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CALIFORNIA LIFER NEWSLETTER™

Federal Court Cases

By Donald Miller

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

CIVIL RIGHTS CASE PROCEEDS FOR LIFERS AGAINST THE BOARD'S "FAD" PSYCH EVALUATIONS

Johnson v. Shaffer et al. (#)

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

The Board has until August 20th to respond to this civil rights complaint filed by Keith Wattley of Oakland. In order to be transformed into a class action, ***more input is needed from lifers – please***.

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

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

Please direct your correspondence to:

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

Keep a copy of what you mail to Mr. Wattley, including your documents.

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FEDERAL LIFER CLAIMS PENDING

Gilman v. Fisher (#)

USDC ED Cal. No. 05-830

Please see CLN #41, p. 3; # 40, p. 9; # 39, p. 2.

On April 12th, Magistrate Judge Hollows denied the lifers' (plaintiffs') motion requiring the Board to produce specified Executive Case Summaries (ECS's), but directed the Board to provide a spreadsheet listing specific data for those cases in which lifers convicted of murder have been granted parole, and accordingly are sent to the Governor for review. ECS's are reports that the Board concocts and sends to the Governor as cover sheets with the file of each lifer granted parole following the Board's 120-day review period. As reported in CLN more than five years ago, it is believed that the ECS's, which may prompt the Governor's decisions, are biased. The Board has argued vehemently against disclosure of the actual ECS's.

The pretrial conference is now set for December 17th, with the bench trial to occur on March 19, 2013.

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SUPREME COURT ABOLISHES MANDATORY SENTENCES OF LIFE WITHOUT PAROLE FOR JUVENILES

Miller v. Alabama (#)
Jackson v. Hobbs

132 S.Ct. 2455 (June 25, 2012)

On June 25th the Supreme Court limited the automatic imposition of life without parole terms for state defendants who were under the age of 18 at the time of a murder. The Court held that judges must consider the defendant's youth and the nature of the crime before putting one behind bars with no hope for parole.

In the 5-4 decision, the High Court struck down as cruel and unusual punishment the laws in about 28 states (California does not have such a law) that mandated LWOP terms for murderers, including those under age 18.

In *Miller v. Arkansas*, and *Jackson v. Hobbs*, the Justices ruled in the cases of two 14-year-olds who were given life terms for their role in a homicide, but the decision applies to all those under 18. It does not automatically free any prisoner, and it does not forbid life terms for young murderers. However, it is a crucial victory for those who have objected to imposing very long prison terms on very young offenders.

Justice Elena Kagan referred to state laws that "mandated each juvenile (convicted of murder) die in prison even if the judge or jury would have thought that his youth and…the nature of his crime made a lesser sentence (for example, life *with* the possibility of parole) more appropriate. … We therefore hold that mandatory life without parole for those under age of 18 at the time of their crime violates the 8th Amendment's prohibition on cruel and unusual punishments," she said. Justices Anthony M. Kennedy, Ruth Bader Ginsburg, Stephen G. Breyer and Sonia Sotomayor agreed.

The Court did not suggest whether its ruling would apply only to future sentences, or whether it could give a new hearing to the more than 2,000 prisoners who are serving life terms for earlier murders committed when they were a minor.

Chief Justice John G. Roberts Jr. dissented. "Put simply, if a 17-year old is convicted of deliberately murdering an innocent victim, it is not unusual for the murderer to receive a mandatory sentence of life without parole." Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. (of course) joined in dissent. "Perhaps science and policy suggest society should show greater mercy to young killers, giving them a greater chance to reform themselves at the risk that they will kill again," Roberts wrote in dissent. "But that is not our decision to make."

The majority reasoned that states had not necessarily intended to impose life terms on juvenile offenders. Instead, they passed laws that allowed juveniles to be sentenced as adults for serious crimes, and laws that set life in prison without parole as the required punishment for murder.

PUBLISHER'S NOTE

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

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

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

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

WHEN THE SNAIL WITH THE MAIL GETS LOST

When Life Support Alliance Education Fund took over publication of California Lifer Newsletter earlier this year, we expected some speed bumps along the road; we anticipated there would be some glitches in various areas of getting the publication put together, printed and out to our subscribers. We even anticipated there would be the inevitable problems with prison mail rooms.

What we did not anticipate was that our printing service, responsible for printing, addressing, and delivering all CLN issues to the US Post Office for delivery would flounder in two critical areas, not only delaying the delivery of our issues to the postal service, but also would drop one of the most important parts of any prisoner's address, the CDC number, from the printed address of nearly all CLN issues.

It was the perfect storm of snafus. And to be fair, we must accept our share of the responsibility (what would the BPH think of us if we didn't own up to our mistakes); we were a few days later than we would have liked in completing our work and sending Issue #45 to the printer. So while we'll take our share of the blame for the lateness of the June issue, we also want our subscribers to know we have made every effort to correct the mailing house's mistake, getting the CLN issues, which were returned to us by the post office, re-addressed by hand and back in the mail as quickly as possible. This amounted to several hundred individual newsletters. We hope the worst of this debacle is behind us, though a few copies continue to trickle in and we're dealing with those as well. If you did not receive your May issue, please let us know and we will be sure that you do.

See below for a statement of responsibility from our professional printer/mailer. We have had, shall we say, intense discussions with them to be sure this problem is rectified and this issue of CLN contains all relevant information in the address label, including CDC number, housing information (if supplied to us by the inmate) and the subscription expiration date as well. And please be aware, CLN is not published every month; we are a bi-monthly publication. Our next issue will be Number #47, in October.

Thanks to all our subscribers for their patience while we wade through these initial problems and to those who wrote us to alert us to the missing CDC numbers in the addresses. We continue to welcome your comments and concerns.

From our Printer

"The CDC numbers from the provided list did not transfer to the data printed on the final newsletters. This data was inadvertently omitted in the printing process causing the mailing to be delayed or even prevented in some cases.

Systems have been implemented to ensure this doesn't happen for future mailings."

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In one case, Kuntrell Jackson was 14 when he and two other teenagers went to a video store in Arkansas planning to rob it. He stayed outside, and one of the youths pulled a gun and killed the store clerk. Jackson was charged as an adult and given a life term with no parole.

In the second case, Evan Miller, a 14-year-old from Alabama, was convicted of murder after he and another boy set fire to a trailer where they had bought drugs from a neighbor. He too was given a life term with no parole.

The Court ruled that juvenile offenders younger than 18 have "diminished culpability and greater prospects for reform" and that judges should be able to consider the "mitigating qualities of youth" in sentencing, even when juveniles commit heinous crimes.

"Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," Justice Kagan wrote. "Under these schemes, every juvenile will receive the same sentence as every other — the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one."

The combined decision is the third in a decade that puts new constitutional limits on crimes involving juveniles. In 2005, the Supreme Court abolished the death sentence for those under 18 who are convicted of murder. In 2010, the justices went further and said life terms with no parole are unconstitutional for juveniles who commit crimes short of murder.

The new decision does not end life terms for young murderers, but it says judges or juries must consider the defendant's youth before imposing a life term with no parole. Bryan Stevenson, the Alabama attorney who argued the case, called the ruling "an important win for children. The court took a significant step forward by recognizing the fundamental unfairness of mandatory death-in-prison sentences that do not allow sentencers to consider the unique status of children."

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NINTH CIRCUIT RULES IN FAVOR OF TWO CALIFORNIA DEFENDANTS

Mackey v. Hoffman (#)

682 F.3d 1247
CA9 No. 11-15115 (June 25, 2012)

In 2004, lifer Andrew Mackey was convicted of attempted murder and other offenses in the San Francisco County Superior Court, and sentenced to one term of life with the possibility of parole and a consecutive term of 25 years-to-life. Mackey's direct state appeal and habeas corpus petition were denied. In 2007 Mackey filed a 28 U.S.C. § 2254 habeas corpus petition in the Northern District, asserting that he was denied the effective assistance of counsel. Upon an order to show cause, the Attorney General filed an Answer. Mackey's attorney, LaRue Grim, neglected to file a Traverse. After the district court denied the petition, Grim failed to notify Mackey and failed to file a notice of appeal.

Eight months after the entry of judgment, Mackey wrote a letter to the district court stating that he was "unaware of the current status" of his case. The district court clerk mailed a copy of the docket sheet to Mackey that reflected the denial of the petition and the entry of judgment on July 13, 2009. Mackey wrote a second letter to the district court, expressing concern about his appellate rights, stating, "my lawyer has been telling me for months that I have been granted and evidentiary [sic]. He tells me I have a court date comeing [sic]." The district court ordered Grim to respond to Mackey's letters.

In April 2010, Grim filed a signed declaration with the court stating that Mackey had retained him for the state postconviction proceedings, and that Mackey's parents had only partially paid Grim for those services. Grim said that he prepared and filed Mackey's § 2254 petition pro bono, and that in September 2007, he "fully informed" Mackey and his family that he "couldn't do any more, beyond preparing and filing the [§ 2254 petition], for nothing." Grim further stated that during the next two and a half years, Mackey and his friends called Grim repeatedly, and Grim repeatedly told them that Mackey's parents "had not made any arrangements with [him] or any other attorney to handle the federal habeas and they should call his parents and urge them to do something." Grim further stated that he left numerous voicemail messages for the parents, urging them to "make arrangements." During this time, he "had difficulty making [Mackey] understand what the procedure was and his need to have his parents take care of business." Grim did not state to the district court that he informed Mackey when his petition was denied and admitted that after filing an amended § 2254 petition within a week of filing the original petition, he "did nothing more on the case in court."

In response to Mackey's statement to the district court, that Grim had told Mackey that a court date had been set, Grim said:

> As to Petitioner Andrew Mackey's letter, stating I told him a court date had been set, he misunderstood what I said. I told him about the order to show cause to the Attorney General, about the response, that papers needed to be filed in [sic] his behalf, and that there should eventually be a hearing, that there is much preparation to be done before that happens, that eventually the court will set the date, that he needed have [sic] his parents make arrangements for a lawyer to handle the matter and get moving on it.

Mackey responded to this by providing the district court with the above-quoted June 2008 letter from Grim stating "we are awaiting a trial date." Mackey told the district court that the June 2008 letter was "one of the first times that LeRue Grim stated we are awaiting a trial date on and evidentuary [sic] hearing," and that Grim "has lied to me continuously about and evidentuary [sic] hearing."

