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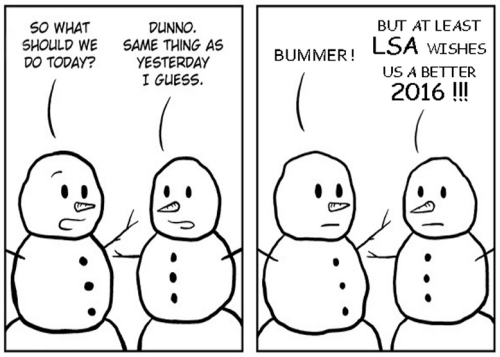
# CALIFORNIA LIFER NEWSLETTER

**CLN/LSA WISHES ALL A GREAT 2016 !**




## State and Federal Court Cases

**by John E. Dannenberg**

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

### STATUS OF *GILMAN V. BROWN*

***Gilman v. Brown***
USDC (N.D. Cal.) Case No. 05- 00830-LKK-CKD
[Ninth Circuit Court of Appeal Case Nos. 14-15613, 14-15680]
July 22, 2014
September 22, 2014

This case, of continuing interest to all lifers whose crimes predated Nov. 8, 1988, but whose BPH grants of parole were reviewed by the Governor, was orally argued and submitted in the Ninth Circuit on June 17, 2015. As of December 4, 2015, no decision has come down.

### STATUS OF *IN RE ROY BUTLER*

***In re Roy Thinnes Butler***
___Cal.App.4th___; CA1(2); A139411
May 15, 2015
CA Supreme Ct. # S227750
July 10, 2015

On October 28, 2015, the CA Supreme Court denied the requests for depublication:

> The requests for an order directing depublication of the opinion in the above-entitled appeal are denied. Werdegar, J., was recused and did not participate.

*Therefore, the published case remains citable.*

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**CALIFORNIA LIFER NEWSLETTER**

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***COURT CASES (in order)***

**Reviewed in this Issue:**

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## ***UC Hastings Law Review Article:***

The opinion of Dr. Even Tsen Lee of the University of California Hastings School of Law was published October 15, 2015, in the U.C. Hastings Law Review. His 155 page article, which deftly challenges California's second-degree felony murder rule as unconstitutionally vague, based on his reading of *Johnson v. United States* (576 US ___ (2015)), is both thoughtful and analytic, while remaining eminently readable. His thesis is that because "regular" (i.e., express or implied malice) second-degree murder requires proof of a conscious disregard for human life, but second-degree felony murder may occur when a death occurs during commission of another felony where that death involved no conscious disregard for human life, a defendant becomes liable for *felony* murder under mental state culpability *less* than that required for *actual* murder.

# Why California's Second-Degree Felony- Murder Rule Is Now Void for Vagueness

*by* EVAN TSEN LEE

If the conceptual paradigm of malice, and therefore murder, is an intentional killing, felony-murder is miles from that paradigm. What is colloquially referred to as "implied malice" or "conscious disregard" murder already represents a significant attenuation from the paradigm. To be convicted of this form of murder, the government must prove that the defendant acted in the face of a conscious disregard for the risk that a human being would be killed. The defendant must have actually considered that risk and acted in spite of it. Note that conscious disregard of some risk of killing is not enough; it must be consciousness of a *high* risk, which distinguishes this form of murder from mere reckless homicide. A killing in the face of a conscious disregard of a less-than-high risk of killing is involuntary manslaughter, which, in California, is punishable by two, three or four years in prison.

The classic case of involuntary manslaughter is a criminally negligent killing. In such a prosecution, the government need not prove that the defendant actually thought about the risk that

### *PUBLISHER'S NOTE*

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

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his conduct might kill someone, it is enough that a hypothetical "reasonable person" in the defendant's situation would have thought about that risk and desisted from the conduct. When someone kills in this situation, the conduct is highly socially irresponsible, and it deserves both serious condemnation and punishment. As noted above, California law treats this as involuntary manslaughter.

Where the government cannot prove conscious disregard by direct or circumstantial evidence beyond a reasonable doubt, the conviction should be for no more than involuntary manslaughter. Such a killing should not be punishable by life in prison.

Some second-degree felony-murders also meet the requirements for conscious disregard murder. Let them be judged by that standard. It is wrong to lump criminally negligent killings in with conscious disregard killings, both because of the lack of required awareness in negligence and because of the lower risk threshold in negligence. Some felony-murders are nothing more than criminally negligent killings, so the government should not be permitted to get a felony-murder instruction that effectively serves to water down the "reasonable doubt" standard for the requisite mental element of conscious disregard murder. The government should sink or swim based on its ability to prove conscious disregard. Consciousness can be proven by circumstantial evidence, and usually is. Where the government cannot prove conscious disregard by direct or circumstantial evidence beyond a reasonable doubt, the conviction should be for no more than involuntary manslaughter. Such a killing should not be punishable by life in prison.

Accordingly, Dr. Lee recommends that 2nd degree *felony* murder in California be reconsidered as unconstitutionally vague in light of the U.S. Supreme Court ruling in *Johnson*. But, as before, this writer cautions CLN readers that Dr. Lee did *not* suggest that second degree *implied malice* murder (i.e., where you were the actual killer) was unconstitutionally vague under *Johnson*.

## GANG VALIDATION OVERTURNED FOR LACK OF "DIRECT LINK" TO GANG MEMBERS

***In re Manuel Martinez***
CA1(2); A142502
November 18, 2015

The California Court of Appeal upheld the Humboldt County Superior Court's granting of habeas relief to Manuel Martinez, which had ordered Martinez' gang-validation record expunged from his record, and his release from the Pelican Bay SHU. This published decision is of interest to lifers whose parole denials are linked to faulty gang validations, such as those pinned by CDC on *all* persons sympathetic to a "mass disturbance," e.g., a food strike.

The gravamen of Martinez' challenge to his validation was that there was not a "direct link" to his participation in gang activities. His going along with a gang-orchestrated protest, standing alone, did not provide this "direct link." More was required, as explained by the Court of Appeal.

> To validate Martinez as a Mexican Mafia gang associate, Pelican Bay officials were required to establish by some evidence a "direct link" between Martinez and a Mexican Mafia "validated member or associate," also known as an "affiliate," which must be a specific person. (§ 3378, subd. (c)(4), (c)(8)(D) & (G); *In re Villa*, (2013) 214 Cal.App.4th

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EDITORIAL

LIFE SUPPORT ALLIANCE

*Public Safety and Fiscal Responsibility*
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## 'JUST BARELY' STUPID

Sitting on a commuter train one recent Saturday morning, on my way to a speaking engagement in San Francisco (yes, we go all over to advocate for lifers) I was surrounded by seats full of young yuppies, all decked out in reflective vests and carrying lunch coolers. They were headed for a weekend work crew, 'sponsored' by the county sheriff, working off 'infractions,' in this case, mostly DUIs.

The chatter centered mostly about what kind of hand balm is best in preventing blisters from shoveling, raking and picking up trash. But I started to tune into the conversations when they began talking (complaining) about how many DUIs they had managed to accumulate and the 'price' they were now having to pay for those 'indiscretions.' An almost incomprehensible number—sure, some of it was probably hyperbole, but even if not all true, the numbers were scary. Two in 18 months; 8 in 5 years, and an incredible (claimed) 12 in 6 years. All these young idiots were in their early to mid-20s. With jobs, money, obviously cars—on their way up, they think. This interruption of their weekend plans, intrusion into their life party, was discussed with great astonishment and indignation, a 'how dare they' attitude.

"I was barely drunk the last time," said one. "Next month I'm gonna lose half my income to fines," lamented another. "Really wanted to go Christmas shopping this weekend," wailed a third.

How badly I wanted to slap this self-centered cadre of fools and tell them how lucky they were not to be in jail or prison, working their way through a life term for a DUI that went wrong, when they were 'barely drunk.' How fortunate they were not to have—yet—done that much damage to themselves and the rest of us. How I wanted to throw those airheads in a room with a lifer, newly released after 15 or more years, trying to find a job, re-engage with family, begin life again, not after a weekend of picking up trash, but half a life-time of self-examination and rehabilitation.

But, chances are better than even that sooner or later we at LSA will be dealing with some of these very same individuals, or their kindred souls, after they've wreaked havoc in their lives and the lives of others—and become lifers. And it occurred to me that maybe the best community service these 'pre-lifers' could do wasn't picking up trash for a day, but perhaps it would be more impactful for them, and certainly of more service, if they did spend the day with some paroled lifers, helping with that job search, assisting in learning the ever-present technology that is such a challenge to those coming home, and watching those paroled lifers speak to groups about making amends and giving back after having taken so much. Getting a glimpse of the actual, on-going price they might have to pay if they continue down their present path.

They might learn that being 'just barely drunk' is like having 'just a little gun.' And that person they hit, while 'just barely drunk,' will be more than just barely dead. They might learn their actions, their decisions, lead to consequences that they will be held responsible for and will affect them the rest of their lives. Things all lifers know.

My brief Saturday encounter only proved once again what we continue to say—the public is in less danger from a paroled lifer than from the stranger behind them in the grocery store line. Or entitled, arrogant and self-centered stranger behind the wheel at the next stoplight.

***MARTINEZ* from pg. 3**

954, 970 (*Villa*).) The CDCR, with our Supreme Court's approval, has interpreted this "direct link" "as encompassing a connection that is " 'without interruption or diversion' and 'without any intervening agency or step.' " (§ 3378, subd. (c)(8); *In re Cabrera* (2012) 55 Cal.4th 683, 690–692 (*Cabrera I*).) The warden asserts that Martinez's participation in a prison "disturbance" (Martinez prefers prison "protest") of Southern Hispanics ordered by a person who was later validated as a Mexican Mafia associate (the Mexican Mafia affiliate) establishes this direct link.

We disagree. The warden's evidence shows that Martinez participated in a prison disturbance along with almost 200 Southern Hispanics and Sureños in Facility B that was ordered by the Mexican Mafia affiliate. It does not establish that Martinez participated knowing the disturbance was ordered by the Mexican Mafia gang affiliate (as opposed, for example, to participating at the insistence of another person). In other words, the warden's evidence shows Martinez acted consistent with the order of the Mexican Mafia affiliate, but not that he did so in order to comply with an order from that specific person. The warden does not provide any evidence connecting Martinez to the Mexican Mafia gang affiliate—the only person relied on by Pelican Bay officials to establish the requisite "direct link"—without an intervening step or interruption. Thus, there is no evidence of this "direct link" between the two. Martinez should not have been validated as a Mexican Mafia gang associate. We affirm the trial court's grant of Martinez's petition on this ground. We also decline the warden's implied invitation to expand the CDCR's definition of "direct link" to require nothing more than some evidence of a "straight-forward connection," no matter how attenuated, with a gang member or associate, just as the Fifth District declined to do in *In re Cabrera* (2013) 216 Cal.App.4th 1522, 1535–1540 (*Cabrera II*), upon the remand ordered in *Cabrera I*.

The facts surrounding Martinez' validation were related by the Court.

In December 2011, Pelican Bay officials validated Martinez as a Mexican Mafia "associate." An "associate" is "an inmate . . . who is involved periodically or regularly with members or

***MARTINEZ* cont. pg. 6**

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associates of a gang." (§ 3378, subd. (c)(4).)

In order to validate Martinez, Pelican Bay officials were required to produce at least three "source items," one of which had to be a "direct link" to a validated gang member or associate, including those validated by the CDCR within six months of the established or estimated date of the activity identified. (§ 3378, subd. (c)(4).) Pelican Bay officials validated Martinez as a Mexican Mafia associate based on four source items. The first three were a drawing found in Martinez's possession that prominently depicted a symbol that Mexican Mafia members commonly used to display their gang loyalty; a tattoo on Martinez's back of a symbol Mexican Mafia members similarly used to show their gang loyalty; and a 2008 rules violation report stating that Martinez and three other Southern Hispanic inmates assaulted two Northern Hispanic inmates. Martinez does not contest the validity of these three as "source items," and we shall not discuss them further in any detail.

The fourth source item, which Pelican Bay officials relied on to establish the "direct link" requirement, was a July 2006 rules violation report by Lieutenant A. Navarro. Navarro stated that on June 26, 2006, Martinez and his cellmate participated "in a disturbance which threatened the Institutional Security by covering or barricading their cell front. This act was a continuing effort of the Facility B Southern Hispanic Inmate population in a show of solidarity to protest the moving of any Southern Hispanic Inmate." According to Navarro, every Southern Hispanic inmate on B Facility had refused to move from their assigned cell in a disturbance that began on June 24, 2006, but he did not indicate Martinez had participated in the disturbance before June 26. "These Inmates acted in an organized and structured manner, clearly demonstrating that these actions were planned, organized and consistent with Southern Hispanic group gang activity." Navarro further reported that Martinez and his cellmate were ordered, but refused, to remove their cell covering and submit to handcuffs, refused orders to exit their cell and were then subdued.

For its legal standard of review, the Court adopted the minimal standard of "some evidence" that is used in parole denial decisions.

We independently review the record and consider issues of law de novo as to whether the warden submitted evidence to the trial court that establishes the requisite "direct link" between Martinez and the Mexican Mafia affiliate "[b]ecause the trial court's findings were based solely upon documentary evidence." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677 [reviewing a trial court's grant of a habeas petition regarding a petitioner's suitability for parole].) We uphold the warden's validation if it is supported by at least "some evidence." (*Cabrera II, supra*, 216 Cal.App.4th at pp. 1531–1532; see *In re Shaputis*, (2011) 53 Cal.4th 192, 210 [indicating in a parole case that the "some evidence" standard requires " 'only a modicum of evidence' "].) It is not for us to reweigh the evidence, and the some evidence standard does not allow us to reject the CDCR's reasonable evaluation of the evidence in favor of our own judgment. (*Shaputis*, at p. 210.)

On the other hand, the warden must establish a "rational nexus" between the evidence and his conclusion that it establishes a direct link. (See *In re Lawrence* (2008) 44 Cal.4th 1181, 1226–1227 [parole case applying the "some evidence" standard]). As this court has stated in the parole context, "a determination . . . cannot be predicated merely upon 'a hunch or intuition.' (*Lawrence, supra*, 44 Cal.4th at p. 1213.) Or 'guesswork.' (*In re Young* [(2012)] 204 Cal.App.4th [288,] 308.) A determination for which there is no evidentiary support . . . is arbitrary and capricious. It is not rational." (*In re Morganti* (2012) 204 Cal. App.4th 904, 926.)

When the Warden argued back that the "direct link" did not mean what he himself had agreed it meant in an earlier case (*Cabrera I*), the Court of Appeal shot him down.

The warden also attempts to disassociate the CDCR from the "direct link" definitions the CDCR itself fought for in Cabrera I, contending that the appellate courts have followed these definitions based on a mere "dictionary definition" of "direct." This is misleading, to say the least. Again, our Supreme Court approved these definitions for "direct link" in *Cabrera I as proffered by the CDCR.* (*Cabrera I, supra*, 55 Cal.4th at p. 690 [referring to the "CDCR's definition of 'direct link' (§ 3378, subd. (c)(4)) as encompassing a connection that is ' "without interruption or diversion" and "without any intervening agency or step," ' " italics added]. ) The warden neither renounces these definitions nor gives us reason to deviate from them. To the extent the warden intends to imply by his reference to "straight-

forward connection" that we should expand the boundaries of "direct link" beyond those his own agency advocated and our highest court endorsed in *Cabrera I*, we decline to do so, just as the Fifth Appellate District declined to do in *Cabrera II*.

Indeed, such an expansive "interpretation" of direct link would render that distinct requirement of the CDCR regulations meaningless, since almost any source item could be characterized as having a "straight-forward connection" with a gang member or associate. Gang symbols, such as tattoos, for example, arguably would communicate one's gang affiliation to, among others, gang members and associates. (See *Cabrera I, supra*, 55 Cal.4th at 692 [noting gang expert's statement that "a gang affiliate may collect or keep a copy of [drawings or photos containing coded and hidden messages] to demonstrate his association with [a] validated gang member or associate"].) The direct link element requires more.

For any lifer whose plight of parole denials hangs in the balance on improper gang validation, this published decision offers guidance as to how one might proceed, if caught up in one of the mass disturbances where everyone was written up – even where there was no "direct link" to gang validation.


## GOVERNOR REVERSED BECAUSE THERE WAS NOT "SOME EVIDENCE" OF LIFER'S CURRENT DANGEROUSNESS

***In re Kent Wimberly***
CA4(1); D067596
October 22, 2015

Kent Wimberly has been incarcerated over 35 years on a 25-life for first degree murder. The Board found him suitable at a 2012 parole hearing. Governor Brown, however, reversed the Board's decision, finding Wimberly did not sufficiently address the factors that led him to commit his life crime.

At Wimberly's March 12, 2014 hearing, the Board again found him suitable. This time, the Governor reversed because of the "shocking" nature of the murder and Wimberly's lack of insight into the causative factors of it.

Wimberly was denied habeas relief in the Superior Court. He then petitioned the Court of Appeal, contending that the Governor's decision was not supported by some evidence, and the Governor did not adequately consider the factors of Wimberly's youth, as required by PC § 3051, because he committed the life crime when he was 17 years old. The Court of Appeal concluded that the record does not contain "some evidence" to support the Governor's ultimate conclusion that Wimberly was unsuitable for parole because he currently poses an unreasonable risk to public safety. Accordingly, the Court granted habeas relief and ordered reinstatement of the Board's parole release order.

Wimberly's programming was not disputed. He earned his AA degree, completed vocational programs, and participated in self-help classes. He had no 115s since 1988. His parole plans, multiple housing options, and employment opportunities were good. The sole concern was the nature of the life crime and whether some evidence exists that Wimberly lacks insight into his commitment offense.

Wimberly pled guilty to two counts of first degree murder, committed when he was 17. The principal evidence on his current dangerousness was to be assessed from his three most recent psych evals, which were positive.

