Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

Federal Court

LIFER'S CIVIL RIGHTS COMPLAINT CONTESTS VALIDITY AND USE OF BOARD'S FAD PSYCHOLOGICAL EVALUATIONS IN DETERMINING PAROLE SUITABILITY

CLASS ACTION CONTEMPLATED

Johnson v. Shaffer et al. (#)

USDC E.D. Cal. No. 12-01059

On April 20th, a civil rights action was initiated in the federal district court for the Eastern District of California by Keith Wattley of Oakland, on behalf of Sam Johnson, a lifer at San Quentin. Under the Fourteenth Amendment and State constitution Johnson seeks "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 suitability fo r parole.'

Johnson has steadfastly maintained his innocence of a 1991 first-degree murder and related offenses for which he is serving 25-to-life and a 4-year determinate term. Names as defendants are BPH Executive officer Jennifer Shaffer, Secretary of Corrections Matthew Cate, Governor Edmund G. Brown, Jr. BPH's Chief Psychologist and FAD head Dr. Cliff Kusaj, Dr. Richard Hayward (the FAD psych who wrote Johnson's eval), and the BPH Commissioner and Deputy Commissioner who denied Johnson parole based on the FAD eval, Thomas Powers and Al Fulbright. The Honorable Gregory G. Hollows is assigned as the Magistrate Judge in the action.

A summary of the more salient facts and claims set forth in the complaint:

● BPH established the FAD in 2006, long before BPH proposed regulations to authorize that, and when BPH attempted to do so, it provided false and misleading information to OAL.

● Since then BPH has utilized the FAD to prejudice BPH commissioners against granting parole to eligible lifers like Johnson.

● In Johnson's 2009 FAD eval Dr. Hayward mis-diagnosed Johnson by using inapplicable diagnostic criteria and incorrect facts and historical data, and refused to correct numerous errors despite efforts by Johnson and his attorney.

● For example, Dr. Hayward stated a "substantial history of impaired impulse control," "impaired behavioral control," and "negative attitudes," although Johnson had no history of violence, no juvenile record and only three misdemeanor convictions prior to the commitment offense, he maintained steady employment and strong leadership positions prior to and throughout 19 years in prison, and incurred only one non-violent 115.

● Although Dr. Hayward acknowledged that Johnson had no mental illness, had never received mental health treatment in prison and had no history of any problems with drugs or alcohol, he nevertheless concluded there was evidence of "a lack of responsiveness to treatment" that increased Johnson's risk to the public if released.

● Dr. Hayward likewise claimed Johnson "had significant problems with previous violence, psychopathy (sic) and Antisocial Personality Disorder" prior to the commitment offense, but none of that is true.

● Dr. Hayward stated that Johnson scored high-risk in the PCLR ("Superficial Charm, Pathological Lying, Shallow Affect, Poor Behavioral Controls, Impulsivity, Irresponsibility"), but the assessment was devoid of any evidence of any of those findings.

● Dr. Hayward's use of the HCR-20 was likewise flawed, asserting *evidence* of "a lack of insight, negative attitudes, impulsivity and lack of responsiveness to treatment." Nowhere did Dr. Hayward explain any evidentiary basis for any of that.

● The assessment stated that Johnson's parole plans indicated problems in the area of personal support and compliance with remediation attempts, but Dr. Hayward found "generally feasible" Plaintiff's plans to live with his wife and children and to seek a job in the restaurant industry where he was successfully employed for roughly 15 years prior to his incarceration. Those contradictory statements were never reconciled.

● Factors that purportedly increased Plaintiff's risk of recidivism were a "reduced level of pro-social family support, a reduced level of constructive leisure activities, associations with criminally oriented companions, a pro-criminal orientation and an antisocial pattern." But those statements directly contradict the findings elsewhere in the report that Plaintiff maintains a positive relationship with his two surviving family members and his wife's family, is married to the mother of two of his children, has completed his Associate's Degree in prison and is chair of the Men's Advisory Council.

● Dr. Hayward based a finding of high parole risk on lack-of-remorse and lack-of-insight based in turn on Johnson's claim of innocence, contrary to state parole law.

● The factors and tools on which Dr. Hayward based Johnson's risk assessment were generally invalid, inapplicable and baseless, and the assessment was at odds with Johnson's previous assessments.

● Contrary to protocol, the Fad refused to correct

cont. p.2

California Lifer Newsletter
(CLN) PUBLISHERS NOTE

California Lifer Newsletter (CLN) is a collection of informal 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.

NEW ADDRESS

CLN
CALIFORNIA LIFER NEWS
PO BOX 277
RANCHO CORDOVA, CA 95741

INDEX

COURT CASES Discussed in This Issue

SUP-Missouri v. Frye
SUP-Lafler v. Cooper
FED-Johnson v. Shaffer
FED-Brodheim v. Dinini
FED-Grant v. BPH
FED-Nedds v. Calderon
FED-Birdwell v. Martell
Cal.App-In re James Hunter
Cal.App.4th In re C. Morganti
Cal.App.4th In re W.J.Pugh
In re Andrew Young
CA-In re Gary Eccher
CA-In re Harole Harvey Hawks
CA-In re Cole Bienek
CA-In re Mary Eileen Farrar
CA-John L. Randel v. Steve M. Delilippis
CA-In re John Fratus
CA-In re Henry Bratton
CA-In re Michael Marcel Harris
CA-In re Dameion Brown
CA-In re Victor Sousa
CA-In re Emilio Sanchez
CA-In re Vincent Van Motley
CA-In re Hui Kyung Kang
CA-In re Michael Vicks on Habeas Corpus

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

Johnson... cont. from p.1

these errors, some of which even the Board complained of at Johnson's parole hearing, and the FAD failed to notify John's hearing panel of his attorney's efforts to have these errors corrected prior to the hearing.

● Many procedural errors in this process prejudiced Johnson's parole determination, the Board and FAD refused to cooperate with Johnson's counsel to correct same, and the complaint alleges that the entire FAD evaluation process on which parole determination is based is inaccurate, unlawful, and unconstitutional.

The complaint seeks injunctive, declaratory and definitive relief. Conversion to a class action is contemplated.

To support this effort, Mr. Wattley seeks input from lifers, specifically, if you have any personal experience with (or information about) any of the following issues, please write to:

Keith Wattley
UnCommon Law
220 4th Street, Suite 103
Oakland, CA 94607.

To Respond to Request on Possible Class Action on FAD:

Please keep a copy of your documents before you send them to us because the large volume of letters/documents on these issues makes it very difficult for us to copy and promptly return your documents.

1. Expert opinions stating that the PCL-R, HCR-20 or LS/CMI are not valid predictors of future violence among a population like California's Lifers.

2. Challenging FAD evaluations based on either one substantial or three administrative errors, or both.

3. Requests to have psychological interviews tape recorded.

4. Requests to have FAD psychologist present at parole hearings.

5. Unexplained changes in risk assessment from one evaluation to the next from "low" to either "moderate" or "high."

6. Attempts to interview or speak with FAD psychologist after the report is written but before the hearing.

7. BPH either overlooking substantial errors when the rest of the evaluation puts the prisoner in a negative light, but emphasizing errors when the rest of the evaluation puts the prisoner in a positive light. This includes the BPH finding the report to be inconclusive.

8. You requested the raw scores or underlying data that supported the FAD psychologist's report.

9. You requested to call witnesses (either friendly or adverse) at your parole hearing.

10. The FAD psychologist gave you a diagnosis of Antisocial Personality Disorder even though you had little or no previous criminal or delinquent history.

11. You were denied parole at an initial hearing when the risk assessment was "low" or "low/moderate".

12. You have seen inconsistent labeling (low, medium/moderate or high) of numerical findings. For example, on one scale a 6% ranking would be labeled "medium," while on another scale a 7% ranking would be labeled "low."

13. BPH hearing panel conducted very little or no review of your written comments/objections to FAD psychological evaluations. For example, your written comments/objections did not make it into the Board Packet or was not presented to the hearing panel in a timely manner.

14. The BPH has defended its decision to use the PCL-R, HCR-20 or LS/CMI, including their reliance on an expert panel who reached a consensus on these tools.

15. The BPH violated California's rulemaking statutes when developing the FAD regulations.

16. Any other FAD problem not listed here.

LSA AND THE FAD

Editor's note: From its inception, Life Support Alliance, (now the publisher of CLN) has been a leader in the fight against the Board of Parole Hearing's Forensic Assessment Division and its flawed, inaccurate and damaging and ultimately illegal psychological evaluation process. LSA was the first to call for a public hearing when the BPH attempted to quickly pass Section 2240, which ratified and legalized the FAD. LSA has haunted the halls of the legislature and repeatedly bedeviled the BPH at monthly open meetings on the improprieties of the FAD, the clinicians and the reports.

We have become, through tenacity, research and resolve, experts in all things FAD and have been able to provide information, background and perspective on the FAD to the legislature and other groups examining the psychological evaluation process, including attorney Keith Wattley of UnCommon Law. We are gratified to at last see this court action come to fruition and commend him for taking the initiative in filing legal proceedings. As often mentioned LSA is not a legal firm and as such, does not have the expertise or resources to file court action.

The case filed by Wattley lists sixteen causes of action; in fully half of those areas of contention, LSA has been in the forefront of finding, collecting and using information relative to these issues. The Second Cause of Action notes CDCR mislead the Office of Administrative Law (OAL) in justifying the use of tests by the FAD, specifically in the department's untrue assertion that a panel of experts agreed on the tests to be used: LSA was first to ferret out this significant nugget of information by contacting all six of the experts involved to reveal there was no such consensus and photographing the alleged 'minutes' of this meeting, which were in reality nothing by scribbled notes. The Sixth Cause of Action notes the BPH refuses to record and transcribe psychological evaluation interviews: LSA has repeatedly and publicly, in the monthly Executive Meeting of the BPH, called for such recordings and put this call on the public record.

In the Seventh Cause of Action the suit notes the tests used in FAD evaluations are not standardized and are arbitrary, and argument LSA made forcefully in public BPH considerations of approving Section 2240. The Tenth Cause of Action speaks to the numerous factual errors often found and uncorrected in FAD evaluations; LSA has collected numerous examples of the egregious factual errors and repeatedly brought them to the attention of both the BPH and the legislature. This has resulted in administrative action by the BPH in some individual cases and to a call by the Senate Rules Committee for an investigation of factual errors in FAD reports.

The suit's Eleventh Cause of Action addresses Section 3041 of the Penal Code, which famously notes the BPH 'shall normally find' an inmate suitable for parole at his/her initial hearing; LSA has been in the forefront of reminding, and in some cases, educating for the first time, legislators on the issue of 'shall normally find.' In the Twelfth Cause of Action the right of prisoners to call witnesses in their behalf at hearings is brought forward; LSA has asked, and been granted, permission to attend parole hearings, the first such prisoner-oriented group in memory

Cont. p.3

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

LSA and the FAD... cont. from p.2

to be allowed to attend hearings. And while we cannot speak or advocate within the hearings, the mere fact that we are there (kudos to BPH Executive Director Jennifer Shaffer for granting permission) is a step in the right direction.

The Fourteenth Cause of Action again covers the misleading representations made by the BPH in relation to the consensus of experts on the methods in use, with particular attention to the alleged court mandate to establish the FAD; LSA, in our written objections to both versions of Section 2240, strongly pointed out there is no court mandate to establish the FAD and indeed, the CDCR changed its stated position on such a group within the space of a year. Cause of Action Number Fifteen speaks to the BPH's failure to comply with California Administrative Procedures Act, including their failure to address the massive objections to enactment of 2240 and the clandestine manner in which the regulation was ultimately adopted; LSA undertook an extensive research effort of all objections to 2240 and the BPH's response, or lack thereof, to each and was the first organization to expose and document the under the table nature of the ultimate approval.

A NEW ERA FOR CLN

Beginning with this issue, California Lifer News embarks on a new chapter, hopefully as well received and dependable as the last, with new publishers, new contact information and some (fairly) new faces. But with the new, we retain the reliable, the main focus of CLN; providing important, timely information for lifers, information they can use in their fight for release.

Publication of CLN has been assumed by Life Support Alliance Education Fund (LSAEF); part of the grass-roots advocacy Life Support Alliance group, dedicated to being a public voice and a conscience to the California legislature for lifers and their families. For the past two years LSA has been diligently working in Sacramento for lifers, bringing their situation and concerns to both the legislature and the parole board. Assuming responsibility for publication of CLN provides us an even greater opportunity to expand our mission and be of more service to lifers.

CLN, long the standard of excellence in lifer-oriented publications, began some 8 years ago, the creation of Donald "Doc" Miller, former lifer, current paralegal and always champion of and tireless worker for lifers. Don's insightful and useful analysis of court cases has always constituted a large part of CLN, providing a much-needed legal resource to lifers. Our commitment to maintain that same dedication and level of reporting is firm, helped greatly by Don's agreement to continue providing legal analysis for CLN, becoming our Editor Emeritus.

All subscriptions and rates will remain the same and readers should notice little change. There may be some minor cosmetic adjustments in coming months, but the heart of CLN, the in-depth legal reporting and information useful to lifers, will remain.

More on Life Support Alliance, our mission, our works and goals, in future issues. We hope to meet many now-and-soon-to-be-released-lifers at this year's picnic, August 11, 2012 in Walnut, California -- keep reading upcoming issues of CLN for details. We welcome your input, suggestions, comments, to our new mailing address: CLN, PO Box 277, Rancho Cordova, Ca. 95741.

FEDERAL LIFER CLAIMS PENDING

Gilman v. Fisher (#)

USDC ED Cal. No. 05-830

Please see *CLN* #41, p. 3; # 40, p. 9; # 39, p. 2. Monica Knox reports:

The defendants in the Gilman case had been represented by the law firm Porter Scott for several years, but the Attorney General's office recently took back representation in the case. That change in counsel has resulted in new attempts to get most of the case dismissed. Nevertheless, the AG does not contest the litigation going forward on the Proposition 9 claims.

The district court had granted us a preliminary injunction on the Prop 9 claims in 2010; but the Circuit reversed that order because it was based on the face of the changes effected and not on any evidence of implementation.

Thus, we obtained information about what had happened since implementation and had a hearing on a renewed motion for preliminary injunction in April 2011. The hearing went well: we presented significant information showing that the longer deferral provisions were, in fact, increasing the time life prisoners were spending in custody; the defendants produced no evidence.

In the fall of 2011, the judge said that he thought the court should have a statistical expert to provide an opinion on whether the evidence proved a significant risk of increased custodial terms. That expert filed a brief report opining that our evidence was "incomplete." We filed a response, showing that the expert had misunderstand both our claims and our evidence and providing a declaration from another expert statistician saying that the evidence did prove the claim.

Nevertheless, in a brief order issued in March, the judge held that, given the experts' differing opinions, a preliminary injunction was not appropriate. We have come up with a way to "fill in the gaps" even for the expert the court relied upon and we are currently doing that. We will then seek a trial to present that evidence, after which the issue will be decided (not as a preliminary matter as when we sought a preliminary injunction, but as a final matter). It is not yet clear when that trial will take place.

Any ruling by the court on the final merits of the claim will be appealed by the losing party.

We remain optimistic about obtaining relief on the issue, but it will clearly take longer than we had initially thought it would.

We are also proceeding on an ex post facto challenge to Prop 89, the

1988 initiative that gave the Governor the right to reverse a grant of parole for those prisoners convicted of murder. We obtained in discovery copies of all executive case summaries (under a protective order, so we cannot share them) and are completing review and tabulation of those in order to show that Prop 89 has, in fact, increased custodial terms. Within the next 60 days we will be seeking a preliminary injunction on that claim (an injunction preventing the Governor from reversing any grant of parole to a prisoner whose commitment offense occurred before November 9, 1988).

The AG moved to dismiss all our due process claims (relative to how the Board determines

Cont. on p.4

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

Gilman... cont. from p.3

parole suitability) based on the United States Supreme Court opinion in Swarthout v. Cooke, 131 S.Ct. 859 (2011), which held that the only due process rights the Supreme Court has previously held were required at a parole hearing were an opportunity to be heard and a statement of reasons supporting the decision. Thus, the AG argued that, since all life prisoners in CA get that, there can be no due process violations. The AG also moved to limit our due process claims and our ex post facto claim as to Prop 89 to only those prisoners whose first hearings or first governor reversal took place after October 2006; the premise for the argument was a statute of limitations contention. We fought all the AG's contentions, noting that Cooke was discussing a habeas case, where relief is restricted to violations of "settled Supreme Court law," while we are litigating a civil rights case and can seek to expand prior Supreme Court rulings and the statute of limitations is not applicable because we are not seeking remedies for past actions but injunctions to prevent continuing unconstitutional actions. The motions were on calendar May 21, and the judge ruled in our favor on all the issues in those motions. So the lawsuit, with all our claims, is going forward.

While we have no final rulings to report at this time, we still have very viable constitutional claims.

Brodheim v. Dininni (#)

USDC ED Cal. No. 05-1512

On May 7, 2012, Magistrate Hollows recommended the dismissal of this case, filed in 2005, because Brodheim's claims are subsumed within *Gilman, supra*.

Grant v. Cal. Board of Parole Hearings (#)

USDC ND Cal. No. 10-2817

On March 5th Phyllis J. Hamilton, District Judge, dismissed Aubrey Grant's due process claim which contended that the Board denied his due process rights when it refused to set his term in advance of finding him suitable for parole. The Court, however, ***denied*** the Attorney General's motion to dismiss his claim that the Board's current regulations are ex post facto when applied to him (Grant was sentenced in 1979).

SUPREME COURT UPHOLDS DEFENDANTS' RIGHTS IN PLEA BARGAIN PROCEEDINGS

Missouri v. Frye (#)

132 S.Ct. 1399 (2012)

Lafler v. Cooper (#)

132 S.Ct. 1376 (2012)

On March 21st the United States Supreme Court handed down its 5-4 decisions in both of these cases. As almost always, Justices Alito, Thomas, and Roberts dissented from a decision favorable to defendants.

In ***Missouri v. Frye*** the Court held that a defendant may assert a claim for ineffective assistance of counsel based on failure of counsel to notify the defendant of a favorable plea offer that lapsed—if the defendant can also show a reasonable probability that neither the prosecution nor the trial court would have prevented the acceptance and implementation of the plea.

In August 2007, Frye was charged with driving with a revoked license. Because of three prior convictions for the same offense, he was charged with a Class D felony that carries a maximum term of four years imprisonment. The prosecutor sent Frye's counsel a letter with two plea offers; one of the offers would have reduced the charge to a misdemeanor, which carries a maximum term of one-year imprisonment. Frye's counsel did not communicate the plea offers to his client, and they expired. One week before his preliminary hearing, Frye was arrested for driving yet another time with a revoked license. He ultimately pled guilty without a plea agreement to the August 2007 offense and was sentenced to three years in prison. In post-conviction proceedings, he argued that his attorney's failure to communicate the plea offers denied him effective assistance of counsel because he would have pled guilty to the misdemeanor.

The Missouri Court of Appeals determined that **Frye** met the requirements for showing a Sixth Amendment violation under *Strickland **v.** Washington*, 466 U.S. 668 (1984). The court deemed the plea withdrawn and remanded.

The Supreme Court vacated and remanded, holding that "plea bargains have become so central to the administration of the criminal justice system" that defense counsel must meet certain responsibilities "to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." Specifically, "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Under *Strickland*, to establish ineffective assistance of counsel, a defendant who does not receive notice of a favorable plea offer must also show prejudice by demonstrating (1) a reasonable probability that the earlier plea offer would have been accepted if the defendant had had effective assistance of counsel, and (2) a reasonable probability that neither the prosecutor nor the court would have prevented the entry of the plea.

In applying those standards to Frye's circumstances, the Court found it uncertain that Frye could show prejudice and remanded for further consideration of that issue. Because of Frye's fifth charge of driving without a license, which occurred between the time the plea offers were extended and the date of the preliminary hearing, the Court found reason to doubt that the favorable plea would have been entered.

Justice Kennedy delivered the opinion of the Court, in which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. Justice Scalia filed a dissenting opinion, in which Chief Justice Roberts and Justices Thomas and Alito joined.

In ***Lafler v. Cooper*** the Court held that a defendant who receives ineffective advice that results in rejection of a plea offer and conviction at trial may be entitled to relief from the sentence after conviction, but the proper remedy will be tailored to the defendant's circumstances.

In March 2003, Lafler fired multiple shots at a female victim for unclear reasons, but she survived. Lafler was later charged with multiple crimes under Michigan law, including assault with intent to murder. The prosecution offered to dismiss certain charges and recommended a sentence of 51 to 85 months in exchange for a guilty plea. Lafler expressed willingness to accept this plea in a communication with the court but then rejected the offer, allegedly after his lawyer persuaded him that the prosecution could not establish intent to murder because he shot the victim below the waist. Lafler instead went to trial, was convicted on all counts, and received a mandatory minimum sentence of 185 to 360 months' imprisonment.

Lafler pursued an ineffective assistance of counsel claim in state court, which was rejected by the trial court and the Michigan Court of Appeals. The Michigan Supreme Court denied leave to file an appeal. Lafler then filed for federal habeas relief under 28 U.S.C. § 2254. The district court held that the Michigan Court of Appeals had unreasonably applied the standards of *Strickland **v.** Washington*, 466 U.S. 668 (1984), and granted a conditional writ. It ordered specific performance of the 51 to 85-month plea agreement. The Sixth Circuit affirmed.

The Supreme Court considered how to apply *Strickland's* prejudice test when the defendant rejects a plea on advice of counsel but is subsequently convicted at trial. Taking into account "the reality that criminal justice today is for the most part a system of pleas, not a system of trials," the Court determined that the

Cont. on p.6

CALIFORNIA LIFER NEWSLETTER™

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

Lasler... cont. from p.4

defendant must show that ineffective assistance of counsel "caused the rejection of a plea leading to a trial and a more severe sentence." The remedy for such a constitutional violation must be tailored, with the court retaining some discretion, and could result in a resentencing or in requiring the prosecution to re-offer the plea.

Applying these standards to Lafler's circumstances, the Court determined that deficient performance had been conceded, that Lafler had shown a reasonable probability that he and the trial court would have accepted the guilty plea, and that as a result of not accepting the plea, he was convicted at trial and received a sentence 3 ½ times greater than he would have received under the plea. The remedy for this violation was not to order specific performance of the original plea agreement but rather to order the prosecution to re-offer the plea, which then provides the trial court an opportunity to exercise discretion as to whether to vacate the convictions and resentence pursuant to the plea agreement, to vacate only some of the convictions and resentence, or to reject the plea agreement and leave the convictions undisturbed.

Justice Kennedy delivered the opinion of the Court, in which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. Justice Scalia filed a dissenting opinion, in which Justice Thomas joined, and in which Chief Justice Roberts joined except as to Part IV. Justice Alito filed a dissenting opinion.

FEDERAL COURTS RULE IN LIFERS' FAVOR IN TWO TIMELINESS ISSUES

Nedds v. Calderon (#)

__ F .3d __; 2012 WL 1560992

9th Cir. No. 08-56520 (May 2, 2011)

Birdwell v. Martell (#)

(unpublished) 2012 WL 1131540

USDC ED Cal. No. 10-2523 (March 30, 2012

In ***Nedds v. Calderon***, the Ninth Circuit reversed a decision by the Central District (Judge Dale S. Fischer), and held that Darryl Nedds was entitled to equitable tolling. The Court held that Nedds was entitled to tolling for the entire time he pursued his state habeas petitions because, in determining when to file his federal petition, he was justified in relying on then-existing Ninth Circuit precedent under which the federal petition would have been timely when filed (the Supreme Court later disapproved the Ninth Circuit's precedent Nedds had relied on).

The facts of Nedds' case are not so important as the Ninth Circuit's excellent review of the authorities it relied on for this decision.

In ***Birdwell v. Martell***, Senior District Judge Lawrence K. Karlton rejected the recommendation of the Magistrate Judge who held that pro per petitioner Billy Paul Birdwell's claims against BPH were moot. Birdwell had contested a disciplinary violation for material found on a state computer in the prison law library where he was assigned. Magistrate Judge Edmund F. Brennan, reasoned that because Birdwell had been transferred to a different institution and could therefore not regain the assignment from which he was removed, his claim was moot. The Magistrate Judge erroneously found that, because the 115 violation in Birdwell's file was *not* likely to impact the result of his next BPH parole suitability hearing, the issue of his assignment

Cont. on p.7

CALIFORNIA LIFER NEWSLETTER™

Birdwell... cont. from p.6

was the only adverse consequence Birdwell suffered by his being found guilty of the contested disciplinary violation.

Apparently the Magistrate Judge was not aware of, or could care less about the near impossibility of obtaining a grant of parole from the Board so soon after a 115. Fortunately, Judge Karlton read the record, and the law, focusing on the Board's previous Panel's warning that Birdwell should "not receive more disciplinary violations."

VICTORY FOR "OLD LIFER" IN PROTRACTED HABEAS CASE MICHAEL (Malik) HARRIS PAROLED

In re Michael Marcel Harris (#)
Santa Clara County Superior Court No. 58135
Former CA6 Case Nos. H032714, H033292
(April 27, 2012)

Finally! Justice was slow but it arrived on June 4th when – after nearly four decades and a prison record of exemplary reform – Malik Harris' wife drove him home. The Attorney General did not appeal the trial court's April 27th decision reversing Governor Brown's action. But the case is not that simple – as this editor knows, having worked on it for nearly *eight years* (attorneys: Michael Beckman, Marc Grossman). Space allows but a brief summary of what would become a most tortuous case.

Following his conviction of two 1974 murders (one first- and one second-degree), Harris was sentenced to a merged term of 7 years-to-life with the possibility of parole. Now 58 years old (he was 20 at the time of the offenses), Harris entered prison in 1974 and became eligible for release on his 1981 MEPD. After considerable misconduct early on, Harris sustained an exceptional disciplinary-free record of therapy, programming, self-help, and reform for nearly three decades. For more than two decades the Board's psychologists had deemed Harris to be a "low" risk of danger or to recidivate.

The initial habeas corpus petition filed the Santa Clara County trial court contested the Board's 2003 denial of Harris' parole. Following its issuance of an OSC, the court lumped Harris' case with what would become *In re Criscione* (2009) 173 Cal.App.4th 60, a conglomerate of five cases in which the trial court would reject the Board's practice of terming all murders "especially heinous, atrocious, or cruel" in its unsuitability decisions. Although the Court of Appeal reversed the trial court's decision in those cases (reached after two years of intensive discovery and expert testimony), Harris' case lingered because it contested *the Governor's* (same) practice; the issue of the illegality of the Board's 2003 denial of parole to Harris seemed to get lost in the shuffle.

Eventually the trial court reversed the Board's 2003 decision for lack of some evidence of current dangerousness or a nexus to such a finding, and directed the Board to afford Harris a new hearing. In 2009 the Board found Harris suitable for parole, calling his turnaround "spectacular." But irascible Governor Schwarzenegger reversed the Board's decision based on the new, standard "lack-of-insight" recital – which the California Supreme Court unwittingly authorized in *Shaputis-I* (*In re Shaputis* (2008) 44 Cal.4th 1241) – as the new parole denial talisman when combined with the always heinous, atrocious, or cruel commitment offense. But the Board's psychologists had uniformly found Harris' insight, remorse, and acceptance of responsibility to be more than adequate.

In Harris' next habeas action, the trial court reversed Conan's insight finding (although Schwarzenegger had perhaps less insight than any Governor in world history, he appointed at least one of the State Supreme Court Justices who then ruled in his favor in *Shaputis-I*). The trial court found the record devoid of

Cont. on p.8

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

Harris... cont. from p.7

any *evidence* (as opposed to a lay Governor's lay staff's professed concerns or opinion) suggesting that Harris lacked insight into his former criminal conduct. But, perhaps aware of that fact, instead of reinstating and effectuating the Board's parole grant, the trial court – likewise unwittingly - remanded the case back to Conan for still more mischief.

In the meantime, Governor Brown had replaced Schwarzenegger (who would be disgraced when his dishonesty and immorality came to the public's attention). Governor Brown's crew, which included most of the same staff who made Conan's decisions, again reversed the Board's 2009 parole grant – on basically the same grounds which the trial court had struck down when recited in the previous reversal by Conan.

In his final habeas petition to the trial court, Harris based his request to set aside the Brown reversal on res judicata and collateral estoppel grounds. The trial court agreed, and on April 27th it reinstated the Board's 2009 parole grant. The trial court rejected the AG's (knowingly stupid) argument that principles of res judicata and collateral estoppel do not apply because a different Governor made the decision at issue. The trial court promptly and emphatically rejected the notion, terming the process "recycling." Citing governing authorities, the trial court held that any parole decision-maker is bound by findings of law or fact in a final superior court order on the same issues.

Also, despite Harris' decades of sobriety and exhaustive substance abuse therapy and programming, Governor Brown's staff opined that he might someday relapse into substance abuse, a factor in his commitment offense. The trial court pointed out that the same could be said of anyone who once abused drugs (creating an "unobtainable standard"), and that the record, and findings of the State's psychologists, indicated that to be a very low probability in Harris' case. The trial court cited *In re Morganti* (2012) 204 Cal.App.4th 904 (see *CLN* # 44, p. 56; this issue, *State Court Cases*): "The risk a former drug or alcohol abuser will relapse, which can never be entirely eliminated, cannot of itself warrant the denial of parole. If it did, the mere fact an inmate was a former substance abuser would 'eternally provide adequate support for a decision that [he] is unsuitable for parole.' This cannot be the case." (*Id.*, at pp. 1181, 1226.)

State Court Cases

By Donald Miller

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

COURTS OF APPEAL REVERSE SEVEN MORE PAROLE DENIALS BY BOARD, GOVERNOR

APPELLATE PANELS REJECT POST-*SHAPUTIS-II* MISUSE OF "LACK-OF-INSIGHT"

In re James Hunter (#)

__ Cal.App.4th __; 2012 WL _____

CA1(3) No. A131580 (May 18, 2012, After Rehearing)

This is a case which the petitioner, James Hunter, and his attorney, Michael Beckman, had to win *twice*. In December 2011, in an unpublished decision the Court of Appeal granted Hunter a new parole hearing. The Attorney General convinced the Court to vacate and reconsider its decision in light of the California Supreme Court's *Shaputis-II* aberration. But we couldn't discern a thing in common, or any impact *Shaputis-II* might have upon Hunter's case (I had the pleasure of working for the petitioner and his counsel on this case). In time the Attorney General's persistence awarded Hunter, and a host of confined lifers, with a prescient, resounding, *published* opinion (by a truly conservative appellate panel).

The victim died from stab wounds inflicted by Hunter during a fierce argument with his former girlfriend in 1985. He had been freebasing cocaine and claimed he was only attempting to scare the victim into revealing the whereabouts of a stash. When he realized the victim was dead, Hunter found and took some cocaine, and some jewelry, to emulate a burglary.

Hunter pled guilty to the first degree murder, and the concurrent second degree murder of her fetus, to receive a sentence of 25 years-to-life and a determinate term for enhancements and a related offense. He was committed to prison in 1985 with an MEPD of 2004. Hunter's petition contested the Board's w2009 denial of his parole.

Hunter's recollection of the facts of the offense remained consistent over the years, including his account in response to questions from the Panel at the 2009 parole hearing at issue.

Cont. on p.9

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

Hunter... cont. from p.8

Hunter had a minor criminal record, and incurred three 115's, none involving violence – two in 1987 for disobeying orders, the most recent in 2008 for refusing to report for work during an inmate work stoppage. Hunter's prison record has been otherwise exemplary, with extensive therapy, programming, educational and vocational training, and self-help, including substance abuse. His parole plans were acceptable to the Board. The State's psychologist found Hunter's parole to pose a "low" risk.

Nevertheless, the Board denied Hunter parole for seven years. The Board based its decision on the gravity of the commitment offense, his prior drug use, and his "past and present mental state," the codified factor recited in almost every one of the Board's decision denying parole. The Panel claimed that Hunter's "mental state" was defective because it said he "minimized" his conduct (the standard post-*Shaputis* catch phrase, along with "lack of insight") because "in discussing the crime, Hunter had not spontaneously discussed its effect on the fetus or on the five-year-old son of the victim, and thus, in the Board's view, failed to demonstrate appropriate remorse." The Board cast Hunter's refusal to break the recent work strike as "significant misconduct." The most absurd reasoning by the typically harebrained Panel was its professed concern that Hunter, who had killed a pregnant woman who was also the mother of a five-year-old, plans to reside with his brother, who has children in his home.

After the San Francisco County Superior Court (as always) denied a similar petition in March 2011, the Court of Appeal issued an order to show cause. On December 21, 2011, the Court issued its initial unpublished decision concluding that the Board's denial was unsupported by any evidence and directing the Board to conduct a new parole hearing.

After the California Supreme Court issued its opinion in *Shaputis II,* the Attorney General promptly requested that the Court reconsider its decision in light of that case. In its current decision, the Court of Appeal initially explained, "After careful study of the *Shaputis II* opinion and the supplemental briefing submitted by the parties, we remain convinced that under the deferential standard of review reaffirmed in *Shaputis II*, the Board's decision here fails to withstand scrutiny. The denial of parole is supported by no evidence and by no inference that can rationally be drawn from the evidence tending to show that Hunter will pose an unreasonable risk of future violence if granted release on parole."

Timeliness. The Court rejected the Attorney General's claim that the petition was untimely.

> Capital habeas petitions are untimely if not filed within 180 days of the final date for filing a petitioner's reply brief in the direct appeal. (*In re Soderstein* (2007) 146 Cal.App.4th 1163, 1221.) The Attorney General asserts that this 180-day period serves as a benchmark for what should be deemed "substantial delay." Petitioner's superior court writ petition was not filed for more than 11 months after the Board's decision became final. The Attorney General contends the delay was substantial, unjustified, and does not fit into any exception to the habeas timeliness requirement.
>
> We do not agree that the considerations regarding the timeliness of a petition for habeas corpus challenging a criminal conviction apply to a petition challenging a parole denial. As pointed out in *In re Burdan* (2008) 169 Cal.App.4th 18, 31, in the parole denial context the record is simply a paper record, typically well preserved, and the finality of the petitioner's conviction is not at issue. Therefore, delay normally can prejudice only the petitioner. (fn. 1) Because this is a parole denial case, it is not subject to the deadlines associated with habeas petitions challenging criminal convictions. There is no basis to deny this petition as untimely.
>
> It is possible in unusual circumstances for the passage of time, in combination with other events, to result in the petitioner forfeiting the habeas remedy in a parole denial case. For example, if key records are lost during the elapsed time, writ review may become impossible. If the petitioner has a subsequent parole hearing before the prior one is challenged, the challenge to the earlier denial may become moot. Here, no records have been lost and Hunter is not scheduled to have another parole hearing until 2016.

