of these bills, peppering the Governor's office with support calls, letters, emails and FAXes urging his signature. As late as 6 days before the signing our members were reminding Gov. Brown that these bills were worthy of his signature.

All the news is not good, however. On the same day he signed SB 9 and SB 542 Gov. Brown vetoed AB 1270 (Ammiano, D-San Francisco), which would have greatly increased the access to prisoners allowed to members of the media. Though supported by many groups and individuals, including several media concerns and reporters, Brown found Ammiano's bill too "expansive" for his taste.

Brown's veto message appeared to fear the expanded access could allow prisoners to "glorify their crimes and hurt victims and their families" and impinged too broadly on a warden's power to refuse the media access to prisoners. The Governor did, however, leave open a small window of possibility, noting "I agree too little media access may be harmful," but concluding "This bill gives too much."

POLITICS

ARNOLD'S ACTION "REPUGNANT" BUT NOT ILLEGAL COURT SAYS

Ever diligent in his efforts to be one of the 'good 'ol boys' and make the best political mileage out of any situation, one of the last actions performed by former Governor Arnold Schwarzenegger may have done more to tarnish his image than anything else he did while in office. And it has been upheld by the California courts.

On Jan. 2, 2011, in the last hours of his administration, Schwarzenegger commuted the 16 year sentence of Esteban Nunez, son of former California legislator and some-time Schwarzenegger ally Fabian Nunez, to a 7 year term. The younger Nunez pled guilty to manslaughter in the death of 22-year old Luis Santos at a San Diego party in late 2008. During the trail of Nunez and his cohorts much was made of the powerful friends and associates of Daddy Nunez. On issuing the last minute commutation, effectively halving young Nunez' sentence, Schwarzenegger called the 16 years for manslaughter sentence "excessive" and noted Esteban did not himself commit the killing. This, from the same chief executive who vetoed nearly 80% of legally granted parole dates doled out by his conservative and hand-picked parole board.

Predictably, once the commutation was announced (virtually as Arnold was scooting to the airport for a quick hop back to Southern California and a civilian but not without controversy life) howls of foul play were heard from all sides of the political spectrum. The Santos family and tough-on-crime factions loudly criticized the move as an abuse of power, travesty of justice and political dirty-dealing. Social justice groups, prisoner advocates and more liberal minds said—pretty much the same thing. It was a rare moment in California politics and justice, when both sides of the coin were equally agitated about the same action, for the same reasons.

The Santos family brought action in Sacramento Superior Court seeking to overturn the commutation and restore the original 16 year sentence. In early September a clearly troubled Judge Lloyd Connelly ruled the commutation, while "repugnant" and "distasteful" was within the scope of Schwarzenegger's authority as governor and was therefore valid. Connelly also labeled the former governor's actions "an abuse of authority."

The Santos family has based their legal action in part on precepts of Marsy's Law, contesting the legality of commutation because the governor did not notify the family prior to the commutation. Judge Connelly ruled that commutations are so different in legal character from pardons that former do not require the same family notification as the latter, and thus the notification clause does not apply in this case.

In another of his less-politically astute moves, Schwarzenegger, when asked about the part his friendship with the senior Nunez played in the commutation of the son's sentence replied "Well Helloooo. Of course you help out a friend." Fabian Nunez is presently partner is a "public strategy firm' (read lobbyist) and recently became an election analyst for Spanish language media giant Univision. Son Esteban remains in prison.

THE GOVERNOR'S RADAR

All assessments of Governor Jerry Brown's actions in the first year of his administration agree this governor is invoking his power to reverse lifer parole dates less frequently than any of his predecessors. Whether this trend is good or bad, whether Brown is following the law or getting soft on crime, those opinions depend on where one stands on the prison reform debate.

Crime victims groups are beginning to loudly bemoan what they see as Brown's laissez faire attitude, while social justice groups, like Life Support Alliance, maintain Brown is merely the first governor in decades to really follow the law. To be sure, Brown has allowed more lifers convicted for first or second degree murder to parole than Schwarzenegger, Davis, or Wilson, but he has reversed about 15% of parole suitability findings made for that category of lifer.

The governor, theoretically, reviews each grant of parole, giving equal consideration to all aspects of the situation. The reality is, the governor's staff reviews the grants and there seem to be certain specific circumstances that appear to trigger a reversal. Culling through the record of the 71 parole grant reversals from Brown's first year in office reveals there about a half dozen particulars that seem to draw the Governor's attention and reversal message.

- Victims: female victims, children, the elderly or vulnerable in some way (handicapped, ill).
- Multiple victims: either in one incident or spread over a few days
- Execution, abuse or torture
- Gang related killings; prison or street gangs
- Victims' family members: attending the hearing and/or contacting the governor's office after the parole hearing.

Of the 71 reversals in 2011, half had victims in the risk category, nearly 20% involved crimes with multiple victims, another 20% were gang-related and yet another 20% featured torture or abuse circumstances. In roughly 10% of the grant reversals victims' families had been present at the hearing or had contacted the governor.* LSAEF is collecting data that we hope will provide more information on how victims efforts affect either grants of parole or actions by the governor.

By the end of 2011 the parole grant rate was about 12% overall for all commissioners. There were 4,274 hearings held with 510 suitability decisions. That's up from about 8% grants in 2010 and 7.5% in 2009.

Brown's reversal messages also reveal a few consistencies. When speaking about a crime where the victim was a family member, especially a child or female spouse of the prisoner, Brown's message will usually castigated the prisoner for violating his/her "position of trust and care" bestowed by virtue of the relationship. If the prisoner maintains innocence or no lucid memory of the crime due to substance abuse or if his version of events differs from that in the 'official record', the governor's remarks will almost universally include the acknowledgement that inmate" is not required to admit guilt to be found suitable for parole. But I am not obligated to accept his version of the crime. And I do not."