Grim filed an additional declaration with the district court, in which he reiterated that he was retained by Mackey's parents, who then stopped paying him and apparently abandoned their son's legal defense. Grim concluded:

> The failure of his parents to help him was not petitioner's fault. It was not my fault. It may not have been their fault. It is obvious the parents are not going to put up any money to help Mr. Mackey in his case before this Court. Petitioner Andrew Mackey has been deprived of counsel in this habeas corpus proceeding through no fault of his own. Fairness suggests the Court should vacate to order [sic] dismissing the petition and reinstate the habeas corpus proceeding and appoint counsel to represent petitioner.

The district court termed the fiasco "a failure of communication, Mr. Mackey was not aware of

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that fact [that his petition had been denied] and so, therefore, any kind of appeal deadline for appealing from my ruling passed without his opportunity to consider it.... [M]y plan is this: My plan is to either reissue the order or—if I still can do this ... issue an extension of time to file an appeal." The district court noted that Mackey did not have a constitutional right to counsel on his habeas position, but asked Grim to undertake to file an appeal on Mackey's behalf once the procedural barriers were lifted. Grim agreed to do so, and orally made a motion seeking to have the district court vacate the July 2009 judgment and reopen the case.

In a December 2010 order, the district court stated it was without authority to grant Grim's motion to vacate the judgment, stating that if it possessed "the discretion to vacate and reenter the judgment in order to allow petitioner the opportunity to appeal, the Court would do so."

In December 2010, Mackey filed a notice of appeal from the denial of the motion and sought a certificate of appealability on the issue of whether the district court had erred in denying his request to vacate the July 2009 judgment to allow him the opportunity to appeal. Mackey contended that his failure to timely appeal "resulted from his attorney's [Grim's] gross negligence and failure to communicate, which deprived [him] of notice and the opportunity to be heard." In January 2011, the district court issued a certificate of appealability.

The Ninth Circuit found gross negligence on Grim's part and, after a thorough review of the applicable case and statutory law, held as follows:

> A federal habeas petitioner—who as such does not have a Sixth Amendment right to counsel—is ordinarily bound by his attorney's negligence, because the attorney and the client have an agency relationship under which the principal is bound by the actions of the agent." *Towery v. Ryan,* 673 F.3d 933, 941 (9th Cir.2012), *cert. denied*, —— U.S. ——, 132 S.Ct. 1738, 182 L.Ed.2d 271 (2012).
>
> However, when a federal habeas petitioner has been inexcusably and grossly neglected by his counsel in a manner amounting to attorney abandonment in every meaningful sense that has jeopardized the petitioner's appellate rights, a district court may grant relief pursuant to Rule 60(b)(6). See *Maples*, 132 S.Ct. at 924; *Tani*, 282 F.3d at 1170; *Lal*, 610 F.3d at 524.

Granting relief to Mackey is not barred by *Bowles v. Russell,* 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), which held that the time periods prescribed by Rule 4(a)(6) are "mandatory and jurisdictional." 551 U.S. at 209, 127 S.Ct. 2360 (internal quotation marks omitted) (holding that appellate court lacked jurisdiction to hear appeal from denial of habeas petition where district court had erroneously granted the petitioner a 17–day period to file his notice of appeal, rather than the 14–day period prescribed by Rule 4(a)(6), and the petitioner had filed his appeal on the sixteenth day). Mackey is not receiving relief pursuant to Rule 4(a)(6). The district court correctly noted that it could not consider Mackey's March 2010 letter as a motion to extend the time to file a notice of appeal because it was made outside Rule 4(a)(6)'s 180–day limitations period. Mackey is seeking relief pursuant to Rule 60(b)(6) to cure a problem caused by attorney abandonment and not by a failure to receive Rule 77(d) notice.

Mackey contends that he has demonstrated that extraordinary circumstances—here, abandonment by counsel of record—prevented him from being notified of the order denying his federal habeas petition. If he has done so, justice requires that relief be granted so that he may pursue an appeal. See *Klapprott,* 335 U.S. at 614–15, 69 S.Ct. 384.

The district court, in its order denying Mackey's request to vacate the judgment, stated that "if it possessed the discretion to vacate and reenter the judgment in order to allow petitioner the opportunity to appeal, the Court would do so." We hold that the district court would possess such discretion if it were to find that Grim effectively abandoned Mackey, causing Mackey to fail to file a timely notice of appeal. Therefore we remand this case with instructions to the district court to make a finding as to whether Grim's action and/or inaction constituted abandonment and, if so, whether to exercise its discretion to grant the relief sought by Mackey.

The Ninth Circuit remanded the case to the district court "to proceed in a manner consistent with this opinion."

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Johnson v. Uribe (#)

682 F.3d 1238
CA9 No. 11-55187 (June 22, 2012)

The U.S. District Court for the Central District of California granted state prisoner Kennard Gerald Johnson's petition for writ of habeas corpus, but ordered an incorrect remedy. Johnson was offered a plea bargain by the prosecutor for several theft-related charges, but his attorney failed to adequately advise him of its terms and consequences. Subsequently, again upon his counsel's advice. Johnson pled guilty to an 11-year term and entered a Vargas waiver which permitted that term to be reduced to 6 years if Vargas returned as scheduled for sentencing. Again, counsel failed to advise Johnson that the 11-year term he was offered was in excess of that allowed by law, and failed also to advise his client of the possible consequences of a Vargas waiver. Because Johnson did not appear for a scheduled hearing, the 11-year term was imposed.

The district court directed the state trial court to re-set Johnson's term within permissible ranges for the offense to which he ultimately pled guilty.

On appeal Johnson claimed that the correct remedy was to permit him to withdraw his plea bargain.

The Ninth Circuit found ineffective assistance of trial counsel, and agreed with Johnson as to the correct remedy. The Court vacated the district court's judgment and directed it to issue a conditional writ of habeas corpus, "subject to the trial court's vacating Johnson's conviction and granting him a new trial."

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FEDERAL HABEAS RELIEF AVAILABLE TO CHALLENGE CDC-115 WHERE EXPUNCTION IS LIKELY TO REDUCE PAROLE DENIAL INTERVAL

Dunn v. Swarthout

2012 WL 3143889
U.S.D.C. (E.D. Cal.) No. 11-2731
(August 1, 2012)

Lifer John Dunn received a CDC-115 for fighting, and suffered loss of credits. But his biggest concern was the effect this recent 115 might have on his then-pending May 2012 parole hearing. Wishing to challenge the 115 on due process grounds, Dunn asserted that he had standing to do so in federal court because a potential 7-to-15 year denial interval could be imposed if the 115 remained on his record, and, therefore, it was "likely" that the errant 115 would increase his incarceration. Dunn postponed his hearing for one year while he pursued federal habeas relief. The Warden moved for dismissal on grounds that federal habeas relief was not available for a "speculative" increase in incarceration.

Magistrate Hollows was not persuaded by the Warden's argument that the credit loss would *not* affect Dunn's incarceration because he must first be found suitable for parole and, only then, the BPH would apply any available credits; thus, Dunn's *release* would not be affected. To the contrary, the court found

> The undersigned does not find respondent's argument persuasive, instead agreeing with petitioner that it is likely that expungement of the disciplinary finding could accelerate Petitioner's parole eligibility.

The court went on to note that most – but not all – recent case law favored Dunn's access to federal habeas corpus here. The court gave a useful list of such citations.

> In the first place, as noted above, a challenge by a prisoner to a prison disciplinary conviction by a habeas corpus petition if the conviction resulted in the loss of good time credits and seeking restoration of such credits comes "within the core of habeas corpus in attacking the very duration of their physical confinement itself"). *Preiser* at 487–88. Further, reversal or expungement of petitioner's conviction for the rules violation, if warranted, is both "likely" to accelerate his eligibility for parole, *Bostic,* 884 F.2d at 1269, and "could potentially affect the duration of [his] confinement." *Docken*, 393 F.3d at 1031. See, e.g., *Avina v. Adams,* 2011 WL 6752407 *18 (Case No.1:10–0790) (E.D.Cal. Dec. 23, 2011) (recommending denial of motion to dismiss petitioner's challenge where he was assessed a time credit loss at a prison disciplinary hearing, alternatively, finding that expungement of the disciplinary finding potentially could affect his duration of confinement), adopted by order, see *Avina v. Adams*, 2012 WL 1130610 *1–3 (E.D. Cal. Mar 30, 2012); id. at *2, acknowledging inconsistent conclusions of Ninth Circuit district courts and Eastern District of California judges regarding habeas corpus jurisdiction where petitioner has not lost credits for a prison disciplinary finding or cannot receive prison credits, but finding persuasive the newer cases wherein district courts [and a Ninth Circuit panel] have found they have jurisdiction, i.e., *Martin v. Tilton*, 430 Appx. 590, 591,3 2011 WL 1624989, at *1; *Chavez v. Lewis*, 2012 WL 538242 [at *11–12] (N.D.Cal. Feb 17, 2012); *Young v. Sisto*, 2012 WL 125520 [*4–5] (E.D.Cal. Jan 17, 2012); *Morris v. Haviland*, 2011 WL 3875708 [at *2–7] (E.D.Cal. Sep 01, 2011); *Maxwell v. Neotti*, 2010 WL 3338806 [at *3–6] (S.D. Cal. Jul 15, 2010); see also, *Johnson v. Swarthou*t, 2011 WL 1585859 at *2–3 (2:10–cv–1568 KJM DAD P) (E.D. Cal. Apr 22, 2011) (findings and recommendations recommending that habeas jurisdiction exists for a challenge to a disciplinary decision, adopted by order filed on August 12, 2011); *Allen v. Swarthout*, 2011 WL 2680756 (2:10–cv–3257 GEB GGH P) (E.D. Cal. Jul 8, 2011) (order adopting findings and recommendations4 of the undersigned, denying motion to dismiss challenge to prison disciplinary that did not result

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in time credit loss because it could affect his next BPH hearing and release); *Hardney v. Carey,* 2011 WL 1302147 at *5–8 (2:06–cv–0300 LKK EFB) (E.D.Cal. Mar. 31, 2011) (finding habeas corpus jurisdiction for prison disciplinary conviction because expungement like to accelerate parole eligibility and reaching merits)5; *Foster v. Washington–Adduci*, 2010 WL 1734916 at *4 (C.D.Cal. Mar. 24, 2010) (respondent's reliance on dictum from Ramirez was not persuasive in case brought under § 2241 in the federal prison context)6; *Murphy v. Dep't of Corrs. & Rehabilitation,* 2008 WL 111226 at *7 (N.D.Cal. Jan. 9, 2008) (habeas corpus jurisdiction is proper to challenge a disciplinary guilty finding because "[a]s a matter of law, it is well established that a disciplinary violation may affect the duration of an inmate's confinement"); *Drake v. Felker*, 2007 WL 4404432 at *2 (2:07–cv–0577 JKS) (E.D.Cal. Dec. 13, 2007) (habeas corpus jurisdiction found to exist over a challenge to a disciplinary decision because "a negative disciplinary finding, at least in California, necessarily affects potential eligibility for parole").