The first was prepared by J. Larmer, Psy.D., after meeting with Wimberly on March 28, 2012. In the assessment, Larmer noted: "While it is clear that Mr. Wimberly demonstrated characteristics or traits of Personality Disorder in his youth, there is no evidence to conclude that he has demonstrated such traits or features in many years. His relationships with others appear to be long standing and positive in nature, he does not demonstrate manipulative or antisocial attitudes or behaviors, he has consistently abided by the rules of the institution for many years, and by all accounts he gets along well with others, is respectful, hard working and avoids interpersonal problems."

***WIMBERLY* cont. pg. 8**

***WIMBERLY* from pg. 7**

Larmer also noted: "Wimberly has spent a great deal of time and emotional energy examining the crime, his motivation and the underlying factors which contributed to his decisions and behaviors. Over the years of incarceration he has engaged in individual and group therapy as well as self-help groups aimed at assisting him in understanding the personality factors and situational factors which contributed to the crime. He demonstrates a significant amount of insight into the casual factors of the life crime." Larmer additionally observed, Wimberly "expresses credible remorse for the crime and empathy for the victims and their families."

R. Stotland, Ph.D., prepared the second assessment after meeting with Wimberly on July 19, 2013. Stotland concluded that Wimberly "showed generally fair to good insight" into his life crimes.

The most recent assessment was prepared by Richard Hayward, Ph.D., after meeting with Wimberly on January 24, 2014. Hayward concluded that Wimberly represents a low risk for violence and is a nonelevated risk for violence relative to life term inmates and other parolees. Hayward also determined that "Wimberly has developed understanding of the primary factors that contributed to his commitment offense."

Hayward's analysis emphasized the immaturity of Wimberly's thinking at the time of the life offenses: "He decided to murder Mr. Lauterbach and Ms. Liebrenz with a desperate hope that Eric would be pleased and their friendship would continue. . . . [H]is thinking was immature at the time because he had no resources that would allow him to communicate his thoughts and feelings and help him understand his emotional turmoil and find assistance. He now expresses appreciation of his overwhelming adolescent emotional problems and he explains that he is horrified that he made the decision to commit two murders. He has developed the communication skills he was lacking in adolescence and he now feels comfortable expressing his feelings and communicating with supportive friends and family members. He feels accepted as a gay man and he has developed a supportive network of Christian friends. He associates primarily with pro-social individuals and he expresses a genuine commitment to follow the guidelines of his Christian faith. He has expressed understanding that his rage at the time of the murders was a reaction to his deep feelings of hurt as a misunderstood adolescent with no connection to anyone except Eric."

Hayward also wrote about Wimberly's maturation while incarcerated: "Wimberly has matured substantially while incarcerated and he has developed understanding of the maturity of his thinking and behavior at age 17. He is now able to appreciate the extensive pain he caused to Mr. Lauterbach and Ms. Liebrenz and to their families. . . . He has developed a substantial sense of responsibility."

In 2012, the Board found Wimberly suitable.

The Board determined that "Wimberly does not pose an unreasonable risk of danger to society or a threat to public safety, and is therefore eligible for parole at this time." In reaching this decision, the Board noted that Wimberly had admitted to committing the life crime and took full responsibility for his actions. Further, the Board read from Larmer's assessment of Wimberly, emphasizing Larmer's opinion that Wimberly was a low risk to reoffend if released and demonstrated a significant amount of insight into the causative factors of his life crime.

The Governor reversed based solely on the nature of the crime and his opinion that Wimberly didn't have insight.

The Governor reversed the Board's decision. In doing so, the Governor stated he was concerned by the "heinous and appalling" nature of Wimberly's life crime. Also, the Governor stated that he was "not convinced that Mr. Wimberly has sufficiently addressed the factors that led to the murders or the compulsion to kill that he described to the Board in 2012."

In the 2014 Board hearing, Wimberly specifically spoke to having gained additional insight following the Governor's 2012 concerns.

"[G]oing through this process

> of discovery and answering the question why, the newer insight that I've had, even since the last hearing, even since the Governor's denial when he said that there seemed to be something missing there, and I believe there has been, is that I wasn't just angry at my parents, but that I had projected my anger toward my parents on to Eric's parents. And that part of me wanted to be like Eric, but another part of me wanted Eric to be like me. And when I saw Eric, I saw myself. And when I saw his situation, I saw my situation. And when I saw his difficulties with his parents, I saw my difficulties. And when I saw his desire to kill his parents, I saw my desire to kill my parents. Even though those feelings were not acknowledged in my mind at that time, I see that now. And I've not wanted to admit that because as horrific as the crime is, to me it's a whole nother [sic] of - - it's a whole nother [sic] level of horrificness [sic] to say that the driving force of killing Leon and Gloria, what enabled me to have such violence, what enabled me to continue with the crime and not stop when there were multiple opportunities to stop, to have that lack of empathy and caring for them, was that at some level that I didn't understand at the time, was killing my own parents."

Wimberly also responded to his attorney's question about his reaction to the Governor's reversal of the Board's decision in 2012. Among other comments, Wimberly stated that the Governor "was right" and that he needed to obtain "more clarification" to "come up with some additional thoughts and explanations about how [his] relationship with [his] parents had a huge impact on the crime that [he] committed."

The Board again found that Wimberly did not pose an unreasonable risk of danger to society or threat to public safety and was eligible for parole. In reaching this decision, the Board stressed that it was applying PC § 3051 and gave "great weight" to Wimberly's "diminished capacity" as a juvenile because he committed his life crimes when he was 17 years old. The Board also pointed out that it reflected on the "hallmark features of youth as well as the subsequent growth and maturity that the offender develops during his incarceration."

The Board found that Wimberly was a low risk to violently reoffend. In terms of insight, the Board stated:

> "But of particular note is that on - - for 2-1/2 pages, from pages 8 through 11 of 15, the doctor details the factors of insight that led to the life crime. Which I think is very significant because that is an issue that certainly the Governor was concerned about, that the District Attorney has voiced concern about, and this Panel was very concerned about as well. But clearly the doctor has noted not only the significant insight that you have developed into the causative factors of the life crime, but as your attorney pointed out, you did detail at least 23 different causative factors, and you talked about them in detail during the hearing. So we don't have any reservations in that regard today."

The Governor found Wimberly exhibited a lack of insight. The Governor observed:

> "I reversed Mr. Wimberly's grant of parole in 2013, because I was troubled by Mr. Wimberly's explanation for this vicious crime. I continue to have the same concern today. Mr. Wimberly told the psychologist in 2014 that Mr. Lauterbach began to avoid him after the two had a sexual encounter, and he 'offered to help with the murder so [he] could get in with Eric again.' Mr. Wimberly went on to say '[t]he reality of it was not hitting me. I felt I needed to be part of this to cement my relationship with Eric' and that Mr. Lauterbach would be 'indebted to me forever and couldn't kick me to the curb.' The fact that Mr. Wimberly murdered two people in cold blood to 'cement' his relationship with his friend remains disturbing and is not adequately explained. Mr. Wimberly has not fully addressed the factors that led him to believe that stabbing two individuals to death was necessary to mend his relationship with his friend. I encourage Mr. Wimberly to continue participating in self-help classes, and seek mental health services, to help gain a better understanding of the reasons he resorted to murder solely for the purpose of maintaining a friendship, however intense."

For these reasons, the Governor concluded that "the evidence shows that [Wimberly] currently poses an unreasonable danger to society if released from prison."

The Court related the framework of its review authority.

> As this court recognized in *In re Vasquez* (2009) 170 Cal.App.4th 370 (*Vasquez*), "[t]he granting

***WIMBERLY* cont. pg. 10**

***WIMBERLY* from pg. 9**

of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals as soon as possible and alleviate the cost of maintaining them in custodial facilities. [Citations.] Release on parole is said to be the rule, rather than the exception [citations] and the Board is required to set a release date unless it determines that 'the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration . . . .' " (*Id*. at pp. 379-380; italics omitted.)

Because Wimberly committed his life crime while he was 17 years old, the Board applied section 3051 in considering Wimberly's eligibility for parole. (§ 3051, subd. (a)(1).) That section requires the state to provide a juvenile offender with a meaningful opportunity to obtain release within his or her expected lifetime. (§ 3051, subd. (b)(1)-(3).) In addition, when considering an individual for parole, section 3051 directs the Board or Governor to release the individual on parole as provided in section 3041, except that the Board and/or Governor also is to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c); see § 3051, subd. (d).) Accordingly, although section 3051 provides additional factors for the Board and/or Governor to consider, it does not otherwise alter the suitability factors that inform a parole decision.


The Court discussed the import of *Lawrence* as to *the need to establish a nexus* to *current* dangerousness, in order to overcome the presumption of parole. In looking for this nexus, it found no evidence of it.

> Here, the Governor did not articulate how the life offense indicates that Wimberly would be a current danger to the public if paroled. Certainly the circumstances of Wimberly's commitment offense are despicable and fully justify Wimberly's guilty plea and sentence for first degree murder. These circumstances alone, however, are not "some evidence" supporting the Governor's denial of parole. The inquiry into current dangerousness "cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude." (*Lawrence, supra*, 44 Cal.4th at p. 1221.) We find nothing in the record showing the Governor's reasoning establishing a rational nexus between the life offense and the determination of current dangerousness. (*Id*. at p. 1210.)

The Court then reviewed current law on the question of "insight."

A prisoner's insight into his offenses and his understanding of the nature, magnitude and causes of his crime are important parole suitability factors. (*In re Rodriguez* (2011) 193 Cal. App.4th 85, 97.) Further, a "petitioner's current attitude toward the crime constitute[s] [a] factor[] indicating unsuitability for parole." (*Shaputis I, supra*, 44 Cal.4th at p. 1246.) A conclusion that a petitioner remains dangerous and is unsuitable for parole can be supported by evidence that, among other things, the petitioner "is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming.'" (*Id*. at p. 1260.) However, expressions of insight and remorse will vary from inmate to inmate and there are no special words for an inmate to articulate to communicate he or she has committed to ending a previous pattern of violent or antisocial behavior. (*Id*. at p. 1260, fn. 18.)

"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; italics & fn. omitted.)

As to the Governor's review of "insight," the Court found the question open.

Although case law is clear the Governor can consider a petitioner's lack of insight of the life offense, it is obscure regarding the proper role of this nonstatutory factor for assessing suitability for parole.

More recently, the Supreme Court discussed the "lack of insight" on the part of inmates and how the Governor or parole authorities may use lack of insight in parole decisions. (*In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*).) In that case, the court reaffirmed the requirement of judicial deference to executive branch decisions regarding paroles. The court noted parole authorities can use "insight" as a basis of a parole denial and that judicial review is limited to determining whether there is a modicum of evidence to support the executive decision. (*Id*. at pp. 212-213.) The court also noted that in the wake of its decisions in *Lawrence, supra*, 44 Cal.4th 1181 and *Shaputis I, supra*, 44 Cal.4th 1241—which "reoriented the focus of parole suitability review, making it clear that the inmate's current dangerousness is the crucial determination"—parole authorities were giving greater attention to lack of insight as a basis for this determination. (*Shaputis II, supra*, at p. 217; italics omitted.) Although "[c]onsideration of an inmate's degree of insight is well within the scope of the parole regulations" (id. at p. 218) that direct the Board to consider such factors as past and present attitude towards the crime, the presence of remorse and whether the inmate understands the nature and magnitude of the offense, " '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. 226 (conc. opn. of Liu, J.).)

*Shaputis II, supra*, 53 Cal.4th 192, however, does not require us to defer, absent any review, to the Governor's decision based on lack of insight. Instead, the "some evidence" standard requires us to uphold the Governor's interpretation of the evidence "if it is reasonable, in the sense, that it is not arbitrary, and reflects due consideration of the relevant factors." (*Id*. at p. 212.)

Significantly, the Court found that evidence of insight was in abundance, and that the Governor's claim to the contrary was simply not supported by evidence.

We acknowledge that is not our role to reweigh the evidence presented at the parole hearing or considered by the Governor. (See *In re Shigemura* (2012) 210 Cal. App.4th 440, 457.) However, we observe that a mountainous amount of evidence of insight exists in the record. ...

In addition, the three doctors who assessed Wimberly found that he had insight into his crime. In fact, the most recent assessor (Hayward) went into great detail regarding Wimberly's significant insight. Also, the Board emphasized the insight Wimberly had gained into the causative factors of his life crime and indicated that it did not have any reservations about Wimberly's insight.

Yet, despite the wealth of evidence in the record regarding Wimberly's insight, we are surprised how little the Governor addressed this evidence. Only adding to our astonishment, we note the Attorney General eschews any real discussion of this evidence. We find these omissions a fundamental shortcoming in both the Governor's reversal and the Attorney General's arguments before us.

Rather than conducting an illegal "reweighing" of the evidence, the Court found that the Governor's "opinion" was *devoid* of supportive evidence in the record, and for that reason reversed his decision.

We find that the evidence in the record before us does not support the Governor's finding that Wimberly lacks insight into the causative factors of his life crime. "Where, as here, undisputed evidence shows that the inmate has acknowledged the material aspects of his or her conduct and offense, shown an understanding of its causes, and demonstrated remorse, the Governor's mere refusal to accept such evidence is not itself a rational or sufficient basis upon which to conclude that the inmate lacks insight, let alone that he or she currently remains dangerous." (*In re Ryner, supra*, 196 Cal.App.4th at p. 549.)

In sum, we have searched the record and have determined that the Governor's decision to reverse the Board's finding that Wimberly is suitable for parole is not supported by the requisite "some evidence" that Wimberly currently presents an unreasonable risk of danger to the public if released on parole. Because we reach this conclusion, we do not address Wimberly's additional argument that the Governor's finding on insight ignores section 3051's factors.

***WIMBERLY* cont. pg. 12**

***WIMBERLY* from pg. 11**

As of December 1, 2015, remittitur issued in the case, and no petition for review in the California Supreme Court was filed. Wimberly should be released from San Quentin forthwith.

## GOVERNOR REVERSED BECAUSE THERE WAS NOT "SOME EVIDENCE" OF LIFER'S CURRENT DANGEROUSNESS


***In re Charles Riley***
CA1(2); A145041
December 3, 2015

In another appellate review of a Governor reversal of a lifer grant of parole, the 1st DCA granted habeas relief when it found that there was no evidence supporting the Governor's reason for reversal. It is particularly noteworthy because the lifer was originally on Death Row (his death sentence was commuted after the earlier death penalty was overturned by the CA Supreme Court), and his crime left an indelible mark on the public in his county of commitment, Marin County.

The case is even more unusual, because the same Court of Appeal reversed Riley's prior (2012) denial of parole the Board, and ordered (effective 2014) a new parole hearing. That decision, originally ordered published by the Court of Appeal, was ordered *de*published by the CA Supreme Court on 8/20/14, at the request of the Marin County district attorney.

In the remanded 2014 hearing, the Board found Riley suitable, and granted parole. The Governor reversed his Board, citing the brutality of the crimes and Riley's purported lack of insight. In this final chapter, the Court of Appeal heard Riley's habeas petition alleging a lack of any evidence of his current dangerousness, per the *Lawrence* ruling of the CA Supreme Ct., and reversed the Governor.

> Riley was in 1976 convicted of first degree murder of the parents of his then-girlfriend, Marlene Olive. He was originally sentenced to death, but while his case was on appeal, the California Supreme Court declared the statutory death penalty scheme unconstitutional (*Rockwell v. Superior Court* (1976) 18 Cal.3d 420) and the Court of Appeal modified petitioner's sentence to 25 years to life on each count, said terms to run concurrently. Riley's minimum eligible parole date was set at seven years, June 27, 1982. He has now been incarcerated for more than 40 years.
>
> Riley claims the Governor's reversal of the Board's grant of parole in 2014 is not supported by any evidence and an abuse of discretion. We agree and shall therefore vacate the Governor's decision, grant Riley's petition for writ of habeas corpus, and direct the Board to release Riley pursuant to the conditions set forth in its decision of September 19, 2014, granting him parole and setting a release date.

The Court briefly recounted the crimes:

> "According to the Circumstances of Offense Report dated June 8, 1977, . . . Charles Riley (age 19), and his girlfriend, Marlene Olive (age 16) planned and executed the murder of Marlene's parents on June 21, 1975, in Marin County. Marlene Olive divulged to friends that her boyfriend, Charles Riley, hit her mother on the head with a hammer while she was sleeping in the sewing room of her home. She also stated that her father was shot in the back by Charles Riley. She admitted to wrapping up her parents' bodies in sheets and waiting until dark. Once it was dark, both she and Riley took the bodies to the fire pits at China Camp where the bodies were burned using wood and gasoline. During the trial, witnesses testified that Mr. Riley admitted to killing both victims. Apparently Mr. Riley and Marlene Olive were going to wait until the victims were pronounced dead, collect the insurance money, and go to Ecuador, South America."

In prison, Riley outgrew his teenage drug and marijuana usage, and gained skills and education.

> While incarcerated, he earned a Bachelor of Science degree in Business Administration from Chapman College, his prison work reports were "mostly above average to exceptional," he had completed Vocational Drafting with "A+ grades," and his instructor stated he was employable in that field and

had also completed training as a milling machine operator, a tool grinder operator and a lathe operator.

Riley's last 115 was in 1979, and his pysch evals over the years were uniformly all "low risk" (he consistently scored in the 1st percentile in risk assessments).

In 2014, the same Court of Appeal reversed the Board's denial of parole, setting the stage for its later grant.

On May 22, 2014, we reversed the Board's 2011 ruling. As we explained, Riley's consistent explanations of why he committed his offenses had for decades repeatedly been deemed credible and consistent with other evidence by virtually all of the psychologists and others who had evaluated Riley. The Board's finding Riley was unsuitable for release "rested solely upon circumstances that, if supported by the evidence at all, were not linked by any reasonable theory to a determination of current dangerousness." The record in 2011 provided no evidence Riley's "current mental attitude establishes that despite his excellent and long-standing intervening conduct, he would still pose an unwarranted risk to public safety if released." (*In re Denham* (2012) 211 Cal. App.4th 702, 715.) In addition to the absence of evidence Riley was currently dangerous, we questioned the Board's indifference to extensive evidence that, measured by the regulatory factors pertaining to suitability and unsuitability for release on parole (see Regs., § 2402), Riley appeared suitable for release; a conclusion additionally supported by the unique set of circumstances in which he committed his crimes. As we said, his horrific crimes "were a one-time occurrence, neither preceded nor followed by any evidence of [him] [having a violent nature."