LIFER

Lifer Scheduling and Tracking System

Commissioners Summary
All Institutions
July 01, 2012 to July 31, 2012

	ANDERSON, JR	FERGUSON	FITZGERALD	FRITZ	GARNER	LABAHN	PECK	ROBERTS	ROBLES	TURNER	ZARRINNAM	BPH HO	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Hearing Totals*	33	38	36	30	36	31	22	30	0	30	30	249	565	19**	546
Summary of Suitability Hearing Results per Commissioner															
Suitability Hrg Total	31	36	26	27	28	26	21	29	0	30	25	129	408	19	389
Grants	6	7	6	9	8	5	10	7	0	11	4	2	75	7	68
Denials	19	22	13	16	10	13	10	16	0	15	13	3	150	9	141
Stipulations	3	2	3	1	2	7	0	2	0	0	5	12	37	1	36
Waivers	0	2	2	0	2	0	0	2	0	2	0	67	77	2	75
Postponements	2	3	2	1	4	1	1	2	0	2	3	35	56	0	56
Continuances	1	0	0	0	2	0	0	0	0	0	0	0	3	0	3
Split	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	9	9	0	9
Denial Length Analysis per Commissioner (Summary of Denials and Stipulations)															
Subtotal (Deny+Stip)	22	24	16	17	12	20	10	18	0	15	18	15	187	10	177
1 year	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
3 years	14	14	11	10	6	10	5	10	0	10	10	11	111	7	104
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	5	7	4	5	4	6	4	7	0	4	3	4	53	3	50
7 years	2	2	1	2	1	3	0	1	0	1	2	0	16	0	16
10 years	1	1	0	0	1	1	1	0	0	0	3	0	8	0	8
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Waiver Length Analysis per Commissioner															
Subtotal (Waiver)	0	2	2	0	2	0	0	2	0	2	0	67	77	2	75
1 year	0	2	2	0	2	0	0	2	0	2	0	37	47	2	45
2 years	0	0	0	0	0	0	0	0	0	0	0	16	16	0	16
3 years	0	0	0	0	0	0	0	0	0	0	0	10	10	0	10
4 years	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	3	3	0	3
Postponement Analysis per Commissioner															
Subtotal (Postpone)	2	3	2	1	4	1	1	2	0	2	3	35	56	0	56
Within State Control	1	0	0	0	0	0	0	0	0	1	1	24	27	0	27
Exigent Circumstance	1	2	0	1	4	0	0	0	0	0	2	1	11	0	11
Prisoner Postpone	0	1	2	0	0	1	1	2	0	1	0	10	18	0	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, and Inmate Petition (PR/FR).
** Hearings Conducted with more than one "Commissioner" column count on the Hearing Total" line does not include En Banc Reviews.

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LIFER

Lifer Scheduling and Tracking System

Commissioners Summary
All Institutions
August 01, 2012 to August 31, 2012

Hearing Totals*	35	41	24	17	50	20	9	18	1	12	0	29	24	293	551	2**	549

Summary of Suitability Hearing Results per Commissioner

	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	Total CMS Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	35	35	20	16	42	17	9	18	1	12	0	25	18	141	370	2	368
Grants	8	6	4	1	12	9	0	4	0	3	0	5	1	6	57	0	57
Denials	13	18	14	9	20	7	0	9	0	8	0	12	11	0	121	2	119
Stipulations	0	6	0	2	1	0	0	3	0	1	0	0	5	11	29	0	29
Waivers	0	0	0	1	3	0	0	1	0	0	0	1	1	71	78	0	78
Postponements	4	4	1	3	5	1	0	1	1	0	0	1	0	57	78	0	78
Continuances	0	1	1	0	1	0	0	0	0	0	0	2	0	0	5	0	5
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	2	2	0	2

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

Subtotal (Deny+Stip)	13	24	14	11	21	7	0	12	0	9	0	12	16	11	150	2	148
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	8	18	9	7	13	7	0	7	0	5	0	7	9	9	97	1	96
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	4	5	3	2	4	0	0	5	0	1	0	3	5	1	33	1	32
7 years	1	3	2	2	3	0	0	0	0	3	0	2	2	0	18	0	18
10 years	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1	0	1
15 years	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	0	0	1	3	0	0	1	0	0	0	1	1	71	78	0	78
1 year	0	0	0	1	2	0	0	1	0	0	0	1	1	33	39	0	39
2 years	0	0	0	0	1	0	0	0	0	0	0	0	0	22	23	0	23
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	14	14	0	14
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	4	4	1	3	5	1	0	1	1	0	0	1	0	57	78	0	78
Within State Control	1	3	1	3	2	0	0	0	0	0	0	1	0	49	60	0	60
Exigent Circumstance	1	0	0	0	2	0	0	0	1	0	0	0	0	0	4	0	4
Prisoner Postpone	2	1	0	0	1	1	0	1	0	0	0	0	0	8	14	0	14

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

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BPH NEWS

BPH ACTIONS AND EN BANC HEARINGS

As the spate of revocation of parole hearings lessens, due to the restructuring of that duty under realignment, the number of en banc hearings decreases and the outlook of the parole board subtlety shifts, due to changes in political outlook and leadership, the parole commissioners have begun what can only be seen as an effort to be proactive in improving the parole situation for lifers. Several months ago the board as whole agreed to form a series of advisory committees to study various areas of the parole process, with each committee making recommendations to the board as a whole.

While these committees have waffled a bit as the commissioners have come and gone, the latest incarnation of the committees, indeed the board, seems relatively stable and the various committees are beginning their work in earnest. The three advisory committees, their purpose and members are:

CORRECTIONAL
REHABILITATION PROGRAMS;
to research and recommend to the entire board correctional rehabilitation programs available to life inmates. Members of this committee are Commissioners Montes, Figueroa, LaBahn, Peck and Singh. This committee will meet in October.

This committee met in September and heard a report on the peer mentoring program currently underway at CSP-Solano. The program has achieved considerable success and is now being transplanted to other prisons, via the transfer of graduates of the program from Solano to other institutions. Giving a review of the program and a critique of its success was recently paroled prisoner David Pack.

BEST PRACTICES;
to identify best practices in administrative process, hearing practices and decision review processes to be applied to parole hearings. Members are Commissioners Ferguson, Fritz, LaBahn, Peck and Zarrinam.

COMMISSIONER TRAINING;
to research and recommend commissioner training programs, including initial and continuing education of commissioners. Members are Commissioners Anderson, Fritz, Garner, Roberts and Turner.