The court did acknowledge some cases to the contrary.

> There is no doubt that there has been inconsistency inasmuch as some district courts have found no habeas jurisdiction in this context, see, e.g., *Perrotte v. Salazar*, 2010 WL 5641067 at * 5 (ED: 06–cv–0539 JHN (VBK) (C.D. Cal. Nov 8, 2010) (finding "merely speculative" that disciplinary charge could affect parole eligibility)7; *Rhodes v. Evans*, 2:09–cv1842 JAM EFB, docket # 's 18, 20 (E.D.Cal. Apr. 4, 2011) (district judge held that challenge to disciplinary decision was not cognizable on habeas review, rejecting magistrates judge's recommendation); *Norman v. Salazar*, 2010 WL 2197541 at *2 (C.D. Cal. Jan 26, 2010) ("the mere possibility that the 2006 disciplinary conviction could be detrimental to petitioner in future parole hearings is too speculative to serve as the basis for a habeas corpus petition")8; *Santibanez v. Marshall,* 2009 WL 1873044 at *7 (C.D. Cal. Jun 30, 2009) (claim seeking expungement of disciplinary conviction not cognizable on habeas review because it would have only speculative impact on the petitioner's consideration for parole in the future).

Relying on the principal 9th Circuit precedent in *Bostic*, the court found that Dunn had stated a federal habeas claim.

> The disciplinary finding for fighting is "criminal misconduct which is reliably documented." Cal.Code Regs. tit. 15 § 2402(b). The BPH is required to consider the violation because it reflects on petitioner's behavior "after the crime." Id. ...
>
> Although respondent argues, unsurprisingly, in light of the [recent one-year] waiver, that the court can only speculate as to whether or not the disciplinary finding could impact petitioner's parole eligibility negatively. Reply, pp. 1–2, citing *Sisk v. CSO Branch*, 974 F.2d 116, 117 (9th Cir.1992) ("A prisoner may bring a section 1983 action to challenge disciplinary procedures having only a 'speculative or incidental effect' on the length of his sentence."). However, it is the arguably idiosyncratic ruling of *Bostic9* which must prevail. It is at least 'likely' that expungement of the disciplinary finding could accelerate petitioner's eligibility for parole at any future parole hearing.

Nonetheless, the court left some doubt to be resolved. In footnote 9, the court observed

> Indeed, the undersigned, bound by the ruling of B*ostic*, is puzzled by its rationale and its applicability in the habeas setting, without which the court would not find petitioner had stated a federal habeas claim in this context.

The court further found that *Swarthout v. Cooke* 131 S.Ct. 859 (2011) did not control here, as it did not impliedly overrule Bostic.

> However, the undersigned does not find that *Swarthou*t controls in this situation. While *Swarthout* indeed fundamentally altered the landscape of parole habeas law, its holding is not closely related enough to *Bostic*, so as to overrule *Bostic*. If *Bostic* is indeed overruled in light of *Swarthout*, that is not for this court to decide. *Bostic* is still good law in the Ninth Circuit and petitioner has demonstrated that it is at least 'likely' that expungement of the disciplinary finding could accelerate his eligibility for parole.

Accordingly, the court denied respondent's motion to dismiss and ordered respondent to file an answer to the petition within 60 days. Since this order is not final, but must survive the district court's review [this district court was one of the ones cited above for having *rejected* habeas jurisdiction], it is not yet citable or binding. Very likely, the continuing viability of *Bostic* will be challenged above by the respondent.

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STATE COURT CASES

By Donald Miller

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

MIXED SIGNALS FROM COURTS OF APPEAL; DECISIONS OFTEN FOLLOW PANELS' POLITICS

Sadly, a lifer's fate often hinges on three aspects of state, local, and appellate politics. First, on which Commissioners and Deputy Commissioners are assigned to that week's hearing panel at the lifer's institution. Despite the Commissioners' inherent bias (intentional – nearly all are selected due to their law enforcement or peace officer backgrounds, in contravention of the cross-section requirement of Penal Code § 5075)), some are consistently fairer than others.

Second is the matter of which superior court prosecuted the commitment offense – and thus will receive the lifer's habeas corpus petition contesting a parole denial by the Board or Governor. Many superior courts, such as San Diego and Riverside Counties in the south, and the smaller county trial courts in the State's northern and central sectors, routinely issue form or summary denials, irrespective of the underlying facts and claims.

The third and most egregious obstacle is often the particular appellate court and panel that will entertain the lifer's habeas corpus petition, or the Attorney General's appeal of a decision by the superior court that ordered the lifer's release or a new parole hearing. For example, the Second Appellate District's Fourth Division, which has denied every habeas corpus petition contesting a parole decision as far back as the five years we have checked in the records available. Although, as we report in these issues, occasional breakthroughs give pause for hope, a lifer's ultimate fate – eventual freedom (or at least the limited freedom of parole), versus life without the possibility of parole – may rest entirely on the bias and political leanings of the particular courts in which the habeas corpus petition must by law be filed.

THREEAPPELLATE COURTS REVERSE BOARD DENIALS OF PAROLE; "LACK-OF-INSIGHT" AND "INADEQUATE PROGRAMMING" RECITALS REJECTED

In re Mark Ouellette (#)

2012 WL 2992125 (unpublished)
CA2(5) No. B238365 (July 23, 2012)

Mark Ouellette has at last obtained justice, in the form of a new parole hearing at which, hopefully, due process will prevail (this editor had the privilege of having worked on Ouellette's behalf). On July 23rd, a panel of Division 5 of the Second District rejected the Attorney General's appeal and affirmed the Los Angeles County Superior Court's November 2011 grant of habeas corpus relief. After appointing counsel for Ouellette, the appellate court squarely rejected the lay Board's "lack-of-insight" finding. At this time the decision is unpublished.

Ouellette was sentenced to 15 years-to-life after confessing and pleading guilty to a 1992 second degree murder. He was a 23-year old drug abuser at the time. Ouellette became eligible for parole on his 2002 MEPD date. Ouellette was found suitable and granted parole in 2008 by the Board, but the Governor reversed that decision based on the standard post-*Shaputis* "lack of insight" recital.

By the time of his 2010 parole hearing, Ouellette was 42 years old. The Los Angeles County Sheriff and DA's office (as usual), and four members of the victim's family opposed his parole. Contrary to its 2008 decision, the Board *denied* parole based on its standard recital that Ouellette now "lacks insight" into the reasons he committed the life offense, and thus would pose an unreasonable risk of danger to society and a threat to public safety. As the Court of Appeal noted, "[t]he Panel found no other fault with Mr. Ouellette, and commended him for his positive programming, stating: 'Your programming excels above most other inmates. And we acknowledge that. You've reduced your custody and your classification levels as low as you can. You've completed vocational programs, and then you continued to excel in those programs even after completing them, like welding where you continue to weld after you've finished. You've maintained an excellent work record in just about every job I could find on record. You attended college, taken college classes on more than one occasion, and you've made a legitimate effort to complete the college. And you've participated in numerous self-help. We discussed some of the recent self-help today, but the record shows that you've been attending self-help for a long time. And then you've continued on and actually continued to help others through facilitating in those programs and serving as a secretary and so on, as evidenced with the New Beginnings that we talked about today and your secretary in AA or NA. And we acknowledge all that. And you've done all this and managed to maintain disciplinary free.'" The 2010 Panel also commended Ouellette for his exceptional parole plans.

Contrary to the Board's recital, Ouellette's 2008 forensic evaluation by the Board's psychologist concluded that he posed an overall "low" risk of future violence, that his level of insight was "excellent," that he "accepted responsibility for his actions," "was remorseful," and had done "everything in his power to improve himself." The psychologist also found that Ouellette had "a strong commitment to sobriety and will likely do well if released on parole." Ouellette's prior psych evals were likewise positive.

As always, the Board recited the most lurid details of the commitment offense to find it especially cruel, heinous and atrocious. However, as the Court pointed out,

> The Board may base a denial of parole upon the circumstances of the offense only if the facts are probative of the "ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." *(In re Lawrence, supra*, 44 Cal.4th at p. 1221.) Where, as here, the life prisoner has served more than his suggested base term, the
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> circumstances of the life offense will rarely support a finding of unsuitability for parole. (*Id.* at p. 1211.)

The appellate court focused on the Board's insight recital – the only arguable nexus to its unreasonable risk conclusion. The Panel had stated: "The biggest problem that we had was the insight and the lack of connecting the dots. … [We] just didn't hear why there was so much rage. You had virtually no violence that we could see, virtually no violence prior to the crime, and virtually no violence after the crime. It's this one circumstance that we are dying to have an explanation for. And we

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simply didn't get it today."

As the Court noted, Ouellette did provide an explanation for the crime at his hearing; he explained "he had a lot of pain from his abandonment by his father and felt a void in his life. … 'I was a hurt person, and I wanted to hurt somebody.' … he thought 'I didn't think I was going to get caught.'" Ouellette was a long-time drug user and knew that his drug abuse affected his behavior and contributed to his loss of control and violence.

But the lay Board (to reach its predetermined denial based on lack-of-insight, the only nexus" it could conjure up), rejected this explanation (as well as its psychologist's determinations), reciting, in lay terms, "It seems to me that the issue with regard to your father leaving at a very young age, and I didn't get the sense, the understanding, nor the reasoning from you that it was anything more than just, you know, the unfortunate reality of what society faces today in just divorce, that you met him some time later. We just didn't get the sense that you had the depth of understanding that would vault you from being upset over your dad and mom breaking up, namely your dad … "

The Court of Appeal found that no evidence supported the Panel's conjecture, and it quoted the psychologist's finding of "a significant amount of emotional pain in relation to his father never being present in his life. … there was no indication of any problems [with Mr. Ouellette] concerning appropriate contact with reality. … insight is excellent and his judgment and common sense are more than competent." The Court concluded, "Thus, clearly, the psychologist found Mr. Ouellette's claim of a 'significant amount of emotional pain' to be based in reality and to be a reasonable response to abandonment. For the Panel to disregard this assessment and take the position, unsupported by any evidence in the record, that the events of Mr. Ouellette's childhood could not possibly have caused significant pain to him is arbitrary and capricious."