We also rejected the Board's theory that Riley's insufficient understanding of his substance abuse at the time he committed his offenses provided evidence of current dangerousness. As noted in our opinion, "given petitioner's extremely long period of abstinence, and determination to continue with NA and seek help from his network support in the event he was drawn to consider using drugs or alcohol, it is difficult to imagine what more he could have done to address

***RILEY* cont. pg. 14**

***RILEY* from pg. 13**

this concern." We also cited the observation in *In re Stoneroad* (2013) 215 Cal.App.4th 596 (*Stoneroad*) that " '[t]he risk a former drug or alcohol abuser will relapse, which can never be entirely eliminated, cannot of itself warrant the denial of parole, because if it did the mere fact [the] inmate was a former substance abuser would "eternally provide adequate support for a decision that [he] is unsuitable for parole." ' " (*Id*. at p. 625, quoting *In re Morganti* (2012) 204 Cal.App.4th 904, 921.)

Finally, we emphasized that the circumstances of Riley's life crime were so unique that it is difficult to see any nexus between his 30-year-old substance abuse as a teenager and young adult and current dangerousness to the public.

The 2014 Board panel took the hint. After extensive reviews of Riley's feelings about his crime, and how he had grown out of "that person," the Panel explained its conclusions.

Presiding Commissioner Montes identified the specific circumstances indicating Riley was suitable for release: He "did not have a history of violent crime prior to the life crime, as a juvenile or an adult," he "grew up in a stable home environment," had only six minor disciplinary violations, and none during the last 35 years, received numerous "laudatory chronos," had "managed to abstain from alcohol and drugs," continuously participated in NA, and numerous other self-help workshops and in charitable activities, and has "not demonstrated any signs of mental illness while in prison. All of these factors, the presiding commissioner said, "are positive factors suggesting that you do have an interest and a commitment to prosocial conduct."

The presiding commissioner emphasized that the Comprehensive Risk Assessments in 2011, the supplemental risk assessment in 2014, and indeed every risk assessment of Riley since 1997, all indicated a low risk of violence. "[O]f particular note," the presiding commissioner said, "was the very low finding in the clinical construct for psychopathy, which someone with this egregious life crime we would be very concerned about . . . So all of that is favorable."

The Court then dissected the Governor's reversal, to find that the only real "reason" was the gravity of the offense.

On February 6, 2015, finding that "the evidence shows that he currently poses an unreasonable danger to society if released from prison," the Governor reversed the decision to parole Riley.

The Governor's decision is based on the gravity of Riley's "utterly callous and heinous" crime and the proposition that "even after nearly 40 years, Mr. Riley continues to downplay his active role in planning and carrying out these murders."

The Governor's justification of the conclusion that Riley still downplays his responsibility is as follows:

"[Riley] told the psychologist in 2014 that although he and Marlene had discussed killing her parents on prior occasions, 'he did not take her discussions seriously . . . assuming she was simply "venting." ' He said that on the night of the murders he went to Marlene's home to meet Marlene, and only realized that he was expected to carry out the murders when he saw Ms. Olive sleeping. He also claimed that he expected to sneak out of the house after killing Ms. Olive, and only shot Mr. Olive because Mr. Olive turned and saw him. He told the Board that the murders were 'an impulsive act' carried out after plans made the same day. Mr. Riley continues to paint himself as a bystander caught in the grip of romantic infatuation. This is simply not the case. The Court of Appeal's 1978 opinion [which affirmed Riley's conviction] found that Mr. Riley and Marlene had been planning to murder the Olive's 'for some time' because the Olive's objected to their relationship. The two had 'prearranged' for Marlene to lure her father out of the house so that Mr. Riley could enter and kill Mrs. Olive with a 'conveniently placed hammer,' and then shoot Mr. Olive with a gun . . . brought to the house. Mr. Riley's actions were not impulsive; they were calculated and entirely without empathy."

The Court found this reasoning beside the point, however, when reviewed under the proper legal standard.

The Governor's written decision appears to acknowledge that virtually all of the applicable regulatory factors indicative

of suitability for release on parole apply to Riley and, save the gravity of the commitment offenses, none of the factors indicative of unsuitability apply, but found the relatively objective regulatory factors all "outweighed" by Riley's "minimization" of the calculated nature of the life offenses and his role in them and that until Riley "is able to come to terms with his role in this horrendous double murder," he will be unable "to avoid violent behavior if released." On this ground, the Governor reversed the Board's 2014 grant of parole.

Next, the Court summarized the state of the law.

We review the Governor's decision under a " 'highly deferential "some evidence" standard.' " (*In re Young* (2012) 204 Cal. App.4th 288, 302 (*Young*), quoting *In re Shaputis* (2011) 53 Cal.4th 192, 221 (*Shaputis II*).) "[T]he appellate court must uphold the decision of the Board or the Governor 'unless it is arbitrary or procedurally flawed,' and it 'reviews the entire record to determine whether a modicum of evidence supports the parole suitability decision.' ([*Shaputis II*], at p. 221.) 'The reviewing court does not ask whether the inmate is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness. The court is not empowered to reweigh the evidence.' (*Ibid*.) At the same time . . . the Board's decision must ' "reflect[] due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards." ' ([*Id*.] at p. 210, quoting [*In re*] *Rosenkrantz* [(2002)] 29 Cal.4th [616,] 677, and citing [*In re*] *Lawrence* [(2008)] 44 Cal.4th [1181,] 1204 (*Lawrence*), and [*In re*] *Shaputis* [(2008)] 44 Cal.4th [1241,] 1260–1261 [(*Shaputis I*)].)" (*Stoneroad, supra*, 215 Cal.App.4th at p. 616.) We are required to affirm a denial of parole "unless the Board decision does not reflect due consideration of all relevant statutory and regulatory factors or is not supported by a modicum of evidence in the record rationally indicative of current dangerousness, not mere guesswork." (*Ibid*.)

The nexus to current dangerousness is critical. "*Lawrence* and *Shaputis I* 'clarified that in evaluating a parole-suitability determination by either the Board or the Governor, a reviewing court focuses upon "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.' ([*In re*] *Prather* [(2010)] 50 Cal.4th [238,] 251–252.)" (*Stoneroad, supra*, 215 Cal.App.4th at p. 615.) " '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, italics added.) The Board 'must determine whether a particular fact is probative of the central issue of *current* dangerousness when considered in light of the full record.' (*Prather*, . . . at p. 255, italics added.)" (*Young, supra*, 204 Cal.App.4th at p. 303.) " '[T]he proper articulation of the standard of review is whether there exists "some evidence" demonstrating that an inmate poses a current threat to public safety, rather than merely some evidence suggesting the existence of a statutory factor of unsuitability. (*Lawrence, supra*, 44 Cal.4th at p. 1191.)' (*Prather*, . . . at pp. 251–252.)" (*Shaputis II, supra*, 53 Cal.4th at p. 209.)

The Court found the Governor's reasoning wanting for substantive, evidentiary, support of current dangerousness.

The Governor's decision is not supported by any record evidence rationally indicative of current dangerousness, and constitutes "guesswork." (*Shaputis II, supra*, 53 Cal.4th at p. 219.) Nor does the Governor's decision reflect due consideration of the regulatory factors indicative of suitability and unsuitability for release on parole, thus denying Riley the individualized consideration to which he is entitled. (*Id*. at p. 210; *In re Rosenkrantz, supra*, 29 Cal.4th at p. 677; *Lawrence, supra*, 44 Cal.4th at p. 1204;

***RILEY* cont. pg. 16**

***RILEY* from pg. 15**

*Shaputis I, supra*, 44 Cal.4th at pp. 1260-1261.) ...

We cannot affirm the Governor's decision because the premise of his conclusion—that Riley has failed "to come to terms with his role in the double murder"—is unsupported by any evidence.

There being no evidence in the record that Riley "continues to downplay his role in this crime," the Governor's decision cannot stand.

The Court's grant of relief was firm and immediate.

The Governor's decision reversing the Board decision granting Riley parole is vacated. Riley's petition for habeas corpus is granted. The Board's grant of parole is reinstated and the Board is directed to conduct its usual proceedings for release on parole. (*In re Lira* (2014) 58 Cal.4th 573, 582.)

Considering that, according to the Board, Riley's adjusted base term (24 years), increased by aggravating factors and enhancements and reduced by his total postconviction and pre-prison credits (12 years and 7 months), entitled him to a July 1, 1987, "release date," which was more than 28 years ago, this opinion shall in the interests of justice be final as to this court immediately. (Cal. Rules of Court, rule 8.387(b)(3)(A).)


## JUVENILE LWOP, RESENTENCED TO 25-LIFE, ENTITLED TO STATEMENT OF PAROLE HEARING AFTER 25 YEARS

### *P. v. Fidel Rosales*

CA5; F068284
October 16, 2015

When defendant Fidel Rosales was 16 years old, he was convicted of first degree murder and other crimes arising from a drive-by shooting. The trial court sentenced him to life without the possibility of parole for the murder, plus a consecutive 25 years to life for a firearm enhancement.

Defendant appealed and we remanded to the trial court for resentencing in light of *Miller v. Alabama* (2012) ___ U.S. ___ [132 S.Ct. 2455]. (*People v. Rosales* (Oct. 5, 2012, F061036) at pp. 2, 44, 47.) On remand, in October 2013, the trial court resentenced defendant to 25 years to life for the murder, plus a consecutive 25 years to life for the firearm enhancement. The court stayed the terms on the other counts and enhancements.

On this appeal, defendant requests only that we modify his judgment to reflect that, pursuant to Penal Code section 3051, subdivision (b)(3), he will be entitled to a parole hearing during his 25th year of incarceration. The parties agree that the California Supreme Court has approved the inclusion of a minimum term of imprisonment within a sentence, citing *People v. Jefferson* (1999) 21 Cal.4th 86 at page 101, fn. 3, which states: "By including the minimum term of imprisonment in its sentence, a trial court gives guidance to the Board of Prison Terms regarding the appropriate minimum term to apply, and it informs victims attending the sentencing hearing of the minimum period the defendant will have to serve before becoming eligible for parole." The People concede that the judgment should be modified, and we agree.

DISPOSITION

Defendant's judgment is modified to reflect that he shall be entitled to a parole hearing during his 25th year of incarceration, as provided by section 3051, subdivision (b)(3).

## RELIEF FROM EXECUTION DELAY CAUSED BY APPEALS OF CAPITAL CONVICTIONS IS OVERTURNED ON PROCEDURAL GROUNDS

### *Jones v. Davis*

--- Fed. 3d --- ; 9th Cir. No. 14-56373
November 12, 2015

In a case watched closely by Death Penalty foes, the Ninth Circuit US Court of Appeals reversed the district court ruling that had held that the lengthy delay – often spanning decades – between pronouncement of a death sentence and the execution of that sentence, was itself cruel and unusual punishment that augured for disapproving of California's death penalty. The Ninth Circuit did not insert itself into the merits of the Death Penalty issue, but instead ruled narrowly that the claim itself was procedurally barred by a US Supreme Court case that

was aimed at curbing just such endless litigation in the first place.

> The State of California authorizes the execution of a capital prisoner only after affording a full opportunity to seek review in state and federal courts. Judicial review ensures that executions meet constitutional requirements, but it also takes time—too much time, in Petitioner Ernest DeWayne Jones' view. He argues that California's post-conviction system of judicial review creates such a long period of delay between sentencing and execution that only an "arbitrary" few prisoners actually are executed, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Under *Teague v. Lane*, 489 U.S. 288 (1989), federal courts may not consider novel constitutional theories on habeas review. That principle "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). Because we conclude that Petitioner's claim asks us to apply a novel constitutional rule, we must deny the claim as barred by Teague. Accordingly, we reverse the district court's judgment granting relief.

This ruling is not necessarily the end of the litigation. The parties have the right to petition the Ninth Circuit for rehearing, rehearing en banc, and then to petition the US Supreme Court for certiorari review.

Lifer litigators who seek habeas relief in the federal courts should take note of the great limitation imposed by *Teague* on just such post-conviction relief.

## "UNCONSTITUTIONAL VAGUENESS" CLAIM FAILS

***P. v. LaQuincy***
---Cal.App.4th --- ; CA1(1); A141278
May 15, 2015

A "hot" issue these days, spurred by the recent US Supreme Court decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), is "unconstitutional vagueness" as a defense against a prior conviction. In May of this year, the state Court of Appeal ruled that such "unconstitutional vagueness" was not a valid argument.

> A jury convicted LaQuincy Hall of possessing cocaine base for sale, and the trial court placed him on probation for three years subject to various conditions. Two of the conditions admonish him to stay away from weapons and illegal drugs. On appeal, Hall argues that these conditions are unconstitutionally vague and therefore must be modified to prohibit him from knowingly violating them. His position conflates principles involving the vagueness of probation conditions with principles involving the mens rea necessary to establish probation violations. We hold that the conditions here are sufficiently precise, and we therefore affirm. We publish our opinion to provide additional guidance in the hope of reducing misguided appeals and unnecessary appellate modifications of probation terms.

The case was grounded in allegedly vague probation conditions.

> When Hall was placed on probation, the sentencing court admonished him as follows: "You must obey all laws and all orders of the Court and of your probation officer. Any willful violation of your probation can result in you being brought back to court and the maximum sentence being imposed . . . . [¶] . . . [¶] You may not own, possess or have in your custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on your person . . . . [¶] . . . [¶] [A]s further terms of your probation, you may not use or possess or have [in] your custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription."

The Court outlined the legal claim.

***LAQUINCY* cont. pg. 18**

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Let us KNOW!!

***LAQUINCY* from pg. 17**

Hall argues that these conditions are unconstitutionally vague and must be modified to incorporate an express knowledge requirement so that he cannot be found in violation of his probation by unwittingly doing something prohibited, such as carrying a backpack that he does not know contains a weapon or eating a brownie that he does not know contains marijuana. He contends that the weapons condition must be modified to state that he "shall not knowingly own, possess, or have in his custody or control any handgun, rifle, shotgun, or any other firearm whatsoever, or any weapon that could be concealed on his person." And he contends that the drug condition must be modified to state that he "shall not knowingly use, possess or have in his custody or control any illegal drugs, narcotics, or narcotics paraphernalia without [a] prescription."

Hall's position conflates two separate concepts, vagueness and mens rea. As relevant here, the first involves the idea that a probation condition prohibiting conduct related to a category of associations, places, or items (a category condition) may be—but is not always—unconstitutionally vague unless it expressly requires the probationer to know that an association, place, or item is within the category. The second involves the idea that courts may not revoke probation unless the evidence shows that the probationer willfully violated its terms. This mens rea prevents probation from being revoked based on unwitting violations of probation conditions. Courts sometimes confuse the distinctions between knowledge as it relates to vagueness with mens rea principles, and this confusion has led to imprecise or unnecessary appellate modifications of probation conditions.

After a lengthy discussion, the court denied relief, but amended the probation condition statements.

In closing, we summarize our conclusions. First, probation conditions that prohibit conduct related to categories of associations, places, or items may be, but are not necessarily, unconstitutionally vague. Second, when such conditions are vague, they can often be made sufficiently clear by incorporating a qualification requiring the probationer to know that the association, place, or item is within the prohibited category. And third, modifying vague category conditions to incorporate a requirement that the probationer must knowingly violate the condition is imprecise and unnecessary to protect against unwitting violations.

Disposition

The minute order of the sentencing hearing is ordered modified to conform to the trial court's oral pronouncement of the weapons and drug conditions. The weapons condition shall read, "You may not own, possess or have in your custody or control any handgun, rifle, shotgun or any firearm whatsoever or any weapon that can be concealed on your person." The drug condition shall read, "You shall not use or possess or have in your custody or control any illegal drugs, narcotics, narcotics paraphernalia without a prescription." In all other respects, the judgment is affirmed.

*But this is not the end of this case*. On September 9, 2015, the CA Supreme Court granted review. This review will necessarily incorporate influence, if any, now imparted by the recent US Supreme Court decision in *Johnson*. CLN readers who dream that *Johnson* mitigates their state crime convictions can now expect to learn if the CA Supreme Court finds any applicability of *Johnson* – a *federal* law based case – to California state law cases.

## PROP. 36 CASES

## PROP. 36 RELIEF DENIAL OVERTURNED WHERE PROSECUTOR FAILED TO ESTABLISH BURDEN OF PROOF

***People v. Abel Esparza***

--- Cal.App.4th ---; CA 6; H040625

November 25, 2015

Abel Esparza had a long history of drinking and driving, which eventually earned him a life sentence under the Three Strikes law. In petitioning for resentencing relief in the superior court under Prop. 36, he was denied because of the court's perceived failure of Esparza to genuinely attempt to correct his alcohol dependency while in prison. At issue was the question, who has the burden of proof here, and, then, was it met?

The Court of Appeal held that the prosecution has the burden of proof, but that the trial court jumped to its conclusion of Esparza's insincerity in substance abuse reformation

***ESPARZA* from pg. 18**

without the prosecution proving this, by evidence. It reversed and remanded to the trial court for reconsideration of Esparza's Prop. 36 petition.

On September 12, 2013, after the Act went into effect, defendant filed a petition for recall of sentence and request for resentencing under the Act. At the time defendant filed a petition for resentencing, defendant was serving a term of 25 years to life for two felony convictions for driving under the influence of alcohol (DUI) with three or more prior convictions for DUI (Veh. Code, § 23152, subds. (a), (b)). DUI with three or more prior convictions for DUI is neither a violent felony as defined by section 667.5, subdivision (c), nor a serious felony as defined by section 1192.7, subdivision (c).