In a move that can only be applauded as a major step toward transparency and accountability in the BPH all committee meeting will be open to the public and, as part of their meeting agendas, will include an opportunity for members of the public to comment on the various subjects of the committees. Additionally, during the last bi-annual training session for commissioners fully half the training sessions and topics were open to the public.

Life Support Alliance will be in attendance at every training session and/or advisory committee meeting open to the public and will report substantive topics as they occur.

Q. What do you call a psychic midget who has escaped from prison?

A. A small medium at large

BPH NEWS

En banc decisions in August and September

Compassionate release for ***Steven Adams***, E 898805, was denied on grounds that the prisoner remains ambulatory and is able to use a wheelchair. The commissioners also cited repeated disciplinary violations as a reason for the refusal. The decision was unanimous.

A new hearing will be held for ***Daniel Lang,*** C 82516, due to an error of law in the previous hearing. The decision was unanimous.

Parole for ***Robert Pike***, C 28261, was denied for 3 years after en banc consideration of split decision. In this instance it was the deputy commissioner who voted against a grant of parole and the majority of the full board agreed. Voting in favor of parole were Commissioners Figueroa and Zarrinam.

Also denied parole for 3 years was ***James Anderson***, J 04845, also on a split decision wherein the Deputy Commissioner voted against parole. In this case the rest of the board agreed with the denial.

Miguel Carreon, F 07922, whose parole was referred back to the board by the governor, was found suitable, affirming the original parole panel's recommendation, by a unanimous vote.

Rory Folsom, D 29621, will receive a new hearing due to a procedural error that allegedly occurred prior to the commencement of his last hearing. The recommendation was unanimous.

In a final action in September the board unanimously recommended the Governor grant a pardon request made by former prisoner ***Thomas George Pflegler***.

CALIFORNIA'S THIRD METHOD OF EXECUTION

According to statute, capital punishment in California shall be carried out in one of two ways: lethal injection or asphyxiation by lethal gas. No condemned prisoner has been executed by either of those methods since 2006.

But this year alone two death row inmates have died from the state's third, unofficial but for more prevalent method of disposing of condemned prisoners; suicide. In May, 2012 James Lee Crummel hanged himself; in August, 2012 Kenneth Friedman was found dead in his cell and was ruled a suicide.

Since 1978, when capital punishment was reinstated in California following a 5 year suspension on Constitution objections, a total of 98 men and women have died while awaiting state execution. Only 13 have been officially executed by the prescribed methods, but another 21 have died by their own had, making suicide a more likely than the ultimate penalty.

Of the remaining 64 deaths, 57 were ascribed to natural causes, leaving 6 inmates who were said to have died from "other" causes.* Other causes include 2 apparent drug overdoses and one unexplained, all three of which would be argued as self-inflicted. One death row inmate was fatally shot in an exercise yard, one stabbed in an exercise yard and one died as a result of heart attack, brought on by an overdose of pepper spray, arguably state-inflicted death.

The last official execution of a condemned prisoner was in 2006. Since that time executions have been halted after a US District Court judge declared the state's execution process as flawed. This moratorium is expected to continue through 2013 while attorneys and courts investigate and debate both the methodology of execution and the physical setting of the death chamber. If Prop. 34 passes, these arguments will be moot.

**one inmate sentenced to death in California was actually executed in Texas, but is still counted in California death row totals.*

CDCR NEWS

PRISON GANGS NO MORE; NOW 'SECURITY THREAT GROUPS'

Validation process to change, 'debriefing' no longer necessary

A decades-long hard-nosed CDCR policy on validating alleged prison gang members and isolating them in near solitary confinement for decades may be about to change. That, at least, is the announced purpose behind the "Security Threat Group Prevention, Identification and Management Strategy" slated to begin October 1. But not everyone is convinced this new policy is any different from the old ways, save for a change in semantics, changing the title of the target groups from 'gangs' to the more politically sensitive 'Security Threat Groups (STG).'

Retired University of Minnesota sociologist David Ward, a member of the 2007 state-appointed panel charged with studying California's system of gang management, was quoted last month in a report by California Watch as commenting "There's nothing I can see in this policy that will change the flow of inmates into these very expensive facilities." Don Spector of Prison Law Office said "The department's approach continues to be guilt by association."

How close an association? The latest version of the new policy lists the following:

- Security threat group-related tattoos and/or body markings
- Clothing worn "with the intent to intimidate, promote membership or depict affiliation in a security threat group"
- The leading or incitement of a disturbance, riot or strike
- Possession of artwork showing security threat group symbols
- Use of hand signs, gestures, handshakes and slogans that specifically relate to a security threat group

The use of tattoos and art work to identify or 'validate' gang members has long been a source of controversy, many advocacy groups noting the use of artwork showing threatening symbols is vague and subjective and inmates who acquired tattoos long ago have had no opportunity to have them removed while in prison, regardless of whether or not they remain actively involved in gang activity. Terri McDonald, CDCR Undersecretary of Operations, defended the guidelines, particularly in relation to tattoos, noting "When you put a gang tattoo on your body, you are saying to the inmate community, 'I'm a member of this gang; I represent the values of this gang.'" McDonald did not, however, address the issue of whether a 30 year old tattoo is still probative in and of itself of an individual's current gang activity.

Under the old, long-standing rules prisoners were automatically housed in Security Housing Units (SHU) if the department identified him (or her) as a member of one of seven prison gangs. Under the new guidelines SHU placement is supposed to happen only when the prisoner is involved in "serious criminal gang behavior or a pattern of violent behavior." However, the new policies seem to expand the scope of those groups from the familiar seven identified prison gangs to what the department now considers any group posing a threat to the security of a prison, including street gangs and those groups termed "extremist groups."

At a recent Board of Parole Hearings Executive Meeting a member of the department's gang task force presented a power point to the BPH commissioners on the new guidelines, a presentation that included photos of several individuals the department now considers a threat group, many so identified by Islamic-themed tattoos. In a memo to members of the CCPOA the department maintains the new policy will allow "previously unavailable flexibility in the recognition and certification of STGs that do not have their origins in prisons."