The Court also addressed the Board's claim that Ouellette's discussion of his drug use did not sufficiently explain the murder, and that he did not adequately explain why his substance abuse gave way to his rage and violence"

We see no statements by the Panel addressing Mr. Ouellette's explanation of the role of drugs in the murder. The Panel did state that 'It seems as though certainly, drugs, alcohol, and in this case meth is certainly a lubricant. And it gets people to do the kinds of things they would not normally do.' Thus, both appellant and the Panel appear to believe that the drugs Mr. Ouellette used simply removed his inhibition and permitted him to act on his violent impulses. They seem to believe that there must have been some pre-existing rage or brutality that the drugs released. There is no evidence in the record to support the view that methamphetamine is simply a 'lubricant.' The only evidence of the effects of methamphetamine comes from the report of the state psychologist who examined Mr. Ouellette in 2001. The psychologist explained: 'It is well documented that methamphetamine dependence leads to irritability and volatile mood swings, which frequently leads to dangerous aggression.' Thus, methamphetamine *creates* anger and aggression in

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> a user, it does not simply remove the user's inhibitions and allow him to act on pre-existing anger and aggressive impulses. The psychologist opined: 'In sum, his mental condition, based upon his substance abuse, was a primary factor in his homicidal behavior.' It was arbitrary and capricious for the Panel to reject the psychologist's explanation of the 'well documented' effects of methamphetamine and rely on their own belief, unsupported by any evidence, that methamphetamine is a 'lubricant.'

Importantly, the Court of Appeal addressed and rejected one of the Board's most common, misguided metaphors, the notion that drug abuse cannot provide an explanation for the crime because "while many suffer from addiction, not every addict reacts or behaves as Ouellette did when he was under the influence." The Court responded:

> We fail to see the significance of the fact that not every drug addict commits a murder. Some do. Mr. Ouellette has explained why he committed a murder. He cannot possibly be expected to explain why other addicts do not.
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> Mr. Ouellette's explanation of his mental state and motivation are entirely consistent with the record, entirely plausible and do not reflect a lack of insight. There are no material factual discrepancies between the evidentiary record and Mr. Ouellette's account of his conduct and its causes. It appears that the lack of insight conclusion by the Board is equivalent to a mere refusal to accept evidence that Mr. Ouellette has acknowledged the material aspects of his conduct and offense, shown an understanding of its causes, and demonstrated remorse. (*In re Ryner* (2011) 196 Cal.App.4th 533, 549.)
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> Even assuming that there was some evidence to support the Panel's finding that Mr. Ouellette had only limited insight into the reasons for his pain and anger, there is no evidence that such limited insight makes him a current risk to public safety. Lack of insight supports a denial of parole only if it is rationally indicative of the inmate's current dangerousness. (*Shaputis II, supra,* 53 Cal.4th at p. 219.)
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> The Panel did not consider whether any limitations in Mr. Ouellette's insight into the causes of his anger showed that he was currently dangerous, much less explain how limited insight made Mr. Ouellette currently dangerous.
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> The Panel believed that Mr. Ouellette's crime was caused by his anger, and Mr. Ouellette acknowledged that anger was a major contributory factor in the crime. Mr. Ouellette explained at length and in detail how he addressed the anger in his life. Mr. Ouellette elaborated: "I lacked the ability to empathize and sympathize. I work a 12–step program. I put myself in other people's shoes when I'm confronted with situations. And that's how I've learned to empathize and sympathize.... I'm not an angry person anymore."
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> Mr. Ouellette also took Anger Management classes and read Anger Management books. He explained that "I've learned to accept setbacks and disappointments without being angry about it. I accept life on life's terms. I couldn't do that before." He clarified that he does still get angry about some things, such as the Governor's reversal of his previous grant of parole, but "I don't stew on anger. I address my anger. I find out the true cause of my anger, and I move forward. I do something positive in its place." When he learned about the reversal, he didn't "choose a destructive action. I was angry about it, and I chose to do something positive and get involved in another self-help group and work through it. Whatever setbacks I have, I work through it."

The panel also noted that Ouellette had never received a disciplinary violation, that his psychological evaluations consistently supported his parole release, and that, "[e]ven assuming for the sake of argument that Mr. Ouellette did not fully understand the source of his anger … twenty years ago and that this lack of insight meant that he might become angry in some point in the future, there is no evidence that such anger would make him a danger to society. The evidence shows that Mr. Ouellette has learned to manage his anger in a constructive way. In light of Mr. Ouellette's demonstrated ability to recognize and deal with his anger under stressful situations, some limitation in his insight as to the childhood roots of his anger is not a rational indicator that Mr. Ouellette would unreasonably endanger public safety if released. (*In re Rodriguez (*2011) 193 Cal.App.4th 85, 99–100.)

The Court of Appeal affirmed the superior court's grant of habeas corpus relief (on the same, but a less detailed basis), and directed the Board "to vacate its decision denying parole and thereafter conduct a new parole hearing for Mr. Ouellette within 120 days, in accordance with this opinion and *In re Prather* (2010) 50 Cal.4th 238."

Editor's note: This case also illustrates the significant obstacle to parole injected by the appearances and emotional opposition to parole by victims' kin at parole hearings, the expected result being a parole denial based on the Board Panel's politically-motivated sympathy. In approximately 200 parole hearing transcripts I have reviewed from 2011-2012, the odds of a parole grant when victims' kin do not appear are approximately four times greater than when they do appear (16% vs. 4%).

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In re Michael Adamar (#)

2012 WL 2525949 (unpublished)
CA2(1) No. B223279 (July 2, 2012)

This 3-year-pending case addresses the lack of any evidence to support a 2009 decision by the Board to deny Michael Adamar's parole. In 2010 the Court of Appeal issued a decision finding no evidence of a lack of insight by Adamar and reversing the Board's decision on that basis.

Along came the *Shaputis-II* debacle, in which the California Supreme Court would legislate "insight" into Penal Code § 3041's parole determination criteria (the timing and gravity of the offense) set by the Legislature. The State's High Court granted review of *Adamar* and other cases involving this issue, effectively placing these cases on hold. After the Court's would-be psychiatrists concocted *Shaputis-II*, they remanded the cases to be reviewed to the Courts of Appeal with directions to consider the insight tutorial propounded in *Shaputis-II* in their new decisions.

After reconsidering the Board's decision in Adamar's case, the Court of Appeal concluded:

> "Applying Shaputis II, we conclude that the Board's finding that Adamar remains a public safety risk lacks any evidentiary support, is arbitrary, and violates due process. Accordingly, we grant his petition for a writ of habeas corpus."

CLN has reviewed the facts of *Adamar* and the Court of Appeal's initial decision. Please see *CLN* # 37, p. 42. At his initial parole hearing in 2009, the Board denied Adamar's parole based chiefly on its "lack-of-insight" recital, which became a standard reason for denying parole by the Board and

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Governor following publication of *Shaputis-I.* Adamar had been sentenced to 15 years-to-life plus a 3-year weapon enhancement for a 1994 gang-related second degree murder committed when Adamar was 18 years old.

Adamar established a respectable prison record of self-help, therapy, and programming. The Board's psychologist questioned his insight (because the facts of his offense which he recalled differed from the prosecutor's version), and rated Adamar a "low-moderate" risk to recidivate. The Board denied Adamar parole for seven years. The Panel told Adamar:

> You need to learn the insights into the causative factors that led you to do this, and even though you have indicated that you really want to do that, and you've taken some courses, we really don't feel that you really have gone through a self-examination portion of what it's going to require you to do that, and that's one of the reasons for the length of the denial that we talked about.
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> [I]t's got to be something that would make you, one, want to disobey your parents and go out at night to do the tagging, and then secondly, why would it be necessary that you would go to the extremes to stab somebody to rescue a friend when there were so many of you around? There were only two of you—I mean two of them and so many other people that were part of your tagging group there beating on these two individuals. So those are the things that you really need to take a good, strong look at because what is going to keep you if you don't know what caused those triggers from you [*sic*] to do the same thing again?

To further support its lack-of-insight recital, the Board noted differences between Adamar's account of the offenses and the facts stated in the appellate opinion. The Board focused on Adamar's statement that he did not know anything about a gun and encouraged him "to go back and take a good, strong look at what the appellate decision said as well as what's in the reports so that you'll be able to understand why it's important that you know and learn the causative factors that led you to do this."

The Court of Appeal noted that the Board also relied upon "'lack of insight' to neutralize or minimize the favorable factor of remorse":

> On your remorse you indicated that you take full responsibility for the crime, and although we see that there is some remorse there, the panel's not convinced that you truly understand the nature and magnitude of the offense because you don't have the insight into why you did it, and until you do that, it's very hard for you to really determine remorse; however, we will go on record to say that you did write letters to the victim [*sic*] asking for them—telling them how sorry you was [*sic*], but again, until you really understand the magnitude of the crime, it's going to be—I mean the nature and why you did it, that's going to be something that you need to work on.

After a thorough review of the governing authorities, including *Shaputis-II*, the Court of Appeal reached the same conclusions it reached three years earlier. Because this issue persists, we will reproduce the Court's entire reasoning on the subject:

> The second and seemingly most significant reason for the Board's decision to deny parole was its belief that Adamar lacked insight into the factors that caused his behavior in both thecommitment offense and tagging. This belief apparently stemmed primarily from Robinson's psychological evaluation, but also appeared to be based upon differences between Adamar's account of offenses and that set forth in the appellate opinion. As noted, the appellate opinion set forth an inaccurate version of the offense. It is thus unsurprising that Adamar's account differs from the appellate opinion. The account of the offense that Adamar gave the Board is supported by the trial record, included all material facts that were necessarily or presumably within

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his own knowledge, and did not attempt to deflect responsibility or minimize his culpability.

Given the chaotic and rapidly evolving events that gave rise to the commitment offenses, it is also unsurprising that Adamar did not know that while he was busy fighting Salvador, one of his fellow DYP members drew a gun to keep the crowd back. We fail to see how Adamar's ignorance of this detail has any relevance to the sole issue before the Board: Adamar's current dangerousness to the public, if released on parole. Certainly, no adverse inference about Adamar's current dangerousness can be based upon whether another person decided—without Adamar's request or direction—to draw a gun to keep other people away.

We now turn to the remaining aspects of the Board's and Robinson's assessment that Adamar lacked insight. Although an inmate's insight is not expressly mentioned in the parole regulations, "the descriptive category of 'insight' " embraces "the inmate's 'past and present attitude toward the crime' ([Cal.Code] Regs., [tit. 15,] § 2402, subd. (b)) and 'the presence of remorse,' expressly including indications that the inmate 'understands the nature and magnitude of the offense' (Regs., § 2402, subd. (d)(3))." (*Shaputis II, supra*, 53 Cal.4th at p. 218.) "[T]he presence or absence of insight is a significant factor in determining whether there is a 'rational nexus' between the inmate's dangerous past behavior and the threat the inmate currently poses to public safety." (*Ibid.*) "[A] 'lack of insight' into past criminal conduct can reflect an inability to recognize the circumstances that led to the commitment crime; and such an inability can imply that the inmate remains vulnerable to those circumstances and, if confronted by them again, would likely react in a similar way." (*In re Ryner* (2011) 196 Cal.App.4th 533, 547 (*Ryner*).)