Ultimately, on January 16, 2014, after a hearing at which defendant's brother testified, the court denied the recall and resentencing petition. Defendant filed a timely notice of appeal.

On appeal, defendant claims that because the trial court applied the wrong definition of unreasonable risk of danger to public safety, this court must reverse the denial of his recall and resentencing petition. Further, he asserts that because the trial court placed the burden of proof on him, his due process rights were violated. In addition, defendant maintains that he had a right to a jury trial. Alternatively, if his request for a jury trial was not preserved for appeal, his due process rights were violated since the court denied his request for a continuance, which resulted in the dismissal of his petition. Finally, defendant argues that along with his right to a jury trial he was entitled to a standard of proof beyond a reasonable doubt and his attorney's failure to assert that standard deprived him of the effective assistance of counsel.

In a well-reasoned published opinion, the Court of Appeal denied relief on all grounds except that pertaining to the burden of proof. At issue were the recency and sincerity of Esparza's attendance in AA to address his long-standing alcohol and drunk driving history. Esparza had introduced evidence of his AA participation in the two most recent years, but the trial court "felt" this was unavailing, and denied relief for want of indicia of such self-help changes. The Court of Appeal found that the trial court reached this conclusion, however, without the prosecution having introduced evidence to show that Esparza remained a danger because of the absence of such self-improvement. Because the prosecution failed its burden of proof, the matter was reversed and remanded to the superior court.

> Plainly, the court did not view the relevant facts as supporting both positions equally. The court described defendant's criminal record—41 misdemeanors, three felonies, 17 times driving on a revoked or suspended license, and a manslaughter conviction. Although the court found defendant's prison record to be "the most stellar" the court had seen for somebody who had been in prison for 16 years, it was the nature of the offenses that defendant committed that concerned the court; and the inference the court drew that defendant only started his AA meetings "simply because the law has been changed and he would be eligible to be reconsidered under the law for resentencing because of the nature of the commitment, which is not a serious or violent felony."

The Act left the dangerousness determination to the court's discretion, considering defendant's criminal history, his conduct while incarcerated, and any other relevant evidence. (§ 1170.126, subd. (g).) Even though the trial court here failed to correctly assign the burden of proof, that failure does not amount to prejudicial error or a due process violation if the prosecution met its obligation under Evidence Code section 115 of proving the facts on which the court based its dangerousness determination.

***ESPARZA* cont. pg. 20**

***ESPARZA* from pg 19**

Certainly, the prosecution produced documents from defendant's prison file, which included the probation report from his 1997 case. In that case, defendant was convicted of two counts of DUI with three or more prior DUI convictions (Veh. Code, 23152, subd. (b)), one count of resisting, delaying or obstructing a police officer, and one count of driving on a suspended license (Veh. Code, § 14601.2, subd. (a)). The probation report documented defendant's prior criminal record—3 felonies, which were drug and alcohol related, 41 misdemeanors, which included 13 DUI's, 17 driving with a suspended or revoked license and three drug-related charges.

Nevertheless, the court based its determination of current dangerousness not only on defendant's prior criminal record, but also on the fact that the court could infer from the evidence before it that defendant was not really sincere in his efforts in AA since defendant had only started his AA classes in April 2013. The prosecution failed to prove that fact. In fact, the records before the court showed that at the time of the hearing defendant had been attending AA meetings for nearly two years starting in the second quarter of 2012, not six months as the court found, and not at a time when it could be inferred that he did so because the law had changed—the Act was not passed until November 6, 2012, several months after defendant began his AA meetings. (See *Yearwood, supra*, 213 Cal. App.4th at p. 167 [the voters approved Proposition 36, the Three Strikes Reform Act of 2012 on November 6, 2012].) Moreover, the prosecution presented no evidence that defendant's commitment to AA was insincere.

In this case, the trial court's analysis became disconnected from the evidence presented. Whether we review this as a violation of defendant's due process rights because the prosecution failed to carry its burden, or abuse of discretion by the trial court. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 [trial court abuses its discretion when factual findings critical to decision find no support in record]) the result is the same. Defendant is entitled to a new recall and resentencing hearing at which the prosecution must present evidence that currently defendant poses an unreasonable risk of danger to public safety. To do so, the prosecution must present substantial evidence that that is the case. By definition, "substantial evidence" requires *evidence* and not mere speculation. In any given case, one "may *speculate* about any number of scenarios that may have occurred . . . . A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' " (*Morris*, *supra*, 46 Cal.3d at p. 21, disapproved on an unrelated point in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

This does not mean that Esparza will win in the trial court, but that he will not be denied relief in the absence of the prosecution meeting its burden of proof of his *current* dangerousness if resentenced. To this end, the Court of Appeal gave guidance to the trial court.

We make the following observations for the benefit of the trial court on remand. In discussing the "some evidence" standard applicable in parole cases, the California Supreme Court has stated: "This standard is unquestionably deferential, but certainly is not toothless, and 'due consideration' of the specified factors requires more than 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." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1210 (*Lawrence*).)

Although we decline to decide how and to what extent parole cases inform the decision whether to resentence a petitioner under the Act or our review of such a decision, we believe that the proper focus is on whether the petitioner *currently* poses an unreasonable risk of danger to public safety. (Cf. *In re Shaputis* (2008) 44 Cal.4th 1241, 1254 (*Shaputis*); *Lawrence*, *supra*, 44 Cal.4th at p. 1214.) Further, we believe that a trial court may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history "*only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.]" (*Lawrence*, *supra*, at p. 1221.) " '[T]he relevant inquiry is whether [a petitioner's prior criminal and/or disciplinary history], when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years [later]. This inquiry is . . . an individualized one, and cannot be undertaken simply by examining the circumstances of [the petitioner's criminal history] in isolation, without consideration of the passage of time or the attendant changes

in the inmate's psychological or mental attitude. [Citation.]' [Citation.]" (*Shaputis, supra*, at pp. 1254-1255.)

## TRIAL COURT HAS NO JURISDICTION TO HEAR A SECOND PETITION FOR PROP. 36 RELIEF AFTER FIRST PETITION IS FINAL

***People v. Manuel Saucedo***
CA 4(3) G050587
November 6, 2015

Manuel Saucedo petitioned the trial court for Prop. 36 relief, which was denied on grounds he was ineligible. That denial was upheld on appeal. Nonetheless, Saucedo petitioned the superior court a second time, making the same claim. The Court of Appeal ruled that, following finality of the first petition, the superior court didn't even have jurisdiction to hear a second petition for relief.

In 1995, a trial court convicted defendant Manuel Anthony Saucedo as a "third striker" and sentenced him to 53 years to life after the jury found him guilty of second degree burglary (Pen. Code, §§ 459, 460, subd. (b)) and evading a police officer (Veh. Code, § 2800.2, subd. (a)). In 2013, defendant filed a petition for recall of sentence after the enactment of Proposition 36. The court ruled him ineligible for resentencing because his prior conviction for attempted murder in 1984 disqualified him under the statute. (Pen. Code, §§ 1170.126, subd. (e)(3), 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv); all further statutory references are to this code.) Defendant appealed the trial court's postjudgment order denying his resentencing petition.

While that appeal was pending, defendant filed another petition for recall of sentence. The trial court reached the same conclusion, finding defendant statutorily ineligible for resentencing based on his 1984 attempted murder conviction. Despite the pending appeal for the denial of his first petition, defendant appealed the denial of his second petition for recall of sentence. In September 2014, this court issued its ruling on defendant's first appeal, finding no arguable issues and affirming the trial court's postjudgment order.

This present appeal concerns defendant's second petition for recall of sentence, in which he argues the trial court failed to exercise discretion under section 1385 to dismiss his prior conviction for attempted murder in determining his eligibility for resentencing. Not only do we disagree with defendant's assertion, but find the trial court lacked jurisdiction to make any finding in regards to defendant's second petition for recall of sentence. Thus, we reverse the trial court's ruling and remand this matter with directions to dismiss defendant's second petition to recall his sentence.

While that ruling is clear, it is instructive to CLN readers to review the law on successive petitions, which the Court explained in detail.

The parties argue at length about whether defendant's second petition for recall of sentence should be barred as a successive petition. However, for procedural reasons, we need not reach this point. A postjudgment order denying a petition to recall a sentence under section 1170.126 is an appealable order (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 601), and once an appeal is timely filed from the first order, the trial court is divested of jurisdiction to consider a second petition on the same issue. (*People v. Perez* (1979) 23 Cal.3d 545, 554 ["The filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur"].) This rule is designed to maintain "the appellate court's jurisdiction by protecting the status quo so that an appeal is not rendered futile by alteration." (*People v. Scarbrough* (2015) 240 Cal. App.4th 916, 923, citing *People v. Alanis* (2008) 158 Cal.App.4th 1467, 1472.) Therefore, "the trial court lacks jurisdiction to make any order affecting a judgment,

***SAUCEDO* cont. pg. 22**

***SAUCEDO* from pg. 21**

and any action taken by the trial court while the appeal is pending is null and void." (*People v. Scarbrough, supra*, 240 Cal. App.4th at p. 923.)

There are very few exceptions to this jurisdictional divestment. For example, "the trial court may, while an appeal is pending, vacate a void judgment, correct an unauthorized sentence, or correct clerical errors in the judgment." (*People v. Scarbrough, supra*, 240 Cal.App.4th at p. 923, citing *People v. Nelms* (2008) 165 Cal. App.4th 1465, 1472.) A trial court may also correct errors in the calculation of presentence custody credits while an appeal is pending. (*People v. Scarbrough, supra*, 240 Cal.App.4th at p. 923, citing *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428.) Under section 1170, subdivision (d)(1), a "trial court has jurisdiction for a period of 120 days to recall a defendant's sentence for reasons rationally related to lawful sentencing and to resentence a defendant as if he or she had not been sentenced previously." (*People v. Scarbrough, supra*, 240 Cal. App.4th at p. 923-924; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 455-456.) Moreover, a trial court has jurisdiction to consider a habeas corpus petition while an appeal is pending so long as the exercise of that jurisdiction does not """interfere with the appellate jurisdiction""" in the pending matter. (*People v. Scarbrough, supra*, 240 Cal. App.4th at p. 924, citing *In re Carpenter* (1995) 9 Cal.4th 634, 645-646.)

Furthermore, once an appellate court issues a final decision, as this court did in defendant's first appeal, it becomes the law of the case. (*People v. Gray* (2005) 37 Cal.4th 168, 196 [""""The rule of 'law of the case' generally precludes multiple appellate review of the same issue in a single case"""]; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 668 ["The doctrine of law of the case . . . governs later proceedings in the same case [citation] with regard to the rights of the same parties who were before the court in the prior appeal"].) In other words, the decision of this court, where we concluded there were no arguable issues on appeal in regards to the denial of defendant's first petition for recall of sentence, is the law of defendant's case. As this court did not grant defendant a motion for a limited remand for the trial court to hear his second petition for recall of sentence, defendant was procedurally barred from

asserting his claims in this second petition. (§ 1260 [an appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"]; *People v. Awad* (2015) 238 Cal. App.4th 215, 222 ["We construe Proposition 47 together with section 1260 to authorize a limited remand to the trial court to hear a postconviction motion to recall a sentence under section 1170.18"].)

As a final point, a trial court should not consider a successive resentencing petition presenting claims previously denied because defendants generally may not assert contentions "piecemeal" by bringing forth successive petitions challenging the judgments against them. (*In re Clark* (1993) 5 Cal.4th 750, 768, 775.) This rule was established to prevent the wasting of scarce judicial resources and to preserve the finality of judgments. (*Id*. at p. 770.) Unlike other petitions, such as a petition for a writ of habeas corpus, a defendant may appeal the denial of a petition for recall of sentence, giving the defendant the opportunity to further exhaust his or her contentions. (See § 1506; 6 Witkin & Epstein, Cal. Crim. Law (4th ed. 2012) Criminal Writs, § 100, pp. 718-719.) For these reasons, successive petitions for recall of sentencing should not be entertained on the merits. As discussed above, defendant's second petition is procedurally barred because the trial court was divested of jurisdiction once his first petition was appealed to the Court of Appeal. However, in the event a defendant does not appeal a prior denial of a petition for recall of sentence, but files a subsequent petition asserting claims previously denied absent a change in applicable law or facts, that subsequent petition should be barred as successive. (*Clark, supra*, 5 Cal.4th at p. 767.)


"You gave away 60 billion toys and didn't get one receipt?!"

## YOU CAN'T USE PROP. 47 TO GET AROUND PROP. 36 DENIAL

***People v. Avalon Jackson***
CA2(1); B263162
November 19, 2015

In a novel approach, Avalon Jackson, who had been denied Prop. 36 relief, petitioned a second time alleging relief under Prop. 47 (Safe Neighborhoods Act), because of his drug-related prior. The Court of Appeal found his reasoning unavailing, and denied relief.

In 1982, Jackson was convicted of robbery and crimes of violence against persons. In 1993, he was convicted of felony possession of a firearm by a felon. In 1999, he was convicted of felony drug possession (Health & Saf. Code, § 11350) and given an indeterminate life sentence under the □Three Strikes□ law (§§ 667, 1170.12).

**As I have grown older, I've learned that pleasing everyone is impossible, but pissing everyone off is a piece of cake.**

In 2014, Jackson petitioned for resentencing pursuant to Prop. 36. The trial court denied the petition because Jackson was ineligible for resentencing because he had suffered a prior disqualifying conviction, a ruling affirmed on appeal.

On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which reduces certain nonserious and nonviolent crimes, such as low-level drug- and theft-related offenses, from felonies to misdemeanors. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 889-890.) A qualifying person serving a sentence for a felony that was reclassified under Proposition 47 may petition the trial court for a recall of sentence and request resentencing, which must be granted "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subds. (a)-(c).) As pertinent here, Proposition 47 amended Health and Safety Code section 11350 to reclassify certain controlled substance possession charges from felonies to misdemeanors. (Health & Saf. Code, § 11350, subd. (a).)

***JACKSON* cont. pg. 24**

***JACKSON* from pg. 23**

Jackson then petitioned for resentencing pursuant to Prop. 47.

> On March 5, 2015, Jackson filed a form petition for recall of his sentence, arguing his felony drug possession offense was reclassified as a misdemeanor by Proposition 47. The trial court denied the petition on the ground that Jackson had suffered a prior disqualifying conviction. Jackson filed a timely notice of appeal.

However, because Jackson had suffered a prior conviction on one of the excluded crimes of violence against persons, he was expressly disqualified from Prop. 47 relief.

> Resentencing under Proposition 47 is unavailable "to persons who have one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 [certain serious or violent felonies] ... (§ 1170.18, subd. (i).) In 1982, Jackson was convicted of ... disqualifying offenses.... Relief under Proposition 47 is therefore unavailable to him.

The bottom line, here, is that Prop. 47 relief of a felony to a misdemeanor does not trump Prop. 36 disqualification for reasons of certain specified types of priors.

## VOLUNTARY MANSLAUGHTER (PC § 192) PRIOR DOES NOT BAR PROP. 36 RESENTENCING ELIGIBILITY

***People v. Leo Hill***
CA6; H040009
November 3, 2015

Although a conviction of voluntary manslaughter might sound like a serious/violent offense that would bar Prop. 36 relief, it in fact is excluded from the statute's list of qualifying offenses.

> In 1998, defendant Leo Samuel Hill, Jr. pleaded guilty to four felony offenses: two counts of assault by means of force likely to produce great bodily injury (Pen. Code, former

§ 245, subd. (a)(1); counts 1 & 4), false imprisonment (§§ 236/237; count 2), and inflicting corporal injury on a cohabitant (§ 273.5, subd. (a); count 3). Defendant admitted that he personally used a deadly weapon in the commission of counts 3 and 4. (§§ 667, 1192.7, 12022, subd. (b)(1).) Defendant also admitted two prior felony convictions that qualified as strikes under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12): a conviction of voluntary manslaughter (former § 192, subd. (1)), and a conviction of "assault with personal infliction of great bodily injury and/or assault with personal use of a deadly weapon."

At the sentencing hearing held in 2000, the trial court imposed an aggregate sentence of 55 years to life, which included consecutive sentences of 25 years to life for the assault charged in count 1 and the infliction or corporal injury on a spouse charged in count 3. Defendant thereafter appealed to this court, which affirmed his convictions and sentence.

Hill's relief came from a pro per habeas petition, which the trial court interpreted as a petition for relief under Prop. 36. However, that court denied relief, claiming Hill was ineligible for relief. In this appeal of that ruling, the Court found otherwise, and granted relief. Relief was appropriate on two grounds: (1) that voluntary manslaughter was *not* a disqualifying offense, and (2) that under the recent *Johnson* decision by the CA Supreme Court, he was entitled to be reconsidered for resentencing as to a third strike attached to the voluntary manslaughter prior.

In 2013, defendant filed a petition for writ of habeas corpus in the trial court, in propria persona. In the petition, defendant requested he be resentenced pursuant to Proposition 36, the Three Strikes Reform Act of 2012 (the Reform Act). The trial court construed his habeas petition to be a petition for recall of sentence (§ 1170.126) but denied the petition for two reasons: (1) defendant's prior conviction of voluntary manslaughter was a disqualifying prior offense under section 1170.12, subdivision (c)(2)(C)(iv)(IV), and (2) one of defendant's current felony convictions was "a felony in which the defendant personally used a dangerous or deadly weapon" and thus a serious felony under section 1192.7, subdivision (c)(23).

On appeal, defendant contends his prior conviction of voluntary manslaughter was not a disqualifying prior offense. Defendant also contends that although he had one disqualifying current conviction, he was entitled to be resentenced on the other counts. In a supplemental brief, defendant contends he was entitled to appointed counsel on his petition for recall of sentence.

We conclude that defendant's prior conviction of voluntary manslaughter as defined in former section 192, subdivision (1) was not a disqualifying offense under section 667, subdivision (e)(2)(C)(iv)(IV) or section 1170.12, subdivision (c)(2)(C)(iv)(IV), both of which apply to "[a]ny homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive." We further conclude that although defendant had two disqualifying current convictions, he was entitled to be resentenced on the other two felony counts under *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), which held that "an inmate is eligible for resentencing with respect to a current offense that is neither serious nor violent despite the presence of another current offense that is serious or violent." (*Id*. at p. 695.) Thus, we will reverse the order denying defendant's petition for recall of his sentence.