No evidence suggesting a rational nexus between the offense and the Panel's finding that Hunter's parole posed an unreasonable risk of future violence. The Court of Appeal distinguished *Shaputis-II*. It found no evidence in the record or cited by the Panel suggesting tht Hunter lacked sufficient "insight" or "minimized" his culpability, and it rejected the Board's notion that Hunter's version of the facts somehow transforms him into a current unreasonable parole risk.

> The specific holding in *Shaputis II* was that adverse evidence from prior years concerning an inmate's suitability for parole does not "evaporate" because the inmate decides "to limit the evidence available to the Board by refusing to participate in an evaluation by a [California Department of Corrections and Rehabilitation] psychologist and declining to speak to the Board on any matter of substance at his parole hearing." (*Shaputis II*, *supra*, 53 Cal.4th at p. 211.) The court acknowledged "that often the most recent evidence as to the inmate's level of insight will be particularly probative on the question of the inmate's present dangerousness, but that is not *necessarily* the case. If the newest evidence is unreliable or insubstantial, the parole authority is not bound to accept it." (*Ibid.*) As the court itself expressed it, *Shaputis II* "is an example of the Board's proper reliance on older evidence in the record, and of the disadvantages that may follow from an inmate's decision not to testify at a parole hearing or otherwise cooperate in the development of current information regarding his or her mental state." (*Id.* at p. 220.)
>
> The unusual factual situation with which the court was concerned in *Shaputis II* has no application in the present case. The issue here is not whether prior evidence of unsuitability trumps current indicators of suitability, but simply whether there is any evidence that provides a rational basis for considering Hunter to pose an unreasonable risk of reoffending if granted parole.
>
> We do not quarrel with the Board's assessment that Hunter's commitment offense was egregious and callous. But however horrible the crime, it is an insufficient basis for the denial of parole unless there is an evidence-based, rational nexus between the offense and present behavior. (*In re Lawrence, supra,* 44 Cal.4th at pp. 1210, 1227; *In re Ryner* (2011) 196 Cal.App.4th 533, 546 [commission of a heinous crime is insufficient to deny parole unless factors demonstrating unsuitability, supported by some evidence, are probative of a nexus between the gravity of the offense and a present risk to public safety].) Hunter's crime was committed in 1984, 25 years before the Board hearing. It was motivated by a desire to obtain drugs and committed while Hunter's judgment was impaired by drugs. There is no evidence that petitioner has used or sought drugs while imprisoned, or that he is likely to return to their use upon release. To the contrary, he has successfully participated in substance abuse programs and has been evaluated to be at low risk of returning

Cont. on p.10

CALIFORNIA LIFER NEWSLETTER™

Hunter... cont. from p.9

to his former addiction. The Board expressed no doubts in this regard.

The Board's denial rests primarily upon its conclusion that Hunter lacks remorse and insight, based on its belief that Hunter's explanation of his crime lacks credibility. The Board did not believe that after having consensual sex with the victim and leaving to buy food, Hunter returned with a knife to scare the victim rather than to kill her. It questioned why he would arm himself to return to the victim's house when he knew she was alone and eight months pregnant. It questioned why the victim, who had a boyfriend, would want to have sex with Hunter. It noted that Hunter had pled guilty to first degree murder, implying premeditation.

In *Shaputis II,* the Supreme Court confirmed that "[c]onsideration of an inmate's degree of insight is well within the scope of the parole regulations" (*Shaputis II*, *supra*, 53 Cal.4th at p. 218), but pointed out that "lack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness" (*id.* at p. 219). (See also, e.g., *In re McDonald* (2010) 189 Cal.App.4th 1008, 1023 [lack of insight is a proper consideration for determining suitability for parole, but conclusion that there is a lack of insight must be based on evidence in the record upon which the finder-of-fact is entitled to rely]; *In re Powell* (2010) 188 Cal.App.4th 1530, 1542 [lack of insight is probative of unsuitability only if rationally indicative of current dangerousness].)

Whatever inferences might properly be drawn were there some evidence that Hunter was being untruthful in stating that he returned with the knife only to scare the victim, we have reviewed the entire Central File (or C-File) that was available to the Board at the hearing and found no evidence that contradicts Hunter's version of the crime. His version of events has remained unchanged over numerous retellings. If his version of the crime is "not physically impossible and [does] not strain credulity such that his denial of an intentional killing [is] delusional, dishonest, or irrational," the Board cannot discredit his account of events. (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1112, disapproved on another ground in *In re Prather, supra*, 50 Cal.4th at p. 252; see also *In re Jackson* (2011) 193 Cal.App.4th 1376,1388-1391; *In re McDonald*, *supra*, 189 Cal.App.4th at p. 1018.) As in *Palermo, McDonald* and *Jackson*, "this is not a case where the inmate's version of the crime was physically impossible or strained credulity." (*In re Jackson*, *supra,* p. 1391.)

While there is evidence of the inmate's guilt of the crime charged, the denial of the prosecutor's version "is not necessarily inconsistent with the evidence. Further, like the inmates in [these three cases, Hunter] accepted responsibility for the death of his victim, behaved well in prison, successfully engaged in self-improvement activity while there, and received positive reports regarding his potential dangerousness by prison psychologists. Under these circumstances, [Hunter's] continuing insistence . . . [on his version of the crime] does not support the Board's finding that he remains a danger to public safety." (*Ibid*.) The decision in *In re Jackson* was cited with approval in *Shaputis II*, *supra*, 53 Cal.4th at page 216.

The circumstances here are very different from those in cases upholding the conclusion that an inmate lacks insight based on discrepancies between his account of the crime and the record. In the two *Shaputis* cases, for example, the Supreme Court upheld the determination of the Governor in the first case, and of the Board in the second, that the petitioner remained a threat to public safety based in part on disbelief of the petitioner's claim that the victim's death had been accidental. The conclusion that Shaputis was not credible was based on the inmate's extensive prior history of spousal abuse (44 Cal.4th at pp. 1246-1247; 53 Cal.4th at p. 227) and evidence that the gun used in the murder could not have been fired accidentally (44 Cal.4th at pp. 1248, 1260; 53 Cal.4th at pp. 207-208.). (See also *In re Taplett* (2010) 188 Cal.App.4th 440, 450 [upholding parole denial where there was specific evidence that petitioner's version of events was inaccurate]; *In re Smith* (2009) 171 Cal. App.4th 1631, 1639 [same].)

The Board's view that Hunter formed an intent to murder the victim when he retrieved the knife from his car apparently was based in part on the fact that Hunter pled guilty to first degree murder. When the Deputy Commissioner confronted Hunter about what he perceived as Hunter's disingenuous account of the crime, the Commissioner commented, "You've already copped to murder one." But at the hearing on Hunter's change of plea, the prosecutor discussed culpability under the felony murder doctrine, so that by his plea Hunter apparently acknowledged his guilt under that theory.

Thus, we do not reweigh the significance of evidence considered by the Board, but simply find no evidence in the record that supports the Board's conclusion. The record contains no evidence that Hunter's consistent description of his crime is untruthful and his insistence that he did not intend to kill Tanya when he returned to the home with the knife provides no basis for the inference that he lacks remorse or insight. It certainly provides no basis for believing, contrary to all of the positive evidence in the record, that Hunter will pose an unreasonable risk of future harm if granted parole.

Nor is there any other evidence in the record that Hunter lacks genuine remorse for having killed Tanya and the fetus she was carrying. Both before and during the parole hearing Hunter has expressed remorse for his actions. The Board questioned the genuineness of these expressions based in part on its unfounded perception that Hunter minimized his culpability. Although Hunter claimed in his narrative that at certain points in the struggle he was prepared to desist and defended himself to counter the victim's actions, he unequivocally described how he initiated the violence, motivated by a desire to obtain drugs. He emphasized that he had a "serious and heavy addiction" and was hoping to buy cocaine from his dealer. He brought the knife with him on his return to the apartment to scare Tanya to provide him with the drugs and he began the struggle when she refused to do so. Hunter described an evolving situation in which his desire to frighten Tanya led to her murder. A review of his full narrative shows that he consistently admitted he was the aggressor, motivated by a desire to obtain drugs. (See *In re Powell, supra,* 188 Cal.App.4th at p. 1540 [petitioner's description of isolated interaction with victim as accidental does not negate petitioner's acceptance of responsibility for entire incident, including murder].)

The Attorney General focuses on the fact that Hunter referred to "tapping" petitioner with the knife. At one point Hunter also described having "scratched" the victim. But Hunter also spoke of inflicting a "puncture wound" and when asked how the victim died, he replied "[b]y stab wounds." When asked how many times he stabbed her, he replied, "I would say, I know in her chest. I'm not for sure if I hit her twice in her chest, but I know I hit her definitely once on

Cont. on p.11

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

Hunter... cont. from p.10

her side that I remember." The district attorney asked whether he might have stabbed her as many as seven times and he readily acknowledged that possibility. In context, Hunter's references to "tapping" and "scratching" the victim cannot be understood as an attempt to minimize his responsibility.

The Board also referred to Hunter's failure to spontaneously include in his narration of events mention of Tanya's five-year-old son or the fetus. But the Board asked him if the victim had been pregnant, and Hunter replied that she had been. The Board then asked why he had not mentioned that fact and Hunter replied that he hadn't yet had a chance, but that he was going to get to that. He went on to state that his addiction was so compelling that he had "no regard[] for her life or her unborn child." When asked to name the victims of the crime, he included Tanya's parents and extended family, but did not mention her five-year-old son. But once the Board asked about the son and the fetus, Hunter immediately agreed that they too were victims. He apologized for not bringing up the five-year old and indicated that he could only imagine how the child experienced the crime. Later in the hearing he twice mentioned the unborn child as a victim. At no point during the hearing did he say anything to minimize the impact of his conduct on the fetus or on the five-year-old child. In light of Hunter's numerous statements of remorse and acceptance of responsibility and his nondefensiveness when the omissions were pointed out, the temporary oversight hardly indicates a failure to appreciate the harm that he caused or to accept responsibility for his actions.

"Evidence of lack of insight is indicative of a current dangerousness only if it shows a *material* deficiency in an inmate's understanding and acceptance of responsibility for the crime. To put it another way, the finding that an inmate lacks insight must be based on a factually identifiable deficiency in perception and understanding, a deficiency that involves an aspect of the criminal conduct or its causes that are significant, and the deficiency by itself or together with the commitment offense has some rational tendency to show that the inmate currently poses an unreasonable risk of danger." (*In re Ryner* (2011) 196 Cal.App.4th 533, 548-549, fn. omitted.) Here, Hunter's passing failure to refer to the fetus or five-year-old son demonstrates no deficit in perception or understanding; nor does it rationally demonstrate current dangerousness.

The Court of Appeal likewise disposed of the Board's far-fetched notion that unfortunate death of the victim's fetus – and Hunter's failure to dwell on that issue – made his parole plans too risky.

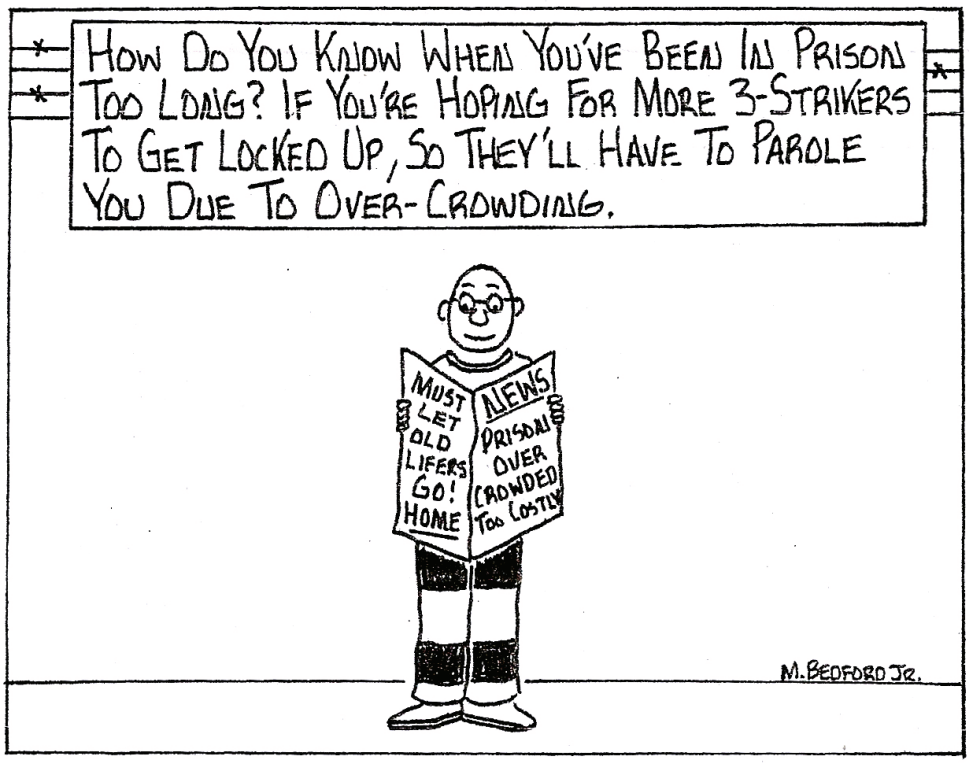
> Furthermore, the omissions are not evidence that Hunter's parole plans to live with a relative who has children are inappropriate, as the Board suggested. In light of Hunter's abstention from alcohol and drug use for the last quarter century, his participation in and commitment to substance abuse programs, and his generally positive record in the intervening years, the fact that in 1984, while under the influence of drugs, he killed the fetus in the course of killing the mother, and created a traumatic and tragic situation for Tanya's young son, says nothing about the risk he would pose if he were now to live in a house with children. (Cf. *In re Jackson, supra,* 193 Cal.App.4th at pp. 1380, 1386 [fact that defendant was convicted of murdering his former girlfriend did not make his parole plans, which included plan to live with family or friends, unrealistic]; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 242-243, 245 [fact that inmate who had drowned his wife maintained solid relationships with his family and planned to live with longtime friends did not render his parole plans unrealistic]; cf. *In re Criscione* (2009) 173 Cal.App.4th 60, 75-76.)

The Court of Appeal lastly addressed the Panel's notion that Hunter's refusal to report to work amidst a prison-wide inmate work strike – a choice he made to *avoid* violence – made the grant of his parole too risky. Note: Why can't the Board of Parole Hearings – after six previous court decisions explaining the point – take heed?

> Finally, in the course of explaining over some ten pages the Board's reasons for finding Hunter unsuitable for parole, the presiding commissioner made brief reference to the fact that in January 2008 Hunter had been disciplined for failing to report to work. Recent discipline may provide a basis for denying parole. (See, e.g., *In re Hare* (2010) 189 Cal.App.4th 1278 [discipline for possession of an altered toothbrush considered to have been modified for use as a weapon]; *In re Reed* (2009) 171 Cal.App.4th 1071, 1085 [recent misconduct violated specific directive from the Board given only two months before and "was not an isolated incident: instead, it was part of an extensive history of institutional misconduct, including 11 CDC 115's and 19 CDC 128-A's"].)

But prison discipline, like any other parole unsuitability factor, "supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness." (*Shaputis*

Cont. on p.12



CALIFORNIA LIFER NEWSLETTER™

Hunter... cont. from p.11

II, supra, 53 Cal.4th at p. 219.) Not every breach of prison rules provides rational support for a finding of unsuitability. (See, e.g., *In re Palermo, supra,* 171 Cal. App.4th at p. 1110 ["Nothing in the record supports a conclusion that [inmate] poses a threat to public safety because he once engaged in the unauthorized use of a copy machine, once participated in a work strike, and once was found in possession of a fan stolen by his roommate."].)

Hunter failed to report to work on one occasion. Although at the disciplinary hearing Hunter claimed that he did not report to work because he was ill, he later acknowledged that the true reason was his desire to avoid exposure to violence in light of threats that had been made in connection with an inmate work stoppage. Hunter told the Board, "I don't want any type of violent situation on my records at all. I try to avoid conflict by all means," to which a commissioner responded, "Well, that's something we obviously want you to do." Moments later the commissioner added, "Well, let me point out the positives: That there's been no violence on your part and no weapons, and I want to point that out." Elsewhere, the Board also noted that Hunter's supervisors speak highly of him. One supervisor described him as being a model for other inmates, displaying a "good attitude and work ethic."

Thus, Hunter's failure to have reported to work on this single occasion does not indicate that he is likely to pose a danger if paroled. There simply is no nexus between this particular disciplinary incident and the likelihood that Hunter will engage in future violence if released from prison. The incident provides no basis for upholding the finding of unsuitability. (*Shaputis II, supra,* 53 Cal.4th at p. 219; *In re Palermo, supra,* 171 Cal.App.4th at p. 1110.)

The Court's conclusion in this case is an especially noteworthy summary:

As summarized in *In re Lawrence*, *supra*, 44 Cal.4th at page 1202 and repeated in *In re Prather*, *supra*, 50 Cal.4th at page 249, " 'Pursuant to statute, the Board 'shall normally set a parole release date' one year prior to the inmate's minimum eligible parole release date, and shall set the date 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude *in respect to their threat to the public*. . . .' (Pen. Code, § 3041, subd. (a), italics added.)" Release on parole is thus "the rule, rather than the exception." (*In re Smith* (2003) 114 Cal.App.4th 343, 351.) A parole release date must be set unless the Board determines that public safety requires a lengthier period of incarceration. (*In re Lawrence, supra,* 44 Cal.4th at p. 1202; § 3041, subd. (b).) The Board is to consider all relevant information, but the principal consideration is public safety. (*In re Lawrence, supra,* at pp. 1205, 1210.) The denial of parole may be affirmed only if supported by "some evidence" that public safety requires further incarceration. (*Id.* at p. 1191.) "[T]he circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative of the determination that a

Cont. on p.13

CALIFORNIA LIFER NEWSLETTER™

Hunter... cont. from p.12

> prisoner remains a danger to the public." (*Id.* at p. 1212; see also, e.g., *In re Moses* (2010) 182 Cal.App.4th 1279, 1300 [parole shall normally be granted unless some evidence of current dangerousness, after consideration of all circumstances, justifies denial]; *In re Burdan, supra,* 169 Cal.App.4th at p. 29 [court must consider whether at least one factor relied on to deny parole is predictive of current dangerousness].) ***Nothing in the most recent decision in Shaputis II changes any of these principles***.
>
> The Board has not articulated a rational basis supported by "some evidence" to support its conclusion that Hunter will pose an unreasonable risk to public safety if paroled. There is no evidence that his mental state (including his remorse, acceptance of responsibility, or insight) indicates current dangerousness. There is no evidence that his narrative of the life crime is inaccurate or minimizes the significance, impact, or wrongfulness of his prior actions. Nothing in the record links his life crime, committed in 1984, with an assessment that he will pose an unreasonable danger if now granted parole. Nor has the Board articulated or do we see a rational nexus between the 2008 disciplinary event and a risk of future violence. In short, the record fails to provide any rational basis for finding Hunter unsuitable for parole.
>
> (Emphasis added.)

The Court of Appeal accordingly set aside the Board's decision and remanded to the Board to "promptly conduct a subsequent parole hearing in light of this opinion."

In re Christopher Morganti (#)

204 Cal.App.4th 904

CA1(2) No. A132610 (March 28, 2012)

We reported on this case as a late-breaking decision in the last issue (*CLN* # 44, p. 56), but promised to include here the important separate opinion of Presiding Justice J. Anthony Kline, Jr., who concurred with the Majority on Morganti's due process claim, but dissented from the Majority's refusal to address or take seriously Morganti's claim concerning "the statutory framework of parole and failure to accord parole applicants individualized consideration deprives him and implicitly all life prisoners a liberty interest safeguarded by article I, section 7, of the California Constitution and the Fourteenth Amendment to the Constitution of the United States." Hopefully, Justice Kline's focus on the importance of this issue will shake some of the State's reviewing courts from their refusal to recognize its significance.

Morganti claims not only that the denial by the Board of Parole Hearings (the Board) of his request for parole is unsupported by "some evidence," but also that the Board's disregard. Producing evidence showing that life prisoners are almost never granted a parole release date at the time the Legislature contemplated a date would ordinarily be granted, Morganti requested the opportunity to conduct discovery and have an evidentiary hearing in order to establish a factual basis for his due process claim. The trial court denied the request on the ground Morganti's constitutional argument was "conclusory and fails to state a prima facie claim for relief." Because I believe the ruling erroneous, I would remand this case to the trial court with directions to grant Morganti's request for discovery and an evidentiary hearing.

The evidence Morganti provided in support of this request is undisputed and credible, and the issue he raises bears not only upon the rights of thousands of other life prisoners, but also on the efficacy of the relief properly granted Morganti by the trial court. If it is true, as he claims, that requests for parole are routinely denied on the basis of a Board policy, remanding this matter to the Board for a new parole hearing will not result in the individualized inquiry to which Morganti is entitled. This is not, however, the only or perhaps even the strongest warrant for the discovery and evidentiary hearing Morganti requested.

In addition to his due process claim, Morganti contends the Board administers the law governing the parole process in a manner regularly resulting in the confinement of life prisoners for periods of time disproportionate to their culpability. He seeks an inquiry into the policies and practices responsible for this systematic violation of constitutional rights. The integrity and lawfulness of the parole process pertaining to life prisoners, which Morganti provides reason to question, requires that this judicial inquiry be undertaken.

As will be seen, more prisoners are now being indeterminately sentenced under our nominally determinate sentencing scheme than were ever indeterminately sentenced under the Indeterminate Sentence Law (ISL) (Pen.Code, former § 1168).[2] (See discussion, *post,* at p. 462, fn. 13.) As a result, and as legions of cases like this one show, the problem of disproportionate sentencing, which the DSL was designed to cure, has reappeared with a vengeance. There is, however, a big difference: the administrative safeguard against disproportionality imposed on the parole authority by a frustrated Supreme Court shortly before the ISL was replaced by the DSL (*In re Rodriguez* (1975) 14 Cal.3d 639, 122 Cal.Rptr. 552, 537 P.2d 384) (*Rodriguez*) (see discussion, *post,* at pp. 461–462) is no longer in effect. The fact that the present parole process lacks the protection against disproportionate sentences imposed by the Supreme Court in *Rodriguez* requires that discovery requests like Morganti's receive serious judicial consideration, as was not here the case.

Morganti's assertion that the Board disregards the parole scheme pertaining to life prisoners set forth in the DSL focuses on the statement in section 3041 that "[o]ne year prior to the inmate's minimum eligible parole release date," a panel of the Board shall "meet with the inmate and *shall normally set a parole release date* ... in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates." (§ 3041, subd. (a), italics added.)

Morganti's claim that, contrary to the mandate of section 3041, "parole is practically never granted at the initial parole consideration hearing," is based on statistical evidence regarding the Board's parole decisions from January 1, 2000 through October 31, 2010, which he attached as an exhibit to his petition. The exhibit—the accuracy of which was undisputed by the Board in the court below and conceded by the Attorney General at oral argument before this court—shows that during that nearly 10–year period the Board conducted 5,993 initial parole hearings at which parole was granted or denied. In 5,372 of those hearings parole was denied; in 599 the inmate stipulated to being unsuitable for parole, and parole was granted at the initial hearing on only 22 occasions, which constitute 0.37 percent of the 5,993 hearings, or 0.40 percent of the 5,394 hearings at which the inmate did not stipulate to the denial of parole. During the same time period, the Board conducted 5,523 first subsequent parole hearings, including Morganti's, and granted parole only 75 times, or in just 1.3 percent of those hearings.

Cont. on p.14

CALIFORNIA LIFER NEWSLETTER™

***Morganti*... cont. from p.13**

The seemingly inordinate rate at which life prisoners are found unsuitable for parole—i.e., "an unreasonable risk of danger to society if released from prison" (Cal.Code Regs., tit. 15, § 2402, subd. (a))—is hard to square with the fact that recidivism among life prisoners is less than one percent, which is "miniscule" compared to that of other prisoners. (Weisberg, Stanford Criminal Justice Center, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California* (Sept. 2011) at p. 17 (*Life in Limbo*).)[5] The facially inexplicable discrepancy between the extraordinarily high rate at which life prisoners are denied parole, and the extraordinarily low rate at which such prisoners recidivate lends credibility to Morganti's contention that the Board's systematic refusal to find life prisoners suitable for release is based on something other than an individualized inquiry into whether life prisoners eligible for parole would pose an unreasonable risk of danger to society if released from prison.

Our agreement with the trial court's determination that the denial of parole to Morganti is unsupported by "some evidence" should not be allowed to obscure Morganti's more consequential constitutional claim, which pertains to the most vexing sentencing issue now regularly confronting the courts of this state: whether the seemingly systematic denial of parole to life prisoners at the hearing specified in section 3041, subdivision (a), is the product of the individualized consideration that is constitutionally required or a thinly veiled policy of "transforming most indeterminate sentences with the possibility of parole into sentences of life-without-parole." (Cotton, *Time to Move On: The California Parole Board's Fixation with The Original Crime* (2008) 27 Yale L. & P. Rev. 239.)

The evidence Morganti offered in support of his request for discovery and a evidentiary hearing raises not only the questions whether the Board is systematically violating the legislative mandate and inmates' due process rights, but whether the disconnect between the parole-granting norm prescribed in subdivision (a) of section 3041 and actual Board decision-making may be the result of, or related to, the Board's practice of delaying the fixing of an inmate's "base term" until after he or she has been deemed suitable for release. (Cal.Code Regs., tit. 15, § 2403, subd. (a).) As I later explain, that practice—which is identical to the practice condemned by our Supreme Court in *Rodriguez, supra,* 14 Cal.3d 639, 122 Cal.Rptr. 552, 537 P.2d 384 because it facilitated the imposition of disproportionate sentences and obstructed judicial review of allegedly excessive sentences—is among the matters Morganti wishes to investigate and subject to judicial review.

In short, our determination that no evidence supports the Board's denial of Morganti's request for parole leaves entirely unaddressed his claim that the Board denies him and thousands of other life prisoners their constitutional right to individualized consideration of their parole suitability due to (1) a Board policy to almost never grant life prisoners a parole release date at the time the Legislature mandated that such a date should "normally" be granted, and (2) the Board's administration of the parole and term-setting process in a manner that does not guard against but facilitates the disproportionate sentences resulting from application of the policy.

The majority declines to address these issues because my colleagues agree with the trial court that "the claim is conclusory, and not adequately developed, and that [Morganti] fails to identify an appropriate remedy in the event he could establish a right to relief." (Maj. opn. at p. 439, fn. 4.) The concern that Morganti has not fully developed his constitutional claim, which is true, seems to me unfair, because he was prevented from doing so by the trial court's limitation of its inquiry to whether the decision to deny Morganti parole was supported by "some evidence." Reliance on Morganti's failure to identify an appropriate remedy puts the cart before the horse. He cannot determine that remedy until he is allowed the discovery necessary to establish the factual basis of his constitutional claim and does so. If he establishes the fact, the remedy will not be difficult to fashion.

The Attorney General's arguments why we should not address Morganti's constitutional claim seem to me manifestly untenable. The claim is not before us, she maintains, because " ' "a respondent who has not appealed from the judgment may not urge error on appeal." ' [Citations.]" (*County of Los Angeles v. Glendora Redevelopment Project* (2010) 185 Cal.App.4th 817, 828, 111 Cal.Rptr.3d 104.) Recognizing the statutory exception to this rule (Code Civ. Proc., § 906), which permits a respondent to " 'assert a legal theory which may result in affirmance of the judgment' " (*County of Los Angeles,* at p. 828, 111 Cal.Rptr.3d 104), the Attorney General argues that "a reviewing court 'need not' consider such claims when the appeal can be decided 'based solely on the issues raised by [appellant].' (*Id.* at pp. 828–829, 111 Cal. Rptr.3d 104.)" That is the case here, the Attorney General asserts, because this Court can determine the propriety of the superior court's order simply by deciding whether some evidence supports the Board's denial of parole.

The course urged by the Attorney General would *always* operate to insulate the constitutional claim from judicial review, *regardless* whether a challenged Board ruling was found supported by "some evidence." If there were not "some evidence," the case would be remanded on this basis and the constitutional claim would be moot; if there were such evidence, its existence would defeat the inmate's claim for relief. The rule that a reviewing court should not entertain a constitutional claim if the party seeking relief can be provided a remedy on a lesser ground is not properly used to effectively immunize from judicial review a government practice credibly claimed to infringe the constitutional rights of a large class of persons. Furthermore, as I have said, it is necessary to address Morganti's constitutional claim to ensure that, upon remand to the Board for a new hearing, his suitability for release is not determined on the basis of a Board policy, as he claims would otherwise be the case.

The Attorney General also contends that the statistics Morganti relies upon are no more impressive than those found inadequate in *In re Rosenkrantz* (2002) 29 Cal.4th 616, 128 Cal.Rptr.2d 104, 59 P.3d 174 (*Rosenkrantz*). In *Rosenkrantz,* our Supreme Court agreed that evidence indicating a parole decision was made "in accordance with a blanket no-parole policy properly could be considered by a court in determining whether the decision satisfies due process requirements." (*Id.* at p. 684, 128 Cal.Rptr.2d 104, 59 P.3d 174.) The petitioner in *Rosenkrantz* argued that the Governor's reversal of a Board decision granting him parole was based upon an impermissible general policy of automatically denying parole to prisoners convicted of murder. The trial court accepted this argument, relying in part on the Governor's statements, quoted in the *Los Angeles Times* and authenticated, that murderers, even those with second degree convictions, should serve at least a life term. (*Ibid.*) The trial court also relied on evidence establishing that between January 1999 through April 2001, the

Cont. on p.15

CALIFORNIA LIFER NEWSLETTER™

Morganti... cont. from p.14

Board held 4,800 suitability hearings and granted parole to 48 inmates. The Governor declined to review any cases in which the Board denied parole, and reversed 47 of the 48 in which parole was granted (he subsequently let one other Board decision granting parole stand). (*Id.* at p. 685, 128 Cal.Rptr.2d 104, 59 P.3d 174.) Reversing the trial court's decision, which the Court of Appeal had affirmed, the *Rosenkrantz* court concluded that the evidence relied on by the trial court and the Court of Appeal "does not support the finding that the denial of petitioner's parole was based upon a policy of automatically denying parole to all murderers." (*Ibid.*)

Rosenkrantz sets a high standard, but I believe the statistics Morganti produced are adequate for the purpose for which he offered them. For one thing, the statistics at issue in *Rosenkrantz* involved 48 gubernatorial decisions during a period of less than two and one-half years; the statistics Morganti relies upon involve more than 10,000 initial and first subsequent parole hearings over nearly a decade, which is far more indicative of a pattern and practice and the absence of individualized consideration. In any event, unlike the petitioner in *Rosenkrantz,* Morganti does not claim the statistical evidence he provided entitles him to relief; all he claims is that it entitles him to discovery and an evidentiary hearing.

The manner in which the parole process can impermissibly facilitate disproportionate sentences was first brought to judicial attention in cases arising under the ISL, and these cases continue to be relevant. Moreover, as I will explain, the manner in which the Board now administers provisions of the DSL relating to indeterminate sentencing is similar to the manner in which the Adult Authority[7] administered the ISL. The judicial response to the problems created by the administrative practices of the Adult Authority sheds significant light on the present practices of the Board, and raises substantial questions about their effect.

Morganti's constitutional challenge to the manner in which the Board administers the parole process arises out of the conflict between the paramount purposes the DSL was designed to achieve, and the purposes of the indeterminate sentencing carried out under provisions of the DSL applicable to life prisoners such as Morganti. The conflict, and the manner in which the Board attempts to resolve it, warrant brief discussion.

Under the ISL, all convicted felons were indeterminately sentenced. "The court imposed a statutory sentence expressed as a range between a minimum and maximum period of confinement—often life imprisonment—the offender must serve. An inmate's actual period of incarceration within this range was under the exclusive control of the parole authority (then called the Adult Authority), which focused, primarily, not on the appropriate punishment for the original offense, but on the offender's progress toward rehabilitation. During most of this period, parole dates were not set, and prisoners had no idea when their confinement would end, until the moment ... the Adult Authority decided they were ready for release." (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1077, 23 Cal. Rptr.3d 417, 104 P.3d 783 (*Dannenberg*).)

The perceived deficiencies of indeterminate sentencing at the time the Legislature was considering repealing the ISL and replacing it with a determinate sentencing scheme included not just the uncertainty of the date of release, which created anxiety among prisoners and was deemed an obstacle to rehabilitation, but as well the disparate terms fixed for inmates committed on the same or similar offense, the fixing of terms disproportionate to the offense or otherwise excessive, the broad discretion of the Adult Authority and its relative immunity from judicial review, and increasing doubt about the validity of some of the fundamental premises upon which indeterminate sentencing was based. (Cal. Sen. Select Com. on Penal Institutions, Transcript of Hearing on Indeterminate Sentence Law (Dec. 5–6, 1974); Frankel, *Criminal Sentence: Law Without Order* (1973); Mitford, *Kind and Usual Punishment: The Prison Business* (1973) *79–94;* American Friends Service Comm., *Struggle for Justice: A Report on Crime and Punishment in America* (1971); Singer & Statsky, *Rights of the Imprisoned* (1974) 281–285; Meyerson, *The Board of Prison Terms and Paroles and Indeterminate Sentencing: A Critique* (1976) 51 Wash. L.Rev. 617; Morris, *The Future of Imprisonment: Toward a Punitive Philosophy* (1974) 72 Mich. L.Rev. 1161; Prettyman, *The Indeterminate Sentence and the Right to Treatment* (1972) 11 Am.Crim. L.Rev. 7, 17–21.) The fundamental problem was not just the reliability of the inherently predictive determination whether an inmate was rehabilitated, which was widely challenged by leading authorities (see, e.g., Diamond, *The Psychiatric Prediction of Dangerousness* (1974–1975) 123 U.Pa. L.Rev. 439), but the *ability* of the state to rehabilitate offenders (Calif. Assembly Comm. on Crim. Proc., *Crime*

Cont. on p.16

***Morganti*... cont. from p.15**

and Penalties in California (March 1968) summary & p. 4 ["There is no evidence that prisons rehabilitate most offenders"]; Glueck, *Predictive Devices and the Individualization of Justice* (1958) 23 Law & Contemp. Prob., 461–462.)