But, while insight is valuable, "we have to question whether anyone can ever fully comprehend the myriad circumstances, feelings, and current and historical forces that motivate conduct, let alone past misconduct. Additionally, we question whether anyone can ever adequately articulate the complexity and consequences of past misconduct and atone for it to the satisfaction of everyone. Indeed, the California Supreme Court has recognized that 'expressions of insight and remorse will vary from prisoner to prisoner and ... there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior.' ([*In re*] *Shaputis* [(2008)] 44 Cal.4th [1241,] 1260, fn. 18.)

More importantly, in our view, one always remains vulnerable to a charge that he or she lacks sufficient insight into some aspect of past misconduct even after meaningful self-reflection and expressions of remorse." (*Ryner, supra,* 196 Cal.App.4th at p. 548.) "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 [sic] 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." (*Ryner, supra*, 196 Cal.App.4th. at pp. 548–549, fn. omitted.)

In re Shaputis, supra, 44 Cal.4th 1241 (*Shaputis I*), illustrates such a case. Shaputis had a history of committing violent acts upon two wives (the second of whom he murdered) and his daughters. He was also "a problem drinker with a history of violence when drunk," and had been drinking heavily the night that he murdered his second wife. (*Id.* at pp. 1246–1248.) In his parole hearings, Shaputis characterized himself as a mellow drinker, claimed that he shot his wife accidentally, found his daughter's allegations of rape, incest, and domestic violence inexplicable, and, when asked if he had a problem in the way he treated women, he said he did not, but he guessed he "had a problem then." (*Id.* at pp. 1248–1250, 1252.)

Notably, Shaputis intended to live with his third wife if paroled, thereby placing himself in circumstances similar to those in which he had previously behaved violently. (*Id*. at p. 1252.) The Board "reluctantly" found Shaputis suitable for parole, but the Governor reversed that decision. (*Id*. at pp. 1252–1253.) The Supreme Court found the record supported the Governor's determinations that (1) the crime was especially aggravated and the aggravated nature of the offense indicated that Shaputis posed a current risk to public safety, and (2) "although petitioner has stated that his conduct was 'wrong,' and he feels some remorse for the crime, he has failed to gain insight or understanding into either his violent conduct or his commission of the commitment offense." (*Id*. at pp. 1259–1260.) With respect to the lack of insight, the court explained, although the evidence indicated that Shaputis killed his wife intentionally, he "*still* claims the shooting was an *accident*.

This claim, considered with evidence of petitioner's history of domestic abuse and recent psychological reports reflecting that his character remains unchanged and that he is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming,' all provide some evidence in support of the Governor's conclusion that petitioner remains dangerous and is unsuitable for parole." (*Id*. at p. 1260, fn. omitted.)

In *Shaputis II*, the Supreme Court similarly concluded that Shaputis demonstrated a lack of insight: " Here, petitioner's lack of insight was established by a variety of factors: the 2004 and 2005 psychological reports discussed in *Shaputis I, supra*, 44 Cal.4th at pages 1250–1252; his own statements about the shooting, which failed to account for the facts at the scene or to provide any rational explanation of the killing; his inability to acknowledge or explain his daughter's charge that he had raped her; and his demonstrated failure to come to terms with his long history of domestic violence in any but the most general terms." (53 Cal.4th at p. 216.)

As both of the Shaputis cases illustrate, a "lack of insight" into past criminal conduct may reflect an inability to recognize the circumstances, forces, and impulses that led to the commitment offense, and this inability may support an inference that the inmate remains vulnerable to those circumstances and, if confronted by them again, would likely react in a similar way. But "expressions of insight and remorse will vary from prisoner to prisoner and ... there is no special formula for a prisoner to ar-

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ticulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior." (Shaputis I, supra, 44 Cal.4th at p. 1260, fn. 18.) "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 [Board'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 remains currently dangerous." (*Ryner, supra,* 196 Cal.App.4th. at p. 549.)

Adamar fully acknowledged that he beat Chavez and stabbed Salvador. He did not attempt to minimize or deny his conduct or mitigate his mental state or culpability in any way, and his account of the offenses did not contradict the evidence. He correctly noted that his codefendant also inflicted a fatal stab wound to Salvador and plausibly explained that he was trying to get Salvador off of Sperling and was not thinking rationally. Even Robinson admitted that Adamar "is likely correct that he was consumed with the emotions of the moment, which probably impaired his judgment." Adamar acknowledged that his conduct was a poor decision and that he should have pushed or "tackled" Salvador to attempt to free Sperling.

The record demonstrates that Adamar, Chavez, Salvador, and others were engaged in a street brawl. Adamar has demonstrated his understanding of the causes of his conduct in the commitment offense, and has demonstrated remorse. He has not made inconsistent statements about his role or culpability in the commitment offense. His statements regarding his mental state and motivation are entirely consistent with the record, entirely plausible—especially in light of Adamar's youth at the time of the offenses—and do not reflect a lack of insight. The record indicates that Adamar has matured, reflected upon the nature and consequences of his conduct—as well as the irrationality of his conduct and alternatives he could have pursued—and undertaken extensive rehabilitative efforts that include conflict and anger management courses. His prison record is devoid of any instances of violence or aggression and indicates, as Robinson acknowledged, "that Mr. Adamar has a fairly well mastered sense of self-control," and this "represents a positive prognosis for continued self-control and non-violence."

There were no material factual discrepancies between the evidentiary record and Adamar's own account of his conduct and its causes. As noted, some of the Board's (and perhaps Robinson's) conclusions that such discrepancies existed stemmed from reliance upon the factually inaccurate appellate opinion. And, as noted, Adamar's ignorance of whether one of his friends pointed a gun at a crowd is neither surprising, given that he was engaged with Chavez and Salvador, nor material to Adamar's culpability or current dangerousness.

The "lack of insight" conclusion by Robinson and the Board is arbitrary, lacks any factual basis in the record, and bears no rational relationship to the essential question before the Board, that is, whether Adamar would constitute a current threat to public safety if released on parole. Unlike the circumstances in *Shaputis I* and *Shaputis II*, the record before us does not include even a modicum of evidence that Adamar gave conflicting accounts of his conduct in the commitment offense, minimized his role in the commitment offense, minimized or failed to acknowledge a history of violent conduct, or otherwise showed a lack of insight or failure to accept responsibility that would support an inference of current dangerousness if released on parole. Unlike Shaputis, Adamar had no "long history of violence" (*Shaputis I, supra*, 44 Cal.4th at p. 1261), as the commitment offense was an isolated incident.

The Board's and Robinson's reliance upon Adamar's purported lack of insight into his prior tagging activities is also misplaced. Although an inmate's past criminal history is part of the information the Board should consider (Cal.Code Regs., tit. 15, § 2402, subd. (b)), prior of-

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> fenses that are neither violent nor sexual and sadistic are not a circumstance showing unsuitability. (Cal.Code Regs., tit. 15, § 2402, subd. (c).) Tagging, while a costly criminal nuisance, does not in itself endanger the life of any member of the public. It follows that a conclusion that Adamar lacks sufficient insight into why he tagged cannot "provide a logical nexus between the gravity of [the] commitment offense and a finding of current dangerousness." (*Ryner, supra,* 196 Cal.App.4th at p. 547.)

For the reasons set forth in its first decision, the Court dismissed the Board's professed concerns about Adamar's disciplinary record and parole plans, and again pointed out that the only "moderate" risk ratings found by the psychologist were based on static *historical* factors, i.e., the commitment offense.

The Court again set aside the Board's 2009 decision and directed the Board to afford Adamar a new parole hearing that conforms to due process and the holdings of *In re Prather* (2010) 50 Cal.4th 238.

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In re David Gary Peaslee (#)

2012 WL 2362905 (unpublished)
CA3 No. C069693 (June 22, 2012)

On June 22nd, the Court of Appeal, Third Appellate District, granted David Peaslee's habeas corpus petition contesting the Board's 2009 decision denying him parole. The main reason used by the Board was its allegation that because Peaslee had been enrolled in substance abuse programming only since 2008, his parole posed an unreasonable risk, i.e., in order to pose an acceptable parole risk, Peaslee's substance abuse programming must be further "maintained over time."

After reviewing the facts of the case and rejecting most of the Board's concerns, the Court of Appeal addressed the Board's substance abuse treatment rhetoric.

No evidence in the record suggests that petitioner ever had a substance abuse problem. All of the reports and evaluations conducted during petitioner's incarceration conclude that drugs and alcohol did not play any role in his commitment offense.

In 1983, the probation officer's report prepared for sentencing stated: "The defendant claimed moderate, social use of alcohol and no drug involvement whatever. These claims appear to be well substantiated by statements of people who knew him well." Likewise, petitioner's 1992 "Cumulative Category 'T' (Group Therapy) Record" touched on his consumption of alcohol and his use of marijuana at age 16 or 17, before noting that he did not demonstrate a history of substance abuse.
Until the Board's 2008 denial of parole, the record demonstrates uniform agreement that petitioner never had a substance abuse problem and that alcohol did not play a role in the commitment offense. Petitioner's 2009 psychological evaluation followed shortly after the Board denied parole in 2008 and urged him to participate in self-help programs addressing substance abuse and addiction.

Dr. Pritchard, the author of the 2009 evaluation, stated: "Substance abuse has never been identified as a particular problem for [petitioner]. He had some social drinking and experimental drug use in adolescence but the [probation officer's report] found, 'The [inmate] claimed moderate, social use of alcohol and no drug involvement whatever. These claims appear to be well substantiated by statements of people who knew him well.' He has no history of substance related infractions in [the Department of Corrections and Rehabilitation]." Rather than having any concerns about substance abuse, Dr. Pritchard concluded that among the "[f]actors which *decreased* his risk of recidivism included ... no problems with alcohol and drugs...." (Italics added.) Dr. Pritchard's conclusion that petitioner never had a substance abuse problem is consistent with the other psychological evaluations of petitioner in 2006 and 2001.