As it turns out, many other petitioners seeking *Johnson* relief are also getting action, as the following case summaries relate.

## BAD RECORD DOOMS PROP. 36 RELIEF

***P. v. Curtis Perry***
CA2(5); B261133
October 13, 2015

Curtis Perry sought Prop. 36 relief from his two recent non-violent, non-serious, forgery convictions, from which his past strikes resulted in a 53-life sentence. He was denied relief when the court found him ineligible because one of his 20

***PERRY* cont. pg. 26**

***PERRY* from. pg. 25**

prior strike convictions was for attempted murder – a Prop. 36 preclusive crime.

This case demonstrates the reality of the absolute bar to relief from Third Strike life sentences from non-violent, non-serious current convictions, given such disqualifying priors.

## *JOHNSON* RELIEF TO PROP. 36 RESENTENCING APPLICANTS GRANTED IN NUMEROUS CASES

In CLN #65, we reported on the important recent California Supreme Court ruling in the matter of Timothy Johnson. In that decision, the Court held that if you have two 3-strike life sentences, the fact that one is ineligible for prop. 36 relief does not bar prop. 36 relief for the other. Many lifers who had multiple third-strike life sentences have petitioned, citing *Johnson*, for a redetermination of their resentencing eligibility where one or more of their underlying target offenses were neither serious nor violent. In this issue, we report on several recent cases where "*Johnson* relief" was sought.

### *P. v. Kenneth Wilson*

CA2(7); B260281
October 13, 2015

Kenneth Wilson, sentenced as a third striker to 56-life, petitioned under Prop. 36 for recall of his


sentence and resentencing as a second strike offender. The trial court held Wilson was ineligible because one of the commitment offenses, assault by means of force likely to produce great bodily injury and with a deadly weapon (former § 245, subd. (a)(1)), is a serious felony. (See § 1170.126, subd. (e)(2).) On appeal, citing to the *Johnson* ruling, the Court found he was eligible for resentencing and reversed the trial court.

> A jury convicted Wilson in 1996 of inflicting corporal injury on a cohabitant (§ 273.5, subd. (a), count 1), making a terrorist threat with the use of a knife (§§ 422, 12022, subd. (b)(1), count 2) and assault by means of force likely to produce great bodily injury and with a deadly weapon (count 3) with findings he had suffered one prior serious felony conviction for voluntary manslaughter (§ 667, subd. (a)(1)) and four prior convictions qualifying him for sentencing under the three strikes law (§§ 667, subds. (b)-(d), 1170.12). The jury also found Wilson had four prior felony convictions that were predicates for a separate prison term enhancement (§ 667.5, subd. (b)). ...
>
> Wilson argues he is entitled to recall of his third strike sentence for infliction of corporal injury on a cohabitant because the offense is neither a serious nor a violent felony and an inmate's eligibility for resentencing under Proposition 36 should be determined on a count-by-count basis. The Supreme Court recently addressed this issue in *People v. Johnson* (2015) 61 Cal.4th 674, holding that Proposition 36 "requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a three-strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life." (*Johnson, supra*, at p. 688.)
>
> Based on this holding, although Wilson's convictions for aggravated assault and making a criminal threat with a deadly weapon enhancement are disqualifying serious felony convictions under section 1170.126 (see §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), he is nonetheless eligible for recall of his indeterminate sentence for inflicting corporal injury on a cohabitant. On remand, the trial court must resentence Wilson for inflicting corporal injury on a cohabitant pursuant to section 1170.126, subdivision (f), if Wilson satisfies all the criteria set forth in subdivision (e), "unless the court, in its discretion, determines that resentencing [Wilson] would pose an unreasonable risk of danger to public safety."
>
> DISPOSITION
>
> The order is reversed, and the matter remanded with directions to grant the petition for recall of sentence and to proceed in accordance with the procedures specified in section 1170.126 regarding the sentence for inflicting corporal injury on a cohabitant.

## *P. v. Lester Tuthill*

CA4(3); G050469
October 13, 2015

Lester Tuthill appealed from an order dismissing, in its entirety, his petition for recall of his two indeterminate life sentences under Prop. 36. He was granted relief under the new *Johnson* authority.

> Defendant argues the trial court erred because he remained eligible for resentencing on one of the two consecutive indeterminate life sentences imposed, even though he was ineligible for resentencing on the other. The Supreme Court has recently ruled this interpretation of section 1170.126 is correct. (*People v. Johnson* (2015) 61 Cal.4th 674.)
>
> Because defendant's counsel did not make that split-eligibility argument in the trial court, he asks us to consider the point for the first time on appeal. He also argues, in the alternative, he is entitled to relief because his counsel was ineffective in failing to raise the issue below. He has made the ineffective assistance of counsel claim both in this appeal and by way of a separate petition for writ of habeas corpus.
>
> As defendant's argument raises a pure issue of law on a clear record, we exercise our discretion to consider the point for the first time on appeal. And in light of the controlling Supreme Court authority, we reverse the order and remand the case to the trial court with directions to find defendant eligible for resentencing on his conviction for escape from the lawful custody of a peace officer without force (§ 4532), and to hold a hearing to determine whether "resentencing the petitioner [on that conviction] would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

Tuthill was literally saved by *Johnson*.

> [O]ur task has been made easy by *Johnson*. There, the Supreme Court addressed the very situation presented in this case – a defendant whose sentence incorporated two consecutive indeterminate life terms, one for an offense which would otherwise be eligible for resentencing under section 1170.126, and another for a more serious offense which was not eligible. The court concluded section 1170.126 "requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a three-strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life." (*Johnson, supra*, 61 Cal.4th at p. 688.)
>
> Applying *Johnson* here, as we are compelled to do, we reverse the trial court's order dismissing defendant's petition and remand the case for further proceedings to determine whether the indeterminate life sentence imposed on defendant for the offense of escape should be recalled, and defendant sentenced to a lesser term on that count.


## *P. v. Teddy Young*

CA4(2); E061236
December 2, 2015

Teddy Young was convicted in 1997 of robbery (Pen. Code, § 211) and felony evading an officer (Veh. Code, § 2800.2). He had a large number of prior strike offenses from 1985 and 1989, consisting of 14 robbery convictions and two convictions of assault with a deadly weapon. Four of the strikes (three of the robberies and one of the assaults) involved great bodily injury enhancements under Penal Code section 12022.7. In September 1997, defendant was sentenced to a three strikes term of 25 years to life for the robbery, and a consecutive three strikes term of 25 years to life for the felony conviction of evading an officer. The court also imposed two five-year enhancements for prior serious felony convictions, and two one-year enhancements for prior prison terms. All enhancements were run consecutively to the other sentences. Young's total sentence was 62 years to life.

***YOUNG* cont. pg. 28**

***YOUNG* from. pg. 27**

At issue was whether his conviction of evading a peace officer supported a mandatory Three Strikes life sentence. Citing the new *Johnson* decision, the Court of Appeal held that the robbery conviction did not require mandatory life sentencing on the evading conviction.

> Like the California Supreme Court, we discern no reason, either in historical treatment of three strikes sentences or in the election materials supporting passage of the Act, to treat those seeking resentencing differently from those who face new three strikes sentences under the Act. If new third strike defendants are eligible for a sentence of at least 25 years to life for serious or violent felony offenses and for two strike sentences on other counts involving nonserious or nonviolent felony offenses, then pre-Proposition 36 defendants should be eligible to seek resentencing for individual felony counts that are not serious or violent felonies, notwithstanding that they have also been convicted of other serious or violent felony counts.
>
> Allowing an inmate to petition for resentencing on nonserious, nonviolent counts fulfills the Act's stated purposes, as outlined in the voting materials: to make the punishment fit the crime, to reserve places in prison for dangerous felons, and to save the costs of incarcerating felons who are not dangerous. "By focusing on each count, the amendments 'make the punishment fit the crime.' (Voter Information Guide, [Gen. Elec. (Nov. 6, 2012)] argument in favor of Prop. 36, p. 52, capitalization omitted.) This approach also provides that '[r]epeat criminals will get life in prison for serious

> or violent third strike crimes,' and '[r]epeat offenders of non-violent crimes will get more than double the ordinary sentence.' (*Ibid*.) Because a person convicted of a serious or violent felony will receive a minimum sentence of 25 years to life for that offense (§§ 667, subd. (e)(2)(A), 1170.12, subd. (c)(2)(A)), and will not be granted parole if the Board of Parole Hearings determines that 'consideration of the public safety requires a more lengthy period of incarceration . . .' (§ 3041, subd. (b); see *In re Vicks* (2013) 56 Cal.4th 274, 294-295 [153 Cal.Rptr.3d 471, 295 P.3d 863]), 'truly dangerous criminals will receive no benefits whatsoever from the reform' (Voter Information Guide, supra, argument in favor of Prop. 36, p. 52). And by reducing the sentence imposed for a count that is neither serious nor violent, the amendments allow an inmate who is also serving an indeterminate life term to be released on parole earlier if the Board of Parole Hearings concludes he or she is not a threat to the public safety, thereby 'mak[ing] room in prison for dangerous felons' and saving money that would otherwise be spent on incarcerating inmates who are no longer dangerous. (*Ibid*., capitalization omitted.)" (*People v. Johnson, supra*, 61 Cal.4th 674, 690-691.)
>
> "In sum, [Penal Code] section 1170.126 is ambiguous as to whether a current offense that is serious or violent disqualifies an inmate from resentencing with respect to another count that is neither serious nor violent. Considering section 1170.126 in the context of the history of sentencing under the Three Strikes law and Proposition 36's amendments to the sentencing provisions, and construing it in accordance with the legislative history, we conclude that resentencing is allowed with respect to a count that is neither serious nor violent, despite the presence of another count that is serious or violent. Because an inmate who is serving an indeterminate life term for a felony that is serious or violent will not be released on parole until the Board of Parole Hearings concludes he or she is not a threat to the public safety, resentencing with respect to another offense that is neither serious nor violent does not benefit an inmate who remains dangerous. Reducing the inmate's base term by reducing the sentence imposed for an offense that is neither serious nor violent will result only in

earlier consideration for parole. If the Board of Parole Hearings determines that the inmate is not a threat to the public safety, the reduction in the base term and the resultant earlier parole date will make room for dangerous felons and save funds that would otherwise be spent incarcerating an inmate who has served a sentence that fits the crime and who is no longer dangerous." (*People v. Johnson, supra*, 61 Cal.4th 674, 694-695.)

Under the authority of *People v. Johnson*, we reach the same conclusion here. Defendant was not disqualified from seeking three strikes resentencing on a felony conviction that was not a serious or violent felony merely because he was also convicted of a serious or violent felony. The trial court erred in denying defendant's petition for resentencing on the basis that one of his current convictions was a serious or violent felony. The court's order denying defendant's petition must be reversed, and the matter will be remanded with directions to the trial court to reconsider defendant's petition.

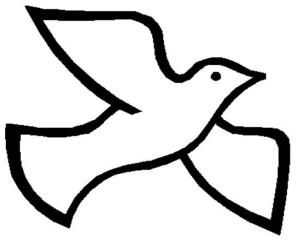
## *P. v. Max Denize*

CA6; H039974
December 2, 2015

Defendant Max Henry Denize is currently serving two consecutive "Three Strikes" life sentences for 1996 convictions for grand theft (Pen. Code, § 484, 487, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a)(1)) (with a true finding on an allegation of personal use of a deadly weapon (§ 1192.7, subd. (c)(23)). Defendant filed a petition for resentencing under section 1170.126. Without appointing counsel, the superior court denied defendant's petition because his assault conviction was a serious felony. On appeal, defendant contends that the superior court erred in failing to appoint counsel to represent him on his petition and in denying his petition. He maintains that his Three Strikes life sentence for grand theft was eligible for resentencing under section 1170.126.

In *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), the California Supreme Court held that section 1170.126 "requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a three-strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third-strike sentence of 25 years to life." (*Johnson*, at p. 688.) Defendant's grand theft conviction is neither serious nor violent. Therefore, under *Johnson*, the superior court's reason for denying defendant's petition is invalid.

The superior court's order is reversed. On remand, the superior court is directed to appoint counsel for defendant to represent him on his petition.



**BOARD OF PAROLE**

## BUSINESS AT THE BOARD—LSA PRESENTS


The October and November business sessions to the BPH Executive Meetings were relatively short, with the most interesting presentations presented by Dr. Cliff Kusaj, head of the Forensic Assessment Division, and—by Life Support Alliance. Not exactly east-meets-west or poles apart, but certainly different.

Dr. Kusaj reported to the board both in October and November on the backlog of CRAs, time frames for getting back on track in getting those reports to prisoners and attorneys in a timely fashion, and on the meaning of some of the factors of those reports—see story elsewhere in this issue for more details. LSA, responding to an invitation from the BPH, gave an over-view of what we do, our mission and how we accomplish that mission. And while the commissioners certainly know us, this was an opportunity to present the full scope of our activities and involvement in issues.

The basics of Kusaj's October report illustrated the numbers of CRAs done by the FAD in 2015 and 2014, which showed a considerable uptick, primarily due to the implementation of SB 260. In 2014 the FAD completed 2,388, and were on track to finish about 2,700 by the end of 2015. He also highlighted the change in the level of assessments, going from 5 (high, medium/high, medium, low/medium and low) to only 3, low, moderate and high.

In November he updated the commissioners on the FAD's efforts to catch up on CRAs, noting more psychs had been hired and the FAD expected to be back on early in the year. He also noted the hardship faced by clinicians with a large number of CRAs to complete. Indeed. To say nothing of the hardship to prisoners when they receive those documents.

In October LSA presented the board with a power point presentation noting our growth over the 6 year period since creation in 2010. From an idea born of the frustration of two 'wifers,' to learn more about the parole process and how to help lifers become suitable, to a state-wide organization publishing 3 newsletters, creating programs to assist in parole readiness and continuing on into reentry for those lifers who are granted parole. All funded by donations, driven by passion for our cause and implemented by a dedicated and all volunteer staff.

*Lifer-Line*, which began on a whim, sent to 3 or 4 prisoners in as many prisons, now has a subscriber list of over 1,500 inmates, with a mail tree of 40+ volunteers who help us service those subscribers in an affordable manner. *CLN,* which we assumed responsibility for in 2012, continues to be the premier publication for lifers, is read by several hundred inmates, officials and attorneys. *After*Life*, rolled out in 2014, addresses issue for those lifers now on parole.

In addition, we hold seminars for lifer families, attend parole hearings to expand our understanding of the process and new procedures, meet with officials and legislators, speak at various meetings and symposiums, provide transcript review reports for lifers, and write, write, write, study, study, study. We were quite appreciative of the invitation from the board to present to them, and pleased to hear Executive Director Jennifer Shaffer note the board recognizes the factual information presented in our publications.

Factual information to the lifer population is what we strive to provide. While some may not like the information, it does no one any good to sugar coat the facts or engage in vindictive hyperbole. Even if we disagree with practices/procedures and interpretations of the law by the BPH, and we often do, the facts are the facts and until laws or procedures change, we will continue to report the how and why of those processes, because what is, is what we must deal with.

*BPH*

## EN BANCS IN OCTOBER AND NOVEMBER

En banc hearings at the BPH Executive meetings in October and November proved to be a decidedly mixed bag, as there were about as many grants sent for reconsideration under rescission as affirmed. But, in a rare turn of events, both prisoners seeking compassionate release to spend their last days outside the wire will be allowed to do so.

In October the panel was also forced to vacate the decision for **Larry Johnson** and schedule a new hearing due to a malfunction or other difficulty which resulted in no recording being made of the hearing.

Also scheduled for new hearings will be **Lyle Crook, Donald Glass, Daniel Slayter, Raymond Turner,** and **Michael Vicks**. Crooks' grant was referred to en banc consideration by the BPH legal time after he was accused, via confidential information, of participating in social media, the inference being he possessed a cell phone. Attorney Marc Norton, appearing on Crooks' behalf, and a parade of family members informed the board that while Crooks did have a social media presence the pages were established and maintained by family and friends outside and that Crooks had no direct access to social media, nor did he possess a cell phone.

Glass, Slayter, Turner and Vicks were referred by the Governor's office, for unspecified reasons, other than Brown felt the grants of parole were "improvident." Attorney Norton also spoke for Glass, telling the panel there was no good cause to hold a rescission hearing. Attorney Brian Wanerman addressed the board on behalf of Slayter, with a well-reasoned, point-by-point response to the Governor's letter. The DA from Stanislaus County maintained the grant should be reconsidered because a Static 99 test given by the FAD clinician rated Slayter as a low/moderate risk, while the same test given by DAPO resulted in a high/moderate rating. The DA, in no surprise, came down on the side of DAPO, labeling the FAD evaluation as 'unreliable,' a term we doubt he would have used had the results been the reverse.

Turner's family spoke in support of his parole. To no one's surprise the DA's office from Los Angeles County opposed the grant. No speakers, either in support or opposition, came forward for Vicks.

Better en banc news for **Marvin Mc Elroy, Edward Grabowski, Willie Ruff** and **Rodney Smith**; grants for all were affirmed by the board, despite some opposition. There were no speakers for McElroy or Ruff, but Attorney David Ramirez spoke on behalf of affirming the grant for Smith, refuting the Governor's letter point by point.

Grobowski's parole was opposed by a self-proclaimed friend of the victim and bail bondsman, who, lumping lifers in with every prisoner cohort, informed the panel the he knew from personal experience that "these people will reoffend 9 out of 10 times," thereby exposing his ignorance about lifers, who, in fact, do not reoffend even 1 out of 10 times. Fortunately, the commissioners were better informed that the speaker and affirmed the grant.