The central theses of the DSL, diametrically opposed to those of the ISL, are reflected in the legislative findings and declarations set forth in its first provision. The DSL commences with the proposition that the purpose of imprisonment for crime is not rehabilitation, but "punishment," and states that "[t]his purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." (§ 1170, subd. (a)(1); see also Morris, *The Future of Imprisonment: Toward a Punitive Philosophy, supra,* 72 Mich. L.Rev. 1161.) The Legislature further found and declared "that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion." (§ 1170, subd. (a)(1).)

The DSL establishes a triad of alternative sentences for most felonies. The sentencing court imposes the middle term unless mitigating or aggravating circumstances call for imposition of the specified lower or upper term. Thus, a determinate sentence is tailored primarily to the offense, not the offender, a paradigm that shifts attention away from the rehabilitative sentencing model exemplified by the ISL, which tailored the sentence to the offender, not the offense. However, under the DSL "certain serious offenders, including 'noncapital' murderers ..., remain subject to indeterminate sentences. These indeterminate sentences may serve up to life in prison, but they become eligible for parole consideration after serving minimum terms of confinement. [Citation.] As under prior law, life inmates' actual confinement periods within the statutory range are decided by an executive parole agency," which is now the Board. (*Dannenberg, supra,* 34 Cal.4th at p. 1078, 23 Cal.Rptr.3d 417, 104 P.3d 783.)

The most significant tension in the DSL, which has become increasingly problematical and is at the heart of Morganti's constitutional claim, arises from the conflict between its chief purposes—the enhancement of uniform sentencing and the early setting of terms proportionate to the seriousness of the offense—and the perpetuation, with respect to a large and growing number of inmates, of the indeterminate scheme responsible for the problems of disparate sentencing and disproportionate terms that the DSL was designed to cure. (See *Dannenberg, supra,* 34 Cal.4th at pp. 1080–1083, 23 Cal.Rptr.3d 417, 104 P.3d 783.)

The legislative attempt to reconcile the indeterminate sentencing prescribed by the DSL to the goals of uniformity and proportionality—i.e., the intention "to apply some determinate sentencing principles to life-maximum inmates" (*Dannenberg, supra,* 34 Cal.4th at p.1083, 23 Cal. Rptr.3d 417, 104 P.3d 783)—is manifested in subdivision (a) of section 3041, the provision upon which Morganti relies. As earlier noted, section 3041, subdivision (a), requires the Board to "normally" set a parole release date at the initial parole hearing "in a manner that will provide uniform terms for offenses of similar gravity and magnitude...." (§ 3041, subd. (a).) The directives of subdivision (a) are, however, significantly qualified by those of subdivision (b). Subdivision (b) declares that the Board "shall set a release date unless it determines that the gravity of the current conviction offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of consideration for this individual, and that a parole date, therefore, cannot be fixed at this meeting."

The conflict between the relatively objective factors central to determinate sentencing enumerated in subdivision (a) of section 3041 and Board regulations (Cal.Code Regs, tit. 15, §§ 2404, 2405) on the one hand, and the subjective consideration of the inmate characteristic of indeterminate sentencing required by subdivision (b) of section 3041 on the other hand, was almost immediately seen as presenting a fundamental problem: the extent to which DSL's primary goals of uniformity and proportionality are compromised by Board consideration of post-conviction factors in determining whether to grant parole to indeterminately sentenced life prisoners. (See, e.g., Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game* (1978) 9 Pacif. L.J. 1, 86–87.)

A new development has further exacerbated the situation. Historically, when a life prisoner was denied parole, the parole authority was required to set the prisoner's next hearing within 12 months. (§ 3041.5, subd. (b)(2), as added by Stats.1976, ch. 1139, § 281.8, p. 5152.) Since the enactment in 2008 of Proposition 9, known as "Marsy's Law" (codified in § 3041.5, subd. (b)(3)), a life prisoner denied a release date must now wait at least three years for a new hearing, and possibly as long as 15 years. Thus, when it denied Morganti a parole release date at his initial parole hearing in 2006, the Board deferred his next parole hearing until 2010, thereby increasing his prison term at least four years beyond the point the Legislature contemplated as normative for the setting of a release date. After denying him parole in 2010, the Board deferred the next parole hearing for three more years, thus extending his prison term beyond the norm posited by section 3041 by a total of at least seven years. In short, as Morganti's situation demonstrates, the denial of a parole release is now much more adversely consequential than it has ever been, which heightens the significance of the post-conviction factors relied upon by the Board to determine suitability for release on parole.

The Board's ability to defer a subsequent parole hearing for a lengthy period of time also increases the possibility that, as a practical matter, the denial of parole may result in the prisoner serving a term of imprisonment disproportionate to his offense. However, the Board does not fix a prisoner's "base term" until after he or she is found suitable for release, and, as this case demonstrates, judicial review of the denial of a parole date is conventionally limited to inquiring whether it is supported by "some evidence." As a result, most prisoners, the vast majority of whom are unrepresented by counsel in judicial proceedings, are unable to successfully challenge the denial of parole on the ground that it results in the imposition of a disproportionate sentence, *even if, as a practical matter, that is the case.* (Indeed, as explained, *post,* at pages 17–18, if Morganti had not received judicial relief, by the time of his next parole hearing he would have served a term disproportionate to his crime under Board criteria.)

The difficulty in reconciling the discretion inherent in any indeterminate sentencing with the limits imposed by the principle of proportionality is not a new problem. Morganti's constitutional claim is similar in some respects to that addressed in *In*

Cont. on p.17

CALIFORNIA LIFER NEWSLETTER™

Morganti... *cont. from p.16*

re Minnis (1972) 7 Cal.3d 639, 102 Cal. Rptr. 749, 498 P.2d 997 (*Minnis*), which arose under the ISL. The inmate in that case contended that although the parole authority evaluated his application for parole according to its usual procedures, which he did not challenge, "it refused to fix his term at less than maximum or to grant him parole on the basis of a 'policy' that prisoners who have sold drugs or narcotics 'purely for profit' should be retained in prison for the maximum term permissible." (*Id.* at p. 642, 102 Cal.Rptr. 749, 498 P.2d 997.) The Supreme Court agreed that such a policy "completely disregards the individual prisoner's conduct in prison and his disposition toward reform.... If every offender in a like legal category receives identical punishment, prisoners do not receive individualized consideration ... [which] violates the spirit and frustrates the purposes of the Indeterminate Sentence Law and the parole system." (*Id.* at p. 645, 102 Cal.Rptr. 749, 498 P.2d 997, fn. omitted.) The court concluded: "An administrative policy of rejecting parole applications solely on the basis of the type of offense with the result that the term of imprisonment is automatically fixed at maximum, although the Authority action includes a pro forma hearing and review of the cumulative case summary, does *not* satisfy the requirements of individualized treatment and 'due consideration.' " (*Id.* at p. 647, 102 Cal.Rptr. 749, 498 P.2d 997.)

The problem in conducting judicial review of the parole authority's term-fixing practices was discussed in two subsequent cases: *People v. Wingo* (1975) 14 Cal.3d 169, 121 Cal.Rptr. 97, 534 P.2d 1001 (*Wingo*) and *People v. Romo* (1975) 14 Cal.3d 189, 121 Cal.Rptr. 111, 534 P.2d 1015 (*Romo*). The defendants in those cases contended their indeterminate life sentences, determined under the ISL, were excessive and amounted to cruel and unusual punishment. The Supreme Court recognized "that a sentence may be unconstitutionally excessive either because the Adult Authority has fixed a term disproportionate to the offense or, *in some circumstances, because no term whatever has been set.*" (*Wingo,* at p. 182, 121 Cal.Rptr. 97, 534 P.2d 1001, italics added.) However, faced with the problems of analyzing the constitutionality of a sentencing statute as applied to a defendant's particular conduct in the absence of a fixed term, it held that "judicial review must await an initial determination by the Adult Authority of

the proper term in the individual case. When the term is fixed a court can then analyze the constitutionality of the statute as applied." (*Id.* at p. 183, 121 Cal.Rptr. 97, 534 P.2d 1001.) Aware that this could cripple an indeterminately sentenced prisoner's ability to seek judicial relief if the Authority set no term at all, the court further held that "[i]f the Authority, either by omission or by the exercise of its discretion, fails to or declines within a reasonable time to set a term, the particular conduct will be measured against the statutory maximum." (*Ibid.*)

The ultimate solution to the problems caused by the Adult Authority's practices presented in *Minnis, Wingo, Romo* and like cases was fashioned by the Supreme Court in *Rodriguez, supra,* 14 Cal.3d 639, 122 Cal.Rptr. 552, 537 P.2d 384, which was decided in 1975, while the Legislature was in the process of replacing the ISL with the DSL. Cognizant that administration of the ISL by the Adult Authority countenanced constitutionally impermissible prison terms and complicated judicial review of parole decisions allegedly resulting in excessive terms, the *Rodriguez* court accepted a judicial obligation "to look beyond the facial validity of a statute that is subject to possible unconstitutional administration." The court reasoned that " 'a law though "fair on its face and impartial in appearance" may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings.' [Citation.]" (*Rodriguez,* at p. 648, 122 Cal.Rptr. 552, 537 P.2d 384.) The "obligation to oversee the execution of the penal laws of California extends not only to judicial proceedings," the court stated, "but also to the administration of the Indeterminate Sentence Law." (*Ibid.*) Concluding that the ISL "is not now being administered in a manner which offers assurance that persons subject thereto will have their terms fixed at a number of years proportionate to their individual culpability [citation], or, that their terms will be fixed with sufficient promptness to permit any requested review of their proportionality to be accomplished before the affected individuals have been imprisoned beyond the constitutionally permitted term," the *Rodriguez* court rejected the parole authority's contention that it "has no obligation, either statutory or constitutional, to ever fix [a life prisoner's] term at less than life imprisonment." (*Id.* at p. 650, 122 Cal. Rptr. 552, 537 P.2d 384.)

Cont. on p.18

CALIFORNIA LIFER NEWSLETTER™

Morganti... *cont. from p.17*

The judicial concern in *Rodriguez* was that the Adult Authority was not complying with the legislative intention that it fix terms within the statutory range prescribed by the ISL "that are not disproportionate to the culpability of the individual offender." (*Rodriguez, supra,* 14 Cal.3d at p. 652, 122 Cal.Rptr. 552, 537 P.2d 384.) The source of the problem, the court explained, was the Authority's failure to recognize the difference between its responsibility to fix an inmate's "primary term"—which should not be "disproportionate to the culpability of the individual offender" and must "reflect the circumstances existing at the time of the offense"—and its discretionary power to later reduce the term thus fixed, based on post-conviction considerations, through exercise of its parole-granting function. (*Id.* at pp. 652–653, 122 Cal. Rptr. 552, 537 P.2d 384.) Because it improperly conflated these separate and distinct functions, the Adult Authority did not fix an inmate's primary term until and unless it determined he or she was suitable for parole. The result was that the ISL was "not ... being administered in a manner which offers assurance that persons subject thereto will have their terms fixed at a number of years proportionate to their individual culpability [citation], or, that their terms will be fixed with sufficient promptness to permit any requested review of their proportionality to be accomplished before the affected individuals have been imprisoned beyond the constitutionally permitted term." (*Id.* at p. 650, 122 Cal. Rptr. 552, 537 P.2d 384.)

The solution decided upon by the *Rodriguez* court was to require the Adult Authority to fix the length of a prisoner's sentence, i.e., the "primary term," shortly after he or she entered prison, and to later, by granting parole, reduce the primary term "in recognition of a prisoner's good conduct, his efforts toward rehabilitation, and his readiness to lead a crime-free life in society." (*Rodriguez, supra,* 14 Cal.3d at p. 652, 122 Cal.Rptr. 552, 537 P.2d 384.) The court concluded that this "permits the Authority to retain a prisoner for the full primary term if his release might pose a danger to society [citation] and to revoke parole, rescind an unexecuted grant of parole and refix a reduced term at a greater number of years up to the primary term if the prisoner or parolee engages in conduct which affords cause to believe he cannot or will not conform to the conditions of parole, or would pose a danger to society if free. [Citations.]" (*Ibid.*)

The *Rodriguez* court encouraged the Adult Authority to fix prisoners' primary terms promptly, and ensured inmates would be able to obtain review even if it did not, by announcing that, in the future, for purposes of assessing the constitutionality of an inmate's term, "the court will deem it to have been fixed at the maximum if the Authority does not act promptly to fix the primary term of a prisoner committed to the Department of Corrections to serve an indeterminate sentence." (*Rodriguez, supra,* 14 Cal.3d at p. 654, fn. 18, 122 Cal.Rptr. 552, 537 P.2d 384.) The *Rodriguez* remedy ensured that the maximum term a prisoner might serve would not be disproportionate to his or her offense or, if it was, an inmate could timely seek and obtain judicial relief.

The *Rodriguez* analysis is directly relevant to the Board's administration of the present parole system, because the Board's regulations reinstate the very practice condemned in *Rodriguez.* As the Supreme Court noted in *Dannenberg, supra,* 34 Cal.4th 1061, 23 Cal.Rptr.3d 417, 104 P.3d 783, Board regulations interpreting subdivision (a) of section 3041 provide that the Board need not set a "base term" until after it first determines that a life prisoner is suitable for release on parole. (*Dannenberg,* at p. 1091, 23 Cal.Rptr.3d 417, 104 P.3d 783, citing Cal.Code Regs., tit. 15, §§ 2402, subd. (a), 2403, subd. (a).) In the view of the *Dannenberg* majority, the function of the "base term" is to "establish[ ] a parole release date" *after* "the prisoner is deemed suitable—i.e., safe—for parole." (*Dannenberg,* at p. 1091, 23 Cal.Rptr.3d 417, 104 P.3d 783.). Under the Board's regulations, the "base term," which is the equivalent of what *Rodriguez* referred to as the "primary term," is "established *solely* on the gravity of the base crime, taking into account all of the circumstances of that crime" (cal.code regs., Tit. 15, § 2403, SUBD. (A), Italics added.) Consideration is limited to the gravity of the offense because the purpose of the "base term" is to ensure life prisoners are not confined for a period of time disproportionate *to their offense,* which the Constitution forbids. The *Rodriguez* court understood that by conflating the setting of terms with the decision to grant parole—that is, by not fixing the term of imprisonment until *after* a prisoner is found suitable for release on parole—the Adult Authority was able to deny a parole release date without inquiring whether a finding of unsuitability would result in a sentence disproportionate to the prisoner's "base crime", i.e., "the most serious of the murders [the prisoner committed] considering the facts and circumstances of the crime." (Cal.Code Regs., tit. 15, § 2403, subd. (a).)

Morganti's situation provides a perfect example of the manner in which the Board's present practice, like that of the Adult Authority in *Rodriguez,* operates to undermine the constitutional principle of proportionality. Morganti was convicted of

Cont. on p.19

CALIFORNIA LIFER NEWSLETTER™

***Morganti...** cont. from p.18*

second degree murder in June 1993. If the Board's denial of his request for parole in 2010 and deferral of his next parole hearing to 2013 were allowed to stand, Morganti would at his next hearing have served 20 years. However, as explained in the margin below, 20 years is *longer* than the *maximum* number of years in the triad of sentences applicable to Morganti's "base crime," second degree murder. In other words, by denying him parole in 2010, and scheduling a subsequent hearing in three years, the earliest allowed under section 3041.5, subdivision (b)(3), the Board has effectively imposed on Morganti a prison term arguably disproportionate to his offense under the Board's own criteria. This shows that under the Board's administration of section 3041, a life prisoner's term of imprisonment is far more significantly "fixed" by the Board's suitability determination than by its subsequent establishment of the "base term." As I have said, the suitability determination, which focuses narrowly on the perceived dangerousness of the prisoner, diverts attention from the constitutional requirement of proportionality. The Board's regulations therefore invite the constitutional problem addressed in *Minnis, Rodriguez* and other cases and raised again here by Morganti.

Though the Board regulation pertaining to term-fixing directs a practice materially the same as that condemned in *Rodriguez,* the *Dannenberg* majority distinguished it on the grounds that section 3041 "partially combined the term-setting and parole functions *Rodriguez* had described as separate under prior law" (*Dannenberg, supra,* 34 Cal.4th at p. 1090, 23 Cal. Rptr.3d 417, 104 P.3d 783), and "the Legislature has not disturbed the Board's interpretation of section 3041 in this fundamental regard." (*Id.* at p. 1091, 23 Cal.Rptr.3d 417, 104 P.3d 783.)[13] Furthermore, under *Dannenberg,* the public-safety provision of subdivision (b) of section 3041 "takes precedence over the 'uniform terms' principle of subdivision (a)" of that statute. (*Dannenberg,* at p. 1082, 23 Cal.Rptr.3d 417, 104 P.3d 783.) As the court said in that case, "[s]o long as the Board's finding of unsuitability flows from pertinent criteria, and is supported by 'some evidence' in the record before the Board [citation], the overriding statutory concern for public safety in the individual case trumps any expectancy the indeterminate life inmate may have in terms of comparative equality with those served by other similar offenders." (*Id.* at p. 1084, 23 Cal.Rptr.3d 417, 104 P.3d 783.)

However, the issue germane to Morganti's request for discovery and an evidentiary hearing is not uniformity or the "comparative equality" of sentences, a matter governed by statute, but the proportionality of the punishment imposed on him by the denial of a release date, a matter governed not by statute but by the federal and state constitutions. Although the *Dannenberg* majority rejected the remedy employed in *Rodriguez,* it relied on *Rodriguez* (and *Wingo*) to recognize that under the DSL even life prisoners are constitutionally protected from excessive confinement. "Of course," the court stated, "even if sentenced to a life-maximum term, no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense. Such excessive confinement, we have held, violates the cruel or unusual punishment clause (art. I, § 17) of the California Constitution. (*Rodriguez, supra,* 14 Cal.3d 639, 646–656 [122 Cal.Rptr. 552, 537 P.2d 384]; *Wingo, supra,* 14 Cal.3d 169, 175–183 [121 Cal.Rptr. 97, 534 P.2d 1001].) Thus, we acknowledge, section 3041, subdivision (b) cannot authorize such an inmate's retention, *even for reasons of public safety,* beyond this constitutional maximum period of confinement." (*Dannenberg, supra,* 34 Cal.4th at p. 1096, 23 Cal.Rptr.3d 417, 104 P.3d 783, italics added.)

The point of the foregoing discussion, and indeed of this opinion, is that, because it permits the Board to defer the fixing of the "base term" until after a prisoner is found suitable for release—on the basis of the public-safety provisions of section 3041, subdivision (b), which are unrelated to and potentially conflict with the principle of proportionality—*Dannenberg* heightens judicial responsibility to ensure that "the overriding statutory concern for public safety," which "trumps" the statutory interest in uniform sentences (*Dannenberg, supra,* 34 Cal.4th at p. 1084, 23 Cal.Rptr.3d 417, 104 P.3d 783), is not also allowed to "trump" prisoners' constitutional right to sentences proportionate to their offenses. By relying on *Rodriguez, Dannenberg* implicitly acknowledges the judicial responsibility to scrutinize Board practices that are allegedly inadequate to safeguard the constitutional rights of prisoners and to craft such remedies as may be needed to ensure against the imposition of disproportionate terms.

Morganti's request for discovery and an evidentiary hearing asks us to discharge this judicial responsibility. What he seeks is an opportunity to persuade the trial court that the Board's systematic denial of parole to life prisoners is not based on individualized inquiry, as required, but on the basis of a policy that violates due process and does not take proportionality into account, a practice that regularly results in life prisoners like him serving periods of confinement disproportionate to their offenses. Basically, like the petitioner in *Rodriguez,* Morganti is saying that section 3014 "is not now being administered in a manner which offers assurance that persons subject thereto will have their terms fixed at a number of years proportionate to their individual culpability [citation.]" (*Rodriguez, supra,* 14 Cal.3d at p. 650, 122 Cal.Rptr. 552, 537 P.2d 384.) Also like the petitioner in *Rodriguez,* Morganti wants to litigate his claim now, before his "base term" is fixed, if it ever is, because by then he is certain to have been confined for a period that amounts to a disproportionate term.

The evidence Morganti provided to the trial court entitles him to factually explore and obtain judicial review of the Board policies and practices he claims fail to safeguard the constitutional rights of life prisoners to individualized consideration of their suitability for release on parole and to terms of imprisonment proportionate to their offenses.

(footnotes omitted)

In re Andrew Young (#)

See *CLN* # 44, page 4

The citation for this case is **204 Cal.App.4th 288** (2012).

In re William Jon Pugh (#)

__ Cal.App.4th __; 2012 WL 967588

CA3 No. C066229 (March 22, 2012)

In this case the Court of Appeal addressed and rejected one of the Board's and Governor's favorite ploys for denying parole – a recital that the lifer's version of the facts has not been consistent or is at odds with the facts the Board or Governor professes to believe – which of course (unless the inmate's version is dishonest or incredible) has nothing whatsoever to do with the subject's risk to public safety if granted parole.

Pugh was 18 when he shot and killed Donald

Cont. on p.20

CALIFORNIA LIFER NEWSLETTER™

Pugh... cont. from p.19

Fields. Fields was 30 years old, the roommate of Pugh's friend, Alton. Fields, after Pugh had stolen $30 worth of coins from him, told Alton he did not want Pugh visiting the house again. But Pugh went to Fields' apartment to try to convince him that he had not stolen the coins, even though he admitted doing so. After Pugh managed to do so, Fields complimented Pugh on his looks, and asked whether he and Alton had a homosexual relationship. Fields sat back in his chair, put his hand on his genitals and told Pugh to touch him and "give [him] some head." Pugh panicked and shot Fields.

The prosecution of course claimed that Pugh went to Fields' apartment intending to kill Fields if he could not convince him he did not steal the coins. The jury rejected that theory and the charge of first degree murder, and instead convicted Pugh of second degree murder.

The Board granted parole in October 2009, concluding he did not pose a current risk of danger to society, based in part on his adequate remorse, insight, and acceptance of responsibility for his offense. Pugh had maintained an excellent prison record of reform and programming.

In November 2009, the Governor's staff reversed the Board's decision, based on the heinous nature of the offense, and – you guessed it – a recital that he "failed to obtain insight into his violent behavior[.]" The reason the Governor's staff gave for its insight notion was that Pugh had consistently maintained he shot the victim when he "freaked out" after the victim made sexual advances toward him, but that this version of events was inconsistent with the facts in the record. These "facts" were: (1) the probation report, which asserted that Pugh planned to confront the victim and "duke it out[;]" (2) statements from the victim's family denying he had been gay; and (3) statements made by the deputy district attorney at Pugh's parole hearing, claiming that when the victim answered the door to his apartment, Pugh did not wait before shooting the victim at the entrance of the residence.

The Governor's staff (as is common when attempting to justify a predetermined decision to reverse a rational one) relied on a 1987 mental health examination, ignoring the more recent psychological reports indicating Pugh showed insight and remorse.

Pugh was convicted of second degree murder after the jury rejected the prosecution's theory of premeditation. He was sentenced to 15 years-to-life plus two years.

The Sacramento County Superior Court had granted Pugh's earlier petition. After the Attorney General appealed, the Court of Appeal *denied* the petition for writ of supersedeas, refusing to stay the trial court's order. Accordingly, *Pugh was released to parole well before the Court of Appeal's ultimate decision*.

The Court of Appeal began with a summary of its decision.

> We shall affirm the judgment of the trial court. Appellant argues Pugh's current dangerousness is evidenced by his lack of insight into the offense combined with the heinous nature of his crime. We find no evidence in the record that Pugh currently lacks insight into his offense. Furthermore, we find no evidence of any recent history of lack of insight. Appellant's claim that the lack of insight makes the heinous nature of the crime probative to Pugh's current dangerousness must, therefore, be rejected. Because the nature of the offense is no longer an accurate indicator of current dangerousness, the trial court correctly granted Pugh's petition for writ of habeas corpus.

The Court of Appeal explained how it applied the standard of review to the facts and findings in Pugh's case, and squarely addressed the issue of variances between the inmate's recollection of the offense on one hand, versus the version adopted by the Board or Governor, on the other hand.

> … [T]here must be a connection between the factual findings and the conclusion that the inmate is currently dangerous. (*In re Criscione* (2009) 180 Cal.App.4th 1446, 1458, 103 Cal.Rptr.3d 549.) "[T]he relevant inquiry is whether some evidence supports the *decision* of the ... Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence, supra,* 44 Cal.4th at p. 1212, 82 Cal. Rptr.3d 169, 190 P.3d 535.)
>
> Appellant argues that two factors cited by the Governor indicate the trial court's decision should be reversed: (1) the circumstances of the offense, and (2) Pugh's lack of insight into his violent behavior.
>
> As to the first factor, the Governor may base a denial of parole decision on the circumstances of the offense only if such circumstances "support the ultimate conclusion that [the] inmate *continues* to pose an unreasonable risk to public safety." (*Lawrence, supra,* 44 Cal.4th at p. 1221, 82 Cal.Rptr.3d 169, 190 P.3d 535.) Where the inmate's record indicates he is no longer dangerous, the circumstances of the commitment offense do not provide "some evidence" of unsuitability for parole absent a "rational nexus between those

Cont. on p.21

CALIFORNIA LIFER NEWSLETTER™

Pugh... cont. from p.20

facts and current dangerousness [.]" (*Id.* at p. 1227, 82 Cal. Rptr.3d 169, 190 P.3d 535.)

Appellant claims Pugh's lack of insight indicates the heinous nature of the offense is still probative to his current dangerousness. Therefore, our review of the Governor's decision turns on whether there is evidence Pugh lacks insight into his criminal behavior.

Appellant's opening brief asserts that Pugh's lack of insight is evidenced by his varied depictions of the crime, his continued denial of culpability, and his problematic psychological evaluations. We find no evidence to support any of these assertions. We also address an issue raised at oral argument following the Supreme Court's recent decision, *In re Shaputis* (2011) 53 Cal.4th 192, 134 Cal.Rptr.3d 86, 265 P.3d 253 (*Shaputis II*). Appellant argues there is some evidence that Pugh's version of the crime is different from the official version, and that this constitutes some evidence of current dangerousness. We shall conclude that any difference in Pugh's version of the crime provides no evidence of current dangerousness where his version is not inherently incredible and is not inconsistent with the evidence established in the case.

As evidence that Pugh's depictions of the crime have varied, appellant first asserts that Pugh initially stated he murdered the victim because he was angry at the victim over the victim's allegations that Pugh had stolen $30.00 in pennies. There is no evidence in the record that Pugh ever gave this reason for the shooting. The probation report related that Alton told police Pugh had taken offense that the victim accused him of theft. According to the probation report, *Alton* claimed that two or three days prior to the shooting, Pugh said he was going to confront the victim and "duke it out." However, the probation report did not state that Pugh himself gave this as a reason for the murder.

The probation report also stated that Pugh told Alton he had been sitting and talking to the victim, when he (Pugh) "freaked out." This is consistent with all of Pugh's later statements regarding his reason for the shooting, although it is incomplete. Pugh told a defense psychologist who began interviewing him a few months after the offense that the victim had made sexual advances toward him and that it was in that context that he pulled the gun and shot the victim. The psychologist stated that Pugh appeared to be "genuinely and severely homophobic."

This was the version of events to which Pugh testified at his trial. This was the version of events Pugh told the court-appointed psychiatrist, who interviewed him in the months following the crime. This was the version of events Pugh related to his mental health evaluator in 2007. This was the version of events Pugh related to his psychological evaluator in 2008. Appellant's claim that Pugh's depiction of the crime has "varied" is therefore unfounded.

Appellant also claims there is no evidence in the record to support Pugh's "self-serving" version of the crime. In fact, the evidence was more supportive of Pugh's version of the crime than of the prosecution's theory that Pugh went to the apartment intending to kill the victim and shot him shortly after entering the apartment. At Pugh's 2007 parole hearing, Deputy District Attorney Cintean stated:

"[W]hen ... the victim, opened the door ... defendant didn't wait much before shooting the victim at the entrance of the victim's own residence.... [T]his crime was committed in a friction over pennies. It was, the motive for this was trivial. There's pretty much no motive for this other than being accused of stealing pennies. He overheard that he was being accused of stealing the pennies, and even though he had, he didn't want to admit it, and he wanted to pretty much teach the victim a lesson by bringing a gun and shooting the victim, execution-style that is, in front of, or at the door, at the victim's door inside the victim's residence."

Contrary to this statement, the evidence showed that Pugh telephoned his girlfriend and Alton from the phone at the victim's apartment approximately 30 minutes before the shooting, and Pugh's testimony indicated he had been at the apartment for approximately an hour and a half before the shooting. Also, a slug and blood was found in and on the living room chair, corroborating Pugh's account that he shot the victim while he was sitting in the chair, where the body was found, rather than just inside the entrance to the apartment.

Appellant claims there is evidence in the record that Pugh has denied his culpability for the crime, and that his attitude regarding his involvement in the crime varies. To the extent Pugh's attitude regarding his involvement in the crime has varied, the record shows that his attitude has evolved in a positive manner that supports parole.

Appellant points to Pugh's original probation report, completed in 1988, in

Cont. on p.22

CALIFORNIA LIFER NEWSLETTER™

Pugh... cont. from p.21

which it was reported that Pugh said he felt the jury made a mistake in convicting him, and that it should have taken his case more seriously. He said, "This is the first time in my life I was completely honest and the jury convicted me. It makes me mad." By 2008, when Pugh was asked about the fairness of his sentence, he stated: "I was guilty. I feel the trial went badly and I could have received a lesser sentence; but I accept it. I have come to terms with it."

In the 2008 parole hearing, Pugh further explained that "[b]ack then when this happened," he felt it was unfair that he went on the stand, told the truth for the first time in his life, and said things that made him look bad and weak, and other people were not completely honest. He said he had resented it, and "that's the way I thought."

He explained that, someone from the prosecution wrote a letter saying he should have been convicted of manslaughter rather than murder. He said that for a long time this made him feel that his conviction had been unfair. Now, however, he said: "As I've grown, gotten older and talked more and more about this, I've come to learn that, forget about all that. This was a murder, I did it, it's cut and dry, move on."

Pugh's 2008 psychological evaluation, far from stating that Pugh still had not accepted responsibility for the crime, stated that Pugh "took full responsibility for his crime[,]" and "evidenced remorse and guilt for his actions and involvement in the instant offense." At the 2008 hearing, Pugh expressed that at the time of the offense he had not thought he was guilty, but now, "It was murder, period." Contrary to appellant's argument, the record indicates Pugh no longer denies culpability for the crime.

Furthermore, there is evidence in the record that Pugh has accepted responsibility for the crime for some time. A 1991 psychological evaluation concluded he "shows ample insight" into the crime. A 2005 evaluation concluded he "takes full responsibility for this murder and does not try to excuse or trivialize his involvement."

Appellant also argues that Pugh's challenge of the evidence presented by the deputy district attorney who appeared at his parole consideration hearing shows that he has failed to accept responsibility for the crime. However, this court has held that an inmate's refusal to agree with the prosecution's version of the crime does not support a finding of lack of insight. (*In re Palermo* (2009) 171 Cal. App.4th 1096, 1110–1112, 90 Cal.Rptr.3d 101 (*Palermo*), overruled on another point by *In re Prather* (2010) 50 Cal.4th 238, 252, 112 Cal.Rptr.3d 291, 234 P.3d 541.)

In *Palermo,* the Board denied parole based on its finding that the inmate lacked insight into his behavior because of his insistence that he believed the gun with which he shot and killed the victim was unloaded. (*Palermo, supra,* 171 Cal.App.4th at p. 1110, 90 Cal.Rptr.3d 101.) The inmate argued it was inappropriate to find him unsuitable for parole because he refused to admit to second degree murder, rather manslaughter. (*Ibid.*) We reasoned that since the Board could not condition parole on an admission of guilt, it also could not base a finding of current dangerousness on the inmate's insistence that the killing took place in a manner that was not inconsistent with the evidence where the inmate otherwise had accepted full responsibility for the crime, expressed remorse, participated in rehabilitative programs, and been evaluated by psychologists as posing no risk of danger to the public if released on parole. (*Id.* at pp. 1110–1112, 90 Cal.Rptr.3d 101; § 5011, subd. (b); Cal.Code Regs., tit. 15, § 2236.)

As in *Palermo, supra,* Pugh's version of

Cont. on p.23

Pugh... cont. from p.22

events is not inconsistent with the evidence, and Pugh has explained that although he was prompted to kill the victim by the victim's sexual advances toward him, he does not think the victim bears any responsibility for Pugh's crime. Also as in *Palermo, supra,* Pugh has accepted full responsibility for the crime, has expressed remorse, has participated in rehabilitative programs, and has been evaluated as posing no risk of danger to the public if released. Accordingly, we find no evidence to support appellant's claim that Pugh has denied his culpability for the crime.

The Court of Appeal also addressed the common tactic, used by the Board and Governor to support a predetermined parole denial, to parse snippets of verbiage from psychological evaluations (which, as here, determined a low parole risk) to claim "lack of insight."