The new plan moves away for the old policy of "de-briefing," requiring a former gang member or associate to reveal what they knew of the inner workings and activities of the gang and which was an extremely dangerous proposition for those deciding to participate. The new policies involve a multi-phase "step-down" process, worked over a period four years, each step successfully completed allowing the prisoner more privileges and the possibility of eventually leaving SHU confinement without the necessity to "de-brief."

The new policy is being promulgated as a pilot program, beginning with the review of the files of every inmate in Pelican Bay's SHU unit, some 1,100 individuals. McDonald indicated those inmates who have been confined to the SHU the longest would be among the first to be evaluated under the new criteria. Some 500 at PBSP have been in SHU confinement for more than a decade.

Although CDC has maintained that nearly all those now in SHU confinement are active in prison gangs, based on their willingness to refrain from gang related behavior McDonald indicated she expected some "will be released out to a general population prison setting." Still others could even qualify for transfer to other institutions.

The new policies are being viewed with wary eyes by prisoner advocates, who fear the proposed changes may simply be new window dressing and names for an old and much reviled policy. What affect these proposed changes will have on pending litigation filed in May by the Center for Constitutional Rights on behalf of Pelican Bay inmates held in the SHU for over a decade remains to be seen. A management conference on the suit is slated for December before a federal judge.

CDCR NEWS from pg 31

Currently some 3,000 inmates whom the CDC classifies as gang affiliated or involved are housed in SHU units in four prisons: Tehachapi, Corcoran, new Folsom and the largest group in Pelican Bay. According to information made public in October, 2011 the largest gang populations were members of the Mexican Mafia, Northern Structure and Nuestra Familia, with significant numbers affiliated with Aryan Brotherhood, Nazi Low-riders and the Black Guerilla Family.

VSPW NOW CO-ED

One of the more controversial components of Gov. Brown's realignment process, which began last October, was the conversion of Valley State Prison for Women to… Valley State Prison for Men? While the name is as yet uncertain, the changeover has begun.

Two yards at VSPW have been converted to men's facilities, with the women at VSPW now crammed into the two remaining yards or transferred to California Institute for Women in Corona. Although the department has not yet announced the exact number of men already transferred or the number that will eventually fill the two yards, about 70 women have so far been transferred to CIW.

This means that while many prisons in the state are showing a decrease in population density in line with progress toward the 137.5% cap mandated by the 3 judge federal panel, the women at VSPW, now crammed into half the former space, are experiencing a population density overload, upward of 200%. Somehow we don't think this is what the judges had in mind.

ON THE PHONES

CDCR, still touting their predictable line that prisoners with cell phones are the greatest threat to society since Marxism, is however, less that diligent in pursing discipline for those departmental employees caught actually smuggling those insidious cell phones. According to a story published recently in the Los Angeles Times by reporter Jack Dolan less than half those employees accused of illicit cell phone transactions in the first six months of this year actually lost their jobs.

Dolan, gleaning his information for the Inspector General's Semi-Annual Report for January to June, 2012 and from comments by a departmental spokesperson, reported that 54 employees were investigated for smuggling cell phones. Of that number, only 20 either resigned or were fired, while 13 had the allegations dropped and the remainder are still (supposedly) under investigation. Motives for guards and other CDC employees trafficking in phones were suspected to be money (surprise) and illicit personal involvement (surely not! What, the oldest 'connection'?).

The department has reported that while the number of cell phones confiscated so far this year is less than in previous months they still expect to pick up about 12,000 phones by the end of the year. According to Dolan's story CDC spokesperson Dana Simas, true to her green-wall mission, denied the majority of phones are brought in by staff. Rather, she maintained, most phones are brought into the prisons by prisoners on work crews outside the fence. (That scale of merchandising rivals Wal-Mart inventory levels and must involve large air-drops of cases of phones.)

This despite the fact that prisoners are searched on return to the prisons (although not all the time, according to Simas). And the fact that in 2010 legislative analysts' found staff was indeed the primary source for phone infiltration.

As reported earlier in CLN CDCR Sec. Matt Cate recently signed a contract with GTL, the monopoly company providing the inmate phone call 'service' to California prisoners, to erect cell jamming towers at each prison by the end of 2015. While GTL agreed to put the towers at no cost to the state, and promised there would be no increase in phone rates for families, the actual effectiveness of the towers was called into question by the Senate Select Committee on Science and Technology.

What appears to be the first of the towers has been erected at Avenal, with tests supposedly underway to find out how effective the jammers will be and how much they will interfere with other, authorized communications within the prison and surrounding communities. GTL indicated they expect to recoup the money for the towers through forced increased use of the prison collect call system. Whew. We were worried they were about to go belly-up.

They even promised to upgrade the equipment in each prison and have reportedly completed this mission in 13 institutions, though which institutions we have not been able to ascertain. GTL also announced their goal is to provide one phone for every 50 prisoners—but that's 50 prisoners of design capacity. Even if the department reaches a population of 137.5% of design capacity that will still mean many more than 50 prisoners per phone . Hardly an improvement in service.

Hold the phone; we'll let you know more as information becomes available.

CDCR NEWS from pg 32

JUDGES TO CDC: ENOUGH IS TOO MUCH

No Lifers Will Go Home as
Part of Any Early Release Program

Barely three months after patting itself on the back for meeting the population cap goals set by a three judge federal panel, CDC officials were back in court, whining that they couldn't make the ultimate population reduction goal in the allotted time and asking the court—yet again—to cut them some slack. To which the judges said, "Well, maybe."

In June CDCR Secretary Matt Cate was preening as he rolled out figures showing the department had beaten the population level benchmark for that month. Tasked with bringing prisoner population down to 155% of design capacity, some 124,000 inmates, Cate pointed proudly to the reported the prisoner population as of June 27 of 121,129; 2,871 below what the court wanted to see. Or at least those were the figures presented to the public. Officials even began talk of bring back into the state those California inmates farmed out to for-profit prisons in other states.