Two split decisions were decided in October, splitting the results. **Michael Adams** was denied parole while **Dennis Jewell** was granted a date, both "for the reasons sated by the panel member who voted to [deny/grant] parole. Of note is that Adams' denial length was set at one year. Also in October the panel sent a positive recommendation to the Governor's office for pardon application made by **Terri Belmonte**.

November's en banc calendar was even more negative, with most inmates taking no joy from the results, except the duo seeking compassionate relief. While the board has been very reluctant over the past several months to grant such requests, both prisoners considered in November, **Alfred Mon**toya and **Michael Wanless**, were granted that relief. While no one spoke for Montoya, members of Wanless' family appealed to the board, a sister noting that Wanless had been treated for cancer at one point while incarcerated, with the promise of follow up care. That follow up care and evaluation was not forthcoming, leaving Wanless now with less than 6 months to live, a story we have heard many times.

***BPH* cont. pg. 32**

***BPH* from pg. 31**

Two inmates, **Daniel Martin** and **David Zepeda**, both referred by the legal team to en banc, saw their dates vacated and new hearings slated. In Zepeda's case alleged institutional misconduct after his medical parole grant placed that grant in jeopardy. Martin's referral came on a technicality involving IN RE: Rosenkrantz that will be examined as the situation unfolds.

The Governor's office referred a total of six grants for en banc in November, four of which were referred for rescission, one grant affirmed and one will be taken up at the December Executive Meeting, apparently after an internal investigation. **Michael Davis, Lawrence Flores, Thi Nguyen** and **Joaquin Ybarra** all will face rescission hearings in coming months. Davis was represented by Attorney Sabina Corcette, who informed the commissioners the 115 that apparently triggered the Governor's concerns was given to Davis in error and should have been removed from his file.

Ybarra's grant was referred for rescission when a majority of the board agreed with the Governor's concerns regarding Ybarra's alleged minimization of gang involvement. Flores was referred due to the Governor's concerns regarding gang association related in his confidential file. Flores' parole was enthuasuastically opposed by Alexis De La Garza of the LA County DA's office, who was plainly dismissive of the CDCR investigative report regarding that alleged affiliation.

In fact, November was something of a tour de farce (pun intended) performance by De La Garza, who made the most of her chances to intensely oppose everyone on calendar from LA County, a performance seen many times at en banc. Although curiously, she had little to say about Hernandez, regarding Nguyen, the DA treated the board to a total recitation of the minute details of the crime, apparently assuming the panel had not read the report.

De La Garza complained that the DA's office had a lack of information on **Merril Richard's** conduct in prison, but nonetheless opposed. And while one would suppose an inmate's conduct in prison would be pretty well documented, the board decided to request a report on any recent misconduct "deemed relevant" by the Chief Counsel and consider the grant at the December meeting.

## NOTES FROM THE PSYCHS

In October parole commissioners and the public received something of a primer by Dr. Cliff Kusaj, head of the Forensic Assessment Division (the FAD, your friendly neighborhood shrink) on data collected by the FAD in the past year. Much of the information has been announced before, in small snippets, often intermixed with other reports and findings. LSA/CLN has reported much of this as it has trickled out, but when the information is released drips at a time it's harder to collect and report and less impactful overall when presented in pieces.

Some of the information will be officially reported on record and in public session in coming months as part of the Board's agreement in settlement of the *Johnson v Shaffer* litigation. Kusaj alluded to as much, when he noted he would "be sharing more information about recidivism rates of long term offenders in the coming months." Stay tuned for breaking news.

However, Kusaj did provide a bit of insight, to coin a phrase, into the FAD's methodology in presenting their findings in CRAs, primarily, in this report, dealing with the differences in the categories of low, medium and high risk levels. It should be recalled that while the CRAs at one time offered 5 levels of risk assessment (High, Moderate/High, Moderate, Moderate/Low and Low) that delineation proved less effective than it was confusing. Is High/Moderate more High than Moderate? Is Moderate/Low more Low than Moderate, and if so, what's it all about, Alfie?

Last year the FAD simplified (as much as a psych can simplify anything) the levels to just 3; High, Moderate and Low. Kusaj reported that about 35% of lifers received low risk assessments, 45.5% were

***CONTINUED*** pg 40

## Board's Information Technology System

Commissioners Summary
All Institutions
October 01, 2015 to October 31, 2015

### Summary of Suitability Hearing Results per Commissioner

| | ANDERSON, JR | BRANCH | FRITZ | GARNER | LABAHN | MINOR | MONTES | PECK | RICHARDSON | ROBERTS | SINGH | TURNER | ZARRINNAM | BPH HQ | Total CMR Hrg | Hrgs Conducted w/ more than 1 CMR | Actual Hrgs Conducted |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Suitability Hrg Total** | **26** | **0** | **26** | **25** | **27** | **26** | **28** | **25** | **22** | **21** | **26** | **28** | **16** | **108** | **404** | **2** | **402** |
| Grants | 9 | 0 | 7 | 6 | 3 | 6 | 4 | 9 | 2 | 1 | 5 | 10 | 6 | 0 | 68 | 1 | 67 |
| Denials | 14 | 0 | 12 | 7 | 18 | 16 | 18 | 13 | 11 | 10 | 15 | 9 | 4 | 0 | 147 | 1 | 146 |
| Stipulations | 1 | 0 | 4 | 2 | 6 | 1 | 1 | 0 | 5 | 2 | 3 | 3 | 2 | 0 | 30 | 0 | 30 |
| Waivers | 0 | 0 | 3 | 3 | 0 | 1 | 0 | 2 | 4 | 6 | 1 | 3 | 2 | 41 | 66 | 0 | 66 |
| Postponements | 2 | 0 | 0 | 4 | 0 | 1 | 5 | 0 | 0 | 2 | 2 | 2 | 2 | 43 | 63 | 0 | 63 |
| Continuances | 0 | 0 | 0 | 3 | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 6 | 0 | 6 |
| Tie Vote | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Cancellations | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 24 | 24 | 0 | 24 |

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

| | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Deny+Stip)** | **15** | **0** | **16** | **9** | **24** | **17** | **19** | **13** | **16** | **12** | **18** | **12** | **6** | **0** | **177** | **1** | **176** |
| 1 year | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 3 years | 12 | 0 | 12 | 5 | 13 | 10 | 8 | 7 | 13 | 5 | 14 | 5 | 3 | 0 | 107 | 1 | 106 |
| 4 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 5 years | 3 | 0 | 4 | 2 | 9 | 7 | 5 | 3 | 1 | 5 | 3 | 2 | 2 | 0 | 46 | 0 | 46 |
| 7 years | 0 | 0 | 0 | 0 | 1 | 0 | 2 | 2 | 2 | 1 | 1 | 4 | 1 | 0 | 14 | 0 | 14 |
| 10 years | 0 | 0 | 0 | 2 | 1 | 0 | 4 | 1 | 0 | 1 | 0 | 1 | 0 | 0 | 10 | 0 | 10 |
| 15 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |

### Waiver Length Analysis per Commissioner

| | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Waiver)** | **0** | **0** | **3** | **3** | **0** | **1** | **0** | **2** | **4** | **6** | **1** | **3** | **2** | **41** | **66** | **0** | **66** |
| 1 year | 0 | 0 | 2 | 0 | 0 | 1 | 0 | 2 | 4 | 6 | 1 | 3 | 2 | 24 | 45 | 0 | 45 |
| 2 years | 0 | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 13 | 16 | 0 | 16 |
| 3 years | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 4 | 0 | 4 |
| 4 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| 5 years | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 1 |

### Postponement Analysis per Commissioner

| | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Subtotal (Postpone)** | **2** | **0** | **0** | **4** | **0** | **1** | **5** | **0** | **0** | **2** | **2** | **2** | **2** | **43** | **63** | **0** | **63** |
| Within State Control | 1 | 0 | 0 | 3 | 0 | 0 | 1 | 0 | 0 | 1 | 1 | 0 | 2 | 39 | 48 | 0 | 48 |
| Exigent Circumstance | 1 | 0 | 0 | 1 | 0 | 0 | 2 | 0 | 0 | 1 | 0 | 2 | 0 | 0 | 7 | 0 | 7 |
| Prisoner Postpone | 0 | 0 | 0 | 0 | 0 | 1 | 2 | 0 | 0 | 0 | 1 | 0 | 0 | 4 | 8 | 0 | 8 |

*BPH*

## A CONSULTATION, NOT A CONSIDERATION

Is there much of a difference? Plenty. It's the difference between finding out if you're going home and finding out what you still need to do to go home. Amidst the changes in implementation of the newest Youth Offender Parole Hearing bill, better known as SB 261, the nuance between a consideration hearing and a consultation hearing seems to be getting lost, even among some correctional counselors who should, theoretically, know the difference.

So for the education and elucidation of everyone, here's a quick definition and time frame. Until recently lifers were accustomed to receiving a Documentation Hearing roughly a year before their initial parole hearing, to let them know where they were in the suitability pipeline. These old 'doc' hearings proved to be less than useful for lifers, as the information was rather cursory and with only about a year to go before an actual parole hearing, if the individual were lacking in some area he had little time to make it right.

Consultation hearings took the place of doc hearings, and the time frame was moved back so that the review of accomplishments and weaknesses would be far enough from the actual parole hearing to allow inmates to work on these deficiencies. Under terms of newly passed legislation that time line is now codified, calling for consultation hearings for lifer inmates to be held about 6 years before their initial parole hearing.

At a *consultation* hearing the inmate will meet with a parole commissioner or deputy commissioner, who will review the C-file and programming accomplishments, similar to the process in an actual parole hearing (now called *parole consideration hearings)*, analyze the record and provide the inmate with a written list of suggested programming options and/or behaviors that s/he should concentrate on accomplishing before the actual parole hearing. No attorney is present and NO decision as to parole suitability or date will be made. This is an information only review, a snapshot in time of where the inmate is in relation to possible suitability. And there is no guarantee that if the lifer follows the recommendations and achieves all the goals outlined that there will be a parole grant at the eventual hearing. No guarantee, but the chances are much greater that the individual will be well prepared.

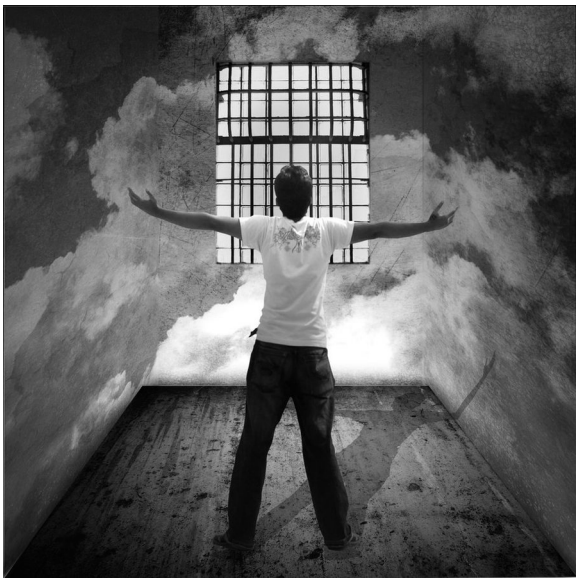
A parole *consideration*, on the other hand, is the real deal. At a consideration hearing a parole panel of 2 or 3 commissioners/deputy commissioners conducts a quasi-judicial hearing where the inmate is entitled to have an attorney present and present his case for release on parole. And of course, others have their say as well, including the DAs, who always find a reason to oppose parole, even if that reason is decades old. And a decision will be made at the end of a consideration hearing, thumbs up or down, to parole or not to parole.

While preparing for a consideration hearing does, and should, take up much of the time of a lifer who is serious about rehabilitation, there is little anyone can do to prepare for a consultation hearing. Show up, be ready to listen, ask questions and receive the advice of those who make the all-important decision on whether or not you still pose an unreasonable risk of danger to society. But~it's never too late to start programming for parole, and it's certainly never too early. The consultation hearing will let you know how you're doing, and the consideration will let you know if you were successful in your efforts.

*POLITICS/BPH*

## SB 261—NOT A CLONE OF SB 260

*Qualifications remain the same,*
*but time lines are different.*



In a scant few weeks the much-awaited implementation of SB 261, bringing youth consideration to parole hearings for those who were under age 23 at the time of their crime will begin, potentially impacting as many as 9,700 California inmates serving either life sentences or long-term determinate terms. While the latest incarnation of Youth Offender Parole Hearings (YOPH) does, as did its predecessor, bring new considerations to the table, the biggest impact of both 260 and 261 is the timing of parole hearings.

While the details of qualification for YOPH consideration under 261 are the same as for SB 260 the biggest difference in the two bills is the length of time available to the BPH to schedule hearings for those affected. Under the first YOPH bill the Board had 18 months in which to bring to parole consideration all those, both ISL and DSL inmates, who were impacted. And this they did, working their way through lifers first, saving the DSL inmate hearings for the last 6 months of the implementation time frame. And while the youth considerations proved useful in helping many lifers find success at hearings, those DSL hearing results did not mirror the success of ISL. In fact, determinate sentenced prisoners, coming before their first ever parole hearing, an event they never expected to occur, were found suitable only about 5% of the time, a dismal result in anyone's book.

***NEVER Say NEVER... SB 261 brings the HOPE OF HOME (SOONER)***

Reflection and research showed the BPH, and everyone else looking into the situation, that DSL prisoners were simply not prepared. Few had done substantial programming, had stable parole plans or understood what the commissioners were looking for in hearing responses. They were, on the whole, simply not ready. The increase in hearing numbers, all of which required a CRA to address the youthful factors, also caused a backlog for the FAD and resulted in many inmates receiving their CRA just days prior to their hearing.

These were among the primary reasons for the passage of SB 519, a companion bill to SB 261 that was passed and signed in tandem. Under terms of this bill the BPH is given substantially more time to initiate those hearings. Lifers who now qualify for YOPH will be seen by the board by Dec. 31, 2017, but the full slate of DSL YOPH hearings won't be completed until the end of 2021, but these inmates will receive a Consultation Hearing by the end of 2017, to allow them to prepare for the eventual consideration hearing.

As with the original YOPH bill the 'controlling offense," or the sentence that determines whether an inmate falls under YOPH will be whatever resulted in the longest sentence; thus, if a prisoner received a 15 year sentence for the crime but a 25 year

enhancement, it is the enhancement that becomes the controlling offense and dictates the timing of a YOPH hearing. For those prisoners previously seen at parole hearings and denied parole who may now qualify for YOPH consideration, the implementation of SB 261 does qualify as a change in circumstance necessary for a PTA request. It does not, however, impact the timing of PTAs, meaning that inmates who have previously submitted a PTA must wait until 3 years have passed from the time of that submission to request another PTA.

Many inmates are now receiving documents from the institutions indicating they are qualified as a YOPH participant, but no other information given, leading to many questions as to when the hearing will be, what to do and how to prepare. The hearings will be scheduled by the BPH, which, at least for the first 6 months of 2016 will be posting a separate list on their website (not much use for prisoners, but available to their friends and family) on those scheduled for YOPH hearings in about 2 month batches. Prisoners will be notified in the usual manner as to the exact date of their hearing, the attorney appointed to represent them and other procedural matters.

The bottom line: if you are an ISL inmate who now qualifies for YOPH consideration, you will have a new parole hearing under those guidelines by the end of 2017, regardless of when your last hearing was held or the denial length given at that time. If you are a DSL inmate who now qualifies for YOPH, your hearing will be by the end of 2021 (unless your natural release date precedes that date) but you will be seen in a consultation hearing by the end of 2017.

STATE OF CALIFORNIA EDMUND G. BROWN JR., GOVERNOR

**BOARD OF PAROLE HEARINGS**
P. O. Box 4036
Sacramento, CA 95812-4036

# IMPLEMENTATION OF SENATE BILLS 261 AND 519

This sheet provides clarifications regarding the Board of Parole Hearings' (board's) implementation of Senate Bills (SB) 261 and 519 (2015-2016).

**EXISTING LAW**

Penal Code section 3051 established a process for the board to provide a parole consideration hearing for the purpose of reviewing the parole suitability of any life or determinately sentenced inmate who was under 18 years of age at the time of his or her controlling offense and who was not otherwise disqualified by any other provisions listed in section 3051. Penal Code section 3051(i) previously required the board to complete all parole consideration hearings by July 1, 2015, for youth offenders who became newly eligible to receive a hearing on January 1, 2014, the date on which that section became effective.

**SUMMARY OF CHANGES**

**1. Expansion of Qualifying Offenses to Those Committed Prior to Age 23**

SB 261 amended Penal Code sections 3051 and 4801(c) to redefine youth offenders as inmates who committed their "controlling offense" prior to the age of 23, and who are not disqualified by any other provisions listed in section 3051.

**2. Timing Requirements**

SB 519 amended the board's timing requirements originally proposed in SB 261 to conduct all parole consideration hearings for youth offenders who become newly eligible for hearings in accordance with Penal Code section 3051(i).

**a. Indeterminate Life Term Inmates**

SB 519 added Penal Code section 3051(i)(2)(A) to require the board to provide a parole consideration hearing by January 1, 2018, for all youth offenders sentenced to an indeterminate life term who become newly eligible for a hearing for the first time on January 1, 2016, as a result of the expansion of the youth offender definition in SB 261.

**b. Determinate Term Inmates**

SB 519 added Penal Code section 3051(i)(2)(B) to require the board to provide a parole consideration hearing by December 31, 2021, for all youth offenders sentenced to only determinate terms who become newly eligible for a hearing for the first time on January 1, 2016, as a result of the expansion of the youth offender definition in SB 261. The board is further required to provide consultations for all determinately sentenced youth offenders under this subparagraph before January 1, 2018.

**ADDITIONAL PROCEDURES**

**1. Notification of Youth Offender Hearings**

For hearings already scheduled to occur from January through June 2016, the board will publish monthly reports on the board's website indicating inmates who have been qualified or disqualified as youth offenders pursuant to the enactment of SB 261. These reports will also indicate whether the inmate's next scheduled hearing will be conducted as a youth offender hearing or a standard parole consideration hearing. Qualified youth offenders whose hearings are conducted as standard parole consideration hearings will receive a separate youth offender hearing on or before January 1, 2018.