> Finally, appellant asserts that Pugh's comments made during his psychological evaluations show a lack of insight. Appellant argues that Pugh was evaluated in 1987, but it was not until 2000 that a psychologist reported he had matured and improved his adjustment. Appellant provides no record cites for this assertion, and it is untrue.
>
> The first evaluation that appears in the record following the 1987 evaluation for the purpose of assisting in Pugh's defense is from 1991. The 1991 evaluation concludes Pugh is "relatively mature and stable ... with no obvious evidence of serious problems." The evaluator also concluded that "maturation has had a positive effect on [Pugh's] behavior, insight, judgment and perception." The evaluator reported that Pugh "shows ample insight, indicating that he would never again put himself in a position where he was carrying a gun, and is no longer bothered by homosexuals."
>
> A 1994 report was quoted at Pugh's 2008 parole hearing as stating: "He's matured along with gaining insight. He avoids conflicutal [sic] situations, doesn't get caught up in the pettiness that goes on around him, and [the] predisposing factors that contributed to the commitment offense, the immaturity, inability to express himself emotionally, inadequate means of expressing anger, are no longer applicable, as this inmate has matured considerably and has gained insight."
>
> In 2000, as appellant concedes, the psychological report stated that Pugh had "significantly matured and improved his adjustment in the years he's been incarcerated." In the same report, it was noted that Pugh recognized his "impulsive and out of control lifestyle, and is horrified to think of the personal state he was in at that time." Pugh acknowledged that "there was no excuse for the crime" and "spoke with some feeling about the tragedy of this crime for the victim and the victim's family, as well as his own family." The report concluded that Pugh's level of dangerousness was low.
>
> A 2008 psychological evaluation cited to several prior evaluations, notably one performed in 2005, which stated:
>
> "Mr. Pugh 'takes full responsibility for this murder and does not try to excuse or trivialize his involvement. He admits he has made numerous mistakes, not the least of which was having a gun. He states he used to blame the crime on his own insecurities and thus indirectly blamed the victim. He now admits it was an utterly senseless killing and he blames no one but himself. He has come to understand how many lives he has ruined in addition to his own, and expressed much ongoing remorse.' Dr. Girtman emphasized the progress and improved level of insight and maturation achieved by the inmate."
>
> A 2006 psychological report stated that Pugh "shows genuine insight and remorse into his early behavior." A 2007 mental health evaluation reported that Pugh, "demonstrates remorse into the far-reaching consequences of his crime, in the case of the victim, the victim's family, and his own." The evaluator stated that Pugh was "able to demonstrate insight into the causative factors that led up to this crime and ways to improve his overall functioning that would substantially lower the risk of future criminal behavior." His 2008 psychological report stated that he "evidenced remorse and guilt for his actions and involvement in the instant offense."
>
> Contrary to appellant's assertion that Pugh's psychological evaluations show a lack of insight, the evaluations on record consistently indicate Pugh has demonstrated insight into the crime and exhibited remorse.
>
> D. No Evidence that Pugh's Version of Events was Untrue
>
> In his opening brief, appellant focused on Pugh's lack of insight as evidenced by: (1) "his varied depictions of the crime," (2) "his continued denial of culpability," and (3) "his problematic psychological evaluations." In a single sentence unsupported by any citation to the record, appellant alluded to another reason set forth by the Governor: "There is no evidence in the record, besides Pugh's self-serving statements, to support the contention that the murder was the result of the victim's sexual advances."
>
> The Court of Appeal distinguished *Shaputis-II*.
>
> As indicated, the Governor concluded Pugh's version of the offense was inconsistent with the facts in the record that: (1) he went to Fields' apartment to "duke it out," (2) that Fields was not gay, and (3) that Pugh shot Fields shortly after Fields answered the door. At oral argument, appellant stressed this aspect of the Governor's reversal, and asserted that the Supreme Court's recent decision in *Shaputis II* "requires that the Superior Court's decision be reversed."
>
> We disagree. *Shaputis II* reaffirmed "the deferential character of the 'some evidence' standard for reviewing parole suitability determinations." (53 Cal.4th at p. 198, 134 Cal.Rptr.3d 86, 265 P.3d 253.) The "some evidence" standard refers to evidence of current dangerousness. There must be " ' "some evidence" supporting the core statutory determination that a prisoner remains a current threat to public safety—not merely "some evidence" supporting the Board's or the Governor's characterization of facts contained in the record.' " (*Id.* at p. 209, 134 Cal.Rptr.3d 86, 265 P.3d 253.) In this case, unlike *Shaputis II,* the evidence cited by the Governor may constitute some evidence to support the Governor's characterization of the facts, but it was not evidence from which a finding of current dangerousness could be inferred.
>
> Shaputis was convicted of second degree murder in the shooting death of his wife. (53 Cal.4th at pp. 200–201, 134 Cal. Rptr.3d 86, 265 P.3d 253.) He claimed not to have known the gun was loaded, even though an open box of ammunition was on the table. (*Id.* at p. 201, 134 Cal.Rptr.3d 86, 265 P.3d 253.) He claimed to have shot his wife by accident, even though the gun could not be fired unless the hammer was manually cocked before the trigger was pulled, and a transfer bar prevented accidental discharge by making the gun impossible to fire unless the trigger was pulled and held back. (*Ibid.*)
>
> Also, while Shaputis was responsible for calling 911, his wife's body was cold to the touch, blood had partially dried on her face, neck, and head, and there was postmortem lividity in the lower parts of her leg and arm, caused by pooling of the blood after death. (53 Cal.4th at p. 201, 134 Cal.Rptr.3d 86, 265 P.3d 253.)

Cont. on p.24

CALIFORNIA LIFER NEWSLETTER™

Pugh... cont. from p.23

This, plus the fact that the 911 call was made some 58 minutes to an hour and 28 minutes after gunshots were heard, indicated Shaputis waited to call for help. (*Ibid.*) Shaputis had a long history of domestic violence, and had abused his four daughters. (*Id.* at p. 202, 134 Cal. Rptr.3d 86, 265 P.3d 253.) Shaputis's version of the crime changed over the years. At an early parole hearing he claimed he shot his wife by accident, that they did not fight before the shooting, that she handed him the gun for his own protection, that he did not know the gun was loaded, and that he had not aimed the gun at her. (53 Cal.4th at pp. 202–203, 134 Cal.Rptr.3d 86, 265 P.3d 253.) At a later hearing, he said his wife gave him the gun because there had been a prowler in the neighborhood, and she wanted him to look at the gun to see if she could use it. (*Id.* at p. 203, 134 Cal.Rptr.3d 86, 265 P.3d 253.) When he took the gun out of its case, the shells that were in the box fell out. He pointed the gun at the fireplace and pulled the trigger. The gun went off, and he saw his wife on the floor, but he had not seen her before. He called 911 after he found the phone. (*Ibid.*)

The court stated that "an *implausible* denial of guilt may support a finding of current dangerousness[.]" (*Shaputis II, supra,* 53 Cal.4th at p. 216, 134 Cal.Rptr.3d 86, 265 P.3d 253.) It is not the denial of guilt itself that reflects a lack of insight, "but the fact that the denial is factually unsupported or otherwise lacking in credibility." (*Ibid.*) In Shaputis's case, his statements about the shooting "failed to account for the facts at the scene or to provide any rational explanation of the killin0*tis II,* Pugh's version of events was, as we shall show, neither implausible nor inconsistent with the evidence. Because this was the case, the facts cited by the Governor showing inconsistencies between Pugh's version and the official version of the crime do not allow an inference that Pugh is currently dangerous.

There is no inherent improbability in Pugh's version of the crime. The most obvious evidence of this is that the jury believed Pugh's story, convicting him of second degree murder rather that the charged offense of first degree murder. Additionally, Pugh has been consistent in his retelling of the events, and nothing in his story is so far-fetched as to be unbelievable.

The Court of Appeal likewise disposed of alleged additional variances in Pugh's recollection of the facts of his offense, parsed from other documents in the record.

As to Pugh's version of events and the official version, the Governor pointed to three inconsistencies. First, the probation report stated Pugh said he was going to confront Fields and "duke it out." The actual trial testimony was given by Alton, who stated that Pugh said he was going to confront the victim, and that Alton understood this to mean he would verbally confront him. Pugh has admitted that he went to the victim's house and confronted him about his accusation that Pugh stole coins from him. Therefore, there is no inconsistency between Pugh's statement and the trial testimony.

Second, the Governor points to the letters from members of the victim's family, as well as their testimony at various parole suitability hearings in which they insisted the victim was not gay. Assuming Pugh is telling the truth, it was not necessary for the victim to have been gay for Pugh to have perceived the situation as one of homosexual aggression. A psychological evaluation of Pugh performed in 1987 determined that he was a "highly sensitive and suspicious individual who tends to misinterpret the motives and the behaviors of others and to do so in ways that are at times frankly paranoid [,]" and that his "fear of homosexuals and homosexuality is both significant and significantly irrational." The victim's heterosexuality was thus not an inconsistency that would justify an inference that Pugh is not credible and has not gained insight.

Third, the Governor points to a statement by the deputy attorney general at one of Pugh's parole hearings that Pugh "didn't wait much before shooting the victim at the entrance of the victim's own residence." The deputy attorney general's statement is not borne out by the evidence produced at trial. There is no evidence in the record before us that the victim was shot shortly after Pugh went to the apartment. On the contrary, there is evidence he called two of his friends from the victim's telephone approximately an hour after he arrived.

The only evidence that Pugh shot the victim at the doorway to the apartment was the location of the body, and this was not inconsistent with Pugh's version of events. There was expert testimony that the victim could have moved 10 to 15 feet after being shot, and possibly 50 to 100 feet before collapsing. Other evidence precluded an inference Pugh shot the victim at the front door. This evidence surfaced part of the way into the trial, when the bailiff discovered one of the bullets and some blood in the victim's chair.

As demonstrated, the facts cited by the Governor did not constitute "some evidence" that Pugh is currently dangerous because the facts are either not inconsistent with Pugh's version of events or not borne out by the record. This means no inference can be drawn from these facts that Pugh is lying about what happened, and consequently no inference can be drawn that he is still dangerous.

In concluding, the Court of Appeal rejected (for the umpteenth time) the Attorney General's theory that, upon vacating the Governor's staff's decision, the Court should not order Board's decision reinstated and effectuated, but should instead remand the case back to the Governor for still another review and possible re-reversal of the Board's decision.

Because there is no evidence in the record that Pugh lacks insight into the crime, this is not a factor that would indicate the nature of the offense is still probative to current dangerousness.

The trial court ordered the Governor's decision reversed and vacated, and the Board decision reinstated. Appellant

Cont. on p.25

CALIFORNIA LIFER NEWSLETTER™

Pugh... cont. from p.24

argues that if we affirm the trial court, the proper remedy is to remand to the Governor to proceed in accordance with due process. Appellant cites *In re Prather, supra,* 50 Cal.4th at pages 257–259, 112 Cal.Rptr.3d 291, 234 P.3d 541, in which the Supreme Court held that when a court reverses a determination of unsuitability by the Board it is limited to ordering the Board to conduct a new parole suitability hearing in accordance with due process of law. However, *Prather* has no application to the Governor's reversal of the Board. *Prather* expressly acknowledged that its prior decisions "did not determine the proper remedy when a reviewing court grants a petition for writ of habeas corpus on the basis that the Board's decision to deny parole was not supported by some evidence of current dangerousness" because the prior decisions "addressed the Governor's reversal of a grant of parole by the Board." (*Id.* at p. 252, 112 Cal.Rptr.3d 291, 234 P.3d 541.)

Instead, the Supreme Court has tacitly approved the remedy of reinstating the Board's decision when the Governor's reversal is not supported by some evidence of current dangerousness. In *Lawrence, supra,* 44 Cal.4th at page 1190, 82 Cal.Rptr.3d 169, 190 P.3d 535, as here, the Governor reversed the Board's decision to grant parole. The Court of Appeal granted the inmate's habeas corpus petition and reinstated the Board's decision. The Supreme Court affirmed the judgment of the Court of Appeal. (*Id.* at p. 1229, 82 Cal.Rptr.3d 169, 190 P.3d 535.) Thus, the disposition was to reinstate the Board's decision, and not to remand the case to the Governor.

Several Courts of Appeal, including this Court in *In re Copley* (2011) 196 Cal. App.4th 427, 433–435, 126 Cal.Rptr.3d 265, have concluded that the proper remedy when vacating the governor's parole decision is to reinstate the Board's grant of parole and require the inmate to be paroled in accordance with the reinstated Board decision. (See *In re Ryner* (2011) 196 Cal.App.4th 533, 552–553, 126 Cal.Rptr.3d 380; *In re Nguyen* (2011) 195 Cal.App.4th 1020, 1036, 125 Cal.Rptr.3d 751; *In re McDonald* (2010) 189 Cal.App.4th 1008, 1023–1025, 118 Cal.Rptr.3d 145.) We agree with the reasoning of these cases, and we adhere to their approach.

Accordingly, we conclude the proper remedy in this case is to reinstate the Board's 2009 decision and require Pugh be granted parole on terms and conditions consistent with the Board's 2009 decision. … The judgment is affirmed.

On April 17, 2012, the Court of Appeal certified its Opinion for publication.

In re Gary Eccher (#)

(unpublished) 2012 WL 1642420

CA4(3) No. G045503 (May 20, 2012)

After the Orange County Superior Court granted Gary Eccher's habeas corpus petition, vacated the Conan Governor's order reversing the Board's grant of parole, and effectively ordered Eccher's release on parole, the Governor appealed. It should be noted that Gary has been an accomplished jailhouse lawyer who won not only his own case, but cases for many other lifers on whose behalf Gary spent hundreds of pro bono hours of work. (Gary also represented himself at his parole hearings.) I kept asking Gary (as many had asked me before), "When are you getting yourself out." His answer was always (as had been mine), "When some court will listen." Two courts have listened; hopefully, Gary Eccher will soon be free. (After Gary filed his petition, the court appointed counsel for Eccher.)

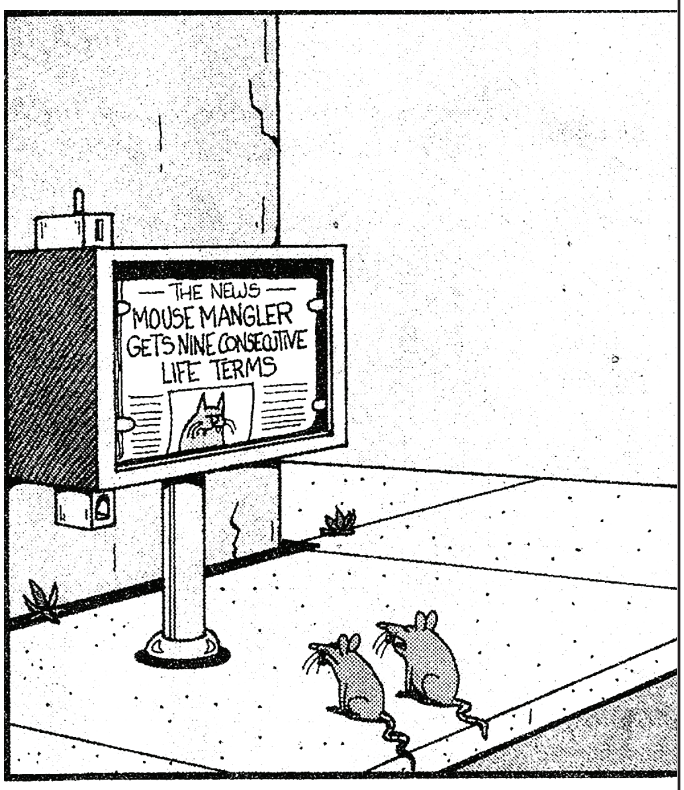
In 1985, after freebasing cocaine for more than five hours, Eccher strangled his girlfriend, his partner in selling and abusing cocaine. Following his arrest and extradition from Mexico, Eccher confessed to the police and was convicted of first degree murder, which the trial court reduced to second degree murder, sentencing him to 15-to-life. The Court noted, "Based on his rehabilitation and exemplary prison record over 24 years, and after nine parole hearings spanning 17 years, Eccher obtained the Board's parole suitability determination in 2010, which the Governor reversed."

The Orange County Superior Court (two different Judges) had previously granted Eccher's habeas petitions (in 2004 and 2009). Each time, and in 2010, the trial court had ordered the Board to conduct a new parole hearing. Finally, after the Board's favorable 2010 parole suitability determination and the Governor's subsequent reversal, the trial court granted Eccher's fourth petition. On appeal, the Attorney General contended that the trial court's latest decision was defective because some evidence supported the Governor's staff's decision. But the Court of Appeal concluded:

> As we explain, the record discloses the Governor made his determination based on putative evidence that while Eccher had addressed his severe drug problem, he also suffered from anger management issues. But as we explain, nothing in the evidence the Governor relied upon suggested Eccher posed a present threat to public safety if released on parole. Contrary to due process, there was no "rational nexus between the evidence and the [Governor's] determination of current dangerousness." (*In re Shaputis* (2011) 53 Cal.4th 192, 221 (*Shaputis II*).) Accordingly, we affirm the trial court's order granting Eccher's habeas petition challenging the Governor's parole reversal. The trial court remanded the matter to the Governor's office to review the Board's parole suitability determination again but, as we explain, the proper habeas remedy is to vacate the Governor's decision and reinstate the Board's July 2010 parole suitability determination, which we now order.

The Governor's staff incredibly relied on the following exchange, taken from the opinion, as a basis for concluding Eccher suffered from "dangerous anger management issues."

Cont. on p.26



"It's not long enough!"

CALIFORNIA LIFER NEWSLETTER™

Eccher... cont. from p.25

After the Board returned from a brief recess and informed Eccher he would not be permitted to represent himself, Eccher responded, "I object." He observed he had a right to waive an attorney and represent himself. Obviously frustrated, he requested that the Board "show me a little bit of respect and tell me what statute or what regulation says there's specific criteria that I have to meet to represent myself." The presiding commissioner responded that "it's up to the Panel to decide whether or not you can represent yourself." When Eccher answered, "No, it's not. I object. That's wrong," and queried, "You have to show me in the statutes or the regulations where that's listed ... [i]sn't that correct," the deputy commissioner accused Eccher of "being disruptive." The deputy suggested "you have not paid attention to your rights in the right[s] package" because no prison recordkeeping reflected Eccher had checked out his prison "C-file" for review before the hearing. But Eccher explained he had done so three months earlier, and he complained the record staff's inaccuracies were beyond his control.

When Eccher requested that the records be doublechecked, the deputy answered, "No, ... we've made our decision," at which point Eccher interrupted the deputy. Eccher commented, "If you're going to kick me out of here because I haven't met some criteria that isn't listed anywhere, isn't that ridiculous?" The presiding commissioner reiterated, "You don't know what your rights are, sir," but Eccher challenged her to recite the rights listed in his notice, stating, "I bet you can't do it without looking at it." Eccher repeated his challenge, "Peel them off right now if you can do it." The presiding commissioner stated she had intended "to go over every one of them," but changed her mind when Eccher interrupted her and the other commissioner. In conclusion, the deputy commissioner stated that "with your behavior and your attitude today," Eccher had "prov[en] our point" that he was not entitled to represent himself. The Board ordered Eccher to appear with an attorney at a reconvened hearing in October 2007.

Eccher appeared at the October hearing represented by counsel, and a new Board briefly revisited Eccher's exchange with the commissioners at the February 2007 hearing. The new presiding commissioner stated his impression from the record that Eccher had not been "confrontational or rude" until he learned he would not be allowed to represent himself, at which point his conduct became "inappropriate," "disrespectful," "extremely demanding," and "extremely out of line" because he had no "right to address th[e] Commissioner in that fashion." Eccher insisted he had a right to represent himself and to be "assertive" about that right, but the commissioner concluded, "It's a real concern[,] your behavior and attitude that you displayed on that day and how you handled yourself." The Board again found Eccher unsuitable for parole, and he filed a habeas corpus petition in the trial court.

After the Attorney General's office stipulated to a proposed order granting Eccher's habeas petition based on his right to represent himself before the Board, in May 2008 the trial court directed the Board to vacate its October 2007 unsuitability determination and to conduct a new hearing. The court specified the hearing was to take place promptly and "petitioner will be able [to] act as his own attorney, absent a finding of any identifiable disability" requiring postponement for accommodation. (Eccher suffered no disability.)

The Court of Appeal reviewed each of Eccher's hearings and the trial court's orders, then addressed the Governor's staff's decision.

> The Governor focused on the gravity of the murder Eccher committed, his lack of insight into the crime, and the Governor's concern Eccher "may not have sufficiently addressed his anger management and control." The Governor explained Eccher's "second-degree murder ... was especially heinous" because he " 'had a relationship' " with Lando and therefore occupied " 'a position of trust' " that he betrayed. Additionally, the Governor explained Eccher's motive, in which he admitted he went "over the edge" when "Lianne bit my finger" during their argument, "was exceedingly trivial in relation to the magnitude of the offense he committed."
>
> The Governor relied on the district attorney's opposition to parole at the 2010 Board hearing, where the deputy district attorney argued, "That's frightening, if that's what sends somebody over the edge. And I don't think it can be chalked up to simply being under the influence of cocaine."
>
> The Governor discounted drugs as a factor in the crime. According to the Governor, focusing on drugs as a causative factor reflected inadequate "insight." The Governor concluded that "although Eccher says he accepts responsibility for his actions, he has still not developed adequate insight into his role in the life offense because he consistently blames his murderous actions on his voluntary drug use." The Governor relied on Eccher's 1993 psychological exam for his first parole hearing, where the evaluator wrote Eccher's "insight into the offense appears to be limited" because Eccher "d [id] not want to blame his substance abuse for his behavior, however, he c [ould] not provide any further explanation for his actions."
>
> The Governor acknowledged Eccher's explanation and understanding grew over the years. The Governor acknowledged Eccher recognized his problems in his 2004 mental health evaluation. As recounted by a prison psychologist, Eccher stated in the 2004 evaluation that "he loved this young lady" and committed the crime "because of his anger and denial of drugs to him," which he recognized was "no justification" for his actions. The Governor acknowledged Eccher expressly recognized in his 2007 psychological evaluation that his anger was "misdirected" at Lando. Eccher described the murder scene to the psychologist as an "episode of anger and misdirected rage ... emanating from a confused mind due to severe cocaine addiction." Eccher viewed his offense as a "singular" aberration, which the interviewing psychologist did not suggest was an inaccurate or unrealistic assessment, but in 2010 the Governor remained "troubled by Eccher's inability to effectively manage his anger."
>
> The Governor cited as evidence of Eccher's continuing anger management difficulties his "outburst" concerning self-representation at his 2007 parole hearing. The Governor explained that "[u] nder questioning by the Board regarding his qualifications to [represent himself], Eccher became 'disruptive,' " and "[u] ltimately, because of his 'behavior' and 'attitude' that day, the Board denied his request to represent himself at the hearing." The Governor also cited Eccher's 2010 mental health evaluation that, according to the Governor, "diagnosed him with Adult Antiosocial [*sic*] Behavior." Specifically, the Governor expressed concern about the psychologist's notation in the 2010 report that "Mr. Eccher has exhibited an inability to accept social norms with respect to lawful behavior, exhibiting aggressive and impulsive behavior, deception, manipulation, drug use, and opportunistic behaviors as an adult." The Governor concluded: "In light of the fact that many of these same traits contributed to Eccher's decision to murder his girlfriend, I believe their continued validity remains predictive of his current dangerousness. Additionally, given the role that anger apparently played in Eccher's commission of the life offense, this recent outburst [at the 2007 parole hearing] leads me to believe that he does not have his anger under control and that he remains a risk to the community."

The Court of Appeal, as in the foregoing cases, discussed the standard of review and the authorities controlling Eccher's claims. The Court did not take issue with the Governor's staff's characterization of the commitment offense,

Cont. on p.27

CALIFORNIA LIFER NEWSLETTER™

Eccher... cont. from p.26

but held, as to the applicability and nexus implications of the Governor's remaining findings and concerns:

> … precisely because parole suitability depends on whether the prisoner poses a current danger to society, the circumstances of the commitment offense alone do not inevitably preclude parole. Rather, "the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Lawrence, supra,* 44 Cal.4th at p. 1221, original italics.)
>
> Notably, "the statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, *particularly after these prisoners have served their suggested base terms,* the underlying circumstances of the commitment offense alone *rarely will provide a valid basis* for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1211, italics added.) Here, Eccher has served more than a decade in prison past his original base term of 15 years, and he has done so despite repeated grants of habeas corpus relief.
>
> The Governor found ongoing relevance in the commitment offense based on Eccher's asserted lack of insight and failure to take responsibility for the crime. According to the Governor, Eccher lacked "adequate insight into his role in the life offense because he consistently blames his murderous actions on his voluntary drug use." Specifically, it appears the Governor concluded the requisite degree of insight and manner of taking responsibility for the crime required acknowledging anger, rather than drug use, explained Lando's slaying. Consequently, the Governor found "Eccher's inability to effectively manage his anger" to be "troubl[ing]" and a bar to parole.
>
> Nothing in the record, however, including voluminous, unanimous reports by numerous mental health experts, supports the attenuated role the Governor cast for drugs in Eccher's crime or his psychological makeup at the time, nor does the record support the Governor's personal assessment of Eccher as a person plagued by anger problems.
>
> The psychologists who examined Eccher over a period of more than two decades instead consistently identified "his prior drug dependence and abuse as primary diagnostic concerns." Nevertheless, assuming arguendo the Governor correctly identified anger as an important or even primary factor in the crime, the relevant inquiry was the degree of danger, if any, Eccher might pose if released from prison decades later. (*Lawrence, supra,* 44 Cal.4th at pp. 1211, 1221.)
>
> In a typical report concluding Eccher's "likelihood of re-offending remains a **low to very low risk**" (original boldface), one psychologist observed, "It is a good indicator that he accepts full responsibility for the murder of the victim. Although difficult and painful, his continuous disclosure of the events of the crime is seen as a move in the right direction as pertains to reducing the likelihood of reoffending. He did express empathy for the victim and [her family] as well as appropriate remorse." The psychologist noted that, "addressing the persistence of the family in requesting that parole be denied," Eccher explained "he understands 'because of the pain and suffering I caused them ... When taking the Victim Awareness class one thing jumped out at me — for a parent the loss of a child is a wound that never heals ... It's an unnatural state (losing a child) ... I don't blame them." (Original ellipses.) The expert also noted correspondence from Eccher's trial attorney 20 years after the crime describing Eccher as the " 'most remorseful client I have ever represented.' " However, the expert did not seek "more specific content in this area ... as empathy and remorse are often not good predictors of future recidivism."
>
> Rather, consistent with all previous and succeeding expert evaluations, the psychologist found Eccher posed a low to very low risk "for future violence" based on objective and clinical assessment tools. For example, Eccher "score [d] in the insignificant range on the PCL–R, a measure of psychopathy which suggests that he does not have a significant propensity for future criminality. He does not appear to be suffering any emotional problems and has no ongoing treatable symptoms of an Axis I mental disorder." Actuarial factors indicated a low to very low risk of violence given his age and, apart from the life offense, his stable background including academic and sporting achievement, including a soccer scholarship through three years of college, and a postconviction record in which "[h]e has been considered an exemplary inmate, especially during the past ten years of his incarceration."
>
> Eccher's "historical abuse of alcohol and/or illicit drugs" raised "some concern" given "the unpredictable and/or dynamic nature of addiction," but his recidivism "still remains a **low risk**" given his demonstrated "commitment to remain clean and sober," including his lengthy history of active NA participation. The psychologist observed Eccher had "matured significantly over the past twenty one years and has a more than adequate degree of insight as pertains to this matter." The psychologist noted in particular Eccher's insight into his own potential for future violence: " 'The best indicator is that I'm never going to use alcohol or drugs again ... My pattern of being cocaine/drug free when combined with 22 years of having no problems with anger ... you have my first 30 years where none of that happened then a little block of time — 5 years [of addiction] ... then the next 22 years of my life." (Original ellipses.)
>
> The psychologist concluded, concurring in previous assessments of Eccher's recidivism risk and consistent with later expert evaluations: "If released to the community, there remains a **low to very low** risk that he would be a danger to others in society based on clinical and actuarial forensic data. The strongest factors that would suggest a lowering of the risk in this case pertain to his age, level of insight, dedication to sobriety and the maturation that has apparently taken place while in [prison] custody[.] The strongest factor that points to any risk in this case is that he committed the Life Term Offense and his history of severe addiction to cocaine. To a lesser extent, his past history of [three rules violations] is a decreasingly relevant factor in assessing future risk. He has shown a high level of motivation in programming at State Prison over many years. In committing the Life Term Offense, he made a severe error in judgment. In summary, the likelihood of re-offending remains a **low to very low risk** in this individual."

Cont. on p.28

CALIFORNIA LIFER NEWSLETTER™

Eccher... cont. from p.27

Of course, as head of the executive branch, the Governor retains discretion to be " 'more stringent or cautious' " than the Board in determining whether a defendant poses an unreasonable public safety risk (*In re Shaputis* (2008) 44 Cal.4th 1241, 1258), and that discretion logically extends to disagreeing with experts retained in the executive's service. We agree with the trial court, however, that no evidence supports the Governor's decision. Nothing in the record supports the Governor's core conclusion that Eccher poses a current danger because of a lack of insight that manifests itself in ongoing anger problems. The Governor relied for his current dangerousness conclusion on Eccher's 2010 psychological examination and, as the Governor phrased it, Eccher's "outburst" at his 2007 parole hearing.

The Governor, however, misread or erroneously cited the 2010 psychological examination, which in no way supports his conclusion. It appears the Governor simply misapprehended as a "diagnosis" a portion of Eccher's 2010 psychological evaluation labeled "Adult Antisocial *Behavior* " (italics added). In fact, the reporting psychologist expressly noted, as the trial court explained, "Petitioner did *not* have a diagnosis of Antisocial Personality *Disorder,* as distinct from 'Adult Antisocial *Behavior.*' " (Original italics.) The latter was based on historical factors that were never going to change, and therefore did not support finding Eccher presently unsuitable for parole. Contrary to the impression the Governor fostered of the 2010 evaluation, the authoring psychologist concurred in all previous evaluations that Eccher's risk potential for violence was low.

Similarly, Eccher's remarks at his 2007 parole hearing did not support a conclusion of present dangerousness. The Governor saw them as a telltale sign of a simmering propensity to anger. But the record provides no support for this interpretation. Over the course of more than two decades of incarceration, and almost a decade past the end of his initial base term with no rule violations in almost 15 years, and none at all giving any suggestion of temper, nothing in the record suggested Eccher suffered from anger management problems. Only the commitment offense and perhaps his drunken push in taking a bike on campus more than 30 years earlier indicated *any* tendency towards using force in anger. Both occurred under the influence of drugs or alcohol, a risk factor Eccher had battled into full remission for more than 20 years of what he acknowledged must be a lifelong sobriety campaign.

The Court of Appeal concluded:

> Eccher's remarks at the 2007 hearing do not undercut this exemplary postconviction record, and must be viewed as those of an advocate, given his right of self-representation, which the Board erroneously and unjustifiably denied. More to the point, nothing about Eccher's remarks carried even the faintest trace of a threat or otherwise hinted at force or violence as a manner of dealing with frustration, obstacles, or problems. Instead, Eccher's advocacy demonstrated a commitment to *process* as a means to resolve disputes, despite repeated, nominally successful but unfruitful grants of habeas relief. In sum, the Governor failed to establish any "rational nexus between the evidence and [his] determination of current dangerousness" (*Shaputis II, supra,* 53 Cal.4th at p. 221), and therefore the trial court properly granted Eccher's habeas corpus petition.

The Court of Appeal then addressed and rejected the trial court's "remedy" of remanding Eccher's case back to the Governor's staff for more of the same. We hope to receive a phone call from Gary shortly, presumably from Orange County (without the "beeps").

In re Harold Harvey Hawks (#)

(unpublished) 2012 WL 1537718

CA4(2) No. E053072 (May 2, 2012)

After Harold Hawks won relief in the Riverside County Superior Court (!), which set aside a decision by the Board denying parole based on no evidence of current dangerousness, the Attorney General appealed.

In 1986 Hawks fired a loaded shotgun at a van during an incident of road rage. On the night in question he had gone to pick up his two-year-old son from his estranged wife for visitation. His wife and son were not at his in-laws' home the meeting place. During the five hours he waited, Hawks drank six to eight beers. When they finally arrived, Hawks and his wife had a heated lengthy argument after which he took his son and drove off. About 20 minutes later, Hawks was driving in the fast lane on the freeway with his son in a car seat when a vehicle came up behind him with its headlights flashing. When he realized the vehicle was a passenger van rather than a CHP car, Hawks did not move out of the fast lane. According to Hawks, the driver of the van pulled around him, threw something at his car, and then cut him off, which forced Hawks' van into the median.

Hawks drove after the van, reached into the back seat to get his shotgun (he had planned to shoot skeet the next day), grabbed a shell, loaded the gun, and fired a warning shot intended to scare the van's driver. The shell turned out to be a slug rather than skeet round. Instead of going over the van as intended, the bullet hit the back panel of the van, then passed through Patricia Dwyer, as she sat in a back passenger seat, and lodged in the throat of Wendy Varga, another passenger in the vehicle.

After firing the shotgun, Hawks pulled off the freeway, stopped to buy more beer, and drove to his cousin's home where he was arrested four days later. He did not know until his arrest that the shot he fired had hit the van. Because the van was paneled he could not see inside the back of it and therefore did not know anyone other than the driver was in the vehicle. It turned out that the murder victim was an officer with the Corona Police Department, the first female officer in that department

Hawks received a split decision at his 2008 hearing, the Deputy Commissioner voting for his parole, the Commissioner against it. The Board's en banc panel (of course) voted with the Commissioner against parole, resulting in the 2009 hearing at issue.

Hawks' prison record has been exemplary. He has been "a model inmate who has taken advantage of every service, program, and opportunity available to him in prison. During the more than 25 years petitioner has been incarcerated he has not received a single black mark (referred to as a CDC 115) or even a nondisciplinary write-up (a CDC 128A). He has earned his Associate of Arts, Bachelor of Arts, and Master's degrees, all with honors. He has completed four vocational programs and also earned a paralegal diploma. Petitioner has participated in every available self-help program including Victim Impact, Cage Your Rage, Healing the Angry Heart, Alternatives to Violence Project, and Effective Family Management. He joined and continues to attend Alcoholics Anonymous and has remained substance and alcohol free since the time of his arrest in 1986. Petitioner has also completed individual counseling, and at his own insistence, continues to see a therapist every other month (which apparently is all he is allowed). In addition, petitioner has participated in every relevant group therapy program available to him. Petitioner has worked while in prison, most recently in the print shop for 35 hours a week, and has voluntarily participated in community outreach programs. His file is filled with commendations from correctional officers, prison staff, and mental health professionals. His last seven psychological evaluations were all extremely positive and support his release on parole."