At the same time state officials were singing the praises of realignment as the sole avenue the state planned to use to achieve the eventual population goal. When first implemented in October, 2011 realignment began decreasing prisoner numbers by as much as 4,000 per month. This was achieved by routing the so-called "non's"; non-sexual, non-violent and non-serious offenders to local lockups while continuing to release determinate sentenced prisoners as their terms ended. A bit like opening the drain without turning on the tap; eventually, the level goes down.

Fast forward to the end of August. The big bubbles of 4,000 prisoners exiting the prison system each month has slowed to a relative trickle of about 1,000 per month. And while the numbers of new inmates being processed into reception isn't what it was before realignment, some counties are expressing their displeasure with realignment by upping the ante on some crimes, sending some into the state system that in other times and conditions would not become the responsibility of Sacramento. Whatever the combination of reasons, by Aug 29th the total number of in-state housed prisoners was reported at 124,489.

Seeing the handwriting on the wall, in early August the three judge panel that set the population cap and goal structure put the state on notice that it needed to "take all steps necessary" to meet the existing population cuts deadlines, and that included finding a method and time line to identify prisoners "unlikely to reoffend or who might otherwise be candidates for early release." The dreaded early release.

Brown's legal minions promptly requested suspension of the overcrowding limits and accused the 3 judge panel of "unwarranted" demands, claiming the state could house 3,000 inmates above the set cap of 110,000 in physical facilities meant to house just under 80,000 and still maintain a Constitutional level of health care. Which was, lest anyone forget, the aim of the population reduction in the first place.

Late in the day on Sept. 7th the 3 judges gave their answer: 110,000 humans packed into spaces designed to hold under 80,000 is enough. CDC will not be allowed to house more prisoners than the original court order called for, but they will get a bit more time to pursue reduction. As now articulated by the court the state must reach the 110,000 limit by December, 2013, an extension of six months.

The judges handed down a succinct, no-nonsense order, noting "[T]hat question [the Constitutionality of setting a population cap] has already been litigated and decided by this Court and affirmed by the Supreme Court, and this Court is not inclined to permit re-litigation of the proper population cap at this time." And clearly the judges are becoming exasperated with the state, indicating they would not consider extending deadline again, past the new December 2013 mark.

Referring back to its earlier order directing CDC to prepare and submit a plan to supplement realignment as means of reaching the population goal the justices signaled the end of their patience, admonishing the state "Defendants may not ignore an order from this Court, and they shall file a brief answering these questions on or before September 17, 2012." In plain speak: by Sept. 17 the CDC must put forth a plan to identify current prisoners who could be included in an 'early release' and not pose a danger to public safety.

In all of this legal back-and-forth, what effect will realignment, population caps and early releases have on life term inmates? The short answer: not much.

Although prison rumor mills went into overdrive with the suggestion of court-ordered early release, the fact is that none of the programs currently in play, or those likely to be put forth, will be a door-opener for lifers. Under the terms of all early release proposals lifers would be exempt from consideration. By statute there are only a few ways life term prisoners can be released from prison and those are limited to parole board, governor pardon or court action on individual lifer cases.

So despite tales of those over a certain age and with two or three decades in prison, those decades past their MEPD date or those with debilitating illnesses being included in early release none of these scenarios is true. Early release targets non-serious, non-violent, non-sexual prisoners, which, by virtue of their convictions excludes lifers.

Realignment may make life a bit more bearable for those lifers and others still in state custody, in terms of less overcrowded conditions and (purportedly) better access to programming, but it is not a ticket home.

FINALLY—OTHER VOICES OF REASON

In an opinion piece written recently for the Sacramento Bee, Stanford University law professor and criminologist Joan Petersilia and Linda Penner, Chief Probation Officer for Fresno County, added their voices, and not inconsiderable reputations, to off-set the rantings of fear mongers and hysterics who have charged the prison realignment effort, now a year old, as responsible for an alleged rise in crime in California. Noting that 'realignment' and 'early release' programs are not one in the same, Petersilia and Penner castigated the media for perpetuating this falsehood.

"Knee jerk reactions and hyperbole about realignment are a disservice to victims of crime, to law enforcement and to the public," the pair wrote. Simply and calmly, Petersilia and Penner lay out the realities of realignment:

"First, realignment was a policy decision to change where people served their time. Despite mischaracterizations of realignment as 'early release,' the law and its implementation have not resulted in the early release of a single person from state prison."

"Second, counties do receive state funds to carry out additional offender management responsibilities under realignment."

"Third, and most importantly, for decades too many people coming out of our state prisons were no better off, and in some cases worse off, than they were when they went in. State prisons have not succeeded in reducing repeat offense rates and this has cost taxpayers billions of dollars."

The pair also described the need to move toward evidence based strategies for corrections rather than the past warehousing efforts, noting that this change may not be popular, as such strategies do not make headlines and such evidence based practices have yet to be fully integrated into the corrections system. They conclude "Blaming realignment for crime is the wrong answer to the wrong question when it comes to long-standing problems in the criminal justice system."

NEWS BRIEFS OF INTEREST

LOS ANGELES: After spending half his life in prison former gang member John Edward Smith was released Sept. 24, 2012 after Los Angeles County prosecutors agreed Smith did not commit the 1993 murder that sent him to prison with a life term. Smith, who early on admitted to being a gang member, always maintained his innocence in the killing.

Smith's case bid for exoneration was pursued by attorney Deidre O'Connor of Innocence Matters, a Torrance public interest law firm. Noting police and attorneys often cut corners in gang-related incidents, O'Conner said Smith's conviction was facilitated by ineffective counsel and shoddy investigations by both police and attorneys.

"Gang members are easy targets," said Laurie Levenson of Loyola Law School. "They are the usual suspects." Attorney O'Connor gave credit to the LA District Attorneys for their part in working toward the exoneration.

After his release Smith said "I had good days and bad days, I stayed hopeful and that's all I could do. I'm not bitter at all, because that ain't going to get me nowhere. I've got to move on."
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SAN FRANCISCO: San Francisco DA George Gascon, in a progressive response to the changes in incarceration brought about by the prison realignment, has formed a Sentencing Commission, with the intent to identify those convicted of crimes who require incarceration and those who can best be served by other rehabilitation programs. According to Gascon the 13-member commission will use evidence based sentencing to steer selected individuals into treatment for addictions or mental health issues, education or job skills training where these services will be more effective than prison or jail time.