**2. Youth Offender Eligibility Reconsideration Form**

The purpose of this form is to allow an inmate or inmate's legal representative to request reconsideration of an official determination published in the board's monthly report that the inmate does not qualify as a youth offender under Penal Code section 3051. In addition to completing the form, the inmate or representative should attach any supporting documentation. If a District Attorney's Office wishes to request reconsideration of a determination that an inmate does qualify as a youth offender, the office should send a letter to the board's legal division.
Please note that, generally speaking, the board considers court records controlling (compared to other official records) when determining an inmate's date of birth, date of offense, etc.

**3. Postponements, Stipulations, and Waivers**

**a. Postponements**

Generally, an inmate may request that the board postpone a parole consideration hearing to resolve matters relevant to his or her parole consideration. The board may grant a postponement only upon the affirmative showing of good cause on the part of the inmate and only if the inmate did not and could not have known about the need for the postponement earlier than when he or

she made the postponement request. California Code of Regulations, title 15, section 2253(d)(2). An inmate's belief that he or she will qualify as a youth offender upon the enactment of SB 261 on January 1, 2016, is not alone sufficient grounds on which to postpone a parole consideration hearing because the inmate's belief is speculative until Case Records Services of the California Department of Corrections and Rehabilitation has issued an official determination of the inmate's youth offender qualification.

**b. Waivers**

An inmate may request to voluntarily waive his or her parole consideration hearing for any reason. Requests made 45 calendar days or more prior to the hearing are presumed valid pursuant to California Code of Regulations, title 15, section 2253(b)(2). The board will grant all waivers based on the enactment of SB 261 submitted more than 45 days prior to a hearing because they are presumed valid.

A request for a voluntary waiver submitted less than 45 days prior to the scheduled hearing is presumed invalid unless good cause is shown and the reason(s) given were not and could not reasonably have been known to the inmate 45 days prior to the scheduled hearing pursuant to California Code of Regulations, title 15, section 2253(b)(3). If the board receives a request for a waiver based on the enactment of SB 261 less than 45 days prior to the inmate's hearing, then the inmate must demonstrate good cause. An inmate's belief that he or she will qualify as a youth offender upon the enactment of SB 261 on January 1, 2016, is sufficient grounds to waive a parole consideration hearing so long as the inmate did not know and could not have known that SB 261 would be enacted.

**c. Stipulations**

An inmate may offer to stipulate to unsuitability for parole. An offer shall be submitted in writing to the board and shall state the reasons that support unsuitability pursuant to California Code of Regulations, title 15, section 2253(c)(1).

**4. Petition to Advance (PTA)**

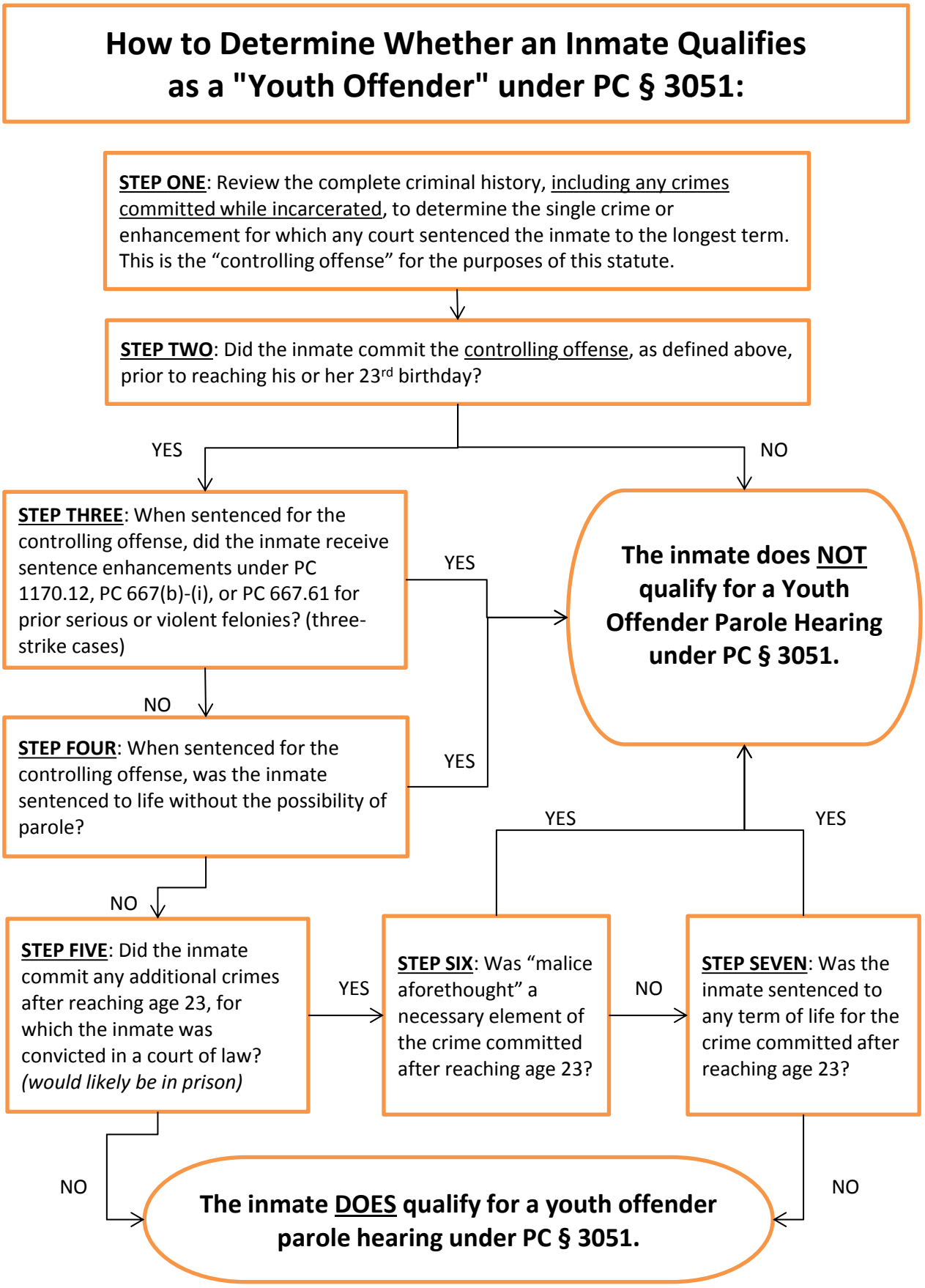
Pursuant to Penal Code section 3041.5(d)(1), an inmate may request that the board exercise its discretion to advance a hearing to an earlier date by submitting a written request to the board following a denial of parole or stipulation of unsuitability. Each request shall set forth a change in circumstances or new information that establishes a reasonable likelihood that consideration of the public safety does not require the additional period of incarceration.

An inmate's qualification as a youth offender upon the enactment of SB 261 on January 1, 2016, constitutes a change in circumstances that may establish a reasonable likelihood that consideration of the public safety does not require the additional period of incarceration.

**5. Release Dates**

Pursuant to Penal Code section 3046(c), an inmate who is granted parole at a parole consideration hearing as a youth offender shall be immediately eligible for release, notwithstanding the board's regulations regarding base terms and adjusted base terms. The inmate's release remains subject to the board's decision review process under Penal Code section 3041(b), and the Governor's review process under Penal Code sections 3041.1 and 3041.2 as applicable.

Revised 12/04/2015 CDCR-BPH


How to Determine Whether an Inmate Qualifies as a "Youth Offender" under PC § 3051:
STEP ONE: Review the complete criminal history, including any crimes committed while incarcerated, to determine the single crime or enhancement for which any court sentenced the inmate to the longest term. This is the "controlling offense" for the purposes of this statute.
STEP TWO: Did the inmate commit the controlling offense, as defined above, prior to reaching his or her 23rd birthday?
YES
NO
STEP THREE: When sentenced for the controlling offense, did the inmate receive sentence enhancements under PC 1170.12, PC 667(b)-(i), or PC 667.61 for prior serious or violent felonies? (three-strike cases)
YES
NO
STEP FOUR: When sentenced for the controlling offense, was the inmate sentenced to life without the possibility of parole?
YES
NO
STEP FIVE: Did the inmate commit any additional crimes after reaching age 23, for which the inmate was convicted in a court of law? (would likely be in prison)
YES
NO
STEP SIX: Was "malice aforethought" a necessary element of the crime committed after reaching age 23?
YES
NO
STEP SEVEN: Was the inmate sentenced to any term of life for the crime committed after reaching age 23?
YES
NO
The inmate does NOT qualify for a Youth Offender Parole Hearing under PC § 3051.
The inmate DOES qualify for a youth offender parole hearing under PC § 3051.

**BPH/CDCR**

# NOVEMBER REPORT TO JUDGES

By terms of settlement between the CDCR and the three federal judges overseeing the prison overcrowding issue the department must report, each month, to the judges on how the plans to reduce that overcrowding are progressing. Part of those overcrowding relief measures involves the Board of Parole Hearings, via the on-going specialty parole hearings. In November the BPH reported the following:

***YOPH***—Between the implementation of Youth Offender Parole Hearings (January, 2014) and the end of October, 2015, the BPH scheduled 872 parole hearings under YOPH guidelines, which resulted in 240 grants, 543 denials and two split decisions. And additional 87 inmates stipulated to unsuitability and the rest of the scheduled hearings were waived, postponed or cancelled.

***ELDERLY PAROLE***—Elderly parole consideration commenced in February of 2014 and from that time through the end of October, 2015, 996 such hearings were scheduled, resulting in 267 grants, 651 denials and 78 stipulations. The remainder of the hearings were waived, postponed or cancelled.

***NVSS***—Non-violent second strikers, who have served at least 50% of their sentence were reviewed by the BPH after referral from CDCR. Deputy Commissioners reviewed 3,165 such cases, authorizing the release of 1,158 inmates, denying 1,083. The remainder of the cases are either still under review or will be reviewed with the individuals involved reach the 50% time served level.

***PROP. 36 AND 47***—Prop. 36, which allowed for qualifying third strikers with a non serious or violent third strike to be resentenced, resulted in the release of 2,154 inmates by mid-November, 2015. Prop. 47, passed in 2014, and changing some property and drug crimes to be reclassified as misdemeanors, resulted in the release of 4,498 prisoners.

***PSYCHS from*** pg 32

inmates in lower security level prisons (2 and 3) *risk assessment* declines and increased age of inmates, especially those approaching or passing 50 years of age, also results in decreased risk assessments.

In his October presentation Kusaj did provide some explanation for that rather confusing term often seen in CRAs, when he noted, “Over 80% of long term inmates assessed by FAD psychologists in 2014 were assessed to represent non-elevated or less risk than other state prison parolees.”

Translation: lifers as a group are less likely to be dangerous than other groups of parolees, even by FAD accounting.

He also revealed, no surprise to anyone, that not all lifers are alike. Well, what he actually said was, “Across low, moderate and high risk categories we expect to observe relevant demographic differences and variations in assessed risk presence and relevance and indices of risk. Long term inmates who are categorized as low risk differ from those categorized moderate risk, and those categorized moderate risk differ from those categorized high risk.” Translation: Low, moderate and high, and the people who fall in those groups, are different from each other.

And, just to be clear, when considering the lifer cohort, we’re dealing largely with individual who have committed a crime, but are not mentally disordered. In Kusaj’s words, “Overall less than 4% of examinees obtained a score on the PCL-R that exceeded the raw score cutoff commonly used to identify psychopathic personality characterizes. This is much lower than what is normally reported in prison samples.” Translation: The vast majority of lifers, about 96%, don’t meet even the FAD standards to be classified as psychopaths, a problem that is found to a greater degree in overall prisoner populations.

Three conclusions were offered at the end of the report: 1) long-term inmates are a lower risk group; 2) variations of risk levels exist within the long-term or lifer cohort and 3) the FAD process “nicely captures this variation.”

***PSYCHS*** from pg 40

Ok, we'll buy the first two, but we'll have to get back to ya on that last one.

The two big take-aways from this are, lifers are less likely to commit another crime than any other group of prisoners and a 'moderate' risk assessment for a lifer is akin to a low risk assessment for any other prisoner. We're sure Dr. Kusaj would throw in several more qualifying words and phrases and several more statistics, but, in essence, it's pretty much the same as we've been saying for several years, in a bit more simple phrases. Lifers don't recidivate, and the public is in more danger from the average stranger behind them in the grocery store line than from a paroled lifer.

## NOTICE !

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## CDCR

# BEARD RESIGNS

*An early Christmas present to California prisoners, or more coal in the stockings?*

***Jeffrey Beard***

As CLN goes to press announcement of the resignation of Sec. of Corrections Jeffrey Beard was released. Beard, in a letter to Gov. Jerry Brown, announced he would resign effective January 1, 2016—less than a month from the Dec. 3, 2015 announcement.

In place for a relatively scant three years, Beard's time in California has not been without controversy. However his letter touts the settlement of the Askher and Mitchell lawsuits as among his accomplishments, as well as progress in population reduction.

It was, in fact, the overcrowding issue and resultant court order to reduce California prisoners that lead to the appointment of Beard, who had originally been one of the critics of California's prison system, agreeing that the conditions were unconstitutionally egregious, with the massive population numbers being the primary cause. Shortly after that, Brown tapped Beard to head the department. Many observers have long felt that once the overcrowding issue was well on the way to final solution Beard would be on the first plane back to Pennsylvania, from whence he came.

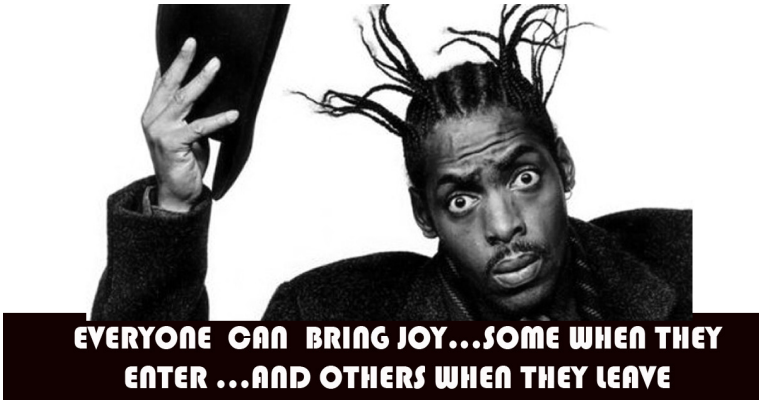
Indeed, in his letter to the Governor Beard noted the state's prison "population is now significantly below the cap set by the Three Judge Panel and we reached that point approximately one year early." He added that he "hoped the court will soon recognize the progress made," a polite way of asking the court to get out of California prison business.

Beard also went on to say he felt the increased investment in rehabilitation would "ensure that recidivism rates continue to fall," and that "prisons are safer now." While mentioning, only in general terms, his pet drug interdiction programs, saying "[W]e have made progress in stopping the flow of drugs into state prisons," Beard did not address the tremendous fiscal cost of these programs, nor the relatively paltry result, in terms of actual drugs found.

The Secretary concludes with the statement, "I have many fond memories of my time here at CDCR," a statement few in other areas of prison reform could endorse. From an advocacy perspective we have found Beard unfailingly inflexible, didactic and closed. We opposed Beard at his confirmation hearing on those grounds, and have not, over time, found any change in his attitude or policies.

The overall question now is who will step in to replace Beard, either on a short-term, place holder capacity or for a long-term appointment. While several names have cropped in the past in hypothetical discussions, no one, at least at this point, has a publically discernable inside track. There are several individuals we at LSA/CLN feel would be a step forward, and several who would represent a regression.

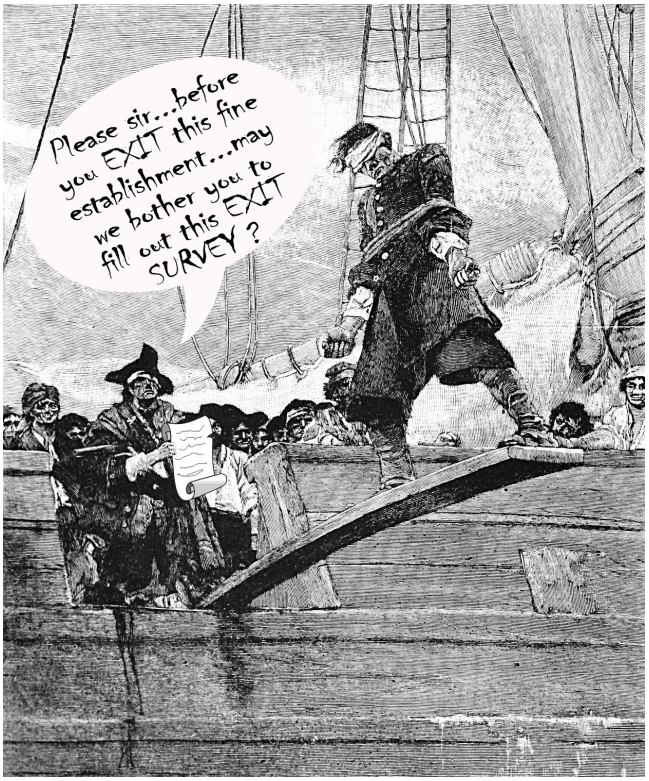
Who will be the next in the hot seat remains to be seen. Once the next appointee is announced we will begin our research, consideration and response, and be ready to support or oppose at an upcoming confirmation hearing. We never expect to be presented with someone who will see every situation from our perspective, but we can hope and advocate for a new, fresh approach to the position, one that looks to the law, above all, for guidance.