Cont. on p.29

CALIFORNIA LIFER NEWSLETTER™

Hawks... cont. from p.28

The 2009 Board Panel denied parole based on Hawks' commitment offense, an alleged lack of insight into his criminal conduct, his demeanor during the hearing, and an alleged failure to demonstrate remorse. The Court of Appeal agreed with the Board's characterization of the commitment offense, but found no nexus between it and the Board's conclusion that its grant of parole to Hawks would pose an unreasonable threat to society:

> The record here consists of nothing other than affirmative evidence that petitioner over the course of his more than 25 years of incarceration has changed his demeanor and mental state. Simply stated, petitioner is not the person he was in 1986 when he committed the crime. He no longer drinks, and has not done so since his arrest in 1986. He actively participates in Alcoholics Anonymous, and has arranged for a sponsor outside of prison. Petitioner no longer allows his emotions to control his actions, a finding supported not only by the number of anger management related courses and programs petitioner completed while in prison but also by his sterling record of behavior in prison. The fact of his crime and its tragic consequences are immutable, but the record demonstrates that petitioner has changed every circumstance under his control that caused him to commit that crime.

The Court of Appeal rejected the Board's standard findings of "lack of insight" and "minimization":

> The BPH also found petitioner lacked insight into the commitment offense because he minimized his conduct as evidenced by his insistence that he only intended to fire a warning shot from behind and over the van but he did not intend to hit the van. The BPH was of the view, given all the circumstances under which petitioner fired the shotgun, that the bullet would not have hit the van unless petitioner had intended that result. Therefore, they found petitioner minimized his criminal conduct and as a result lacked insight.

"Lack of insight" is not a statutory or regulatory factor for determining an inmate's suitability for parole. The Supreme Court coined the phrase in *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis I*), "which held that that petitioner's failure to gain insight into his antisocial behavior was a factor supporting denial of parole." (*Shaputis II, supra,* 53 Cal.4th at p. 217.) In *Shaputis I,* the inmate insisted repeatedly that he accidently shot his wife, despite significant contrary evidence. As the Supreme Court observed, "the murder was the culmination of many years of [Shaputis's] violent and brutalizing behavior toward the victim, his children, and his previous wife." (*Shaputis I, supra,* 44 Cal.4th at p. 1259.)

"As *Shaputis* [*I*] illustrates, a 'lack of insight' into past criminal conduct can reflect an inability to recognize the circumstances that led to the commitment crime; and such an inability can imply that the inmate remains vulnerable to those circumstances and, if confronted by them again, would likely react in a similar way. [Citations.]" (*In re Ryner, supra,* 196 Cal. App.4th at p. 547, citing *Shaputis I, supra,* 44 Cal.4th at pp. 1260, 1261, fn. 20; *Lawrence, supra,* 44 Cal.4th at pp. 1214, 1228; and *In re Lazor* (2009) 172 Cal. App.4th 1185, 1202.)

"Thus ... the presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to the public safety. [Citations.]" (*Shaputis II, supra,* 53 Cal.4th at p. 218.) However, evidence that an inmate lacks insight into the causes or circumstances of the commitment offense is indicative of an inmate's current dangerousness "only if it shows a *material* deficiency in an inmate's understanding and acceptance of responsibility for the crime." (*In re Ryner, supra,* at p. 548, fn. omitted.)

Unlike Shaputis, petitioner has never denied that he intentionally fired the shotgun; he has only denied that he intended to hit the van. Petitioner has consistently stated that he did not know until he was arrested that his shot hit the van. The jury in petitioner's trial believed petitioner did not intend to kill anyone as evidenced by the fact that they found him guilty of second degree murder in killing Patricia Dwyer, rather than first degree murder, and two counts of assault with a deadly weapon, as lesser included offenses to the charged crimes of attempted murder, with respect to Michael Dwyer and Wendy Varga. The BPH has consistently ignored the significance of the jury's verdicts. (See *In re Moses* (2010) 182 Cal. App.4th 1279, 1302.)

The BPH's theory about the manner in which the crime must have occurred does not equate to a lack of insight by petitioner into his criminal conduct and thus indicate his present dangerousness. Petitioner consistently has stated that his response was completely unjustified and entirely out of proportion to the incident. He has consistently explained that he reacted based on his pent up anger at his estranged wife which was magnified by the effect of alcohol. Petitioner has repeatedly acknowledged had he not been angry or intoxicated that most likely he would not have committed the crime. The role anger and alcohol played in the crime motivated petitioner to focus on those issues in order to change his life and in effect atone for his criminal conduct.

Moreover, the BPH finding is at odds with the only other evidence on the issue, namely, the opinions of the two psychologists who submitted psychological evaluations of petitioner for the parole hearing and who both found petitioner acknowledged the seriousness of his crime, admitted his individual responsibility in committing the offense, and did not minimize his involvement.

One psychologist stated in his evaluation that petitioner "appears to have spent sufficient time exploring his thought process leading up to the controlling offense, as well as has identified his errors in judgment that led to the victim's death. He appears to have spent time considering the victim, as well as how his actions have affected the victims[']families [']lives, and the significance of him causing the death of another human

Cont. on p.30

CALIFORNIA LIFER NEWSLETTER™

Hawks... cont. from p.29

being. [Petitioner's] insight appeared to be at a high level with an affective understanding of empathy and remorse, and his expression of empathy appeared internal and emotional. Also, it appears he has examined his history of substance abuse, which was increasing and was a factor in the life crime. The undersigned opines that [petitioner] has taken responsibility for the controlling offense." The other psychologist found that petitioner had acknowledged how horrible the crime was and "spoke at length about the impact that the victim's death has had on his life. He said that 'the only way I can prove that I am truly sorry for what I did is to change my life and begin living in a positive direction.' "

In addition to the most recent psychological evaluations, the BPH had evaluations from previous parole hearings that also stated petitioner had insight into the circumstances of the crime. Dr. B. Zika, a psychologist with the California Department of Corrections and Rehabilitation (CDCR), stated in a report prepared in 2007, "As is well known to the Board, the inmate has attended approximately 14 different self-help groups and/or programs, even though they were not recommended by any of the previous clinicians who saw him. He also attended one-to-one therapy with Dr. Bakeman, Dr. Howlin, and Dr. Fishback. All of the clinicians have written very positive chronos which should be reviewed by the Board.... Dr. Howlin ended his 08/05/04 chrono stating, 'He should have a very low risk of reoffending.' [¶] With the greater awareness that inmate Hawks has obtained through the above programs, he has written letters of apology to the victims and the victims' families. He has participated in a magazine article, which should be read in its entirety by the Board to better understand this inmates' complete understanding of the crime he committed, the pain it has caused other people, and how it has motivated his own personal growth." Dr. Joe Reed, another CDCR psychologist, stated in an evaluation dated August 29, 2000, that petitioner "showed excellent insight into his poor anger control problem and alcohol abuse problem. He showed excellent empathy towards the damage done to the victims and seemed genuinely penitent for his crime."

In short, the psychologists' reports do not support the BPH finding that petitioner lacks insight into his criminal conduct. In finding otherwise, the BPH focused first, and at length, on the commitment offense, and then on petitioner's refusal to adopt their version of how that crime must have occurred.[6] As discussed at length above, petitioner cannot change the fact of the crime. The fact that petitioner will not adopt the BPH's version of how the shooting occurred, or admit that he committed first degree murder rather than second degree murder, does not demonstrate that he lacks insight into his criminal conduct. (*In re Twinn* (2010) 190 Cal.App.4th 447, 466 ["an inmate need not agree or adopt the official version of a crime in order to demonstrate insight and remorse"]; *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110 ["The Board is precluded from conditioning a prisoner's parole on an admission of guilt."]; Pen.Code, § 5011, subd. (b); Cal. Code Regs., tit. 15, § 2402.)

The Court of appeal also rejected the Board's "lack of remorse" recital:

> The BPH found that petitioner "come[s] across as very superficial, well rehearsed, scripted"; he "appear[s] almost robotic in [his] response," and "lack[s] ... an emotional affect." In the presiding commissioner's words, "You're cold, you're calculated in what you say, and I understand that you've been to many of these hearings, but all of us felt the same way. We feel nothing from you." With regard to remorse, the commissioner stated, "I know you claim you're remorseful, I certainly know you're regretful, and I know you say you're remorseful, but again, there's nothing behind it. It's they're empty words, and it's very hard to know that you really understand what you're remorseful for."
>
> Remorse is a circumstance tending to show suitability for release on parole. (Cal.Code Regs., tit. 15, § 2402, subd. (d)(3).)[7] Both psychologists who evaluated petitioner for the current parole hearing found he displayed genuine remorse and that his demeanor is appropriate.[8] Psychologists who evaluated petitioner for prior parole hearings also found petitioner expressed genuine and deep remorse for his conduct. At the parole hearing petitioner clearly expressed his feelings of remorse and regret about what he had done.
>
> There is no evidence in the record on appeal to support the BPH finding that petitioner lacks insight or remorse. In fact the evidence is all to the contrary. The issue then is whether that evidence is trumped by the BPH commissioners' impressions of petitioner's demeanor at the hearing. Those impressions are necessarily subjective because there is no standard against which sincerity or remorse can be judged. As the Supreme Court observed in *Shaputis I,* "[E]xpressions of insight and remorse will vary from prisoner to prisoner and ... there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior." (*Shaputis I, supra,* 44 Cal.4th at p. 1260, fn. 18.) But even if the commissioners' subjective impressions were accurate, at best those impressions are evidence of petitioner's emotional and mental state at the time of the hearing. As such, they have very little if any probative value on the dispositive question of whether petitioner is currently dangerous and therefore unsuitable for parole.
>
> The Supreme Court stated in *Lawrence* and reiterated in *Shaputis II,* that although deferential, "the 'some evidence' standard [of review] 'certainly is not toothless.' " (*Shaputis II, supra,* 53 Cal.4th at p. 215, citing *Lawrence, supra,* 44 Cal.4th at p. 1210.) If we must defer to the BPH members' vague subjective impressions of petitioner's demeanor at the parole hearing, that are otherwise contradicted by the entire record, as "some evidence" to support denial of parole, then review is indeed toothless. Such subjective evaluations are incapable of judicial review since demeanor and affect do not show in a black and white record.

The Court of Appeal concluded that "the BPH findings upon which it based its determination that petitioner is currently dangerous and as a result unsuitable for parole are not supported by any evidence in the record. Therefore, we must conclude the BPH decision to deny parole to petitioner is arbitrary and capricious and as such constitutes a violation of due process. (*Shaputis II, supra,* 53 Cal.4th at pp. 199, 211; *Lawrence, supra,* 44 Cal.4th at pp. 1204–1205.)."

In re Cole Bienek (#)

(unpublished) 2012 WL 1739724

CA4(2) No. E054037 (May 16, 2012)

After the Riverside County Superior Court had denied habeas relief, the Court of Appeal granted his new petition contesting an order by the Governor's staff reversing the Board's 2009 grant of parole.

The offense occurred in 1988, when Bienek was 18 years old. Petitioner had met the victim, 65 years old, a week before when the victim picked him up as Bienek was walking in Palm Springs late at night. Bienek was high on

Cont. on p.31

CALIFORNIA LIFER NEWSLETTER™

Bienek... cont. from p.30

methamphetamine. After sharing a few beers, the victim, as the instigator, performed oral sex on Bienek and gave him $75. Bienek left, and bought and consumed more meth. Needing more drugs, Bienek figured he might be able to get more money out of the victim, he returned to the victim's home, and again the victim orally copulated him. After the victim fell asleep, Bienek took money from his wallet and his car keys. Bienek drove the victim's car to a location where he could buy more drugs. He used the money to put gas in the car, and returned the car and the keys to the victim.

As the Court explained, "Bienek formulated a plan to steal another vehicle belonging to victim and sell it—to 'change my luck and kind of, you know, maybe get a place to live and all the kind of distorted dreams that junkies have.' He returned to the victim's home while the latter was at work and took the other car, but was stopped by police for speeding and the vehicle was impounded. Petitioner then walked to the victim's home—apparently a matter of some miles, as he was stopped on the highway to Indio—and left a note reading, '"Hans, I'm extremely sorry your car was towed to Indio. I'll be over later so you can kill me."' Petitioner explained that he was trying to be jocular, so the victim would not press charges.

"After spending the rest of that day doing or looking for drugs—as petitioner told the panel, 'It's a full-time job to stay high'—he again returned to the victim's home with the intent to rob him. After doing some preliminary rifling through the house, petitioner hid behind a door as the victim entered his home and hit him in the head with a rock he had picked up in the yard. To petitioner's surprise, the victim resisted, and petitioner struck him repeatedly until he fell. He then took the victim's money, credit cards, and car keys before leaving in the victim's Trans Am. Petitioner also admitted to the panel that the victim was making 'awful' sounds when he left—the victim was still alive—but petitioner did not call for assistance.

"Within a day or so, petitioner, with two young female acquaintances, was apprehended in San Diego. He was still wearing bloodstained clothing and asked a detective with some bravado, '"Am I going to get the death penalty for what I did?"' He eventually entered a guilty plea to second degree murder and was sentenced to a determinate one-year enhancement for use of a deadly weapon, followed by 15 years to life in state prison … "

Bienek had successfully completed extensive programming and self-help. The Board's psychologist determined that he has sufficient remorse and insight and accepts full responsibility for his offense.

The Court of Appeal reviewed the authorities governing parole determination and judicial review of the Governor's parole decisions. Importantly, the Court noted:

> … nothing in *Shaputis II* disavowed the clear statement in *In re Lawrence, supra,* 44 Cal.4th 1181, to the effect that in light of the constitutional liberty interest at stake, judicial review of parole decisions "certainly is not toothless." (*Id*. at p. 1210; see also *In re Criscione* (2009) 180 Cal. App.4th 1446, 1458.) In other words, *Shaputis II* does not turn the courts into the "potted plants" first deplored by the court in *In re Scott* (2004) 119 Cal.App.4th 871, 898; indeed, *Lawrence* notes *Scott's* use of the term in its discussion of the necessity of a judicial review "sufficiently robust to reveal and remedy any evident deprivation of constitutional rights." (*In re Lawrence,* at p. 1211.)

Shaputis II compels deference to the view of the evidence taken by the Board or Governor; it does not require, or countenance, abdication of the judicial responsibility to ensure that a parole decision is in fact supported by some relevant evidence. Indeed, although *Shaputis II* describes a reversible decision as "arbitrary" (*Shaputis II, supra,* 53 Cal. App.4th at p. 215), which certainly seems to impose a daunting task on the disappointed inmate, the court also cites *Lawrence* and *Shaputis I* in noting that the challenged decision must be "reasonable." (*Shaputis II,* at p. 212.) "Reasonable" is a possible antonym for "capricious" or "arbitrary," but it is also on the other end of the spectrum from "unreasonable." We therefore do not think that the more colorful "arbitrary" and "capricious," which admittedly carry a more censorious innuendo, do not additionally expand the scope of judicial review. In other words, our approach to the matter is, if the Governor's take on the evidence is "reasonable," we must deny the petition. If it is not, we may grant relief.

The Court addressed and rejected the Governor's chief ground for reversal – a notion that Bienek might relapse into substance abuse if paroled.

> … the "facts" upon which the Governor relied in this respect do not withstand close inspection. The Governor's statement that petitioner's consistent participation in substance abuse counseling did not begin until 2005 is simply incorrect. (Cf. *In re Morganti* (2012) 204 Cal.App.4th 904, 920 [board "put[ ] words in [the inmate's] mouth" with respect to his supposedly sole reliance on religion as an abstinence plan].) While it is true that it was in 2006 that he committed himself to the AA/NA program, as we discussed *ante,* he had been working with the "Men For Sobriety" program for several years before that, even if he was unable to begin to lead formal group involvement until 2005. Furthermore, we are unable to ascertain any basis in the record for the Governor's criticism of a lack of consistency in petitioner's pre–2005 participation.[10] In this case, there is no evidence to support a suspicion that petitioner's participation and internalization of substance abuse information is either feigned or incomplete.

Cont. on p.32

Bienek... cont. from p.31

We also find the Governor's reliance on the 2006 relapse to be somewhat unfair, because, as we have noted *ante,* neither the Board nor the Governor would have known anything about it if petitioner had not volunteered the information as part of his overall explanation of his progress and increased self-awareness. It is also worth stressing that the "relapse" was not volitional with petitioner, but was triggered by the administration of morphine by medical personnel in connection with a medical condition, after petitioner had, by his account, successfully achieved almost 10 drug-free years. His reaction to his failure, within two weeks, was to accept that he needed more help in facing his addiction, and he immediately began AA/NA. In our opinion, this incident does not provide any support for the conclusion that petitioner is likely to affirmatively seek out controlled substances if released. We agree with the Board that it affirmatively reflects his ability to confront and deal with risks and relapses.

The Governor was also concerned that petitioner had not prepared a "relapse prevention plan," although he noted that the Board had asked him to do so at his parole hearing in 2007. Petitioner has secured an AA/NA sponsor—a family friend whom he described as a "surrogate father"[11] and who would be available 24 hours a day if petitioner felt the desire to drink or use drugs. (As noted *ante,* his sponsor has also offered him a place to live if he is paroled to the La Quinta area.) As he explained to the panel, a member's relationship with his sponsor is "one of the fundamental parts" of a relapse prevention plan. He also stressed to the Board that (as evidenced by his decision to turn to AA/NA, a program he had previously avoided because he didn't like to think of himself as an addict) "I know how to ask for help." He repeated also the support of his family. In light of these facts, petitioner's failure to prepare some kind of written "relapse prevention plan" in no way suggests recalcitrance or indifference; indeed, he may have been (as we are) unable to ascertain just what additional advance planning he needed to show the Board. All in all, the absence of a written "relapse prevention plan" is not evidence that petitioner is likely to relapse in fact.

The Governor's final concern was that petitioner had not arranged for a "halfway house" or structured environment. In our view, this comes close to undesirable "micromanaging" of the parole process; surely it is for the Board and parole authorities to set such a requirement if their expertise deems it appropriate. But, in any event, this factor is not evidence of dangerousness. Petitioner has a strong support system in place. Despite the horrific nature of his offense and his defiant youth, he has maintained the love and support of his parents and the esteem of those who know him. He has employment offers and housing available to him. There is no basis for the insistence that he needs more "structure"; indeed, it could much more reasonably be said that the scarce resources of such facilities would be wasted on petitioner and should be saved for a parolee with fewer options. (See *In re Ryner, supra,* 196 Cal.App.4th at p. 551 [rejecting Governor's reliance on speculation that the inmate might need "more" anger management therapy in the absence of any evidence of a current, or even recent, anger problem].) Finally on this point, and also as we discussed *ante,* the Board has imposed conditions of parole that will subject petitioner to strict and constant scrutiny and continued participation in substance abuse programs.

Of course, it is true that relapse into substance abuse remains a constant concern, especially where an inmate's commitment offense was either related to, or committed under the influence of, alcohol or drugs.

However, the mere fact that an inmate was a substance abuser in the past, like the nature of the commitment offense, cannot be used as a basis for the denial of parole in perpetuity. (*In re Morganti, supra,* 204 Cal.App.4th at p. 921, citing *In re Lawrence, supra,* 44 Cal.4th at p. 1226.) It is only where there is an *increased* or *unusual* risk that the inmate will relapse and that a substance abuse history will justify continued findings of unsuitability for parole. (*In re Morganti,* at p. 922.) Where an inmate has demonstrated a lengthy history of abstinence from alcohol or drugs, and has participated fully in self-help programs targeted at substance abuse, there is no basis for reliance on speculative concerns. (See *In re Loresch* (2010) 183 Cal.App.4th 150, 160–162 [the improper use of hypothetical speculations as to the inmate's response to "worst case, what if" stressors in the complete absence of any current "warning signs"]; also *In re Ryner, supra,* 196 Cal. App.4th at p. 551.)

As the cases teach, the paramount concern in making a parole decision is the safety of the public. (*Shaputis II, supra,* 53 Cal. App.4th at p. 209.) It is for this reason that courts must take a deferential approach when the Board or the Governor concludes that an inmate does represent a measurable risk to the public if released. But a decision based on no evidence cannot stand.

When petitioner committed the life offense, he was a troubled and drug-addled teenager. He is now a man in his 40's, with substantial accomplishments, who has demonstrated his ability to conform to expected standards of behavior for over 13 years. With one brief lapse, in part not of his own making, he has broken his pattern of substance abuse simply because he does not like the person that he was and recognizes that using drugs will prevent him from not just reaching his goals, but from being the person he wants to be.[12] Neither the lack of a written "relapse prevention plan" or the fact that he does not currently intend to enter a "halfway house" is evidence that he is at risk of relapse into drug use and criminal activities.

The Court concluded:

As we have also explained, petitioner's extended period of good behavior and accomplishment in rehabilitative and service activities also serves to reduce the continuing predictive value of the offense, especially once current substance abuse is removed from the equation. The Board's decision was therefore well-reasoned and well-supported, while the Governor's reversal is devoid of factual support. The Governor's conclusion that petitioner *currently* represents an unreasonable risk to public safety cannot stand. The proper remedy in this situation is to vacate the Governor's decision to reinstate that of the Board. (*In re Ryner, supra,* 196 Cal. App.4th at p. 553; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256.)

SECOND DISTRICT REVERSES SUPERIOR COURT'S DENIAL OF HABEAS CORPUS; ORDERS NEW PAROLE HEARING

In re Mary Eileen Farrar (#)

(unpublished) 2012 WL 1036067

CA2(1) No. B122938 (March 28, 2012)

After the Los Angeles Superior Court, The Honorable Patricia N. Schnegg, denied Mary Ellen Farrar's habeas challenge to the Board's 2009 5-year denial, Farrar filed a new pro per petition in the Court of Appeal, which Division One of the Second Appellate District granted after appointing counsel, vacating the Board's

Cont. on p.33

CALIFORNIA LIFER NEWSLETTER™

Farrar... cont. from p.32

decision and directing it to conduct a new hearing. Farrar is serving a 7-year minimum life term and a 4-year determinate term for two counts of aggravated kidnapping and two residential robberies with firearm use.

The Court of Appeal applied *Shaputis-II* to determine "that not a modicum of evidence supports the October 30, 2009 decision of the Board to deny parole to Farrar for five years."

The Court reviewed the facts of the offenses. In 1994 at the age of 25 Farrar and her cohorts were abusing cocaine, marijuana and alcohol. Farrar had a minor criminal history but had abused drugs regularly. They planned to rob Carey Levi. Farrar worked as a housekeeper for Levi and had a romantic relationship with him. Accompanied by two armed men, Farrar gained entry to Levi's home by asking for money for her child. With Levi was his fiancée Patricia Howlett. While Farrar pointed a gun at Levi and Howlett, her cohorts blindfolded and bound them. Ringleader Peewee decided that there "wasn't enough money" in the house, so they took Levi and Howlett to the home of Willy Faye Cotton and kept them overnight. Farrar's cohorts forced Levi, at gunpoint, to go to his bank to withdraw funds. Farrar stayed behind and guarded Howlett at Cotton's house. When the others failed to return, Farrar untied Howlett, drove her to a telephone booth, and left Howlett at the booth after giving her money for a taxi. Farrar remained in California for two years, then moved to Washington, married, changed her surname, and worked in collections. In 1999, she returned to California to take care of her younger sister after Farrar's mother and another sister died in a car accident. Farrar did not commit any crimes, but worked and took care of her family. She was arrested in 2001. In 2002 she was convicted and sentenced as set forth above.

Farrar's prison record has been exceptional. She has never incurred a 115 rule violation or even a counseling chrono. She earned many vocational certificates, completed many self-help programs, earned a GED and many college credits, and at the time of the hearing was nine units away from completing an associates of arts (AA) degree. Her file contains numerous laudatory chronos. The psychologist reported: "Supervisor ratings have always been satisfactory or better. She has received several laudatory chronos regarding her work performance within the last six months (e.g., 12/15/08, 01/15/09, and 01/17/09). She was named student of the month on 01/01/06. Postconviction progress reports reflected completion of Vocational Graphic Arts on 02/23/04 and Vocational Electronics I on 03/07/05. Ms. Farrar indicated she has completed about eighteen college units via Coastline Community College. She said she is currently enrolled in a History course. The inmate noted she is presently enrolled in Battered Women's Support (BWS) group, bible study, Houses of Healing, and [Narcotics Anonymous]. Other self-help participation has included Anger and Stress Management (2009), Victim Awareness (2009 and 2008), Communication (2009 and 2007), Job Success (2009), GED Connection Writing (2009), process-focus group (2008), advanced level of the Alternatives to Violence Project (AVP, 2008), Parenting (2008 and 2007), Job Success (2008), domestic violence group (2004), survivor's group (2004), and grief and loss group (2004)." Farrar's psychological evaluation was generally favorable, and the Board approved her parole plans.

The Board's decision was puzzling but not shocking. Most of its decision praised Farrar for her record and accomplishments, listed above. Aside from the details of the commitment offense, the Board gave little reason to deny parole. It stated that Farrar took responsibility for the crimes, understood why she committed the crimes, and was remorseful. But Presiding Commissioner Anderson opined that her statements regarding her role in the planning and execution of the offense were inconsistent with statements she had made to Dr. Pointkowski seven months earlier regarding the planning. He told Farrar, "your insight needs to be really solidified in terms of here's what really happened." Although recognizing her remorse, Anderson speculated that Farrar needs "to develop a clear understanding of the nature and magnitude of this commitment offense."

Citing Shaputis-II and additional authorities, the Court Of Appeal explained in detail why the lay Commissioner's grounds for denying Farrar parole failed the some evidence standard of review.

> "[T]he presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety. [Citations]." (*Shaputis II, supra,* 53 Cal.4th at p. 218; *Shaputis I, supra,* 44 Cal.4th at p. 1261.) A "lack of insight" into past criminal conduct may reflect an inability to recognize the circumstances that led to the commitment crime; and such an inability can imply that the inmate remains vulnerable to those circumstances, and would react to them similarly if again confronted by them. (*Shaputis I,* at pp. 1260, 1261, fn. 20; *Lawrence, supra,* 44 Cal.4th at p. 1213.)
>
> Here, the commissioners expressly found that Farrar was remorseful and took responsibility for the commitment offenses, but then, apparently ignoring its own conclusions, focused on Farrar's low self-esteem explanation, a circumstance that is generally accepted in the professional communities of psychologists and behavioral criminologists as a factor in the causation leading to criminal conduct[4] and her statement to Dr. Pointkowski that she could have stopped the offenses at the last moment as demonstrative of her lack of insight. These conclusions are not supported by the record.
>
> Two essential elements are missing. First, the evidence on which the commissioners ostensibly relied to find lack of insight does not show a condition extant at the time of the parole hearing. In fact, Presiding Commissioner Anderson's own assessment was that Farrar had taken responsibility and was remorseful. Second, the commissioners failed to identify how these evidentiary factors relate to the Board's conclusion that Farrar would present a danger to public safety if she were released. Without evidence of present danger, the commissioners' finding cannot constitute a sufficient evidentiary basis; further, without a rational nexus between their findings and a conclusion of current dangerousness, the evidentiary basis (even if it were sufficient) would fail to establish the ultimate fact. "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence, supra,* 44 Cal.4th at p. 1212.)
>
> A finding that a petitioner for parole lacks insight must be based on identifiable and significant defects in her insight into her criminal conduct or its causes, which have "some rational tendency to show that the inmate currently poses an unreasonable risk of danger." (*In re Ryner* (2011) 196 Cal.App.4th 533, 548–549 & fn. 2; *In re Rodriguez* (2011) 193 Cal.App.4th 85, 97.) As the court stated in *Ryner,* when the Board invokes "lack of insight" as a reason to deny parole, its conclusion about the inmate's lack of insight "is indicative of a current dangerousness only if it shows a *material* deficiency in an inmate's understanding and acceptance of responsibility for the crime. To put it another way, the finding that an inmate lacks insight must be based on a factually identifiable deficiency in perception and understanding, a deficiency that involves an aspect of the criminal conduct or its causes that are significant, and the deficiency by itself or together with the commitment offense has some rational

Cont. on p.34

CALIFORNIA LIFER NEWSLETTER™

Farrar... cont. from p.30

tendency to show that the inmate currently poses an unreasonable risk of danger." (*In re Ryner, supra,* 196 Cal.App.4th. at pp. 548–549; fn. omitted.)

Announcing its decision that Farrar is not yet suitable for parole because she poses an unreasonable risk of danger if released from prison, the commissioners acknowledged that Farrar "examined why this commitment offense occurred," took responsibility, and was remorseful.

Presiding Commissioner Anderson stated that ***he*** did not understand how Farrar's self-esteem issues related to the commitment offenses. Poor self-esteem was only one factor that Farrar cited. Farrar told Dr. Pointkowski that, as a young woman, she was a " 'time bomb.' " At the hearing, Farrar pointed to her lack of judgment and cowardice in planning and participating in the commitment offenses. The record shows that Farrar may not have been perfectly articulate in verbalizing all the factors that caused her criminality, but her statements and conduct demonstrate that she understands that her failure to cope with the physical and sexual abuse against her, her own substance abuse, and her financial dependence on others constituted additional important factors.

Farrar told the commissioners that she began her own self-help and recovery program upon moving to Washington.[5] She confronted the history of physical and sexual abuse she suffered as a child and young woman by finding a battered women's shelter and by participating in one-on-one psychological counseling and group counseling, as well as in domestic violence groups. She overcame her financial dependence on others by finding a job, at which she worked successfully for many years. Farrar addressed her alcohol and narcotics abuse by participating in substance abuse groups, one-on-one psychological counseling, and group counseling. Farrar's continued and excellent participation in substance abuse and other self-help and counseling programs in prison exemplifies her understanding of what led to her criminality.

In questioning the full extent of her insight, Presiding Commissioner Anderson expressed concern over Farrar's statement to Dr. Pointkowski at the June 2009 interview that she believed that she could have stopped her cohorts at the last moment. Importantly, at the October 2009 hearing, Farrar disavowed the statement, explaining that she had not had the opportunity to enlarge upon her comment to Dr. Pointkowski. Instead, as she explained, she was attempting to convey some of her muddled thoughts in the minutes before the robbery began. In the moments before the door opened, Farrar entertained the fantasy that she could halt the commission of the offenses, but that moment passed quickly and she participated fully in the offenses. The Board's own evidentiary findings that Farrar is remorseful and took responsibility for the offenses tacitly recognize that her June 2009 statement to Dr. Pointkowski does not reflect Farrar's *current* insight, remorse, or potential dangerousness. (*In re Barker* (2007) 151 Cal.App.4th 346, 369 [If the inmate genuinely accepts responsibility, " 'it does not matter how longstanding or recent' " that acceptance may be].)

Farrar admitted that she participated in the planning and execution of the commitment offenses, that she was armed and that she threatened the victims. She also told Dr. Pointkowski that she felt the pain of the victims and imagined their trauma.

The Board's decision thus fails to identify, and the record fails to elucidate, any evidence showing that Farrar lacks insight or that said postulated lack of insight renders her an unreasonable risk of current dangerousness. That nexus is essential to Farrar's due process rights. (*In re Twinn* (2010) 190 Cal.App.4th 447, 472.) "[L]ack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness." (*Shaputis II, supra,* 53 Cal.4th at p. 219; *In re Twinn,* at p. 465.) Without that evidence and that nexus, the Board failed to fulfill its duty to provide "more than a rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1210.)

Given that Farrar showed compassion for her victim, has never had even one disciplinary report in prison, did not commit any offenses between 1994 and her arrest in 2001, engaged, and continues to engage, extensively in self-help and education programs, has excellent parole plans, and the Board's own determination

Cont. on p.32

CALIFORNIA LIFER NEWSLETTER™

Randle... cont. from p.34

> that she takes responsibility for the offense and is remorseful, the Board's decision fails to reflect "due consideration of the relevant factors." (*Shaputis II, supra,* 53 Cal.4th at p. 212.)
>
> While our review " 'is limited to ascertaining whether there is some evidence in the record' " to support the Board's decision, we conclude for each of the reasons discussed above that the record lacks evidence—even a " 'modicum' " of evidence—to support the parole denial. (*Shaputis II, supra,* 53 Cal.4th at p. 210, quoting *Rosenkrantz, supra,* 29 Cal.4th at p. 677.)
>
> On this record, the denial of parole cannot be sustained. Farrar is entitled to habeas corpus relief. The Board's denial of parole must be set aside.

The Court of Appeal directed the Board to conduct a new parole hearing for Farrar that conformed to its decision and the requirements of *In re Prather* (2010) 50 Cal.4th 34, at pp. 44, 58.

COURT OF APPEAL DOWNS PAROLE ATTORNEY STEVE DEFILIPPIS

COUIRT REJECTS DEFILIPPIS' CLAIMS AND ARGUMENTS REGARDING HIS INVOLVEMENT IN LAND SCHEME CASE

John L. Randle v. Steve M. Defilippis (#)

(unpublished) 2012 WL 1670178

CA1(2) No. A131538 (May 14, 2012)

A strange team of former lifer/"entrepreneur" Ronnie Bush, his business partner (and former lifer/sex offender) Gary Cantrell (see *People v. Cantrell* (1992) 7 Cal.App.4th 188), Jean Morrison (co-founder of the Alternatives to Violence self-help program), and Bush's long-time attorney, Steve Defilippis (one of the most "expensive" lawyers in the Board/Governor/parole determination arena), were associated in a land development scheme.

Bush and his partners formed Livin' the Cove, LLC, a limited liability company, in June 2005 (3 months after Bush paroled), to buy and develop property at Shelter Cove, Humboldt County. Bush and his associates were sued in a $253,000 real estate foreclosure action by private note holder John Randle

Bush, whose prior conspiracy to kidnap and attempted kidnap for ransom convictions likewise centered on a bogus real estate transaction, had insufficient assets to qualify for a loan for the scheme from John Randle, so he got Defilippis to co-sign the note. When monthly payments to Randle later stopped, Randle foreclosed on both the LLC and personally on Defilippis. Asserting various theories, Defilippis denied such liability.

The Humboldt County Superior Court ruled in favor of Randle's claim against Defilippis' separate assets. On Defilippis' appeal, the First District Court of Appeal came down hard on Defilippis and denied his multifarious defenses. The short of the decision was that, because Defilippis had signed the loan papers in nine places as "borrower," he was personally liable. The Court of Appeal also upheld Defilippis' liability for Randle's $100,000 in legal expenses, in addition to his expenses defending the appeal.