The group is composed of unpaid volunteers including, in addition to Gascon, the Police Chief, Sheriff, Public Defender, heads of juvenile and adult probation departments, university researchers and members of various advocacy groups. They will meet sporadically over the next two years to evaluate programs and create what Gascon hopes will be a model for the rest of the country in impacting recidivism with tools other than incarceration.
****

LOS ALTOS: California Common Sense (CCS), a non-partisan research group, announced last month that their 30 year review of state spending for corrections has revealed that the state now spends over 1000% more on prisons than it did in 1980. In raw numbers, California spent $582 million in 1980 and in 2011 that amount had rocketed to $9.2 billion, an almost unimaginable 1,370% increase.

By contrast, state spending on higher education in the same time period has decreased. Part of that decrease has come at the expense of university professors, who now can expect to earn about 20% less than they did in 1990. This puts professors at a lower pay rate than many professions, including plumbers and……correctional officers.

While the CCS reports the salaries of CCPOA officers have declined from high of $100,000 in 2006 to $75.000 in 2011, those salaries are still 50 to 90 percent higher than guards in other areas of the country earn. And CCOPA salaries are reportedly set to begin increasing next year.

Commenting on the issue of prison spending Governor Jerry Brown laid the rapid increase in prison spending on the prison building boom of past decades. Brown, noting that at one point prisons swallowed 11% of the state's budget, said, "We're reversing that. Prisons are only going to get 7.5 percent, and that's a real reduction in our prison system."

In Brown's previous tenure as Governor California spent five times more on education than it did on prisons.
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COLOMBUS, OHIO: An Ohio prisoner, scheduled for execution in January, has asked the federal courts to delay his execution because his 480+ pound size makes any effort to execute him by standard means could cause "serious physical and psychological pain" and a "torturous and lingering death." This, says his attorneys, constitutes cruel and unusual punishment.

Ronald Post, 53, has seen his requests for gastric bypass surgery denied, has been discouraged from walking due to his risk of falling and is so depressed he is unable to limit his food consumption, according to court papers. His reported efforts to exercise have been stymied by knee and back problems and the exercise bicycle at the prison reportedly broke under his weight.

Ohio's method of execution is a single, intravenous dose of phenobarbital and medical personnel have had difficulty in inserting IVs into Post during previous medical procedures. Attorneys also fear the execution gurney might collapse.

Post's unusual situation does have legal precedents. In 2008 267 pound Richard Cooey argued his size would make finding a viable vein for lethal injection difficult. Federal courts rejected the argument and Cooey was executed in October, 2008. Christopher Newton, weighed 265 pounds when he was executed in 2007, following a 2 hour effort by medical personnel to successfully insert the lethal injection needle.

Mitchell Rupe, also weighing over 400 pounds, was first sentenced to death by hanging. He contested the sentence, saying his size would result in decapitation and a federal judge agreed, but upheld Rupe's conviction. Following more legal moves and a third trial Rupe was sentenced to life in prison, where he died in 2006.
The Ohio prison system had no comment on Post's allegations or the pending litigation.
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SAN FRANCISCO: The first nine-months of the state's prison realignment program have resulted in a prison population reduction of 39%, according to figures released by the Center for Juvenile Crime and Justice. And while this is two-thirds of the way toward the population reduction goal, the easy accomplishments may have been made, resulting in slower and more difficult progress ahead.
As noted elsewhere, the department now acknowledges it will not meet the federal court imposed population standards by the required time through the effects of realignment alone. This is especially true since many counties, notably Los Angeles, are upping the ante by electing to charge more defendants with higher level charges which would still require state prison time.
****
SACRAMENTO: California will spend $2,834,000 to convert and repair several building on the grounds of new Folsom prison to house some 400 female prisoners as part of the prison reshuffling due to realignment. The renovation is expected to be complete by June, 2013. ahead.

MALE INMATE SUES OVER SEXUAL HARRASSMENT BY FEMALE GUARD

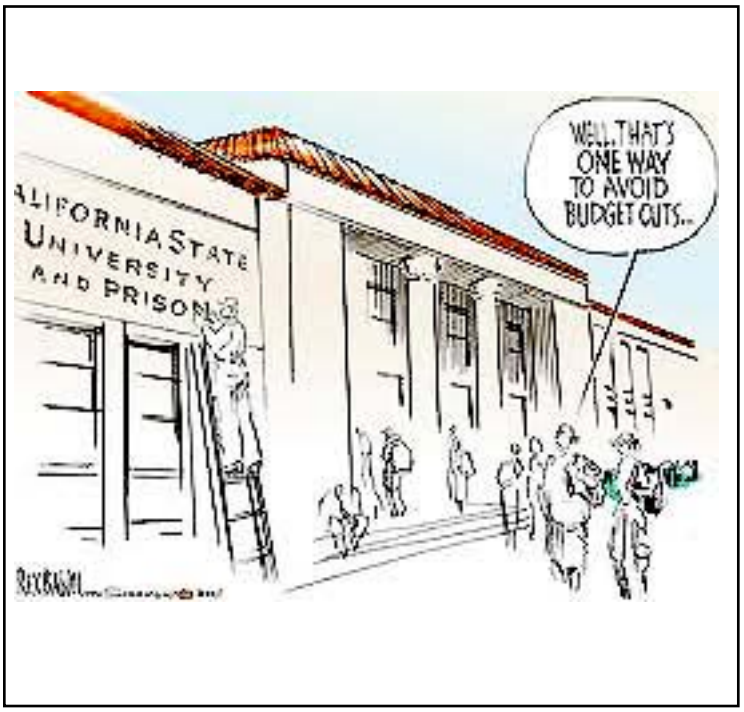
A little noticed ruling last month by the Ninth Circuit Court of Appeals may give an interesting slant on 'over familiarity' allegations frequently used against prisoners. The federal court, noting what it termed the "enormous power imbalance between prisoners and prison guards" re-instated a suit alleging sexual harassment by an Idaho inmate after the action had been dismissed by a US District court.