In this case, the Board rested its denial of parole principally on its speculation that petitioner might have a substance abuse problem. As we have noted, none of the psychological evaluations concluded that petitioner had a substance abuse problem or that alcohol and drugs played a role in the commitment offense. Our decision in petitioner's appeal from his original conviction for the commitment offense does not indicate that alcohol played any role in the murder of Greene. And, the probation officer's report noted that people who knew petitioner well indicated he did not appear to have any substance abuse problem.

The People argue that the record does contain some evidence that substance abuse problems rendered petitioner currently dangerous. Specifically, the People point out that petitioner drank beer on the day of Greene's murder, petitioner had previously used drugs and alcohol, and he had associated with people who used methamphetamine.
Each of these factors relied upon by the People was considered and rejected in the psychological evaluations that concluded petitioner never had a substance abuse problem. Indeed, the only place in the record in which petitioner's consumption of beer on the day of the murder is mentioned is in the same section of the 2008 psychological evaluation that concluded "it would not seem that substance abuse was a factor in the commitment offense."

Petitioner's past association with bikers who used amphetamines is mentioned in the 2001 psychological evaluation, which concluded that there was no evidence to establish the presence of a substance abuse disorder, or a need for substance abuse treatment." Each of petitioner's three psychological evaluations noted that he had consumed alcohol and marijuana in the past. Nonetheless, the evaluations did not find that petitioner suffered a substance abuse problem, that drugs or alcohol played a part in the commitment offense, or that substance abuse constituted a risk factor for petitioner.

The People also note that Greene, the murder victim, was a drug dealer and that drugs were taken from him after his death. The People contend the victim's dealing and stash of drugs provide some evidence to support concerns about substance abuse by petitioner.

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The record shows that the events leading to the murder were motivated by the victim's use of a car previously owned by petitioner. Petitioner sold his car to the victim on the condition that the car would be used for parts. Petitioner believed the victim breached that condition by driving the car, which might have gotten petitioner into trouble due to lack of clear title to the vehicle. There is no evidence in the record that the murder was committed for the purpose of taking the drugs or that petitioner consumed any of the drugs taken from the victim.

Contrary to the Board's concern with petitioner's possible problems with alcohol and drugs, the evidence shows that petitioner does not have a substance abuse problem and that alcohol and drugs did not play a role in the commitment offense. Thus, the evidence leads to but one conclusion: petitioner cannot be deemed currently dangerous on the basis of substance abuse concerns.

The Court of Appeal set aside the Board's decision and directed it to provide David Peaslee a new parole hearing that would comply with the Court's findings.

RECALCITRANT APPELLATE PANELS SUPPORT BOARD DECISIONS, VIEWING BOARD'S LAY OPINIONS AS EVIDENCE OF UNSUITABILITY

In re Frederick Davidson (#)

__ Cal.App.4th __ (2012 WL 2952149)

CA2(4) No. B239385 (July 20, 2012)

Although by now the Second District's Fourth Division graveyard is expected to deny all habeas corpus petitions by lifers, by a long shot In re Davidson takes the proverbial cake. From start to finish in its discussion, the Court belittles the Board's decision and each of the Board's reason for denying Davidson parole. Indeed, the Court of Appeal gives no hint of any dissatisfaction with the trial court's earlier grant of habeas corpus relief, but reversed it.

However, the "some evidence" test, this Court implies, is satisfied by the Board's mere recital that Davidson would pose an unreasonable danger to society because he committed his crime while intoxicated and, although remained sober and completed applicable treatment while in prison, relapse is always possible because he is an alcoholic. Hopefully, the Court's decision to publish this foolishness will invite depublication or review. (By design?)

After reviewing the facts and its take on the current status of governing authority, the Court's relatively brief reasoning seems to support Davidson's claims:

In its decision, the Board called out several factual matters, apparently collected under the rubric of "insight, or lack thereof". These are Davidson's statement to the evaluator that the headlights on the vehicle he was driving were dysfunctional or not on; his failure to include the victim, Luther Wafford, at one point in his recitation of those to whom he should make amends; relatively small discrepancies in his recollection of blood alcohol levels at the time of the arrest leading to his previous driving under the influence conviction and the commitment offense in this case; and his reference to the collision as an accident.

The trial court, and petitioner's counsel on appeal, focused on the insignificance of these references. Even under the deferential standard we are applying, we find little here of moment. Davidson did mention the headlight problem, but at the same time he reasserted his own culpability. While he may have omitted to mention Mr. Wafford at one point in his testimony, he repeatedly referred to him and to his family, and the tragedy of the loss, at other points. And his reference to the collision as an "accident" was literally true, as the Commissioner who summed up recognized ("you accidentally took the life of Mr. Wafford" by choosing to drive while intoxicated).

It is difficult to conclude that Davidson minimized his crime or tried to excuse it in light of his repeated expressions of being the sole cause of the homicide. But, again, the focus is on the ultimate decision the Board had to make: whether his release presents an unreasonable risk to public safety. From a reading of the entire record, and particularly of the proceedings before the Board, we believe the Board's decision is supported by some evidence in the record.

As we have noted, and as Davidson has acknowledged, he is an alcoholic. If his testimony is to be believed, he has not consumed alcohol since the commitment offense. But he has been in a controlled environment during that entire time. Once released he will be able to obtain alcohol readily and at will. According to his own accounts, he has abstained from drinking before, only to relapse. And his record of drunk driving is a matter of serious concern, and it does bear on parole suitability. Once released he, like almost anyone, will face pressures of ordinary life, and hopefully will be able to cope with them without resort to the quick and the momentary escape that drinking may seem to afford. He has good plans and has expressed good intentions. It was for the Board to decide whether he would be able to carry them out. As the presiding Commissioner twice observed, Davidson is a "work in progress".

The Board concluded that a five-year or greater denial of parole was not warranted. Instead, it imposed the relatively brief term of three years. In doing so it recommended, among other things, that Davidson update his parole plan to include a substance abuse

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relapse plan. Given the Board's expression and its recounting of the favorable information before it about Davidson—his virtually clean record while in prison, his participation in AA, Bible classes, vocations, his earned certificates, including a certificate of proficiency from Prison Industries, and college class parole plans (which a Board member described as "the way to go"), as well as his family support and his age—the Board's decision extends hope that he will be suitable for parole the next time he is eligible for a hearing.

Having so expounded, the Court inexplicably concluded:

But the nature of his problem and the record support the Board's conclusion that his release now would pose too great a risk to the public.

For the present, and on this record, there is "some evidence" to support the Board's conclusion that he is not suitable for parole.

Editor: Enlightenment, please.

*****

BOARD AND COURT OF APPEAL PENALIZE LIFER – EXTEND HIS PRISON TERM FOR NOT RATTING OFF HIS CRIME PARTNER EARLIER

In re Alex Tapia (#)

2012 WL 2914121 (unpublished)

CA4(3) (June 25, 2012)

As in most cases, the Fourth Appellate District, Division Three, reversed a decision by the Orange County Superior Court which had granted Tapia habeas relief, set aside a decision by the Board denying Tapia parole, and directed the Board to conduct a new parole hearing.

The decision boils down to approving the Board's failure-to-accept-responsibility notion based on Tapia's refusal – until the time of his parole hearing at issue – to disclose the name of his crime partner. The Court of Appeal noted, in prosecutorial fashion: "Tapia's failure to identify Psycho until the day of the parole hearing permitted Psycho to remain free from punishment for his part in the attack on Vega for at least 17 years, might have allowed a dangerous criminal to remain on the streets as a threat to public safety, and neglected Tapia's societal obligation to protect the public by reporting criminal activity. (See, e.g., Roberts v. United States (1980) 445 U.S. 552, 558, 100 S.Ct. 1358, 63 L.Ed.2d 622 ["gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship"].) As Dr. Kropf noted in the evaluation of Tapia for the parole hearing, Tapia's "choice to withhold information regarding the identity of his co-offender suggests that his commitment to that individual exceeds his commitment to the community." Tapia's lack of commitment to the community was a factor the Board could appropriately consider in determining whether Tapia was suitable for parole.

The Court's (and Board's) reasoning seems to refute the holding in *In re Elkins* (2006) 144 Cal. App.4th 475, that the acceptance of responsibility for the crime, no matter how recent, works in favor of release on parole. The Court of Appeal distinguished Elkins because in that case the lifer had accepted full responsibility for the crime more than a decade before the parole hearing, while Tapia disclosed the culprit's name at his hearing in question: "Failing to provide the identity of a violent criminal for 17 years after the crime is committed constitutes an ongoing threat to public safety ***throughout that time period,*** and is some evidence of Tapia's unsuitability for parole."

We highlighted "throughout that time period" because the Court acknowledged that Tapia accepted full responsibility at that point, making *Elkins* entirely applicable. The Court did not explain why refusal to snitch is not a *virtue*; if such a stance makes one an unreasonable public safety risk, most likely the majority of the State's citizens would pose such a risk.

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In re James Rovida, Jr. (#)

2012 WL 2514907 (unpublished)

CA4(3) (June 29, 2012)

As in the previous case, the Third Division of CA4 reversed an Orange County grant of habeas corpus relief to James Rovida, Jr. The superior court found no evidence to support the Board's grounds for denying parole. But, without contesting the sincerity or honesty of Rovida's statements to the Board, the Court, like the Board, cast Rovida's mention of the terrorization that the victim heaped upon him and his family leading up to the crime, as a lack of remorse and a failure to accept full responsibility of the murder offense.

The Court of Appeal reasoned that Rovida's mention of those *undisputed facts* somehow led the Board to believe he was asserting self-defense instead of admitting premeditation. Accordingly, the Court reasoned, the Board must have felt that if Rovida were to face a similar situation, "he would act the same way." The Court's reasoning leads to the rational conclusion that by continuing to take responsibility for his actions, and by *omitting* mention of the terror he and his family suffered that contributed to his criminal conduct, Rovida will be granted parole next time.

Justice Eileen Moore took exception to the majority:

> I respectfully dissent. James Rovida, Jr., a 77–year old man who lived a crime free life for 55 years before committing a murder that sent him to prison, and who in the more than 22 years since has led an exemplary life with absolutely no write-ups or discipline in prison, was denied parole for the second time because the Board of Parole Hearings found Rovida was not remorseful and did not have insight into why he killed his son-in-law, Robert Brock.
>
> I have no dispute with the announced very deferential standard of review. (*In re Shaputis* (2011) 53 Cal.4th 192, 209–210.) I just do not find a " 'modicum of evidence' " (*id*. at p. 210) in this case supporting the conclusion on the part of the Board that the 77–year old Rovida, given the facts of this case, would pose an "unreasonable" risk to public safety. (Cal.Code Regs., tit. 15, § 2402.)