A close unsuspecting friend of ours and former lifer, Carl McQuillion, was also burned by Bush's scheme. It is difficult to discern from the decision whether Defilippis' motive (for investing with an ex-lifer with past bogus transactions) was to help a client, or just plain greed.

FIFTH DISTRICT RFEJECTS HEARING OFFICER'S EXCUSES FOR DISALLOWING INMATE TO CALL AND QUESTION WITNESSES AT HIS DISCIPLINARY HEARING TO DEFEND AGAINST CHARGE OF BATTERY ON A GUARD

In re John Fratus (#)

(unpublished) 2012 WL 1231947

CA5 No. F058189 (April 12, 2012)

In a 2006 disciplinary hearing, John Fratus was found guilty of a 115 charging battery of a correctional officer. After the Kings County Superior Court denied his petition based on "harmless error" (where have we heard that before?) (the trial court denied Fratus' request for an evidentiary hearing), Fratus filed a new habeas corpus petition in the Court of Appeal, which granted it and restored 121 days of forfeited good behavior credits.

Fratus, who is serving a 44-year term for various offenses, including offenses against peace officers, was accused in the 115 of head-butting a guard who was attempting to restrain him. Fratus claimed the charge was fabricated to cover up his beating at the hands of several officers. Fratus, who had suffered a 115 because he had been seen masturbating by a female guard at another prison, reported that one officer told him, "welcome to Corcoran, you're gonna see what we do at Corcoran, you like to jack off in front of women"? One of 17 inmates (in the area at the time) gave testimony to an IE in Fratus' favor; the other 16 said "I don't know anything."

The Hearing Officer (HO) denied Fratus' request to call as a witness an inmate who had seen the incident (for the standard reason, "it would not provide any additional or relevant information beyond what was contained in his earlier statement to the investigator"). Fratus was allowed to call four guards to testify, but was limited by the HO to asking just one question of each.

Following an excellent summary of case authorities governing prison disciplinary proceedings and the statutes and regulations governing such hearings, the Court of Appeal held that the HO's refusal to permit Fratus to call his inmate witness was a violation of due process and not harmless error. The IE's report verified that the witness's information was relevant, and his appearance would not jeopardize safety or security.

The Court of Appeal also held that although the Constitutions do not afford a right to ask questions at a prison disciplinary proceeding, because California's title 15 regulations do so, and because the record did not negate the probability that Fratus could have exonerated himself by means of facts so elicited, the error violated his right to due process and could not be held harmless – it "undermine[d] confidence in the outcome."

The Court directed CDCR to either provide Fratus with a new hearing consistent with its findings, or restore his forfeited disciplinary credits.

CALIFORNIA SUPREME COURT ORDERS UNFAVORABLE LIFER DECISION DEPUBLISHED

In re Henry Bratton (#)

(Ordered depublished) 2012 WL 187804

CA 6 No. H036619 (January 24, 2012)

On May 11, 1012, pursuant to an order by the California Supreme Court which affirmed the Court of Appeal's decision, the Sixth Appellate District depublished its decision (see *CLN #* 43, p. 28; *In Re Henry Bratton*). The Court of Appeal had reversed a trial court order favorable to Bratton. Although that reversal has been upheld, Bratton has been on parole for two years now, pursuant to different proceedings.

CA6 and CA2(DIV. 3) DENY HABEAS RELIEF TO FOUR LIFERS

In re Dameion Brown *(#)*

(unpublished) 2012 WL 1222819

CA6 No. H037327 (April 11, 2012)

Dameion Brown has served 19 years of his

Cont. on p.36

CALIFORNIA LIFER NEWSLETTER™

Brown... cont. from p.35

sentence, life with the possibility of parole, for his conviction of several 1992 offenses. In July 2011 the Santa Clara County Superior Court granted habeas corpus relief, holding that the Board's 2010 decision denying his parole was not supported by evidence of a current parole risk.

The Court of Appeal reversed the lower court decision. It deemed the some evidence test satisfied by Brown's fairly recent 115s for possession of cellphones – the Board was troubled by Brown's second violation a year later for the same thing, which it believed indicative of Brown's failure to learn from his mistakes. Never mind that all cellphones possessed by inmates were illegally imported into the institutions by staff to profit from their sales to inmates, and never mind that neither the Board nor the Court of Appeal suggested how an even illegal possession of a cellphone transforms one into an unreasonable threat to society.

The Board also noted a stark inconsistency between Brown's alleged *negligence* in committing the offense, his language quoted in the psychological assessment, versus the jury's finding, supported by expert medical testimony, that the victim was *strangled*. Apparently, until Brown presents a different recollection of the offense, whether true or not, he cannot achieve parole. The case illustrates the inherent power of a reviewing court to extract any minutia at all from the record to support a predetermined bent to deny parole.

In re Victor Sousa (#)

(unpublished) 2012 WL 1049482

CA6 No. H036855 (March 28, 2012)

This case is a replica of the Court's *Brown* decision, above – the Sixth District reversing a trial court's decision (see *CLN* # 39, p. 4) ordering a new parole hearing because it found that the Board had failed to support its decision denying parole with evidence of current unreasonable dangerousness.

The Court of Appeal found that the Board had justifiably relied on Sousa's 5-year old 115 violation for the theft of a pair of state boots from his workplace, particularly because he denied stealing the boots for almost two years before admitting it. Theft was a theme in Sousa's commitment offenses, two counts of kidnapping for robbery. The Board was equally concerned with the psychologist's finding that Sousa lacked sufficient insight into his culpability for the offenses.

In this case the Court of Appeal was arguably justified in supporting the Board's decision under the some evidence standard of review, and in ruling that those findings by the Board provided a "rational nexus" to its finding that Sousa's parole still posed an unreasonable risk to society.

In re Emilio Sanchez (#)

(unpublished) 2012 WL 1495411

CA2(3) No. B235472 (April 30, 2012)

In an original proceeding, the Second District Court of Appeal ratified an earlier decision by the Los Angeles County Superior Court that Governor Schwarzenegger's reliance on Sanchez' lack of insight into his criminal conduct provided some evidence of current parole unsuitability.

The Court of Appeal rejected the Governor's staff's use of Sanchez' disciplinary record as a tenable ground for denying his parole. Sanchez had received a 115 for refusal to break an inmate work strike (for his own safety) in 2003, 7 years before the hearing. Sanchez' only other 115 – for possessing inmate-manufactured wine – had occurred 17 years earlier. The Court of Appeal found this record not to constitute a rational nexus to current unsuitability.

As for insight, Sanchez continues to maintain that the homicide was an accident and he did not shoot the victim intentionally. After a review of numerous case authorities on the issue of insight, most of all *Shaputis-II*, the Court of Appeal found Sanchez' version sufficiently at odds with the record to *barely* provide the requisite "modicum of evidence" necessary for a reviewing court to uphold the Governor's staff's decision. It appears that Sanchez will have to change or invent the facts he recalls in order to overcome even the slim margin of evidence the Court of Appeal found and in order to avoid dying in prison, risking that the Board will down him for that variance.

In re Vincent Van Motley (#)

(unpublished) 2012 WL 1493759

CA2(3) No. B234058 (April 30, 2012)

This, the second of Division Three's decisions, is more troubling. The Court was permissive in adopting the lay Board's views at issue with its psychologist's findings, its disproportionate reliance on the gravity of the commitment offense, its mis-reliance on a 24-year old attempted escape, and Van Motley's allegedly inadequate programming and parole plans despite his having satisfied all of the Board's codified requirements for parole on these points.

The Court ratified the Board's professed concern that Van Motley's attempted escape after his mother died indicates that if paroled he may relapse if exposed to stress – an obstacle to parole which Van Motley may never overcome.

This decision, reversing a grant of habeas corpus by the Los Angeles County Superior Court, is typical in a reviewing court's predetermination to deny parole by means of a rambling opinion that upholds each and every finding by the Board without addressing any of the reasons set forth in the petition explaining why the lay Board's findings were at odds with the record and its psychologist's risk assessment, and without setting forth any rational nexus to a finding that Van Motley's parole currently poses an undue danger to society.

The Court's decision is indeed more speculative than the Board's, and goes beyond the facts and findings set forth by the Board in rendering a decision that it would apparently have made had it, rather than the Board, determined Van Motley's parole suitability.

SUPERIOR COURT REVIEWS AUTHORITIES ON WHEN "LACK OF INSIGHT" INDICATES PAROLE UNSUITABILITY

In re Hui Kyung Kang (#)

Santa Clara County Superior Court

Case No. 175010 (April 19, 2012)

Although not legally citable, the Santa Clara County Superior Court's decision in *In re Kang* is worth reproducing because of the authority it explains and relies on and its value to the majority of lifers who are routinely denied parole based on allegations of "lack of insight" – the Board's and Governor's standard post-*Shaputis* talisman. The superior court explained when and why insight recitals are not legally tenable evidence that a prospective parolee would constitute an unreasonable risk of danger to society if granted parole. Its decision incorporated the recent published decisions in *Young*, *Shaputis-II*, and *Morganti*.

The court also rejected the Board's (all-too-often) extraction of snippets of verbiage in the psych evaluation to support a predetermined lack-of-insight recital. Finally, the court explained the meaning of a "rational nexus" between the commitment offense and current parole risk (versus a nexus between the offense and outdated 115s). The court set aside the Board's decision based primarily on "lack of insight" and directed the Board to conduct a new hearing for Ms. Kang.

> This case squarely presents the question of the continued viability of the Sixth District cases of *In re Rodriguez* (2011) 193 Cal. App.4th 85, and *In re Ryner* (2011) 196 Cal.App.4th 533 [following the California Supreme Court's publication of *In re Shaputis* (2011) 53 Cal.4th 192 ("*Shaputis-II*")].

Cont. on p.37

CALIFORNIA LIFER NEWSLETTER™

Kang... cont. from p.36

As outlined in the order to show cause, there were serious and substantial errors in the Board's reasoning and analysis on this case [citing *In re Young* (2012) 204 Cal. App.4th 288, in which the Board continues to determine parole under the disapproved *Dannenberg* standard in which the crime is the basis for denying parole without reference to a viable nexus to current parole risk].

… even egregious errors may be irrelevant if the Board decides the inmate lacks insight and there is a modicum of support for that conclusion anywhere in the record. There is a large caveat to the above holding however. The *Shaputis-II* court reaffirmed that "lack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness." (*Shaputis-II* at p. 219.) … the California Supreme Court [thus] presumes that there will be a meaningful test for when insight is, and is not, probative.

Rodriguez and *Ryner, supra* [the Santa Clara court focused on Sixth District cases, but there are others] provide that meaningful test. The Sixth District has recently explained that if "lack of insight" is invoked as reason to deny parole, that finding must be based on "a factually identifiable deficiency manifested by the inmate concerning a matter of probative significance on the issue of current dangerousness." (*Rodriguez, supra*, at p. 99: "'Lack of insight' when it is invoked as a reason to deny parole must be based on an identifiable and material deficiency in the inmate's understanding and acceptance of responsibility for his or her commitment offense.") "Lack of insight" is not a magic 'talisman' to be invoked capriciously." (*Rodriguez, supra*, at p. 97; see also *In re Russo* (2011) 194 Cal. App.4th 144, J. Huffman concurring.)

In *In re Ryner* (2011) 196 Cal.App.4th 533, 548-549, the Sixth District elaborated as follows:

Evidence of lack of insight is indicative of a current dangerousness only if it shows a material deficiency in an inmate's understanding and acceptance of responsibility for the crime. To put it another way, the finding that an inmate lacks insight must be based on a factually identifiable deficiency in perception and understanding, a deficiency that involves an aspect of the criminal conduct or its causes that are significant, and the deficiency by itself or together with the commitment offense has some rational tendency to show that the inmate currently poses an unreasonable risk of danger.

The recent decision by the California Supreme Court in *Shaputis-II* did not disapprove of this standard., *Rodriguez* and *Ryner* have neither been explicitly, nor impliedly, overruled. Applying *Rodriguez* and *Ryner* to the instant case, the Board's "lack of insight" finding does not pass muster. Instead, it appears Petitioner was told to gain insight without any link to, or consideration of, a nexus to her personal risk of reoffense.

In this case Petitioner openly and fully discussed her life crime with the forensic psychologist who prepared the Comprehensive Risk Assessment report. As documented in that report Petitioner scored low on every diagnostic test and instrument. Accordingly she was given an "Overall Risk Assessment" of "Low Risk." Within this risk assessment Petitioner's "insight" was examined. The forensic psychologist took these considerations into account and, based on the totality of the circumstances and evidence, concluded that Petitioner presents a "Low Risk."

The court condemned the Board's (habitual) isolation of verbiage segments from a low-risk psychological evaluation to support a lack-of-insight finding.

The Board's Commissioners isolated from the Comprehensive Risk Assessment report a few statements regarding "insight" and then, in their lay capacity, concluded that Petitioner is a danger to society. Only

Cont. on p.38

CALIFORNIA LIFER NEWSLETTER™

Kang... cont. from p.37

under a superficial reading of *Shaputis-II* would this appear acceptable. As noted above, *Shaputis-II* reaffirmed that "lack of insight, like any other parole unsuitability factor, supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness." (*Shaputis-II* at p. 219.) The trained professional did not believe that Petitioner's purported lack of insight made her dangerous (fn) and the Board did not explain (other than in generalities always applicable to "insight") why it felt able to ignore the professional. The Board did not identify a material deficiency manifested by the inmate concerning a matter of probative significance on the issue of current dangerousness. Accordingly, the Board's "lack of insight" finding does not cure the other errors, rather it compounds them. (fn: For example, as appears in this case, if an inmate truly demonstrates change, and that she is not the same person anymore who committed a life crime, then insight into a dynamic that will not possibly recur is not presently probative.)

The above analysis presumes that the evidence, in context, actually supports the Board's assessment of Petitioner's statements as evincing a lack of insight. However, this interpretation itself is not necessarily correct. There are several parallels between the instant case and the recently published authority on *In re Morganti* (2012) 204 Cal.App.4th 904. In *Morganti* the superior court granted the inmate's habeas petition observing that the Board articulated "a distortion and oversimplification of his statements." The Court of Appeal agreed calling the Board's findings "mischaracterizations" which "inexplicably ignore the evidence" and which "put words in [his] mouth." The court concluded: "The distressing nature of this case arises not just from the Board's distortion of the record, but as well from its abject indifference to the considerable evidence Morganti is unlikely to relapse and is suitable for release."

At issue in *Morganti* was his statement that "he cannot explain the murder, because it was 'irrational' and 'unexplainable,' … 'I hate who I was then, I hate the man who took [the victim's] life … But I can only despise the man I was then because of the man I have become.'" The Court of Appeal rejected the Board's shallow interpretation of this as a lack of insight. Instead, what was clear, was that the inmate was demonstrating his reform by expressing his complete abhorrence of the prior lifestyle and the thinking processes that allowed him to sink so morally low that he could commit a life crime.

Similarly, in the instant case, the forensic psychologist wrote: "Ms. Kang is remorseful and has a difficult time understanding why she committed that crime and how she has been emotionally able to do so … Ms. Kang states: 'I can't imagine the person I am today being capable of something like that. I know it happened, and I know that is somebody who I was.' … Ms. Kang, to this day, cannot understand how she committed that crime. To her credit, she offers no facile explanations that might ease her conscience." As in *Morganti*, Ms. Kang's statements are not an indication that she has no insight. Instead, they are her articulation that she is such a different person, after having served her base term and five years past her MEPD, that she is disgusted with her prior behavior, and that her changed values and internal moral compass are now such that a life crime is unthinkable. The forensic psychologist seems to have understood it in this context and accordingly rated her as a low risk on every instrument. For the Board to take her statements out of context is the sort of behavior condemned in *Morganti, supra.*

At bottom, as in *Morganti*, *supra*, the Board's "lack of insight" finding appears to be a questionable extraction from a much larger and more comprehensive record. But in any event, even if it is not, to the extent the "lack of insight" finding is legitimate, it nevertheless does not have a nexus to unsuitability. (See *Morganti, supra*, citing *Ryner, supra*.)

Before ordering a remedy, the trial court addressed the Board's inappropriate (and likewise, unfortunately common) "nexus" misunderstanding.

Finally, it is noteworthy that the Board actually used the word "nexus" when commenting on Petitioner's 8 and 13 year old 115s. While the Board was correct that there was a nexus between those 115s and the original crime, the Board did not articulate any nexus to the present. When drawing a nexus from the crime it much reach to the inmate's present dangerousness, not to the 115s that are so old that they must themselves be deemed stale and static factors. This is another Board finding that compounds, rather then cures, its errors.

For the above reasons, as well as those outlined in the order to show cause (the unsupported "torture" finding and the Penal Code § 5011 violation) the petition is granted and the matter is remanded to the Board with directions to provide Petitioner, within 100 days, a new hearing comporting with due process.

Predictably, on May 18th the Attorney General filed a notice of appeal. The Sixth District's decision in this case may be important.

MARSY'S LAW CASES ACCUMULATE

In re Michael Vicks on Habeas Corpus

California Supreme Court No. S194129

Last month the California Supreme Court added *In re Jesus Hernandez* (see *CLN* # 41, p. 33) to the list of cases to be reviewed pending its decision in *Vicks*. *Vicks* will determine the constitutionality of certain provisions in Penal Code § 3041.5 (the "Victims Bill of Rights" enacted by the Proposition Nine ("Marsy's Law") initiative). In particular, the State Supreme Court will decide whether the provision that greatly increases intervals between hearings can be applied retroactively to lifers whose offenses occurred prior to its enactment.

In *Hernandez* the Court of Appeal had reversed a superior court order granting Hernandez habeas corpus relief.

Review in *In re Vincent Russo* (No. S193197; see *CLN* # 38, p. 52), *In re Michael Alan Aragon* (No. S194673), and *In re Robert Smith* (No. S194750; see *CLN* # 39, p. 62) is likewise pending.

STATE SUPREME COURT DISPOSES OF STAYED *SHAPUTIS-II* REVIEWS

In re Raymundo Macias

No. S189107; see *CLN* # 36, p. 50

In re Michael Jay Loveless

No. S190625; see *CLN* # 37, p. 51

In re Michael Adamar

No. S190226; see *CLN* # 37, p. 42

On April 18th the California Supreme Court dismissed review in *Macias* and *Loveless* (cases in which the Courts of Appeal had denied habeas relief), and remanded *Adamar* to the Second Appellate District for reconsideration in light of *Shaputis-II* (the court of Appeal had upheld Adamar's habeas relief). Please see *CLN* # 39, p. 7.

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

PELICAN BAY SHU CONDITIONS CHALLENGED IN COURT ACTION

In 1989 California opened Pelican Bay State Prison. From the air, it appears a large cookie cutter lifted a massive circle of redwood trees out of the forest and dropped PBSP into the void. Screened from the roadway by a dense stand of impressive redwood trees, vehicles can zip by Pelican Bay, never really noticing the ominous walls and wire surrounding the concrete buildings. Inmates at Pelican are virtually hidden from the outside world.

And since 1989 some of those inmates have been more hidden than others. The Security Housing Unit, the SHU, at Pelican Bay holds more than 1000 men accused of gang involvement and membership, chronic serious rule violations and crimes committed while incarcerated. Seventy-eight of those men have been there, in virtual solitary confinement, for more than 20 years. Twenty years without human contact, subjected to sensory deprivation and permitted out of their cells for only 90 minutes a day.

Gleefully labeled "the worst of the worst" by CDCR officials and the news media for years, SHU inmates have been held in a gulag within the gulag of California corrections. Last year a band of SHU inmates began a well-publicized hunger strike to bring attention to their conditions of confinement and their years of virtual torture. The hunger strike eventually spread to other prisons at gained over 6,500 participants. And while the CDC maintains it negotiated a settlement of the strike, the real fruits of that effort appeared May 31 when the Center for Constitutional Rights (CCR) filed suit in federal court for the Northern District of California, alleging extended virtual solitary confinement in SHU conditions violates the Eighth Amendment to the US Constitution, barring 'cruel and unusual punishment.'

CCR's court action took over and revised an on-going 2009 court action filed in pro per by two Pelican Bay prisoners, Todd Ashker and Danny Troxell, who are among 78 held for more than 20 years in the SHU. Incredibly, Ashker filed a hand-written suit in 2009 on behalf of himself and Troxell, laying the ground work for the more far-reaching and comprehensive class action suit by CCR. Both prisoners have been confined continually in the SHU for failure to renounce alleged Aryan Brotherhood ties, though both maintain they are not associated with the gang.

The newly filed action, *Ruiz v Brown*, addresses the hundreds of inmates held for more than 10 years in the SHU. Among the charges contained in the complaint is that "California's uniquely harsh regime of prolonged solitary confinement at Pelican Bay is inhumane and debilitating…Indeed, the prolonged conditions of brutal confinement and isolation at Pelican Bay cross over from having any valid penological purpose into a system rightly condemned as torture by the international community."

In a press release on the day the suit was filed CCR detailed some of the conditions in Pelican Bay's SHU: "*SHU prisoners spent 22 ½ to 24 hours every day in a cramped, concrete, windowless cell. They are denied telephone calls, contact visits, and vocational, recreational or educational programming. Food is often rotten and barely edible, and medical care is frequently withheld. More than 500 Pelican Bay SHU prisoners have been isolated under these conditions for over 10 years; more than 200 of them for over 15 years; and 78 have been isolated in the SHU for more than 20 years. Today's suit claims that prolonged confinement under these conditions has caused "harmful and predictable psychological deterioration" among SHU prisoners. Solitary confinement for as little as 15 days is now widely recognized to cause lasting psychological damage to human beings and is analyzed under international law as torture Additionally, the suit alleges that SHU prisoners are denied any meaningful review of their SHU placement, rendering their isolation "effectively permanent."*

Although the CDCR recently announced proposed changes in the gang validation and SHU confinement process, those changes have been "under review" for more than a year and have yet to go into effective operation. Total implementation of the changes is not expected for several years. The new suit alleges that while the soundproof cells that constitute SHU quarters were originally meant to house prisoners for no longer than 18 months, about 500 have been in SHU for over 10 years, 200 for 15 years and 78, including original litigants Ashker and Troxell, have been so confined for over 20 years.

"There is no other state in the country that keeps so many inmates in solitary confinement for so long," said Alexis Agathocleous, a center attorney.

While not commenting directly on the pending litigation, CDCR spokesman Jeffrey Callison (a former talk-show host for Sacramento public radio), gave the standard promise, "CDCR will increase privileges for inmates housed in a Security Housing Unit who refrain from criminal gang behavior." Although SHU conditions have been unsuccessfully challenged in previous legal actions, few of those have suits have benefited from professional legal representation.

In addition to CCR, legal representation in *Ruiz v Brown* included co-counsels Legal Services for Prisoners with Children, California Prison Focus, Siegel & Yee, and the Law Offices of Charles Carbone. CLN and LSA will closely monitor the progress of this case and report on its progress.

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

News from Life Support Alliance

What is Life Support Alliance

We are an advocacy group working for change in the present parole board policy of finding the preponderance of life-term prisoners almost unsuitable for parole for vague and unreasonable factors typically cited at hearings. Time and again long-serving lifers, who have successfully programmed, often for decades, have availed themselves of the pitifully few self-help programs offered by the CDCR and have, in spite of, not because of, the system managed to rehabilitate themselves are denied the parole due them under state law.

Though these repeated and unreasonable denials are themselves an affront to justice, what makes this policy particularly egregious today, and the reason more and more citizens not directly tied to lifers are becoming increasingly concerned, is the monetary cost, pure dollars and cents, of California's out of control prison system. As state Senators and Assembly members seek ways to save money that has for decades bloated the CDCR we propose to show them a reasonable, safe and immediately available way to both save money and make a significant impact on the prison overcrowding and social justice concerns.

Parole suitable lifers. It is that simple.

Lifers have the lowest recidivism rate of any group of prisoners, making them the safest group of prisoners to parole. Most have proven their suitability with decades of successful programming, mentoring and self-improvement. Paroling lifers is not an early release , in most cases it is an overdue release.

Our job, our mission, is to be the voice and presence of lifers in the legislative offices and public gatherings, in the ear of the CDC regarding conditions of confinement and programming, and to remind the parole board of the realities of lifers' situation. And to assist and educate lifer families as negotiating the labyrinth that is CDCR.

Now in our third year of fighting the lifer cause, we are now a 501 (c) (3) non-profit, tax deductible organization, prepared to follow our mission and increase our outreach through educational seminars for families and Inmate Family Councils throughout the state.

Information, questions and donations may be addressed to our email, lifesupportalliance@gmail.com or PO Box 277, Rancho Cordova, Ca. 95741.

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

Editorial

TIME TO ADDRESS LIFER PAROLE

On a crisp early fall morning last year I arrived at one of California's 33 prisons to spend an emotionally exhausting day observing parole hearings for life term inmates; those sentenced to X-to-life with the possibility of parole. It turned out to be an unusual day; as one of the three inmates considered was actually granted a parole date.

But more typical, more troubling and more indicative of the problems inherent in California's prison system was the fate of another prisoner, another young man in his mid-30s, already 15 years into a possible rest of his life-time behind bars. Two burly guards stood by as the slight, bespeckled man, chained at ankles, wrists and waist shuffled into the room and took a seat.

To the credit of the parole commissioners they quickly decided the prisoner was not a security risk and had the restraints removed for the hearing. What followed, a recitation of his crime, background and prison behavior was a depressing replay of a story heard all too often in any crime and punishment venue but with a slight twist; from a very early age, this prisoner had suffered from diagnosed mental health issues.

A quick synopsis, not an excuse or rationalization for his actions, but to set the stage; convicted of a murder committed in his early 20s, while addicted to drugs, barely functionally literate, living in dismal poverty with no conceivable way out, faced with a situation he had no idea how to deal with, he killed. The prison system estimated his educational level at about fifth grade, was treating his Multiple Sclerosis with drugs that dulled his thinking and reaction time, and, to deal with his self-mutilation and other mental issues, alternated between sending him for short stints to mental hospital and housing him in Administrative Segregation (basically solitary confinement) in a mainline, high security prison.

Though only in his 30s, his limbs shook throughout the hours-long hearing, the result he said, of not taking his meds for MS because he wanted to be as clear-minded as possible for the hearing. He fully admitted to his criminal actions; he also admitted to self-mutilation and to thinking about suicide daily. He was able to present almost no support from family or community to help him should he parole.

After "weighing all the factors presented today," the parole board decided this prisoner was not suitable. Parole denied. For 10 years. The prisoner was chained up and returned to his AdSeg cell, not to be thought of by the parole board for another decade. Oh, the board suggested he "remain disciplinary free" (which he can't do if he continues to be driven to self-mutilation) try to get involved in self-help programs (difficult in, virtual solitary confinement and with a poor education level) and cooperate with psychologists (whose sporadic efforts so far had not been able to provide him any mental help or relief). They also reminded him he could file a special form asking for a hearing before the 10 year date, if there was new evidence of his suitability (a real challenge, given his sub-standard educational and reading level). Hearing closed, on to the next inmate.

Was he suitable for parole? Clearly not. But consider this: in this case, for this man, a 10 year parole denial may well be a death sentence. Over the next decade, if he does not succumb to the ravages of MS, it is entirely likely he will either descend further into mental illness and terminal depression or those demons prodding him to self-mutilation and suicide just may win. And in the meantime he will spend those years being shuffled back and forth from mental hospital to prison, depending on which demons have the upper hand at any given moment, either drugged into a stupor or shut away in a bare cell with as few amenities as possible, to protect him from himself.

Over each of the next 10 years this "treatment," this "tough on crime" attitude for this lifer will cost the taxpayers, conservatory, $80-100,000 per year. At the end of ten years, if this man is still alive, he will return to his next parole hearing older, with more pressing health issues and more than likely, even more pressing mental issues. The result of that hearing will likely be the same. Denied, for another 3, 5, 7, 10 or even 15 years. And the cycle starts again.

This circular firing squad scenario has played out for decades in California parole and is one reason CDCR is over; over-populated, over-spending and over-whelmed. While the present political climate has recently produced a bold and experimental plan (realignment) to deal with many of the other problems in California prisons the fair, reasoned and consistent consideration of lifer parole has not yet been addressed.

Now is the time for another bold step. Let's get serious about lifer parole. This cohort has already evidences a recidivism rate that barely registers, (less than 1% and none for capital crime) and are exemplary parolees. Let's scrap the expensive $3-5 million annually psychological division that assesses every lifer using controversial tests and questionable predictions in favor of actual rehabilitation and treatment programs, including real mental treatment and appropriate housing for lifers like the man above.

And, for the sake of society and the budget, let's have the political courage to acknowledge that people can and do change. When they have, for decades, lived that change we should grant them that second chance the law promises, not use pseudo-pshcyo terms like "insight" and "maladaptive socio- tendencies" to justify decades more of expensive and unnecessary incarceration.

We have been plodding down this path for decades. We are no safer as a society, but we are poorer; poorer in treasure, poorer in social justice and poorer in hope. We can afford none of these things. It is the nature of humanity that crime and therefore prisons will always be with us. Society must have safety and justice, but it must also have humanity and social justice. These things we must find a way to afford. But we can no longer afford vengeance as public policy.

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

BPH DIRECTOR MEETING RECAP

Over the past several months, since her appointment to the post of Executive Director of the BPH, Jennifer Shaffer has evidenced willingness to dialogue with stakeholders on all sides of the parole debate. LSA has been one of those groups and individuals who have had the opportunity to raise issues and seek information exchange with Ms. Shaffer, and, while we don't always agree, the open dialogue and her willingness to consider other viewpoints is a sea change in BPH attitudes from just a few years ago and remains one of the most positive features of the present board.

In a recent conversation with Ms. Shaffer we touched base on several on-going issues.

Inmate attorney lap-tops: some months ago LSA raised this issue with Ms. Shaffer, after attending parole hearings and noting attending District Attorneys were allowed to bring their lap top computers into parole hearings, but prisoners' attorneys were not. Ms. Shaffer reported she is working with CDCR and various prisons to try and resolve (what else) security concerns involving inmates and lap tops. Custodial types are of course overwrought at the even vague possibility that inmates might be near a computer and have access to the internet. While we won't waste time and ink on the ludicrousness of this fear, suffice to say Ms. Shaffer is seeking a procedure wherein prisoner attorneys would be allowed to access their laptops for parole hearings, but would not bring them to individual prisoner consultations, where, apparently, prison personnel fear inmates might somehow have internet access.

We believe her efforts are in good faith and are hopeful a mutually agreeable procedure can be found.

Recording of psychological evaluations: Ms. Shaffer indicated one of the biggest obstacles to this, a proposal that LSA has presented and endorsed at several BPH meetings, is money. At present the BPH has no funds to pay for the transcriptions that would result from psych evals being recorded. Understandable, given the state's current financial situation, but an obstacle we will be seeking ways to overcome. Ms. Shaffer also indicted clinicians in the FAD were also opposed to such recordings, but, given the suit against the FAD chronicled elsewhere in this issue of CLN, that could perhaps change.

120/30 day review period: Once a lifer is fortunate enough to be granted a parole date by a panel, his fate goes into a 5 month review period. The BPH has 120 days to review the decision for legal compliance and verification of parole plans. After that, whether that process takes 30 or 120 days, the decision, if the prisoner has a 187 PC conviction, goes to the governor for review. The Governor has 30 days to either decline to review the parole grant or reverse the Board's decision. LSA asked Ms. Shaffer if there was a way to speed up the review process, making the nail-biting waiting period shorter for lifers.

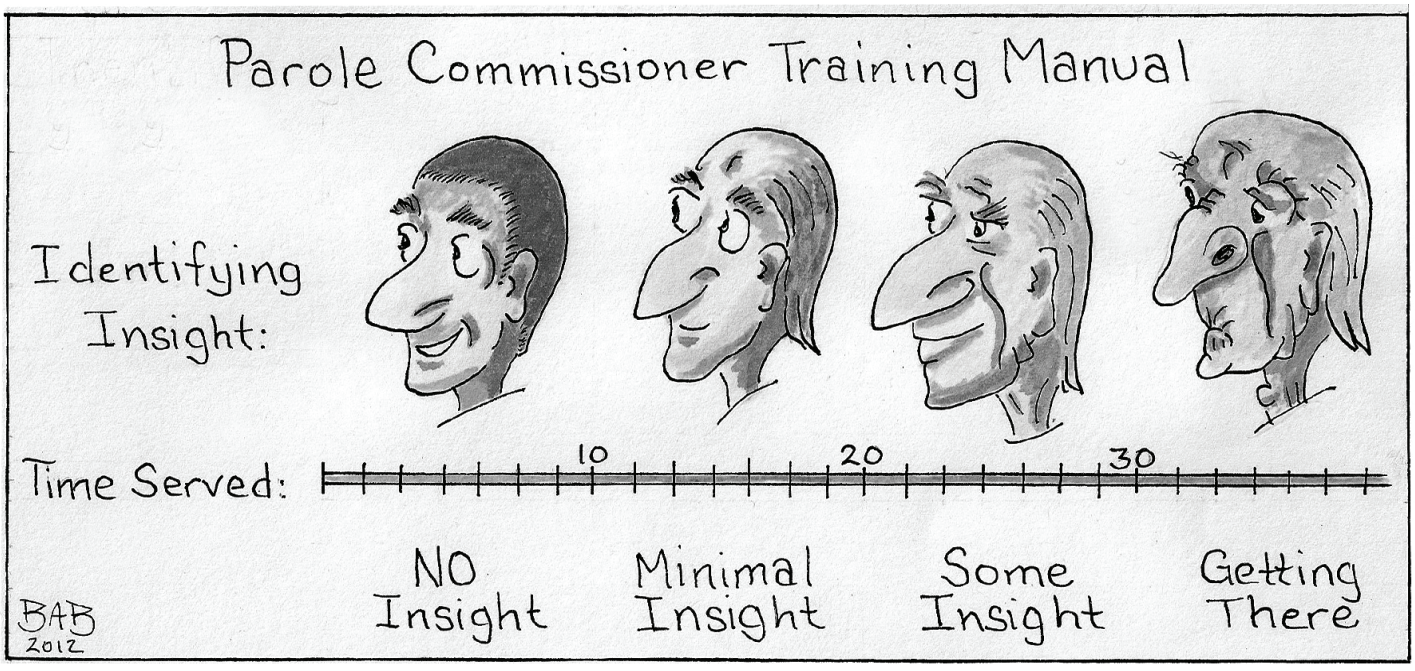
The Director responded that while she would very much like to shorten the time taken for the review, it was, again, primarily a function of budget and workload and perhaps in some ways, a victim of the success of collective efforts to increase the parole grant rate. Ms. Shaffer indicated that the BPH is presently processing 10 to 15 lifer parole dates each week (an encouraging trend!) and with such a workload and the number of investigators presently available, the BPH often needs every one of those 120 days. Of course, she can't speak for the Governor's office.