Idaho inmate Lance Wood sued the Idaho Director of Prisons and a variety of wardens and other prison officials, claiming his constitutional rights had been violated by a female prison guard who "pursued" him into engaging in a non-sexual but physical and romantic relationship. Wood claimed the female guard initiated and engaged in physical contact with him, including what he characterized as "aggressive" pat down searches and appropriate physical contact, after Wood said he attempted to end the relationship after discovering the guard was married.

A US District Court initially dismissed the suit on the basis of the alleged physical contact was based on a "consensual relationship" and not harassment. But the federal court countered "labeling a prisoner's decision to engage in sexual conduct in prison as 'consent' is a dubious proposition," given guards' power over inmates.

Writing the majority opinion Judge Betty Fletcher noted "sexual abuse in prisons is prolific" and, according to statistics, usually involves female guards and male prisoners. And while in a typical sexual harassment case the burden of proof is on the plaintiff to show the sexual contact was unwelcome, in the case of sexual harassment involving a prison guard and prisoner the burden of proof will be on the guard to show the inmate actually consented.

The unanimous 3-0 verdict was termed "very important in terms of protecting prisoners," according to attorney Thomas Saunders who represented Wood. Judge Fletcher's decision also noted the Eighth Amendment to the Constitution protects "the basic concept of human dignity" and forbids conduct that is "so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S.153, 182-83 (1976). We have previously held that a sexual assault on a prisoner by a prison guard is always "deeply 'offensive to human dignity' " and is completely void of penological justification. *Schwenk*, 204 F.3d at 1196."



OTHER STATES

TEXAS AND A QUESTION OF TASTE

Texas has long liked to brag about being Number One. And they are. Number One in illiteracy, repeat teenage births and environmental violations. The Lone Star state also stands alone in the number of executions carried out each year.

And now Texas can add another gem to the crown: number one in bad taste. The Texas Department of Criminal Justice (we won't even comment on the obvious worst oxymoron) has decided to post on their website the last words of inmates put to death in Texas. Perhaps, due to the low literacy rate, Texas DOJ personnel don't know the meaning of the term "prurient interest."

Preserved and available for the casual web surfer on the department's website are the last words, comments, thoughts and emotions of those executed by Number One Texas. Such selections as "Take me home, Lord. I'm ready," from Marvin Wilson, age 54 and with an IQ of just 61, who was put to death in August. Or "Give me my life back," from Kelsey Patterson who steadfastly maintained he was innocent of murder.

Texas DOJ officials do have their own idea of what's acceptable for casual reading, it seems. When Patterson protested his execution, telling the assembled officials to "Go to hell," his words were redacted as being insensitive. But most often the last words of the condemned show remorse and regret, often apologizing to victims and their own families, such as Larry Davis, executed in 2008 who said "Blessed are they that mourn, for they shall be comforted."

A Los Angeles Time reporter, reporting on the website and its contents, called it a collection of "gallows poetry." We call it salacious voyeurism.

A LIFER'S TIMELESS ADVICE

Lifer David Sloane, recently found suitable for parole, shares an important self-help tool

I was arrested in Long Beach 1989 for 1st degree murder. Nothing unusual, outside of the fact that I committed murder. I realize normal people don't kill each other.

I've been in prison for almost 23 years and I've been to the Board 3 times. My first 2 times I was denied parole for 3 years each time. At my 3rd appearance (August, 2012) I was found suitable. As I wait through my 150 days, I'm pretty excited about it, although I know it's not a done deal; it not over 'till it's over.

Nevertheless, it's given me plenty of time to think. I would like to take full credit for this accomplishment, but I know there were many factors at work, not the least of which being that the Board has come much closer to following the law of late, a fact that all lifers are grateful for.

A major aspect of my suitability is that I have had the good fortune to be housed on a yard that seems to be producing about twice as many suitable lifers as even other yards in this prison. 'Amazing,' you say? I think so too! Some may say I'm delusional, but the fact is that as of this writing, on a yard of about 750 prisoners and with about 250 lifers, there are no less than 18 suitable lifers currently waiting through their 150 days, having been found suitable by the Board. In recent months there have been as many as 21 at one time. And whenever hearings are held here more numbers are added.

I attribute this anomaly to the very existence of a real lifer community on this yard and particularly to the team attitude we have adopted. It's nothing the state has done for us. We lifers have brought this about.

I remember a time when lifers had to nearly beg one another just to get case law, most having adopted a selfish attitude borne in fear that someone else would 'use up my opportunity' to parole. I, too, for years played my cards close to my chest.

But a few years ago several guys got together here and made a decision to lay aside their selfish attitudes and work as a community team to gain tools, knowledge and ability to get at least somebody paroled. The result was a group first called Timeless.

The development of Timeless was not without its challenges. We had to set aside our beliefs about separation, our religious and racial differences. The same men who were leaders among us in regard to these things were needed to help lead this movement as well--the leaders in the Christian, Muslim and Buddhist faiths; the leaders in the black, white, Spanish and other communities.

It required that we focus on what we had in common, rather than our differences. And what we had in common was that we were all lifers, wanting to become suitable for parole so that we could rejoin our families and outside communities, to start giving back and becoming productive citizens, not destructive problems.

I know for some setting aside our differences is a monumental feat. Unfortunately some even on this yard deprive themselves of the help they so desperately need because they can't work with any other race or religious belief, even though those differences are not part of the Timeless program. Change requires sacrifice.

What started with a half dozen guys, all now paroled, has grown to encompass more than half the lifers on this yard. In a time when self-help is nearly unavailable, the Timeless group here holds workshops every Saturday, rotating through 9 distinct topics with curriculum stretching from 3 to 12 weeks per topic. We have a Lifer Support Group that meets on Friday nights to work on our character defects and to give general support and information sharing. We hold mock Board Hearings periodically and we conduct think tanks to develop the program and improve it.

While the Timeless group was started by lifers without any staff support it has maintained integrity. Our lives are on the line! We won't allow guys to 'game' the program. When you sign up to participate, it's to really participate, not sign in and leave or side talk.