Brock had abused Rovida's daughter, Cathy. When the Rovidas gave Cathy and the children shelter, Brock threatened to burn down their house. He tampered with the Rovidas' truck and mailbox, and was laying in wait on an emergency freeway exit knowing the family was going on vacation. Rovida fired two shots after Brock cut in front of the family's truck shouting they would never get to their destination. With regard to this incident, the jury convicted Rovida of attempted voluntary manslaughter, a result the jury would not have reached unless it found Rovida lacked malice as the result of sudden quarrel or heat of passion. More than likely the jury's verdict indicated it believed Rovida had a good faith, albeit unreasonable belief, in the need for self-defense. (See *People v. Blacksher* (2011) 52 Cal.4th 769, 832–833.) The next week, however, Rovida went to Brock's workplace, followed him home and shot and killed him. For this crime, he was convicted of first degree murder.

At his parole hearing, Rovida expressed remorse and apologized to Brock's family. A psychiatrist's report states Rovida's remorse "seems genuine." Assessment evaluations report he poses a low risk for future violence. He said he plans to live with another daughter and her husband, and work in the family business, even though he is eligible to collect social security benefits.

> Needless to say, the nature of the commitment offense will rarely provide a basis for finding current dangerousness when there is no other evidence of current dangerousness and strong evidence of rehabilitation (*In re Lawrence* (2008) 44 Cal.4th 1181, 1211), and I find no evidence of a lack of insight. Because such evidence is lacking and Rovida meets all applicable circumstances tending to show suitability for release listed in the California Code of Regulations, title 15, section 2402, subdivision (d), I cannot join my colleagues in upholding the Board's denial of parole.

APPELLATE COURT REAFFIRMS LIFER'S ENTITLEMENT TO PAROLE TERM CREDIT

In re Johnny Lira (#)

__ Cal.App.4th __ (2012 WL 2478155

CA6 (June 29, 2012)

We previously reviewed the Sixth District Court of Appeal's decision of last December. Please see ***CLN*** # 42, p. 49. Here is a brief review of the facts and the Court's findings at that time:

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In November 2008, the Board found Lira suitable for parole, and set his term of imprisonment at 216 months (18 years). In April 2009, then Governor Schwarzenegger reversed the Board's decision. In November 2009, the Board held the next regularly scheduled parole hearing, again found Lira suitable for parole, and set his term of imprisonment at 228 months (19 years). In December 2009, before the Board's decision became final, Lira filed a habeas petition challenging the Governor's 2009 reversal. In April 2010, while Lira's petition was still pending, Governor Brown declined to review the Board's latest parole grant. Lira was released to a 3-year parole term on April 8, 2010.

The Court of Appeal reasoned:

If a gubernatorial veto is not supported by some evidence, it is unlawful: it violates the inmate's right to procedural due process concerning a constitutionally protected expectation of parole. *(In re Dannenberg* (2005) 34 Cal.4th 1061, 1094 [recognizing protected expectation]; *Rosenkrantz, supra,* 29 Cal.4th at pp. 676–677 ["Due process of law requires that [a parole decision] be supported by some evidence in the record ."]; see *In re Johnson* (2009) 176 Cal.App.4th 290 [erroneous denial of conduct credit implicates right to due process because it affects vested liberty interest].) Thus, when a court vacates an unlawful veto and reinstates the Board's suitability finding, the interim period of incarceration—between the Board's finding of suitability and its reinstatement by the court—cannot be characterized as time "lawfully" spent awaiting a determination of suitability. (*Bush, supra*, 133 Cal.App.4th at p. 143.)

We acknowledge that during such an interim period, an inmate's incarceration is technically lawful because a gubernatorial veto of a grant of parole is presumptively valid, and under it, the inmate lawfully remains in custody. However, we do not read the *Bush* court's use of the word "lawfully" and its interpretation of "term of imprisonment" as any period of imprisonment " *'lawfully* served' " (*Bush, supra,* 133 Cal. App.4th at p. 143) to mean a period of interim incarceration whose justification, although initially lawful, is later found to be unlawful and a violation of due process. Such incarceration is distinguishable from the period of incarceration analyzed in *Bush* that exceeded the base term set by the Board after a finding of suitability. It is also distinguishable from the period of incarceration that follows an erroneous finding of unsuitability by the Board. Both such periods are at all times lawful and justified by the fact that the inmate has not yet been found suitable for parole. Until that time, the inmate is lawfully serving his or her indeterminate sentence.

Such a justification is lacking, however, when the Board has properly found an inmate to be suitable, but the inmate is forced to remain incarcerated because the Governor erroneously vetoed the Board's finding. The invalidity of the veto and reinstatement of the Board's finding establishes that the inmate should not have had to remain incarcerated beyond the Board's suitability finding in the first place. Such an extension of imprisonment is akin to erroneous extension analyzed in *McQuillion I* and *II* due to the unlawful rescission of McQuillion's parole date.

In our view, a later determination that a veto was unlawful and violated due process retrospectively negates the legal justification for having held an inmate after he or she has been found suitable for parole. For this reason, we believe the later determination of unlawfulness and not the interim technical legality of incarceration pending that determination should control the characterization of a period of incarceration extended by the unlawful veto. Stated more simply, the unlawfulness of a veto renders "unlawful" the extension of incarceration it caused. As such, that period of incarceration does not become part of the inmate's "term of imprisonment," and, under section 2900, an inmate is entitled to credit for that period against that "term of imprisonment." If the inmate has already been released on parole, then under the definition of "term of imprisonment" (§ 2900.5, subd. (c)), the inmate is entitled to credit against his or her parole term.

[C]redit should be calculated starting from the date that the Board's 2008 suitability finding would have become final and effective but for the Governor's erroneous veto. That date would have been 150 days after the Board's finding on November 13, 2008: April 12, 2009. Thus since Lira was

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released on April 8, 2010, he is entitled to credit for the period from April 12, 2009, to April 7, 2010 …

The Court of Appeal directed the Board to "afford Lira credit against his parole term for the period of his incarceration between April 12, 2009, and April 7, 2010.

As reported in ***CLN*** # 43, the Court of Appeal granted review upon petitions by both Lira and the Attorney General. On June 29th, the Court issued its modified decision.

Based on the value to lifers of the content and the authorities set forth for the Court's reasoning, we report extensively on the decision.

The Court addressed and rejected the AG's claim that the finality of the Board's 2009 decision, which Governor Brown declined to review, rendered Lira's petition contesting the Governor's reversal of Lira's 2008 parole grant moot. Accordingly, the AG argued, the superior court (which granted Lira's habeas petition under appeal) should have dismissed Lira's petition. The Court of Appeal squarely rejected that claim:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*Mills v. Green* (1895) 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293; *Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863, 167 P.2d 725.) "A question becomes moot when, pending an appeal ... events transpire that prevent the appellate court from granting any effectual relief. [Citations.]" (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 419, 67 Cal. Rptr.3d 317.)

In his initial habeas petition, Lira challenged the Governor's veto and sought to have the Board's 2008 decision to grant parole reinstated. Clearly, Lira's subsequent release on parole rendered that relief moot and ostensibly made it unnecessary to review the propriety of the Governor's veto. However, in his supplemental petition, Lira sought different relief—credit against his parole term—based on a claim that he had been unlawfully incarcerated from 2005 to 2010. That claim hinges, in part, on the propriety of the Governor's veto. Since Lira remains under the constructive custody of parole, his release did not render his claim for additional credit moot. On the contrary, if he is entitled to credit reducing his parole term, then he is entitled to get it.

Accordingly, we reject the CDCR's contention that the superior court should have simply dismissed Lira's supplemental petition.

The Attorney General next raised an argument which, as we've reported, the Courts of Appeal have steadfastly denied – that the only appropriate remedy after vacating a governor's reversal decision, is to remand the case back to the Governor for a subsequent review. Accordingly, the AG argued, citing to *In re Prather* (2010) 50 Cal.4th 238, "the superior court erred in directing the Board to grant Lira credit against his parole term." The AG's argument was based on (1) the constitutional Separation of Powers Doctrine, (2) a notion that the grant of such relief abrogated the Board's executive authority to set the length of parole terms and the statutory mandate to calculate such terms continuously from the date the inmate is released from prison, and (3) argument that the reduction or elimination of a parole term through the grant of such credits is inconsistent with the rehabilitative and safety goals of parole.

The Court of Appeal first rejected the AG's Separation of Powers claim.

Concerning the doctrine of separation of powers, the court in *Prather* explained that it does not "prohibit one branch from taking action that might affect those of another branch"; rather the doctrine is violated only "when the actions of one branch 'defeat or materially impair the inherent or core functions of another branch.' [Citation.]" (*Prather, supra,* 50 Cal.4th at p. 254, 112 Cal.Rptr.3d 291, 234 P.3d 541, quoting *Rosenkrantz, supra*, 29 Cal.4th at p. 662, 128 Cal.Rptr.2d 104, 59 P.3d 174.)

We acknowledge that parole determinations, including the length of a parole term, fall within the exclusive power of the executive branch. However, the exercise of that power must still comply with the law. Under section 2900, subdivision (c), "all time *served* in an institution designated by the Director of Corrections shall be credited as service of the term of imprisonment" (§ 2900, subd. (c), italics added); and " 'term of imprisonment' " is defined to include "any period of imprisonment *and parole*." (§ 2900.5, subd. (c), italics added.) Thus, under section 2900, an inmate is entitled to have all of the time that he or she has actually "served"—i.e., custody time—credited against the period of imprisonment and parole.

If under applicable statutes and judicial precedent, Lira was entitled to have a certain amount of the time that he "served" in actual custody credited against his "term of imprisonment," then an order requiring that he receive such credit is simply an order directing the Board to comply with the law. Such orders are not novel, and courts have routinely granted habeas relief and ordered that credit be given to inmates and parolees. (E.g., *In re Ballard* (1981) 115 Cal.App.3d 647, 650, 171 Cal.Rptr. 459 [directing Board to grant conduct credit against parole term]; *In re Anderson* (1982) 136 Cal.App.3d 472, 476, 186 Cal. Rptr. 269 [same]; *In re Randolph* (1989) 215 Cal.App.3d 790, 795, 263 Cal.Rptr. 768 [same]; see *In re Carter* (1988) 199 Cal.App.3d 271, 273, 244 Cal.Rptr. 648.)

Consequently, a judicial determination that an inmate or parolee is entitled to credit against a "term of imprisonment" and an order directing the Board to grant it do not, in our view, impermissibly intrude into the realm of exclusive executive power or defeat or materially impair the Board's statutory parole authority. Accordingly, we conclude that the superior court's order did not violate the doctrine of separation of powers.