*CDCR*

## L(S)TOP THE MADDNESS

As CDCR's Division of Rehabilitative Programming (DRP) was rolling out the Long Term Offenders Pilot Program (LTOPP) program last year as a pilot experience in 3 institutions, Life Support Alliance expressed both concern and a bit of skepticism about the overall effectiveness of LTOPP, and whether it would be seen as the latest 'must do' for lifers. We were concerned, with a certain degree of prediction, that LTOPP would be the department's one-size fits all answer to programming for lifers. And that concern has, to some extent been realized




While we applaud the concept of creating programming specifically aimed at long-serving inmates, from the outset participation in and content of LTOPP were of concern to us. Although portrayed as a voluntary program participation in LTOPP as always been and continues to be a hard sell in prisons, where counselors and other staff repeatedly pressure inmates to 'volunteer,' including making misleading statements that the board will soon require this specific program. One staffer at Solano even told potential participants he had spoken to the Board and if a lifer didn't have LTOPP, he would not go home.

Prisoners with jobs were initially required to give up those jobs, even though full time LTOPP attendance might not be necessary, due to the variety of modules the inmates might be assessed to satisfy 'criminogenic needs,' (don't even get us started on that made up word) and while we were happy to see that requirement somewhat alleviated, now it appears that situation has become worse.

While repeated conversations with the DRP and other agencies, as well as the inevitable and constant 'tweaking' of the program as it went forward, have resulted in some increased effectiveness and change in participation requirements, admission to and content of LTOPP remains solely the domain of the CDCR, which selects who should be included, what sort of curriculum those individuals need, as well as where and how LTOPP will be offered.

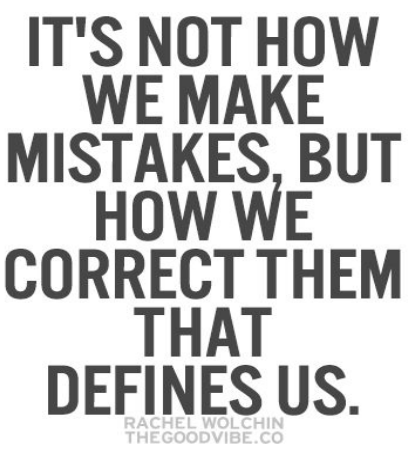
Initially, it was planned that should the program prove a success in helping lifers become suitable for parole the three initial homes to LTOP (Solano, CMC and CCWF) would be expanded to other institutions. Now, it appears from information provided by DRP, that LTOPP will only be offered at those 3 original prisons, with inmates who want to participate temporarily transferred to those locations and then back following the weeks or months needed for LTOPP.

If prisoners can only participate in LTOPP by being transferred to a select few prisons, those participants must again give up any jobs or other programming they may be involved in, to be shipped to one location and then back again with no guarantee they will be able to pick their previous jobs and/or programming on

***CDCR*** from pg. 43

return. Aside from the cost, how this instability can be positive for any prisoner, given the total disruption to all other programming it causes is beyond any explanation offered.

Nor was any indication been given of how all this merry go round of inmates will impact the population situation or how many can be accommodated in LTOPP. Solano and CCWF are already over the capacity goal and even CMC is over 100% capacity, according to the latest population figures reported to the court.




Usually CDCR measures 'success' in numbers—as how many completed a vocational program, how many received a new level of education. But in LTOPP, those numbers haven't been very forthcoming, even though we suggested from the start that the number of LTOPP 'graduates' who were found suitable for parole at their next hearing should be tracked, as one measure of that program's success. At this stage, there have been several LTOPP graduate classes, but we've yet to hear any firm figures about how many of those lifers have gone on to achieve parole. But we're trying to get those numbers.


Does LTOPP programming help some inmates? Undoubtedly. But it is not the panacea for long-term prisoners and certainly should not be looked at as THE solution to lifer programming. We know several BPH commissioners have developed a habit of recommending enrollment in LTOPP to those being denied parole, but we're not at all certain these commissioners have understood the difficulty in accessing the program, what it really entails and whether or not it is really helpful.

We hope, indeed, we have suggested to them, in person and more than once, that commissioners consider all the ramifications of LTOPP, well intended though it may be, and temper their recommendations until more information on the effectiveness and availability of LTOPP is provided. In the meantime, it is not a mandatory program for those who would like to be found suitable, nor will it become an absolute requirement in the near future.

*LSA*

## THE AMENDS PROJECT

It's been a few years now, since CDCR's Office of Victims and Survivor's Rights and Services (OVSRS) stopped sending notes of acknowledgement to those lifers, and other inmates, who wrote apology and amends letters to victims via the OVSRS. At one time those prisoners who wished to offer their apologies to victims or family of their victims, could send that missive to the victims' services office.

If the victims of that individual's crime were registered with the office, and if and only if those victims indicated they were willing to receive those communications, OVSRS would forward the letters to those registered victims. And, the office would also send back to the prisoner verification that their letter had been received, whether or not it had been forwarded to the victims. However, budgetary constraints a few years ago caused the OVSRS to cease sending those acknowledgement letters, though they continued to collect and forward letters sent to them.

Apology and amends letters can be a delicate undertaking. Sincere, heartfelt letters can be part of the healing process for victims and survivors and part of the rehabilitation of the prisoners. Acknowledging fault, offering remorse and making amends are a part of the 12-step tradition and a proven practice in restorative justice programs. On the flip side, off-hand, hollow and superficial letters can be useless from a rehabilitative aspect, and worse, can re-victimize and harm the victims and family.

Many lifers, seriously undertaking the reform of their lives and actions, wrote letters, but were unsure what to do with the document once complete. Other inmates were under the impression, due to the cessation of acknowledgement letters, that victims' services would no longer process their missives. Some sent the letters to the DA's office in the county of their crime.

That was often a counter-productive undertaking, as the DA offices often did not know the whereabouts of the victims or family, but would certainly hang on to the letters, which then frequently became ammunition in their arsenal to oppose parole for the prisoner. Other inmates, fearing this action, simply kept their amends letters, sometimes including them in their parole packet, but just as often not.

And the letters themselves were often less than valuable, often stumbling, sometimes possibly, though inadvertently, adding to the pain of victims through inappropriate or inept language. And yet the concept of offering apology and amends is a valid and useful technique when properly done, and parole commissioners continue to routinely ask lifers at hearings if they have written an apology to their victims, and if so, what have they done with the letter.

Enter *The Amends Project,* created and sponsored by Life Support Alliance (LSA) as a bridge between an inmate's desire to offer amends and continue his rehabilitation, while making what efforts s/he can to further the healing of victims. Not a template or one-size-fits-all letter, to fill in the blanks and offer up as a token, but a curriculum and study course that will assist those lifers who are sincere and ready to take that amends step in successfully negotiating the process. Our purpose is to help lifers who have gained understanding and empathy express their remorse and apologies in terms and language that will not further the pain of the victims and will also provide the means for those lifers to progress in their rehabilitation.

Those who qualify to be included in the two-hour program (lifers who have completed a victims' awareness program and are approved by their counselor) will receive guidance on language and structure of amends letters, what is appropriate to include and what would be unsuitable and will have the opportunity to practice writing a sincere and acceptable amend letter. On completion of the course lifers are encouraged to write an amends letter to their victim(s) and forward the letter to LSA.

***LSA cont.***

Once received, the letter will be reviewed and weighed by trained staff, who will decide if the presented letter is acceptable. If not, the first attempt will be returned to the prisoner with comments, and the individual is free to make another effort. Up to three attempts to produce an acceptable letter are possible, before the participant must re-take the curriculum.

If the letter is appropriate it will be forwarded to the OVSRS, where that office's procedures will either forward the letter or retain the document, depending on victim registration and conditions. LSA will also send those inmates who accomplish a fitting letter an acknowledgement certificate that can be included in their parole packet.

It is important to note that LSA will have no contact with victims and no access to or knowledge of victim information. That remains solely the purview of the OVSRS. We are prisoner advocates and becoming directly involved with victims is not in our mission and would be inappropriate. The intent behind The Amends Project is to facilitate and further the healing that can be realized by both prisoner and victim through the expression of amends and apology.

Curriculum for the two hour program is complete, guidelines set and training for those reading and vetting the incoming letters is underway. A workbook is also in production that will assist those involved in the program in writing their letters.

February, 2016 is our target date for rollout of *The Amends Project.* Our first outreach will be to those institutions with lifer groups that might be interested in the program. Any individual or group interested in participating is invited to write LSA at PO BOX 277, Rancho Cordova, Ca. 95741, and noting *The Amends Project* on the envelope.

Please provide us with information on your self-help or ILTAG group, the name and contact information of the facilitator, who to contact to request gate clearance and when your group normally meets. We hope to be able to offer this program to lifers in various institutions and will make every effort to fulfill all requests.

The Amends Project is not about just the letter or the certificate. It's about furthering your rehabilitation, and the healing of all impacted by your crime.

*LSA*

## WHAT IS LEGAL AND CONFIDENTIAL MAIL

*And what isn't, why the difference is important and consequences of misuse*


In the midst of sorting through mail from inmates our volunteers often find correspondence from inmates marked "Legal and Confidential Mail." And here's why that's a potential problem, not only for those inmates who are sending us mail marked in that fashion, but possibly for Life Support Alliance as well.

Legal mail, which by law is protected, to some degree by confidentiality, must be going to or coming in from an actual attorney or legal firm. Most individual attorneys who are dealing with prison issues include their state bar number as part of the return address. But here at LSA, there is nary a lawyer among is—we aren't an attorney firm. Ergo, we are not entitled to send or receive mail under the confidentiality seal of legal mail.

None of the information we provide, from newsletters, reprints, handouts or transcript review reports, is legal advice/mail and will not be treated as such. Similarly, we are not entitled to receive confidential mail, since we are not attorneys and therefore don't have the benefit of legal protection under attorney/client privilege.

If institutions come to believe we are abusing the system, attempting to circumvent the mail screening process the administration at those locations could make it quite difficult for not only our correspondence, but our publications to be processed. While some correspondence we receive could fall under the definition of legal mail (such as correspondence regarding specific conditions or issues within the prison, information on court cases or pending litigation for example) because we are not attorneys we are, despite the content of the correspondence, not entitled to the legal mail label.

We are always adamant in all our correspondence with inmates to note that we are not attorneys, cannot give legal advice or representation, so we are not especially worried that problems arising from a legal mail notation will come from our end. However, when prisoners write to us and designate their letters as legal mail, they can unintentionally leave LSA vulnerable to difficulty. So please be aware that mail sent to us, while treated with respect and consideration on our part, is not legal mail, in the legal sense, and therefore not entitled to be labeled confidential.

And while we're on the topic of communication, we probably should mention third party communications. This is another dicey area, where the most innocent intent can be skewed to appear nefarious—not that CDCR would do anything like that. Third party communications are defined as a request from one party (that would be the prisoner) to a second party (that would be us at LSA) to communicate something to a third party (mother, friend, girlfriend).

Sounds innocent, and for the most part it is, and we do get frequent requests to contact family for a variety of reasons, let my mom know I'm OK, our mail is being held up can you tell my wife to come visit, I heard my homie just got out, tell him hello. Well~aside from the fact that we barely have time to handle the business calls that come our way, such requests are considered third party communication, and in the (somewhat paranoid) mind of CDCR, could constitute a threat. And, to a certain extent, we understand that mindset, as it would be possible to pass along, shall we say, "encrypted" information without knowing it.

So, for many reasons, time, staffing and to avoid possible suspicion, we unfortunately won't be making those calls, re-mailing those letters, passing along those greetings. Please don't ask.

"In the tradition of infamous holiday letters, and with tongue firmly in cheek, events of this year as one fictional prisoner might relate. All the incidents, while allowing for creative license, are based on actual events.
**We wish our readers Peace, Health and Freedom in 2016. "**

*Dear Folks,*

*Well looks like it's that time again, for my yearly letter to let you all know I'm still here in the prison doin my time. Been lots a talk about making things less crowded here and they have actually let a few fellas go, but they do keep sending more in too, and seems as like they're getting younger all the time.*

*Maybe the schools is all filled up and so they're putting the hard headed ones here to learn a few things. Don't know that they'll be able to get much use outta the stuff we can teach 'em but they do seem to learn it. The shrinks even got a fancy name for it—crimin-o-genic needs, they call it.*

*Not all the things have been good though, some of the guys have had a bit a trouble. Slim got himself another 115 couple of months ago—they caught him sneaking onions out of the kitchen. Slim was gonna sell them to the Pisas here to help with their burrito spread, but they wrote him up for trying to make pruno. I know some guys get pretty desperate for booze, but I never heard of anybody getting so desperate they drunk onion pruno.*

*Red over in the next building is in a bad way too. He got in a dust up with some other guys on the yard and the cops just swarmed em with pepper spray. We all thought they was gonna call us back for fog count there was so much stuff in the air. Of course he got a 115 for the fight, but that's nothing next to the assaulting an officer beef—and he didn't touch nary a one.*

*Seems that Red had so much spray dripping off him that when the cops threw him under the shower and turned it on full blast that dang stuff splashed off poor old Red and into the face of a cop. How that makes ol' Red guilty of assault none of us poor dopes understand. Guess you have to be smart as a cop to figure that one out.*

*We got one of them new psycho doctors from the FAD come by a few weeks ago, to talk to a bunch of us and write up reports. He told me I was a bad historian of my life but I told him I missed school the year they taught history, so I don't know much about being a historian, but I reckon I know my life pretty well. Probably a dang sight better than he does.*

*Turns out he's the one that was confused. He wrote me down as being in Cowboy's family and born in Texas. You know I ain't never even been to Texas and I sure don't have 12 sisters like Cowboy does. Could a been worse though, he put Cowboy in Trey's family and Trey's from Compton--we kinda thought Trey's family might a noticed if Cowboy had grown up there.*

*But Trey's kinda worried about what the doc will say about him. You know Trey converted to Islam and goes by Mohammad now. The FAD guy asked him straight out if he was one of them black Muslims who believed in blowin up Americans. Trey said heck he didn't believe*

*in blowin up anything and he IS an American, but he said the guy didn't much seem to care for that answer.*

*We got all excited a while back, heard they was gonna put a pool table in the gym for us, heard they bought it with money from the Inmate Welfare Fund. Didn't even know there was an Inmate Welfare Fund—hope it's not like the welfare money they give the kids while we're in here and make us pay back after we get out. I thought we were in prison, not on welfare.*

*Anyways, turns out they did buy a pool table but then someone said Uh-oh, those prisoners could use the cue sticks to hit somebody and who knows what they could do with them hard balls. So we got us a pool table, but nothing to shoot pool with. Seems kinda pointless to me, but they sure seem to be making a big deal about buying it with money from that welfare fund. Might be a good place to catch a nap, can't be worse than the bunks.*

*I'm real sorry Granny can't come visit me here no more, since she got banned for trying to blow up the place. We're still tryin to make that new cop out in visiting understand her nitro pills were for her heart condition, not cuz she was a suicide bomber, but he says nitroglycerin is nitroglycerin, all the same, it just depends on how you use it and he's not taking any chances.*

*Maybe sister Amelia could try to visit again if she starts using her middle name, Mary. I know that CO that banned Granny told Amelia he thought her name sounded a lot like Ahmed or one of them other Arab names and he banned her too for trying to help Granny blow the place up, but Mary sounds OK.*

*And maybe she could bring her boy Bubba—I'd like to see my nephew again. I know he was kinda bored the last time he was here, what with the cops in visiting watching football on the TV set and all, but I heard tell they got some new stuff for kids in visiting. Pedro, he's the porter in visiting now, he says they bought a toy tool bench for kids to play on, course the cops got worried some of the inmates might do something with the plastic hammer and screwdriver, so they took 'em away. Dunno what they did with the plastic screws, they already got enough ways to screw everybody here.*

*Probably have em stored with the pool cues and balls. But maybe Bubba could play air hammer and screwdriver, sorta like air guitar. Course, he'd have to be careful, if the cops think he's having a fit they might douse him with pepper spray.*

*Anyways, just wanted to let you all know I'm still here and doing about the same. Guess I'll be here until I get over my crimin-o-genic needs or get some insight. Not sure what that insight is, best I can figure, it's somewhere between hindsight and second sight, but maybe I just need to get my eyesight checked.*

*See ya in a few years*

Buddy

*LSA*

## D2G IS UNDERWAY

*Lights, camera, action!*

After much meeting, brainstorming, trial and error and even some circumstances beyond our control, taping is underway for **From the Date to the Gate**, LSA/CLN's pet project to provide a heads-up to those lifers granted a date and not yet released, on some of the potential and unforeseen challenges awaiting them. The five month (give or take a week or two) period from the finding of suitability (the date) until you're finally out (the gate).

Following the acquisition of some camera and sound equipment, computer software for editing, a bit of training and a lot of intensive thought and confabulation, a group of paroled lifers, out from 10 years to 8 days (talk about a newbie!) gathered recently at our Sacramento LSA office to share their biggest surprises, first impressions, words of wisdom with each other, and eventually, via DVD, with those still inside. Often amusing, frequently poignant, and always open and honest, their observations on first days out, coping with a new world and what it takes to reenter that world will, we believe, make for interesting and helpful viewing for the lifers we hope to see coming home in the next year.

***A teaser from the first rough cut: technology was unanimously named the biggest immediate challenge, followed, to the possible surprise of some, by changes in relationships, either familial or amorous.***

Still a work in progress, D2G is a big undertaking for a small group, but our first foray into the world of video production produced such great substance, we're determined to pull it off. Real lifers, talking to real lifers about real life—no middleman, no psychobabble, no hidden agenda, just real stuff, hot off the streets.

Chris Stewart, Dave Sloane, Eldra Jackson, Also Romero
David Kwaitkowski, Keith Chandler, Joseph Ancira, Eric Taylor, Daniel Silva
Maggie (LSA mascot) & Robin G., LSA office manager

A teaser from the first rough cut: technology was unanimously named the biggest immediate challenge, followed, to the possible surprise of some, by changes in relationships, either familial or amorous. But D2G won't just identify problems, there will be pointers and tools offered to help in dealing with those challenges and tribulations.

One thing is clear from our initial filming, all lifers will experience many of the same issues when released, to one degree or another. And all those who have made it through those first and most challenging months agreed, having their peers' support and advice was priceless to their success.

# CALIFORNIA LIFER NEWSLETTER

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