Over time our integrity has gained respect with both staff and our peers and gradually gained staff support. Personally, over the past two years I've participated in all I could, working my way up through the ranks and into the executive body of our Timeless group. It's been enriching and rewarding. I can say, for the first time, on the day of my last hearing I woke up with a smile on my face, feeling fully prepared for the event.

I guess I don't have to say our Executive Body is ever-changing—the members are continually paroling! If you think you'd like to be a part of something like this, I encourage you to find a handful of like-minded lifers and start the push. If you persist, at some point it will catch like a brush fire and a pro-social, pro-active attitude will prevail. The greatest aid to making me suitable for parole came from what I learned through my efforts to help others become suitable.

Editor's note: Timeless groups are now a non-profit organization, renamed Timelist. Timelist can be contacted at the following addresses:

Northern office address: (Main Office):
Timelist Group, P.O. Box 735, Hayward, CA 94543,
Tel: 510-593-5027.

Southern Office: P.O. 59009, Los Angeles, CA 90059.

LIVING THE REAL LIFE

Ron Hayward

Hi Ron Good to talk to you, how long have you been out?

I've been out since Nov. of 2010

What prisons have you spent time in and how long?

Chino, DVI, San Quentin, CMC East & CMC West over 28 1/2 years

Who do you want to say Hi to inside?

Sonny, Basil, Big "D", Lumpie I think about them all the time!

What was it like when you came home?

When I hit the streets I had family & friends all the way back to grammer school who were there to support me, they said "you act like you've never been away!" I am always thinking positively, I read the news so it wasn't really a shock..everything outside is great.

Regrets?

No amount of time will pay for the life I took. What I learned about myself was that I needed to help others.
I never go a day without my relationship with Jesus Christ and I never go a day without my bible.

What advice would you pass on to Lifers before they go to Board?

Never give up. Think positive. Ask yourself "What benefit can I get from this?". The truth will set you free (& makes you feel better about yourself) Say "I own this- I won't blame this on drugs alcohol etc." It takes a big load off.

I know you've been ill, how is your health?

My cancer is in remission since Feb 2011. It's folicular lymphoma, so since I'm in remission that's as good as I can be.

What do you do for fun?

When I have the chance I go up to my home in Idaho and enjoy my 11 grandchildren and 6 great granchildren. I'm livin' the dream...enjoying my work, my motorcycles and hot rods, and lady-friends

Take It EASY

There was a man who worked all his life and saved all his money. Although a decent provider he was a miser with his money and loved money more than anything else in life. Just before he died he said to his wife, "Now listen, when i die I want you to take all my money and place it in the casket with me. I want to take all my money to the afterlife".

So he got his wife to promise him with all her heart that when he died, she would place all his money in the casket with him.

The very next week the man died. He was stretched out in his casket, the widow sitting next to the casket dressed in black with her best friend next to her. When the pastor finished the service, the undertakers began to close the casket when the wife yelled "Wait! Just a minute...!" and she took the shoe box she had in hand and placed it in the casket.

Then the undertakers lowered the casket lid and rolled it away.

Her friend said, "I hope you weren't crazy enough to put all the money in the casket?"

The new widow said "I promised him I would. I'm a good wife and could not lie to my husband, so yes, I put the money in the casket."

"You're kidding! You put every cent in that box?!"

"I sure did", said the widow, " I got it all together, put it into my account and wrote him a check!"

Abuses in Visiting: Please notify Life Support Alliance of new, needlessly restrictive and interfering visiting practices or so-called "local ops" that make visiting difficult or cause delays in processing. We are looking for such issues as precluding inmates from approaching vending machines, not allowing paper/documents into visiting, restrictions on socializing with others in room, seating arrangements that do not allow inmates and visitors any contact (such as the allowed hand-holding),restrictions in clothing or jewelry other than stated in CDCR regulations, or other restrictions not found in Title 15.

Address label issues: If the mailing label on your CLN copy does not contain your complete mailing address, including CDCR number and housing assignment, as well as the expiration date of your subscription, please advise us. We are aware of problems relating to addresses on the June issue of CLN and have worked to get those corrected.

VNOK at hearings: If victims' representatives appeared at your parole hearing please advise us of the outcome of the hearing and the performance of the VNOK, interaction with DAs and parole commissioners. If your date was reversed by the governor and you believe the VNOK mounted a letter or petition campaign to make this happen, please provide us with the details.

INFORMATION SOUGHT ON LIFER ISSUES

California Lifer News and Life Support Alliance would like information from our readers on the following subjects of interest to and affecting lifers:

- Errors of fact in psychological evaluations
- Other issues with FAD clinicians
- Poor performance by state appointed or privately retained attorneys
- Improper or unusual actions or events at parole hearings
- Superior Court decisions, published or unpublished
- Valley Fever complaints and other medical issues
- Problems in visiting
- Mail and/or package delays

Please write us with information on these and other issues affecting lifers and conditions of confinement to;

CLN, PO Box 277, Rancho Cordova, Ca. 95741.

Great Song Lines

(who sang these? answers below)

1. All lies and jest, still, a man hears what he wants to hear and disregards the rest.
2. All of us get lost in darkness, dreamers learn to steer by the stars.
3. All you need is love, love. Love is all you need.
4. An honest man's pillow is his peace of mind.
5. And in the end, the love you take is equal to the love you make.
6. Before you accuse me take a look at yourself.
7. Bent out of shape from society's pliers, cares not to come up any higher, but rather get you down in the hole that he's in.
8. Different strokes for different folks, and so on and so on and scooby dooby dooby.
9. Don't ask me what i think of you, I might not give the answer that you want me to.
10. Don't you draw the Queen of Diamonds, boy, she'll beat you if she's able, you know the Queen of Hearts is always your best bet.

1.Simon & Garfunkel (The Boxer), 2. Rush (The Pass), 3.The Beatles (All you Need is Love), 4. John Cougar Mellancamp (Minutes to Memories), 5. The Beatles (The End), 6. Bo Diddley CCR, Eric Clapton (Before You Accuse Me), 7. Bob Dylan (It's Alright Ma), 8. Sly & Family Stone (Everyday People), 9. Fleetwood Mac (Oh Well), 10. The Eagles (Desperado)

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