On the whole, if lifers with a date must wait the whole 120 day review time because more lifers are getting dates and requiring the review, well, perhaps we can all just endure that 120 days until realignment is fully implemented and staffing levels coalesce.

Timely arrival of hearing transcripts: Following an egregious and extreme example of mail room/personnel failure brought to the BPH's attention by LSA, Ms. Shaffer indicated her office has undertaken a review of the BPH process of sending hearing transcripts to inmates following hearings. Because of an inquiry by a prisoner at Solano and follow up by LSA's Gail Brown, 87 parole transcripts were found languishing in the mailroom at Solano, undelivered to prisoners, some nearly 6 months after their parole hearings.

Full disclosure here, it appears it was not the BPH who was the weak link in this case, but the mail staff at Solano, who offered the usual short staffing excuse. However, Ms. Shaffer's willingness to check on the BPH process to be sure it is functioning properly is well received.

By law, transcripts are to be in the possession of prisoners 30 days following a parole hearing. Anyone whose transcripts are substantially late is urged to contact LSA.



Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

IT'S NOT A GAME OF FAVORITES; IT'S NOT A GAME AT ALL

When is what's fair for me isn't fair for you? Apparently when the "me" is victims' rights groups and the "you" is prisoner advocates.

At the April Board of Parole Hearings (BPH) monthly meeting paroled lifer Flozelle Woodmore, freed a few years ago after decades of imprisonment, spoke to the Board, to update them on her progress since parole and the prospects for similar success by other lifers. Flozelle now works for A New Way of Life, a re-entry facility in Southern California.

Her testimony to the commissioners was simple; here I am, a paroled lifer, leading a purposeful life, contributing to society, an average citizen presenting no danger to society. She thanked the Board for the opportunity to begin her second chance and shared with them her success and plans to continue working to assist other released prisoners in reintegrating into society, and reminded them there are plenty more like her still inside, ready to be released to safe and contributing lives.

The commissioners were clearly pleased, congratulated Flozelle and wished her continued success. A few commissioners even took time after the meeting to shake her hand and briefly posed with Flozelle for pictures, commemorating her appearance and life-affirming story.

All good, right? Not so, according to Crime Victims United Alliance.

In an email blast to their subscribers on April 30 CVAA was nearly apoplectic in their disapproval and indignation that the commissioners seemed pleased with the success of a paroled lifer. The group, towing their usual line that no matter how long ago the crime and no matter how changed the lifer, there is never enough punishment, pointedly recited for their members some of the (alleged) details of Flozelle's long-ago crime and accusingly maintained that none of the commissioners knew the circumstances of that crime.

"They only knew what she had shared with them that day, that she had been in prison for a life crime and that she had been paroled," to quote the CVAA email. Our question is; what else did they need to know? Flozelle was not there for a re-hearing, she was there to share her story, her comments, her viewpoint with the commissioners, on an equal standing with members of CVAA, LSA and other members of the public (which Flozelle now is).

Quoting again from CVAA's email: "So what kind of message does that send to victims and the general public? Certainly that the priorities of the Board of Parole Hearings have changed. It appears that some Commissioners may be focused more on relations with inmates and inmate rights' groups rather than ensuring the public's safety. How serious is the Board of Parole Hearings about public safety versus political goodwill with inmate supporters?"

OK, we'll tackle those questions. What kind of message does this send to victims and the public? To the victims, while your voices are heard, those voices are not (or at least should not be) the only consideration in parole decisions. And the message to the public? How about that lifers are not eternal threats, monsters or dangers?

And how serious is the BPH about public safety "versus political goodwill with inmate supporters?" Gee, we didn't realize we, inmate supporters as a group, are that serious a threat to the political landscape or had yet reached that level of political clout. Nice to know.

And as for commissioners being more focused on relations with inmates and advocates than public safety, well that's pretty much laughable on its face. With the parole rate hovering around 12% last year and every lifer still facing an uphill battle to be found suitable, clearly the commissioners, as a body, are still focused ad infinitum on keeping their reputation as keepers of the keys intact.

And while LSA in particular has worked hard to build a working relationship with the BPH we are hardly cozy, and probably will never be. It's hard for commissioners to feel warm and fuzzy about an organization that stands 3 feet away from them at confirmation hearings and opposes some commissioners keeping their jobs, laying out on public record and for the Senators the faults and inadequacies we see in those commissioners.

We have, however, seen very a deferential approach by commissioners toward victims' family and representatives at parole hearings and note the incident a few years ago when a presiding commissioner (no longer on the board) ended a parole hearing with a long denial for the inmate and hugs and congratulations all around for victims' family and friends. On that evidence we'd say prisoner advocates have a long way to go in reaching the level of obeisance shown to CVAA and other such groups.

CVAA's motto is a rather disingenuous "Protecting the rights of victims through positive actions." We're still looking for those positive actions; what we've seen has pretty much been no; no parole, not now, not ever, for no one. And yet, there was Flozelle Woodmore, a former lifer, walking free among us. Society continues unfazed, blood is not running in the streets, life as we know it goes on and Flozelle, like many paroled lifers before and others yet to be released, is contributing to her community, helping her peers and enriching the lives of those who know her. That, we submit, is a positive action.

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

IT'S NOT ABOUT THE NUMBERS

At recent confirmation hearings for three Board of Parole Hearings Commissioners Senate Pro-Tem Darrell Steinberg questioned Life Support Alliance (LSA) as to why we spoke in opposition to two of the commissioners under consideration. LSA opposed the confirmation of Commissioners Jack Garner and Dan Figueroa, based in part on their nebulous and unsupportable reasons for denial of parole.

In Garner's case our opposition based on years of court reversals of his denials, often for the same reason, what the courts have identified and rejected as his substitution of his opinion, belief or "gut feeling" in place of actual nexus of dangerousness. In Figueroa's case, our opposition came from review of his denials, which evidenced the same reasoning as Garner, but without, as yet, the number of court reversals of his decisions. Garner has been on the parole board over 10 years, providing ample time for those prisoners he has unfairly denied parole to file and win writs; and Figueroa has been in place only a few months, and his unsupportable denials are just now making their way through the courts.

In questioning why LSA opposed these two, Sen. Steinberg noted the overall lifer parole rate in 2011 was nearly 12% and that the three commissioners sitting for confirmation (Peter LaBahn was the third) all evidenced overall grant rates of 14 to 20%. The Senator seemed to be suggesting, though he did not explicitly say, that perhaps we and other stakeholders should be satisfied with these increases in numbers.

Sorry Senator. We're not having any of it.

If our opposition to commissioners or our satisfaction with the collective acts of the BPH were based solely on numbers, Sen. Steinberg might have a case. Certainly a 12% grant rate is considerably better than the 3-5% annual rate of a decade ago. And commissioners who meet or exceed the average grate rate are certainly welcome.

But it isn't all about the numbers. It's about the law, fair hearings and social responsibility.

As LSA Director Vanessa Nelson explained to Sen. Steinberg, while we and other stakeholders are encouraged by the changes in the BPH, we are not satisfied. Section 3041.5 of the Penal Code states that the BPH "shall normally find" prisoners suitable for parole at their initial hearing. "Shall normally" is taken, in legal parlance, to mean 50% of the time. In his recently published concurring/dissenting opinion In RE: Morganti, Appellate Justice R. Kline, noted statistics reveal that parole grants are given at initial hearings only .37% of the time. That's a far cry from the 50% expected (but not required) by law. And 12% overall grant rate is still well short of 50%, so, no, we aren't satisfied.

And as we related to Sen. Steinberg, what we require is not a commitment to an absolute number or percentage of grants, but a commitment from the BPH, from the commissioners and from the legislature for fair, judicially considered and competent hearings with decisions based on reasonable, legally supportable conclusions and made by fair, open-minded commissioners who will look beyond the instant offense to the record, the character of the present individual.

We firmly believe that once these perimeters are in place, the numbers will take care of themselves. Until then, LSA will continue to remind the BPH, CDCR and legislature of the legal mandate to parole, a second chance for suitable lifers.

It is not about the numbers; it's about making the right decisions for the right reasons.

PAROLE BOARD AT 9 CONFIRMED AND COUNTING…

Following recent actions by the Senate Rules Committee (SRC) in confirming three of Governor Brown's appointees as BPH commissioners the board is still in search of a complete, confirmed compliment.

In past months Commissioners Terri Turner, Cynthia Fritz, John Peck and Howard Moseley were confirmed to fulfill their appointed terms, which will end in mid-summer, 2014 (barring re-appointment prior to that time by the Governor). In mid-May commissioners Dan Figueroa, Peter LaBahn and Jack Garner were also confirmed, for terms also ending in 2014, summer of 2014 for Figueroa and Garner, December, 2014 for LaBahn. Commissioners Arthur Anderson and Jeffrey Ferguson were confirmed last year and will serve terms ending in 2013.

Currently, two sitting commissioners, Michael Prizmich and Gilbert Robles, are awaiting confirmation hearings by SRC and another post, that of Board Chairman, remains unfilled since former Chairman Robert Doyle failed to secure confirmation by vote of the entire Senate, despite his unanimous recommendation by SRC. Little has officially been said about the reasons for this unusual failure and anything we might add to the discussion would simply be conjecture.

Of those present commissioners now confirmed LSA supported some candidates, opposed some and took a neutral position on a few. The decision to support or oppose is never easy and is not based entirely, even primarily, on the particular candidate's parole grant rate. Review of hearing transcripts, analysis of court reversals of the commissioner's decisions, reports from attorneys and prisoners appearing before the commissioner-designates and our own observations at hearings all figure into our decision. And we cannot simply oppose all comers; in doing so we would be perpetrating the exact action we take the BPH to task for, failing to evaluate and consider each individual on their own merits.

The recent hearings for Garner, LaBahn and Figueroa saw the trio questioned more sharply and on more specifics than at any hearing in the last two years. Information submitted to Senators on the committee by supporters and those in opposition to the candidates, including LSA, form the basis for many of those questions.

Of particular interest to LSA were questions posed by Sen. Pro-Tem and SRC chair Darrell Steinberg, who probed all three candidates on their actions in those cases when a psychological evaluation from the BPH's Forensic Assessment Division (FAD) containing substantial factual errors is presented as part of a prisoner's parole packet. Steinberg was armed with specifics of more than one instance of such errors and was clearly troubled not only by the frequency of these events, but in the lack of firm, reasoned and decisive responses to his questions to the candidates as to how they would handle these situations.

Despite less than stellar answers by all three commissioners, all three were confirmed, but to Sen. Steinberg's credit, he was not content to let the issue of factual errors drop. The Senator directed the Office of Senate Research, the inquiring arm of the Senate, to produce a report outlining the frequency, nature and impact of such errors. To that, we can but say Amen!

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

APRIL EN BANC DECISIONS

SENTENCE RECALL, P.C. 1170, Compassionate Release

JAMES FLEMING, F 71274, decline to refer for sentence recall, as prisoner is mobile and has the capacity to reoffend; parole plans not viable. Vote unanimous.

ARTHUR MEFFORD, C 22481, decline to refer for sentence recall, prisoner poses a threat to public safety due to disciplinary and sex offense history, he maintains mobility and parole plans are not compliant with restrictions. Vote unanimous.

SPLIT DECISION REVIEW

RODERICK THOMPSON, C 38944, deny parole for reasons articulated in February hearing. Vote 10-0, Ferguson abstain.

MAY EN BANC DECISIONS

SENTENCE RECALL, P.C. 1170, Compassionate Release

FRED CLARK, H 93213, refer to court for sentence recall, prisoner is medically incapacitated. Vote 10-1, Ferguson Nay.

BERNICE CUBIE, W 34651, decline to refer for sentence recall, prisoner is ambulatory with a walker and parole plans are to live win an individual with extensive criminal history including controlled substances. Ability to perform activities of daily living without assistance render residency plan a risk to public safety due to chance to reoffend. Vote unanimous.

WILLIAM DONNELLY, B90948, refer to court for sentence recall, prisoner is medically incapacitated. Vote unanimous.

JOHN DARRELL HILL, H 12568, refer to court for sentence recall, prisoner is terminally ill and conditions of parole would not pose a danger to public safety. Vote 10-1, Moseley Nay.

JOSE IBARRIA, H 1256, refer to court for sentence recall, prisoner is terminally ill and conditions under which he would be released do not pose a risk to public safety. Vote 10-1, Moseley Nay.

SPLIT DECISION REVIEW

ROBERT EDWARD LEE, B22267, parole granted, suitability pursuant to reasons articulated by Deputy Commissioner at the March, 2012 hearing. Vote 10-0, Fritz abstain.

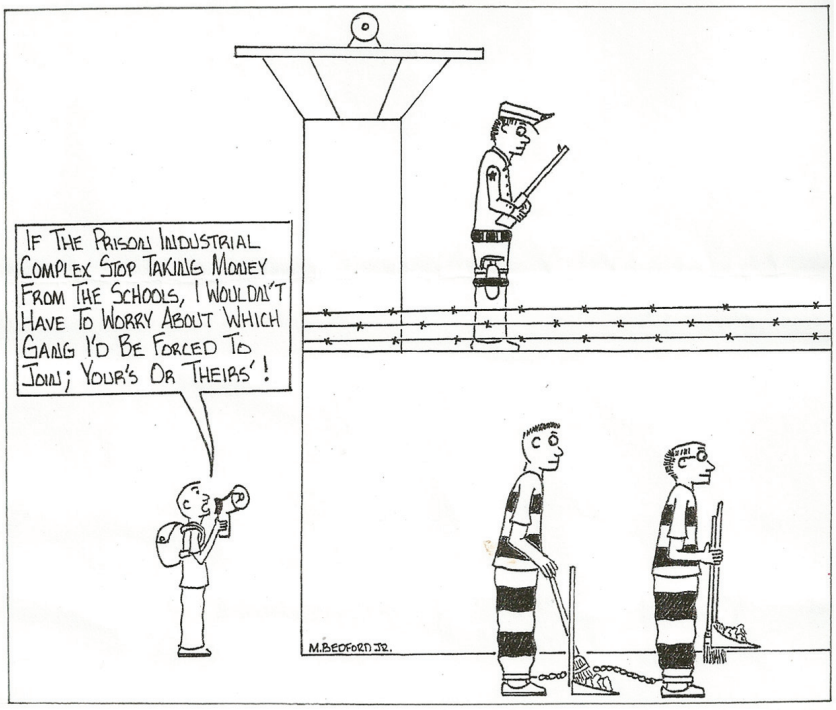
JAMES EDWARD MEINECKE, E 67329, parole granted, suitability pursuant to reasons articulated by the commissioner in the March, 2012 hearing. Vote 10-0, Fritz abstain.

REFERRED BY DECISION REVIEW

JASON RIVERA, J 74943, vacate the January, 2012 decision and set for new hearing date. Vote , unanimous.

GOVERNOR REFERRED

HUSAM MOHAMMAD THAHER, E 24206, affirm December, 2011 suitability decision. Vote 10-0, Fritz abstain.



Lifer Scheduling and Tracking System

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

Hearing Totals*	39	37	46	40	48	26	22	35	40	48	40	207	628	8**	620

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FERGUSON	FIGUEROA	FRITZ	GARNER	LABAHN	MOSELEY	PECK	PRIZMICH	ROBLES	TURNER	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	24	33	31	27	36	24	19	32	36	35	27	138	462	8	454
Grants	2	1	8	4	3	5	4	6	7	2	5	0	47	2	45
Denials	14	20	16	9	19	14	12	15	19	19	20	0	177	3	174
Stipulations	5	2	5	2	6	4	2	1	2	2	0	5	36	1	35
Waivers	0	2	1	6	1	0	0	7	4	3	0	76	100	0	100
Postponements	2	8	1	4	6	1	1	3	4	9	1	46	86	2	84
Continuances	1	0	0	0	1	0	0	0	0	0	1	0	3	0	3
Split	0	0	0	2	0	0	0	0	0	0	0	0	2	0	2
Cancellations	0	0	0	0	0	0	0	0	0	0	0	11	11	0	11

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

Subtotal (Deny+Stip)	19	22	21	11	25	18	14	16	21	21	20	5	213	4	209
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	15	12	13	8	17	12	4	9	15	15	10	4	134	4	130
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	3	5	7	0	3	6	8	3	2	3	6	0	46	0	46
7 years	1	4	1	3	1	0	1	4	4	2	2	1	24	0	24
10 years	0	1	0	0	3	0	1	0	0	0	1	0	6	0	6
15 years	0	0	0	0	1	0	0	0	0	1	1	0	3	0	3

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	2	1	6	1	0	0	7	4	3	0	76	100	0	100
1 year	0	1	0	5	1	0	0	7	3	2	0	48	67	0	67
2 years	0	1	0	1	0	0	0	0	1	1	0	16	20	0	20
3 years	0	0	1	0	0	0	0	0	0	0	0	9	10	0	10
4 years	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2
5 years	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	2	8	1	4	6	1	1	3	4	9	1	46	86	2	84
Within State Control	0	0	0	2	4	0	1	2	2	3	1	26	41	2	39
Exigent Circumstance	1	7	0	2	1	0	0	0	1	4	0	3	19	0	19
Prisoner Postpone	1	1	1	0	1	1	0	1	1	2	0	17	26	0	26

*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.

Lifer Scheduling and Tracking System

Commissioners Summary
All Institutions
April 01, 2012 to April 30, 2012

Hearing Totals*	31	28	42	30	32	32	18	43	29	34	29	163	511	36**	475

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FERGUSON	FIGUEROA	FRITZ	GARNER	LABAHN	MOSELEY	PECK	PRIZMICH	ROBLES	TURNER	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	23	22	25	29	32	27	16	21	19	19	29	114	376	35	341
Grants	3	2	6	6	6	7	3	2	4	1	6	0	46	6	40
Denials	13	15	14	15	13	12	6	11	8	10	18	0	135	17	118
Stipulations	1	2	2	1	2	2	3	4	4	5	1	7	34	4	30
Waivers	3	1	1	4	4	0	0	2	1	2	4	51	73	6	67
Postponements	3	2	2	3	5	6	4	2	2	1	0	47	77	2	75
Continuances	0	0	0	0	2	0	0	0	0	0	0	0	2	0	2
Split	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	9	9	0	9

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

Subtotal (Deny+Stip)	14	17	16	16	15	14	9	15	12	15	19	7	169	21	148
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	8	7	11	9	12	7	5	7	8	7	9	6	96	11	85
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	3	6	4	5	2	4	2	2	3	6	7	1	45	7	38
7 years	2	3	1	2	0	3	1	3	1	0	1	0	17	1	16
10 years	1	1	0	0	1	0	1	2	0	1	2	0	9	1	8
15 years	0	0	0	0	0	0	0	1	0	1	0	0	2	1	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	3	1	1	4	4	0	0	2	1	2	4	51	73	6	67
1 year	3	1	1	3	3	0	0	1	1	1	3	32	49	4	45
2 years	0	0	0	1	0	0	0	1	0	1	0	9	12	1	11
3 years	0	0	0	0	1	0	0	0	0	0	1	6	8	1	7
4 years	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2
5 years	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	3	2	2	3	5	6	4	2	2	1	0	47	77	2	75
Within State Control	1	0	1	2	1	1	0	1	0	1	0	32	40	1	39
Exigent Circumstance	1	1	1	1	4	0	1	1	2	0	0	0	12	0	12
Prisoner Postpone	1	1	0	0	0	5	3	0	0	0	0	15	25	1	24

*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.

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

LEGISLATION

SB 542 UPDATE: IWF SAFE FROM FUNDING RAIDS

As previously reported Sen. Curren Price (D-Los Angeles) introduced SB 542, legislation that would have made the state-administered Inmate Welfare Fund a source of funding for psychological services to inmates released from county custody. While Sen. Price's idea was well intentioned, it was perhaps less well-informed. Life Support Alliance was one of several stakeholder groups and individuals who expressed immediate concern and opposition to the concept.

BILL/AUTHOR	SUMMARY	STATUS
SB 9/Yee	Juvenile LWOP	Still pending
SB 210/Hancock	community release/ female pot growers	Assembly Public Safety
SB 542/Price	Inmate Welfare Fund	Assembly Public Safety Committee
SB 1088/Price	readmission to schools for youth	cleared Senate, in Assembly
SB 1441/ Emmerson	sentences requiring state prison time	Dead
SB 1363/Yee	Restricts juvenile solitary confinement	Failed committee, back to Senate
AB 327/Davis	3rd strike must be violent	in Senate Public Safety committee
AB 526/ Dickinson	Gang intervention funding	In Senate Public Safety Committee
AB 1270/ Ammiano	media access to prisoners	In Senate Public Safety Committee
AB 1831/ Dickinson	Ban the Box	to Senate Rules for assignment

Following an initial meeting with the Senator's staff, LSA was among a handful of groups who met with Sen. Price and staffers to discuss the concept, the reasons for opposition and the Inmate Welfare Fund in general. All agencies and organizations in attendance, from LSA, through county sheriff's groups to the CDCR itself, opposed the use of IWF funds for the purpose outlined in the bill. Following a second meeting with Sen. Price and staff the Senator came to the conclusion that, while the transitional mental health care services are vitally needed and presently underfunded, the IWF is not the appropriate source for that funding.

The Senator has indeed introduced an amended version of the bill, which will see further changes, as discussions continue. However, gone is the language that would tie the IWF to any funding for county services and the most recent draft of SB 542 clearly states the intent to protect the IWF and make it more responsive and beneficial to prisoners. The newly constituted bill recognizes that the IWF needs examination, oversight and input from interested parties, including prisoners, as to how the monies are used at each institution. To his credit, Sen. Price took his inquiry to the source, meeting at San Quentin and Folsom prisons not only with administration officials, but with prisoners, for their input and suggestions. And as Sen. Price noted, the inmates had substantial knowledge of how the IWF is supposed to work and the problems experienced at each prison, as well as several suggestions for both use of IWF funds and oversight methods.

The Senator honestly admitted that until the advent of SB 542 he was unaware of the IWF and any related problems. Now, however, the inconsistencies in use of these monies, the unacceptable laxness of CDCR oversight of monies derived from inmates and their families, and the ineffectiveness of a fund meant to benefit inmates, has caught his attention and he intends provide a solution. More importantly, Sen. Price has made plain his intention to ask for input from those most affected by the IWF, inmates themselves.

If the Senator is able to fulfill his intentions, this could be a win for all sides. Inmates may see actual benefits from expenditures of the IWF, families may see benefits to their prisoners from the monies they supply and the state may actually be able to wisely use funds. These are the potential positive results—they are by no means assured.

More to come on both Sen. Price's progress on an IWF bill and on the CDCR's stewardship of the existing fund, as LSA will be part of the discussions moving forward.

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

CDCR NEWS

JUDGE HENDERSON TO CDC MEDICOS— NOT SO FAST

Earlier this year CDCR asked United States District Court Judge Thelton Henderson to end the medical receivership imposed in 2002 due to unconstitutionally poor health care for inmates and return control of prisoner health care to the tender mercies of the CDCR. On May 30, 2012 Judge Henderson, while noting that reports indicate the department had made "significant progress in improving the delivery of medical care" to California prisoners that progress was not yet complete. And thus, the Receivership, controlling, upgrading and monitoring the delivery and quality of health care to inmates in California, will stay in place.

In its position to the court CDCR maintained the state had "the will, capacity and leadership to maintain a sustainable system of providing constitutionally adequate medical care" to inmates, and bolstered its case by trotting what it sees as accomplishments over the last six years: "significant improvement in the number and quality of health care staff," use of technology in keeping health care records, and construction and renovation of new health care facilities. These and other similar markers, CDC maintained, shows its ability to provide adequate health care, the department asked Judge Henderson to end the Receivership within 30 days.

And while Judge Henderson said in January that "the end of the Receivership appears to be in sight," after consideration of the plans and proposals presented by both CDC and other stakeholders in the case, the Judge found "the record does not contain sufficient evidence to support [the] assertion" that the state is fully ready to assume control and maintain the quality of prisoner health care. The Inspector General's office will continue to monitor and evaluate the CDC's compliance with the on-going health care plan, but the Court also felt an expert evaluation was needed and proposed a plan to supplement the OIG's inspection and evaluation process.

So for the present, medical care in California's prison system remains under the watchful eye of the federal court and the appointed Receiver, and we can't help but feel this is a good decision. Yes, progress has been made in many areas and some individual institutions have made more progress than others. But the quality and response of the CDCR health care system still remains less than optimal and few, outside of CDCR, are convinced the department will either continue with the in-process improvements or maintain the progress made.

Judge Henderson gave the two sides of the issue until July 20 to file opposition briefs and replies to his proposed plan of action, noting "The Court reserves for subsequent proceedings questions related to post-Receivership governance and Court supervision."

Although this is simply conjecture, perhaps some of the concern from stakeholders and interested parties who are reluctant to see CDCR once again assume control of medical care comes from the fact that many verifiably sub-standard, indeed, often downright dangerous doctors are still employed by the CDCR. Although several are no longer allowed to treat patients, they remain employed, often working in semi-menial jobs, yet drawing their top-tier physician salaries, including the infamous Dr. Jeffrey Rohlfing, who, despite working in the mail room at High Desert State Prison, managed to be the top paid state employee in 2010, raking in an astonishing $777,400 and change. Dr. Rohlfing, was fired for cause (following the death of a prisoner under his care and characterizations of his behavior as "bizarre" and "irrational") but ordered rehired two years later by the State Personnel Board. Or Dr. Allan Yin, also fired following a finding of negligence resulting in the death of two prisoners, but ordered rehired after a nearly 3 year battle, also working in the mail room.

And while Receiver spokesperson Nancy Kincaid said recently that once the state personnel board or courts order the department to re-hire a medical personnel who "you can't trust them with patients, you have to find something for them to do," she added "We want taxpayers to know we had no choice in this." The *Los Angeles Times* has reported that over the last six years more than 30 medical and mental health professionals accused of misconduct have either been reinstated or kept employed pending outcome of disciplinary proceedings. All this 'protection' has cost more than $8 million in wages, not counting the extra costs incurred in finding additional medical personnel to take up the slack. And putting a price on deaths as a result of medical negligence or malpractice is impossible.

So while the CDC continues to maintain it can safely and adequately assume supervision and delivery of medical care, it could be that the Receiver's office is rightfully mistrustful of the department's allegiance to the best interests of patients, who also happen to be prisoners. The CDC's often chanted mantra of "safety and security" must also include the safety and security of patient/prisoners. And if reaching that goal requires continuation of the Receivership into the rest of this year, next year or beyond, we fervently hope the Court will continue to put that goal ahead of all else.

THE TWO FACES OF CCPOA

The process of realignment under AB 109 has created a myriad of changes within the CDCR and has created some strange bedfellows. None stranger than the new incarnation the CCPOA appears to be attempting to sell in the Capitol. Taking a page from a former president, California's once most powerful and most politically feared union is now peddling itself as a 'kinder and gentler' CCOPA. At least on the surface.

In a new publication, being distributed to legislative offices by the union, the CCPOA alternately touts realignment as the way forward while in the next paragraph playing the fear card in whispering about the dangers of sending felons to county custody. In the introduction to this slickly produced booklet the union outlines six ideas they suggest are their "outside the wall ideas for meaningful reform." More than half of their 'outside the walls' ideas also just happen to be key to retaining jobs for CCPOA members. We're sure that's just a coincidence.

In a carefully phrased recap of the last few years of corrections in California the union manages to take an oblique swipe at former Gov. Schwarzenegger for his "settlement of two major federal class action law suit alleging inadequate prison health care," suggesting it was Schwarzenegger's settlement of those suits that lead to the population cap action by the courts. Perhaps the CCPOA needs reminding that far from 'alleged,' the inadequacies in prison health care were proven to the satisfaction of the United States Supreme Court, no easy audience. The new position also manages to trash the policy of sending inmates to out of state prisons, but only for reasons based on money; it costs more and causes lack of (guess what kind of) jobs. What a surprise. The union disparages private prisons as suffering from "inadequate and inexperienced staff, and with management and accountability problems." And in this, those out of state prisons differ from California prisons, how?

The report casts a wistful glance back, to the time when AB 900 build-a-prison-in-every-town was passed, noting "[H]ad AB 900 been implemented as promised, California could have as many as 20,000 additional custodial beds today," neglecting to mention there would probably have been 35,000 prisoners waiting to fill those beds. The union decries the financial crisis the state finds itself in, singling out the recession and "budget crisis" in the state, ignoring the budgetary woes are due in no small part to the exorbitant expenditures over the past several years on prisons and CCPOA contracts. While lamenting the slashing of monies for rehabilitative programs that have occurred recently the CCPOA (finally) acknowledges such programs are "woefully ineffective and underfunded," but omits any mention of their unrelenting drive to secure fat paycheck for their members at any cost.

Cont. on p.51

CALIFORNIA LIFER NEWSLETTER™

CCPOA... cont. from p.50

In an effort to make nice the union report lays out several suggestions for rehabilitation programs, which it has suddenly decided "are crucial to the mission of corrections." Noting, "[W]hile not all inmates are ammenable to rehabilitation, those who are have been essentially abandoned, left with virtually no serious programs to help them succeed." We could ask, just when did CCPOA wake up to this, but we're not sure this is genuine, as we shall explore later in this article.

Even as it makes a plea for more programming for prisoners, CCPOA cannot resist playing the fear card once again, suggesting that many counties may not have the ability to deal with the type of prisoners now being housed in their facilities. As an example the report trots out Sacramento County Sheriff Scott Jones, one of the most vocal advocates of building more county lock ups and one of the loudest and most successful voices in diverting money sent to the counties by the state to building rather than programming. To overcome this problem the union suggests a "hybrid re-entry program," which calls for the state and counties to "re-think their strict interpretation of the law's (AB 109) county-centric shift and consider state-county partnerships as a better means to achieve their goal." Read more jobs for state correctional workers.

The CCPOA even helpfully suggest a couple of out-state programs that "prepare inmates near the end of their term to successfully assimilate back into society." Thus effectively cutting lifers out once again. Apparently the union's newly-discovered interest in rehabilitation hasn't yet figured out that it must start well before 6 to 12 months prior to end of sentence.

Our friends in green also suggest a trio of measures they advise the legislature take requiring more legislative approval for changes within the department and more reports of departmental actions. These would indeed be very helpful, but as just about anyone familiar with the workings of the legislature knows full well, none of these have much chance of serious consideration, let alone passage and implementation. But it sounds good.

The final page of the 10 page report wraps up all the points the union hopes to make, from the dangers of realignment to protection of jobs, in one short paragraph; "In the interest of public safety, we recommend that supervision of the above listed offenders [a short list of what the report terms "very serious and violent offenders"] immediately return to the Division Adult Parole Operations under the California Department of Corrections and Rehabilitation." Fear and jobs, all in one sentence. Well done.

In what is perhaps the single, most honest statement in the entire presentation, CCPOA notes "the members of CCPOA have a direct and vested interest in the future of corrections and public safety policy." The report ends by boldly stating, "We're prepared for the long process of recovery and renewal that lies ahead." Good to know, CCPOA, because you certainly were prepared to participate in the long and ugly process that brought corrections in California to its present sorry state.

So much for the smiling, public face of CCPOA. Now let's see what they really think. The following excerpts were printed in our sister publication, *Lifer-Line*, and were culled from posting on various internet blogs by and for CCPOA members. Full disclosure here, all miss-spellings and incorrect syntax are original to the posts.

"Ever here of a work out?

We show up to work since our job has a "no strike" clause... so we all show up but don't do a damned thing! No releasing inmates to yard etc. but we are there keeping the babies safe and sound and locked up!! If the inmates can get all they want from a state Governor after a couple of effin hunger strikes, then how bout us doing a work-loss strike. We come to work and keep the inmates locked up! "

"The only reason I/M get things from the Gov/ Admin is due to prisoner rights groups that are fighting for them(something we don't have at the moment.)"

"If society only really knew the evils, the dangers and stresses caused by allowing these scumbags in General Population within the Prison; the violence would be even greater. The reason these scumbags are in solitary confinement is because they are violent and dangerous not only to staff but other inmates. They are worse then vicious animals. They are evil and need execution but since California is weak;;; we confine them."

"how we feel about blacks, or mexicans on the street are how we feel about them. but when we step through that gate, their is only two colors guard green and maggot blue."

We could go on, especially in the vein of race relations and union members' trust of their own union, but you get the point. These attitudes aren't new, prisoners and their families have suffered under this mind set for years. What is new is that we now have proof of what inmates have long been subjected to, over and above the punishment set by the courts. You decide which is the real face of CCPOA. And while the new attitude evidenced by the CCPOA in the recent report is interesting, it brings to our mind that well-worn quote from Shakespeare: " O villain, villain, smiling damned villain."

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

PEERING INTO CDCR'S CRYSTAL BALL: THE FUTURE IS MURKY

'The Future of California Corrections" Outlined

While proclaiming progress in reducing overcrowding made via Gov. Brown's realignment plan, the CDCR recently admitted that realignment alone will not bring California's prison population to the level required by the Supreme Court in time for the June, 2013 deadline. But never fear, CDCR has (another) plan, this one that is a blue print for the course of corrections through 2017.

The recently released report "The Future of California Corrections" is 250 page master plan for coming years, complete with tables, charts and a prison-by-prison breakdown of staffing and programming plans through 2017. "It's a massive change," said CDCR Secretary Matthew Cate.

In past years, at the height of CDCR's overcrowding mess, prisons were packed to more than 200% of capacity. Then the United States Supreme Court ruled that California could not house more than 137.5% of its prisons design capacity within the existing prisons.

With recent legislative action to implement realignment and shifting of some categories of prisoners to local lockups, the number of state-held prisoners has been reduced by about 22,000 and the department had hoped to comply with the court order, thereby saving itself from the embarrassment of a federal takeover of corrections. Now, however, CDCR estimates that absent any programs other than realignment, they will miss the cap by about 3.5% or roughly 5-6,000 inmates by next year's court imposed deadline.

Inmate Classification Score System Changes

Institutional Security Levels		
Level	**Current**	**New**
I	0 – 18	No Change
II	19 – 27	19 - 35
III	28 - 51	36 - 59
IV	52+	60+

Reason for Mandatory Minimum Score	Current	New
Condemned	52	60
Life without possibility of parole	52	36
~~CCR 3375.2 (a)(7) Life inmate (multiple/execution style murders; escapes)~~	28	delete
History of escape	19	No Change
Warrants "R" Suffix (sex crimes)	19	No Change
Violence exclusion	19	No Change
~~Public interest case~~	19	Delete
Other life sentence	19	No Change

The newly revealed master plan report suggests, and Cate has confirmed, that instead of speeding up realignment, adding prisoner releases or finding more ways to cut the population, the state plans to request the court modify its order to allow CDCR to house up to 145% of prison design capacity by June, 2013.

Further components of the plan, according to the CDCR, will "build[s] upon the changes brought by realignment, and delineates, for the first time, a clear and comprehensive plan for the department to save billions of dollars by achieving its targeted budget reductions, satisfying the Supreme Court's ruling, and getting the department out from under the burden of expensive federal court oversight."

In normal parlance, that's called putting the best face on a bad situation; in politics, it's called spin.

The new master plan reports that all the non-traditional or 'ugly beds' have been removed from non-housing areas such as gymnasiums and day rooms and prophesizes that these areas will " once again begin using the previously occupied gymnasiums and dayrooms for their intended purposes." As of yet, however, this has not happened, due to reported staff shortages. In another reversal of past policy the department has announced it will begin returning out-of-state housed prisoners back to California, a process that could take up to 5 years to return the 9,500 California inmates now sitting in prisons from Virginia to Arizona. All of these changes will result, so we are told, in a monetary savings of about $30 billion over a 10 year period.

Another piece of these saved monies will apparently come from staff reductions within CDCR; about 6,000 workers, both administrative and custodial will be cut through enactment of standardized staffing levels, which will provide a "new and uniform ratio" of staff in each prison, based on security level, physical plant configuration and mission. The staff reduction overall seems to be primarily in custody positions, with most institutions on track for increases in such non-custody positions as educational, vocational and plant operations.

The six major points of "Future of Corrections in California" are:

- o Improve inmate Classifications System, which will shift about 17,000 prisoners to lower custody levels, a process that will reportedly begin in a few months.
- o Return out of state housed inmates to California, for an estimated savings of $318 million.
- o Improve access to rehabilitation programs, including educational and vocational, in which the department hopes to enroll about 70% of their 'targeted population.'
- o Standardize staffing levels in each prison
- o Comply with court health care standards, in part by opening a new health care facility in Stockton.
- o Satisfy the court order to reduce overcrowding, if they can convince the court to up the cap from 137.5% to 145%.

Details include closing the aging Norco facility and converting Valley State Prison for Women in Chowchilla to a Level II men's facility. And because realignment is moving many individuals who previously would have been housed in Level I and Level II prisons to county custody, coupled with the new classifications thresholds soon to be put into practice, the department expects that by 2017 it will need nearly 1,000 more Level III beds than are currently in use and over 600 more Level IV beds. The numbers of Level I inmates would decrease by about one half and Level II inmates by nearly

Cont. on p.54

CALIFORNIA LIFER NEWSLETTER™

Crystal Ball... cont. from p.53

one third by 2017. Overall CDC expects to house about 33,000 fewer inmates by June 2017 than were present in June, 2011 including a reduction of about 1,000 prisoners now housed in SHU facilities.

The trend in lower population levels, through fewer new inmates received into the prison system will result in at a couple of upward trends; the numbers of prisoners over 55 years of age within the population will increase and the percentage of prisoners who are lifers will also rise. By 2016 CDC projects prisoners over 55 years old will number about 20,000 and those prisoners classified as lifers will constitute about a third of the population, up from about one in 5 now.

Other major changes will see a change in the classification point system. As the department struggles to keep lower level institutions including fire camps full, it is turning to a 2010 University of California study reviewing the classification system. The study looked at mandatory minimums, custody designations, and the point thresholds that separate the four security levels used by the department and concluded that preliminary scores, not mandatory minimums or custody designations, are the best predictors of risk. The research also showed that the point thresholds could be changed to allow a greater number of inmates to move into less restrictive housing without increasing the risk of serious institutional misconduct. In fact, in some cases, moving inmates into less restrictive housing may lessen the inmate's risk of misconduct.

As a result the department is changing custody point designations and will begin moving prisoners' housing assignments to fit the new model. Several point-carrying designations have been eliminated, which will mean about 9,500 prisoners until now required to remain in Level IV prisons may be eligible to move to Level III and some 7,000 may be shifted from Level III to Level II. The new classification chart is included elsewhere in this issue.

The report also gives more information on the newly evolving gang management strategy, being revamped for the first time in 25 years. So far several new policies have been announced:

- Offer graduated housing and privileges as incentives for positive behavior and impose consequences for gang-related behaviors;
- Offer a step-down program for inmates to work their way from a restricted program back to a general population setting;
- Provide support and education for inmates seeking to disengage from gangs;
- Employ a weighted point system to enhance the integrity of the gang validation process;
- Use segregated housing only for those gang associates and suspects who engage in additional serious disciplinary behavior; and
- Offer programs designed to promote social values and behaviors in preparation for an inmate's return to the community.

CDCR believes these new policies, more details of which are not yet available, will mean a decreased need for SHU housing and toward that end has cancelled previous plans to build 50 new segregated exercise yards, a move the department says will save $2.9 million dollars. And, more importantly, may result in more prisoners being freed at last from virtual life-long solitary confinement in SHU units.

Along with all the logistical changes that CDC is parading for approval comes a commitment, albeit tepid, to create more programming opportunities in education, vocational and self-help groups, including "additional structured programs to address particular needs such as criminal thinking, anger management, and family relationships."

Having apparently just discovered that"[R]esearch has shown that effective programming can reduce an offender's likelihood to reoffend," the department now happily announces "[F]ortunately, the population reductions resulting from realignment will allow the department to significantly increase the percentage of offenders served while also allowing the department to address a much broader array of factors that put offenders most at risk of reoffending.

"Prior to realignment, the department was able to serve only a small percentage of its target population. Realignment has provided the opportunity to increase access and improve its rehabilitative programs, which will significantly lower California's recidivism rate. Under this plan, the department intends to increase the percentage of inmates served in rehabilitative programs to 70 percent of the department's target population prior to their release." Now for the bad news: lifers are not included in the department's 'target population,' which is those prisoners approximately 6 to 12 months away from release.

Once again, lifers are being discounted. If the department is planning on reaching only 70% of the target audience, what portion of lifers will be reached with access to newly increased programming opportunities, given that they are not even part of that target? Yet, of course, lifers need participation in these very programs in order to evidence suitability before the parole board. The one bright spot for lifers, the proposal of "Long-term Offender Models" at four prisons, beginning next year in four prisons which the department projects will have " a substantial population of long-term offenders." Whether lifers are considered part of the 'long term offender' population was not delineated in the report, nor which institutions would be part of the program.

And, according to the new master plan, the" Offender Mentor Certification Program will continue to provide an opportunity for long-term inmates to complete a certification program in alcohol and other drug counseling. Inmates are recruited from various institutions and transferred to the host institution (currently California State Prison, Solano, and the former Valley State Prison for Women) for training. Once certified as interns by the California Association of Alcohol and Drug Abuse Counselors, the inmate mentors are transferred back to their original institution and are paid to co-facilitate substance abuse treatment." This, indeed, is a positive development, as peer-driven programs are among the most successful and accepted.

The department also makes a play to return the prisoner health care system to CDCR control, promising a series of protocol revisions and audit continuations and increases in certain services in an effort to convince the federal courts that CDCR is not only capable but committed to maintaining prisoner health/mental and dental care at a constitutional level. Of all the troubling promises made in the "Future of Corrections" report, this is perhaps the most troubling. After the federal courts appointed a receiver to oversee revamping of correctional health care delivery, California's Inspector General's office began independent inspections for compliance with certain standards. In 2008 the average institutional score was 72 points, below the minimum acceptable 75, and that in only 73% of prisons. Last year's inspection cycle showed an improvement, with the average score recorded at 76.9% and only 4 prisons falling below acceptable standards. But acceptable standards is a relative term, in this case meaning levels of care that meet bare minimum standard for being constitutionally adequate. No one should assume that because this low baseline is met that prison health care is now or will continue to be adequate. Turning the health care system back to the tender mercies of CDCR is a frightening prospect for most prisoners and families.

The one entity with CDCR that affects lifers most, the Board of Parole Hearings, rated only a mere single page in the report. Because parole revocation hearings will become less frequent as fewer former prisoners are placed on parole and those revocation hearings that are held will be handled by local jurisdictions, the BPH will see a reduction in staff, with an estimated 75% of Deputy Commissioner positions eliminated and other staff reductions eventually amounting to roughly 30% of the work force.

Cont. on p.55

CALIFORNIA LIFER NEWSLETTER™

Crystal Ball... cont. from p.54

The BPH will, however, continue to hold lifer suitability hearings, medical parole considerations and a handful of other duties.

The report concludes "This blueprint delineates a clear and comprehensive plan to satisfy the Supreme Court's order, and allow California to regain and maintain control of the prison system for years to come" and promises realignment will enable the department to provide quality healthcare, "improve offender management" and increase opportunities for programming. It also promises eventual monetary savings to taxpayers of $3 billion annually. Those promises are clearly stated.

What isn't clear is what this, or any other plan proposed by CDCR promises prisoners in the way of adequate rehabilitation and conditions of confinement. Fine sounding words and plans; but as the BPH is fond of saying, past actions are predictors of future behavior. On that basis, we are not convinced.

CELLS IN CELLS: THE TRUTH ABOUT BLOCKING TECHNOLOGY

LSA, LSAEF or CLN do not advocate or encourage the use or possession of cell phones by prisoners; the following article is presented only in the interests of factual information to our readers.

We're beginning to wonder if CDCR is following former Vice Presidential candidate Sarah Palin, in 'going rogue' more and more. Latest example: a few weeks ago CDCR signed a contract with Global Tel Link, the for-profit phone company that has a lock on all state inmate phone calls and substantial presence in many county and local facilities, to allow GTL to provide the state with a series of devices to block and/or pin point cell phones in each prison. The rogue part? The contract was signed the day before release of a report from a senate committee that suggested the department not partner with GTL, as the equipment in question is indeed in question—questions whether it works. But perhaps the timing was just a coincidence.

Short backstory: for many years the CDCR has tried, unsuccessfully, to stem the tide of cell phones flowing into prisons. Although each year more phones are confiscated, still the numbers increase. Of course the department continues to maintain the majority of the devices come in via visiting. Lie Number 1.

In a recent press release CDCR Sec. Matthew Cate trumpeted "This groundbreaking and momentous technology will enable [the prison system] to crack down on the potentially dangerous communications by inmates." Lie Number 2. Prison officials and GTL say that a 15 min. call from the prison pay phones costs an average of $2. Lie Number 3. A recent test at Solano State Prison was declared a success, with a reported 4,000 'hits' blocked. Lie Number 4. CDCR maintains that increasingly illicit activities, including ordering 'hits' and coordinating gang activities, are done via cell phone. Lie Number 5. CDCR also claims that although GTL is footing the bill for installing the new technology, the costs of inmate phone calls will go down. This, we suspect, is Lie Number 6.

So let's take a look at the half dozen lies.

1: most cells are smuggled into prisons via visiting rooms by visitors. We have yet to find evidence of any visitor prosecuted for bringing a phone, much less multiple phones. We could, however, go on for pages about the posse of guards and staff who have been found with and prosecuted for bringing phones (among other things) into the prisons. In fact, CDCR's oft-trotted out, ultimate scare tactic on inmates will cell phones actually proves out point. As CDC is so anxious to remind everyone, notorious inmate Charles Manson has twice been found in possession of a phone. Manson has been in segregate custody for years; virtually the only people he comes in literal contact with are staff and guards, so clearly, Manson's phones didn't come in via visiting.

2: The proposed new technology will intercept prisoner communications. In actuality, the report released by the non-partisan California Council on Science and Technology, notes the technology tested cannot capture or prevent 4G, Wi-Fi, MiFi, Skype, text messages or satellite transmission calls. Hardly putting a damper on prisoner communications.

3: The average call from the prison wall phones costs about $2.00. Well, perhaps, but only if the prison the inmate is calling from is within shouting distance of where his family/friends live. Remembering many prisons are in remote parts of the state and most prisoners are not housed near family, our research indicated most calls cost between $2.25 and $2.50, with those requiring some distance, say, from San Quentin to the east coast, can be as much as $25.00 for 15 minutes.

4: The recent 'test' at Solano was successful in identifying and blocking cell calls. The actuality, the report from CCST rates the test as "rudimentary and would, at best, constitute a proof of concept, [but] not an acceptable operational test." Reportedly, testers, carrying detection equipment, went from location to location with housing units until a signal was detected, at which point the test was proclaimed a success.

5: Inmates are calling 'hits' and conducting proliferating illegal activities via cell phone. Stakeholders (including Life Support Alliance) and members of the CCST panel asked the CDC for data on this claim—has the crime rate within prisons gone up? Has crime in society gone up? Have large numbers of crimes been verifiably linked to cell phones? How about scary Charles Manson—were any of his calls linked to crimes? The department is apparently deaf—or has no such evidence.

6: The cost of inmate collect calls will go down. This 'promise' is based on the assumption that, with cell calls blocked and no other avenue available, prisoners will be forced to use the pay phones to call friends and relatives, thus leading to more calls for Big Tele-brother GTL, which, under the laws of economics, means the price per call will go down.

But the economic principal that actually applies here is monopoly; with absolutely no competition, GTL will be able to raise rates on desire, probably citing that other economic principal, supply and demand, after all, there are only so many pay phones available and if the demand goes up those wanting to use them will simply have to pay more.

So, in a rush to grab headlines and look tough on crime, the CDCR signed a the dubious contract with GTL and can now breathe a departmental sign of relief that prisoner will no longer be able to use cell phones and the CDC will not have to confront the real elephant in the room; how those pesky cells are getting into cells. The California Council on Science and Technology, formed by the state to advise the legislature on "to improve science and technology policy and application in California by proposing programs, conducting analyses, and recommending public policies and initiatives," called the issue of prison cell phones "complex" issue that will "require a multi-pronged approach to address." The panel also noted that while the system contracted for, the Managed Access System (MAS), "shows promise, it is not ready for deployment. In point of fact, there are no prisons anywhere in the United States using fully functional managed access system to control cell phone use."

The report noted the only one prison, a federal facility in rural Mississippi, has installed a MAS system and that system is not yet fully functional more than year after installation, due to serious operational problems. While the specifics of these operational problems at Parchman Prison in Sunflower County, Mississippi, were not released, it is probably safe to assume the same problems that dog any MAS system are at play within the prison.

According to the CCST report the most significant of these problems include:

- the inability to block many types of cell communications, including text messages, as mentioned above and possibly incoming calls

Cont. on p.56

CALIFORNIA LIFER NEWSLETTER™

Cells in Cells... cont. from p.55

- inability to triangulate where signals are originating, thus making it ineffective in locating cells' locations
- "bleed over" of jamming signals into surrounding areas, compromising the ability of citizens and law enforcement to use their cell phones; these bleed over issues may open the department and CDC to possible litigation issues.
- There will be "dead spots" within any facility, where no jamming system reaches and which will no doubt quickly be identified by those with cell phones,
- As technology continues to advance, the static system as installed may not be able to keep up with these changes, thus allowing more cell calls to circumvent the MAS net

There are many other questions about the effectiveness and consequences of this alleged high-tech blocking system. Although GTL has assured CDC (or sold them a bill of goods) that the state/citizens/families will bear no cost for the installation and operation of the system, the question of what happens, if and when GTL no longer has the contract for prison telephones, has not been announced. Although Sec. Cate has characterized GTL's installation of the MAS system as "risk free" to the public, if GTL is no longer the successful bidder on prison phone contracts, what then? Is the state obligated to pay GTL to continue operation of the MAS system, whether or not it is effective? Is there a buyout provision? If the contracted system will cost $16.5 to $33 million, and GTL is willing to put out that sort of money without reimbursement, how much money must the company be making on the backs of prisoners and their families, to willingly absorb that amount of expense?

The CCST report notes there is no reliable gage of the effectiveness of the system and suggests a third party provide an evaluation of the success of the system, but who will pay for this suggested evaluation is not laid out. Overall the report concludes "managed access as proposed will not do the job that the [CDCR] wants done," according to CCST Chairman Susan Hackwood. Instead the report recommends a series of lower-tech efforts which it concludes are likely to be more effective in combating the introduction of cell phones into the prisons, thus largely eliminating the need to block calls.

And as logical as this sounds, the CCST is looking at the issue from a logical perspective, which means they've not considered a couple of real, important, if totally illogical components: politics and the CCPOA. Although CDC has often tossed around figures regarding the numbers of cell phones seized over the last few years, the report notes corrections has not identified the scope and size of the cell phone problem and it is therefore difficult to assess what is likely to be successful in combatting the problem and how any given system is working. Members of the committee also expressed pronounced and real surprise at the lack of screening/searches of persons (other than family/visitors) entering prisons. The report notes staff, both free and custody, were often observed entering prison grounds with large bags, coolers and personal items, which were not given even a cursory search.

The council recommends CDCR institute "airport like security screening" at all prison gates and conduct thorough searches of all items, vehicles and personnel at sally ports. And while this sounds simple and logical enough, the howls from CCPOA are already evident. The union's position that such searches are not just unnecessary, they will be expensive to the state and (wait for it) insulting to staff. As per their contract, guards are paid 'walk time,' the time it takes them to walk from their vehicles to their posts within the prison. So, if a CCPOA member takes a side trip on his 'walk' to his post to chat with fellow officers, grab a soft drink or visit the rest rooms, the people of the state of California are paying for those sojourns. And of course, if they have to stop to be searched, this will impeded them from timely reporting to their assigned posts, thus resulting in even more expenses to the state.

As for insulting, we have difficulty understanding why making sure rules are being followed is considered insulting. We do, however, note that when sporadic and short-lived interdiction efforts were tried, such as "Operation Disconnect" a few years ago, over a third of staff intermittently searched were found to have cell phones in their possession coming into the prisons. Whatever the excuse, if the state and CCPOA are as concerned about the safety and security risk created by cell phones, it is hard to understand why they would not be willing to take any actions necessary to stop the proliferation of items said to be so threatening.

So if staff has to take a few extra minutes, for which they are paid, we have trouble understanding why that would be considered insulting.

And while CDCR spokesperson Dana Simas has been quoted as saying such security searches are "shortsighted and fail to attack the root of the problem," it would seem that stopping the introduction of contraband is CDCR's usual modus operendi and does indeed, attack the root of the problem—contraband.

The most interesting aspect of the CCST's report on the cell phone/prisoner issue dealt with societal issues. Following the logical principal of asking those most involved by the issue, members of the CCST spoke with prisoners at several California prisons regarding the why and how usage of cell phones. The report gathered "a unique perspective on the contraband cell phone issue. The opinion expressed by some inmates during those visits was that cell phone used by prisoners allowed unfettered contact to family and loved ones otherwise unavailable. The question, "If cell phones were provided as part of the IWTS, and knowing that the calls were recorded, would this deter cell phone use?" was answered with a "no"; the inmates indicated that they were used to their calls being recorded when using the IWTS. There was also acknowledgment by the prisoners that a percentage – small by the inmates' estimation – of cell phone calls are used for illicit and illegal activity. It was noted by the CCST Project Team that access to cell phones (even if monitored by CDCR via computers with screening software) offers to many inmates an ongoing connection to family and friends, as well as entertainment on smart phones (such as games, videos and ESPN sports games). Consideration could be given to piloting a method to screen contraband cell phone calls (rather than blocking) to better understand the impacts that the phones have on prisoner recidivism and overall prison temperament."

This novel recommendation is analogous to LSA's repeated suggestion that limited use cell phones be allowed as an earned privilege as a way to bolster the family unity connection that CDCR repeatedly says it is committed to bolstering, yet takes every action conceivable to damage. There is as yet no announced time line for the installation of the MAS systems in the institutions it is expected to begin within the next 6 months. The length of time needed to fully install all systems and just how well they will work, what problems will be manifested and how the CDCR will spin the results will be something we will be attentive to and reporting on.

In the interim, while the department seems smugly satisfied with its new contract, we suspect the results will do little to impede the operation of cell phones in prisons and more importantly, nothing whatever to prevent the introduction if this and other contraband.

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

BOOK REVIEWS

Book Review: "Life After Murder – Five Men In Search of Redemption"
Author: Nancy Mullane Published by: Public Affairs Books, June 2012; 352 pp.
(Hardcover $17.63, amazon.com)

by John E. Dannenberg

With a gripping meld of investigative journalism and personal involvement, author Nancy Mullane digs into the true meaning of "life with the *possibility* of parole" for California murderers. Tracking the cases of five men who have done much more time than their minimum sentences, and whose families unswervingly supported them for decades in hope of their eventual release, Mullane learns the ropes of what it takes to get paroled from a life sentence in California. Visiting the men weekly at San Quentin State Prison, she earns the respect of prison staff, and the trust of the lifers, to be allowed meetings in cell blocks, the chapel, and the prison yard.

None of the five is certain that the Board of Parole Hearings will ever find him "suitable" and fix a parole release date, much less that even if it does, the Governor will not reverse the Board. Delving into each one's difficult story of their crime; getting to know their family members on the streets; interviewing the prisoners' attorneys; querying staff – from prison guards to seasoned prison executives – Mullane took the pulse of every facet of the parole process.

More than just reporting on the status of parole hearings, Mullane learns the intimate details of self-help programs the men depend on for rehabilitation; how prison disciplinary reports can ruin one's hopes for a "date"; and how the men and their families deal with the repeated disappointments of parole denials and reversals.

Mullane makes effective use of the "flash back" writing style, putting an element of suspense in the book that mirrors what the men and their families are contemporarily going through. All are eventually paroled (a rare event for California lifers), and Mullane follows each one home to chronicle the moments of joy of the families and the lifers as they first taste freedom, following decades of confinement. Importantly, Mullane continues to follow their lives as the five struggle to reintegrate into society.

Life After Murder serves a need for public understanding of what California's lifer parole process really involves; it serves the dual purpose of reporting that the recidivism rate of such paroled murderers is less than 1%, permitting the reader to be informed that releasing the "worst of the worst" prisoners, murderers, is – counterintuitively, but importantly – a win-win situation for the financially strapped California prison system as well as for its 10,000 parole-eligible lifers.

Book Review: "My Life With Lifers"
Author: Dr. Elaine J. Leeder. Published by: E-Books Unbound, 2012, $5, amazon.com; or (prisoner orders only) softback, 140 pp., $10 prepaid to: Your Ebook Team, 33 Alondra Road, Santa Fe, NM 87508

by John E. Dannenberg

Dr. Elaine Leeder, Dean of the School of Social Sciences at Sonoma State University, offers a concise, compassionate view of the life and psyche of California prisoners serving term-life sentences. After a long career including volunteering first to teach prisoners in New York State, and, later, for a decade in San Quentin State Prison, Dr. Leeder has blended her deeply personal humane support of the underdog with her expertise as a sociologist to show that people "thrown away" by society upon their convictions of murder are still people, capable of rehabilitation, and eager for the chance to gain the tools for reintegration by intensive education in prison.

My Life With Lifers chronicles Dr. Leeder's interaction with life prisoners at San Quentin in a round table discussion group she leads there, "New Leaf on Life." Each month, Dr. Leeder brings a guest speaker – a professor, or student – to lead the group in discussion on a topic far from prison life. The speaker engages the lifers' minds in thought processes taking them to new levels – virtually daring them to learn, interact in dialogue, and yearn to learn more. Many of the men also participated in college level classes offered by volunteers from a local private university.

But Dr. Leeder found the educational process was a two-way street. In hearing the men speak in the group, and in side conversations, she learned many of their personal stories: their crimes, their troubled upbringing, their lack of education, and, most importantly, their incredible struggle against society to gain parole. Dr. Leeder gained an education herself from these lifers. In her book, she reveals many of their stories, and their struggles (some successfully) to gain parole, where they were able to parlay the social skills learned in New Leaf. "I have learned that there is little to no rehabilitation in prison," she reported. ... "If a prisoner is to transform, it is through sheer grit and determination." "It is the power of the classroom interaction that is the profound experience."

Dr. Leeder identifies failures of the prison system. She notes that aging lifers are becoming an unaffordable fiscal drag that is ironically forcing reductions in education among those not (yet) in prison, literally feeding an incestuous incarceration whirlpool. Having seen what is wrong with "the system" through the eyes of lifers she immersed herself in for a decade, Dr. Leeder offers society a lesson it needs to learn, and heed. "I have learned what I teach," she counseled, "prisoners are people, too."

REMINDER

New mailing address for Life Support Alliance and California Lifer News**:**
PO Box 277, Rancho Cordova, Ca. 95741. All mail, subscriptions and donations, questions, comments should be addressed here. **When you write us please remember to include your complete contact information, including housing assignment, in the body of your letter as envelopes sometimes become separated from contents.**

CALIFORNIA LIFER NEWSLETTER™

The Other Death Penalty Project Level-III Lifer Survey

The Other Death Penalty Project is preparing to conduct a survey of California lifers serving time in Level-III prisons and requests volunteers. In light of the CDCR's announced reorganization plan, many LWOP prisoners will now be eligible for transfer out of the Level-IV system. To serve our constituents and participants, we will conduct a short survey of term-to-life prisoners (and any LWOP prisoners) already down in the Level-III's. If you're interested in helping your fellow prisoners out, please send us your contact information and we'll send you a survey form and a S.A.S.E. to respond. In addition, we'll provide everyone who completes the survey with a copy of our Prisoner's Organizing Kit and copies of the most recent, updated Level-II institutional summaries from the new reorganization plan. And, of course, you'll be placed on our mailing list for any future updates. If you're interested, contact us at:

The Other Death Penalty Project
P.O. Box 1486
Lancaster, CA 93584

LETTERS TO THE EDITOR

CLN welcomes letters, comments and suggestions from our readers on all subjects relating to CDCR and lifers. From time to time as space and time allows we may publish selected submissions; however, we reserve the right to edit for length and clarity. If you wish to submit a letter for possible publication please so indicate in your correspondence to us.

We endeavor to answer all questions and issues but please remember our staff is small and the amount of mail is great. Please address queries on legal matters and requests for representation to Miller Consulting, PO Box 687, Walnut, Ca. 91788.

INFORMATION SOUGHT ON LIFER ISSUES

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

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

Please write us with information on these and other issues affecting lifers and conditions of confinement, to PO Box 277, Rancho Cordova, Ca. 95741. Please include your complete address in the body of your letter.

Volume 8 Number 3 CLN # 45 JUNE, 2012

CALIFORNIA LIFER NEWSLETTER™

LIVING REAL LIFE

A new feature CLN will be presenting in each issue is LIVING REAL LIFE, the where-are-they-now stories of lifers paroled at last and living life. Some of the individuals featured will be icons of the lifer community, whose names and cases are well known, some will be those recently released and just beginning to enjoy their hard won freedom. If there are particular individuals our readers would like to catch up with, please let us know and we will endeavor to find them and ask for their participation.

The first profiles are of John Dannenberg, whose name and legal case are renowned in the lifer world, and Joshua Kaplan, recently released and contemplating his future course. For both John and Josh their new lives have included involvement with the lifers left behind, through assisting with and contributing to the production of CLN.

John Dannenberg

When did you get out, and paroled from what institution?

Jan. 31, 2009, San Quentin.

Success through the courts or board?

Finally released after third appellate court order (reversed Governor), thereby mooting three other pending favorable court cases

What are you doing now (school, job, etc)?

Legal Ass't to lifer attorneys

What was the biggest challenge you faced after release?

Getting travel passes after Paroles screwed up on the Garrido case

Any words of wisdom/encouragement to those still waiting for parole?

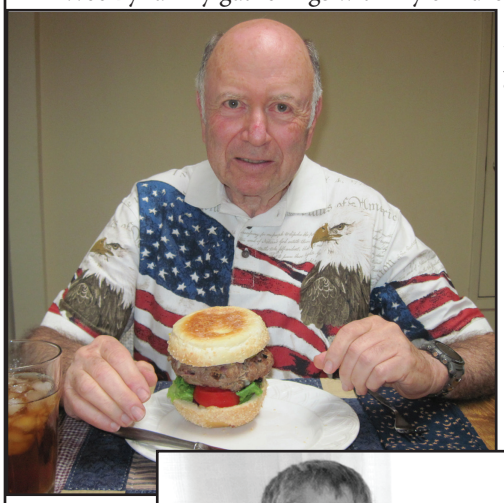
Stay clean; associate only with positive-minded people; set your personal goals high and work daily to achieve them; take time every day to stop and help someone who's hurting more than you are; litigate all your losses -- but get competent help.

Anyone you'd like to send a special greeting to?

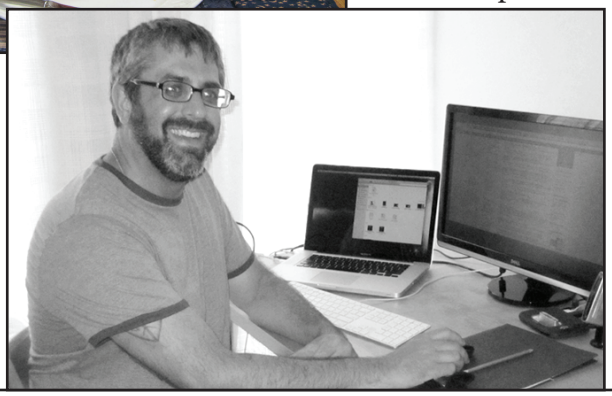
Eleanor Nathan -- you've come a long way!

What's the best thing you've done or experienced since release?

Weekly family gatherings with my children and grandchildren



John eating a "Dannenberger"



Josh at his new favorite place

Josh Kaplan

When did you go in?

1991, the summer between my Junior and Senior years in High School.

When did you get out?

May 2, 2012

Through the Board decision or courts?

A little bit of both. Insightfully I appealed the boards 2009 finding that I lacked insight, lost in Superior, won unanimously in Appellate. In 2011, when I went back before the very same commissioner that denied me in 2009, I was found suitable.

Advice for those going to Board?

1) Whether we like it or not, they make the rules and we have to learn to play their game. 2) Think strategically, we all know that we should be found suitable, but live in reality, hope for that suitable ruling but also plan for the appeal! 3) Even if you don't agree with it, remember they will hold the record as TRUTH. 4) Don't give up, it took me 7 times to the board, and many others many more trips.

What are you doing now? (Plans?)

I am having a blast! I've started back in school working for a Bachelors in Computer Sciences. I have been getting odd jobs doing web design and programming (all skills I taught myself inside), and am also working at a mosaic tile company. I am having so much fun just going for walks or riding my bike.

What prison did you leave from and where are you living?

I was paroled from California Medical Facility-Vacaville and I am now living in Oakland, California

Biggest challenge about re-entry?

Remembering to take it all slowly and not try to do everything at once.

Anything easier than you thought?

So much is easier! This feels NORMAL. I was worried about what it would be like to be in a crowd, but just 2 weeks out I found myself on a BART train coming back from SF that was packed like sardines, and you know what? not a problem.

Best meal out so far?

Everybody that hears my story asks me that, but I tell them that my favorite food is, food! But that first bite of falafel, that will stick with me. And FYI, first meal, Wing Stop, I had been drooling over those commercials for way too long.

I get the biggest kick out of….

Going for walks. I look out the window, its a nice day and I don't have a deadline on a project, I put on my shoes and go for a walk around Lake Merritt. And for those of you who know me, I finally got to walk that mile in a straight line :-)

Volume 8 Number 3 CLN # 45 JUNE, 2012
CALIFORNIA LIFER NEWSLETTER™

15 Things to Give Up

List of 15 things which, if you give up on them, will make your life a lot easier and much, much happier. We hold on to so many things that cause us a great deal of pain, stress and suffering – and instead of letting them all go, instead of allowing ourselves to be stress free and happy – we cling on to them. Starting today we will give up on all those things that no longer serve us, and we will embrace change. Ready? Here we go:

1. Give up your need to always be right.
2. Give up your need for control.
3. Give up on blame.
4. Give up your self-defeating self-talk.
5. Give up your limiting beliefs about what you can or cannot do, about what is possible or impossible.
6. Give up complaining.
7. Give up the luxury of criticism.
8. Give up your need to impress others.
9. Give up your resistance to change.
10. Give up labels.
11. Give up on your fears.
12. Give up your excuses.
13. Give up the past.
14. Give up attachment.
15. Give up living your life to other people's expectations.

UNSIGHT

Tell me the worst thing you've ever done
for that's all you are to me
Speak only of the mistakes you've made
that's all I need to see

Reveal to me your faults and flaws
and the anguish you have cost
failings, to me, are all you are
the rest of you is lost

I will not take you at your word
or acknowledge who you've become
you are to me nothing more
than that dreadful thing you've done

The rest of us are each a sum
but of you such is not true
So tell me the worst thing you've ever done
that is all I"ll see in you

B.Brown 2012

CALIFORNIA LIFER NEWSLETTER™

CLN SUBSCRIPTION FORM

Please add me to your subscription list to receive all issues of CLN beginning with
☐ the last issue
☐ the next issue
☐ other (specify)_____

I am encolsing $_____ or _____ stamps (4 .45cent stamps = $1)

My name, ID, and complete mailing address:

_____

_____

_____

SUBSCRIPTION RATES
Inmates: 1 Year $25; 2 Years $45; 3 Years $65
Other: 1 Year $90; 2 Years $170; 3 Years $250

Back issues: $5.00 (or 20 stamps) each
sent to **CLN, P.O. Box 277, Rancho Cordova, CA 95741**

CLN
California Lifer Newsletter
P.O. Box 277
Rancho Cordova, CA 95741

PRESORTED STD
U.S. POSTAGE
PAID
ORANGE, CA
PERMIT No. 193

Change Service Requested

WHEN DOES YOUR SUBSCRIPTION TO *CLN* EXPIRE?

Your subscription will expire on the date indicated on the first line of the mailing label above. After that date, yo will not receive further issues of CLN without renewal.