The Court of Appeal also rejected the AG's claim, based in *In re Chaudhary* (2009) 172 Cal.App.4th 32, and other authorities, that the reduction of a statutory parole term abrogates the Board's executive authority to set the length of parole terms and the statutory mandate (Penal Code 3000, et seq.) to calculate such terms continuously from the date the inmate is released from prison.

Section 3000, subdivision (a)(1) provides: "The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the effective supervision of and surveillance of parolees,

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including the judicious use of revocation actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge. A sentence pursuant to Section 1168 or 1170 shall include a period of parole, unless waived, or as otherwise provided in this article."

Section 3000, subdivision (b)(1) provides, in relevant part: "In the case of any inmate sentenced under Section 1168, the period of parole shall not exceed five years in the case of an inmate imprisoned for any offense other than first or second degree murder for which the inmate has received a life sentence, and shall not exceed three years in the case of any other inmate, unless in either case the parole authority for good cause waives parole and discharges the inmate from custody of the department."

Under these sections, the Board may waive parole. If parole can be waived, then, contrary to the CDCR's position, a period of parole supervision is not an unavoidable and inexorable consequence of a conviction. Moreover, given the specific provisions of section 2900 mandating credit against a "term of imprisonment," which includes the term of parole, an order directing the Board to give credit against a parolee's term is not inconsistent with the general but qualified requirement of parole in section 3000.

Noting that section 3000 states that a parole term is the period "between imprisonment and discharge," the CDCR argues that the statute "indicates that an inmate's parole term should not be served while he remains in prison," which, presumably, would bar crediting a period of incarceration against a parole term. We are not persuaded.

When read in context, the phrase from section 3000 quoted by the CDCR does not suggest that time spent in prison cannot be credited against a term of parole. Indeed, such a reading is incompatible with section 2900. It provides for all prison time to be credited against the "term of imprisonment," which, as noted, includes a term of parole.

The CDCR's reliance on *In re Chaudhary* (2009) 172 Cal.App.4th 32, 90 Cal.Rptr.3d 678 (*Chaudhary*) is misplaced. That case involved parole for an offense committed in 1986, which subjected the defendant to the provisions of section 3000.1. That statute "provides that a person convicted of a second degree murder that occurred after January 1, 1983 is subject to lifetime parole and becomes eligible for discharge from parole 'when [such] a person ... has been released on parole from the state prison, and has been on parole continuously for five years.' (Stats.1982, ch. 1406, § 4.)" (*Chaudhary, supra*, 172 Cal.App.4th at p. 34, 90 Cal.Rptr.3d 678, quoting § 3000.1, subd. (b).) Lira committed his offense in 1980. Thus, he is not subject to mandatory lifetime parole and a five-year parole eligibility requirement.

Finally, the Court of Appeal rejected the AG's argument that its order was inconsistent with "the rehabilitative goals of the parole system and concerns of public safety." The value of the Court's reasoning on this issue and its explanation of the governing authorities is a valuable tool for pro per lifers and, thus, is reported here in its entirety.

Although section 3000 reflects legislative findings that the period after incarceration along with continued supervision and surveillance are critical to a parolee's successful reintegration and to the protection of the public (§ 3000, subd. (a)(1), quoted *ante*, pp. 9–10), these findings do not suggest that a court may deny credit that a parolee is legally entitled to because granting credit and thereby reducing a parole term is inconsistent with the rehabilitative and protective goals of parole. Nor does the CDCR provide convincing *504 authority for such a proposition. Its reliance on *In re Jantz* (1985) 162 Cal.App.3d 412, 208 Cal.Rptr. 619 (*Jantz)* and *In re Chambliss* (1981) 119 Cal.App.3d 199, 173 Cal.Rptr. 712 (Chambliss) is misplaced.

In Jantz, Jantz earned 1,626 days of presentence custody credit, which exceeded the three-year prison term imposed for his offense. However, the Board placed him on parole for three years. Jantz sought habeas relief, claiming that his presentence custody credit entitled him to release without parole. The superior court struck the parole term, but the appellate court reversed. (*Jantz, supra*, 162 Cal.App.3d at pp. 414–415, 208 Cal.Rptr. 619.)

The case required an interpretation of former section 1170, subdivision (a)(2), which provided, in relevant part, "In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence, including any period of parole under Section 3000, shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the Director of Corrections...." (Stats.1984, ch. 1432, § 9, p. 5028.) The court focused on the meaning of "sentence" in the initial phrase "any sentence imposed pursuant to this chapter." *(Ibid.*) Jantz claimed "sentence" referred only to the actual term imposed for the offense and did not include the period of parole. (*In re Jantz, supra*, 162 Cal.App.3d at p. 416, 208 Cal.Rptr. 619.) Thus, since his credit exceeded the three-year term for the offense, his "entire sentence, including any period of parole" must be deemed to have been served.

In rejecting this view, the court observed that under section 2900.5, subdivisions (a) and (c), a "term of imprisonment" included the period of confinement and parole. The court also noted the Legislature's declaration in section 3000 that sentences "shall include a period of parole, unless waived." The court opined that Jantz's interpretation would create an exception to the general requirement of parole without any apparent supportive rationale. Rather, reading the phrases of section 1170, subdivision (a)(2) together in light of section 2900.5 and the legislative findings in section 3000 concerning the importance of parole, the court concluded that " 'sentence' as used in section 1170, subdivision (a)(2), includes any applicable period of parole." (*In re Jantz, supra,* 162 Cal.App.3d at pp. 416–417, 208 Cal.Rptr. 619; see *In re Sosa* (1980) 102 Cal.App.3d 1002, 1005, 162 Cal.Rptr. 646 ["Section 1170 explicitly declares that presentence credit applies against both the imprisonment and the parole portion of the sentence."].) Thus, the court held that section 1170, subdivision (a)(2) does not permit a release from parole "*unless the in-custody credits equal the total sentence, including both confinement time and the period of parole.*" *(In re Jantz, supra,* 162 Cal.App.3d at p. 415, 208 Cal.Rptr. 619, italics added; accord, *In re Welch* (1987) 190 Cal.App.3d 407, 412, 235 Cal.Rptr.

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470.) Since Jantz's credit did not exceed the separate three-year terms for his offense *and parole*, he was not entitled to release without parole.

Far from supporting the CDCR's position, *Jantz* supports the view that an inmate is statutorily entitled to have credit applied against a term of parole. Indeed, *Jantz* strongly implies that where credit exceeds the period of imprisonment and the term of parole, the inmate is entitled to release *without parole*.

Chambliss, supra, 119 Cal.App.3d 199, 173 Cal.Rptr. 712 is inapposite. Chambliss pleaded guilty as part of a plea bargain but *505 was not told about the possibility of parole upon his release. In a habeas petition, he sought release without parole after expiration of his prison sentence. In denying relief, the court noted that there has been no mention of parole during the plea hearing or evidence of a promise or understanding that he would be released without parole. From this silence, the court concluded that parole-free release was not a part of the plea bargain. *(Id*. at p. 202, 173 Cal.Rptr. 712.) Moreover, given the importance the Legislature attaches to parole as reflected in section 3000, the court opined that Chambliss's alleged ignorance of the possibility of parole was not a reasonable basis to permit him to avoid parole upon his release. (*Id.* at p. 203, 173 Cal.Rptr. 712.)

Chambliss does not support the CDCR's view that a court may not grant credit against a parole term because doing so is inconsistent with the broad language of section 3000. That broad statutory language concerning the purpose of parole and the general requirement of parole must be read in light of, and harmonized with, the specific credit mandate of section 2900. (See *Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 119, 80 Cal.Rptr.3d 326 [specific provisions take precedence over conflicting general provision]; *City of Long Beach v. California Citizens for Neighborhood Empowerment* (2003) 111 Cal.App.4th 302, 306, 3 Cal.Rptr.3d 473 [in ascertaining legislative intent, court considers entire scheme of law so that whole may be harmonized to retain effectiveness].) The CDCR's position would, in effect, negate the provisions of section 2900, and for that reason we reject it.

The Court of Appeal *did* agree with the AG that Lira had been afforded too much credit against his parole term. The Court held that Lira was not entitled to credit against his parole term for the period from 2006, the time when he would have been released on parole had the Board found him suitable at his 2005 hearing, until the time of his 2008 hearing which the trial court had ordered after setting aside the Board's 2005 decision. The Court of Appeal reasoned:

> Although the Board erroneously denied parole in December 2005, the court granted credit for the time served after May 11, 2006. Apparently, the court reasoned that the Board should have granted parole in December 2005, and that decision would not have become final and effective until five months later on May 11, 2006. (See § 3041, subd. (b) [Board's grant of parole not final for 120 days]; Cal. Const., art. V, § 8, subd. (b) [Board's decision not effective for 30 days to permit gubernatorial review].) Thus, the court granted credit from May 11, 2006, to November 2008, when the Board, on remand, found Lira suitable and set his base term. In doing so, the court implicitly found that under *Bush, supra,* 161 Cal.App.4th 133, 74 Cal.Rptr.3d 256, that period of continued imprisonment was unlawful and not part of Lira's "term of imprisonment." We disagree.
>
> When a court reviews the Board's finding of unsuitability, it is only determining whether it is supported by some evidence. The court is not determining whether the inmate is suitable for parole. Indeed, as the Supreme Court in *Prather, supra*, 50 Cal.4th 238, 112 Cal.Rptr.3d 291, 234 P.3d 541 explained, the determination of suitability is within the exclusive powers of the executive branch. Thus, a judicial determination that the Board erred in finding an inmate unsuitable does not, and cannot, constitute a finding that the inmate is suitable for parole or that the Board should have found him or her to be suitable. Nor is it an implicit direction to the Board to find the inmate suitable. If it were, then the judicial reversal of the Board's decision would entitle an inmate to immediate release on parole. However, in Prather, the court found that an order directing an inmate's immediate release violates the doctrine of separation of powers. (*Id.* at pp. 244, 248, 255–257, 112 Cal.Rptr.3d 291, 234 P.3d 541.)
>
> Rather, as *Prather* instructs, when a court reverses the Board's unsuitability finding, it should remand the matter for a new determination of suitability that comports with due process. (*Id*. at p. 244, 112 Cal. Rptr.3d 291, 234 P.3d 541.) In other words, a judicial reversal returns the inmate and Board to the status quo ante and puts the issue of suitability at large before the Board. Under such circumstances, incarceration after the Board has erroneously found an inmate to be unsuitable for parole and until the inmate is later found suitable simply constitutes continued service of the underlying indeterminate sentence. Such incarceration is clearly "lawful" and thus part of the "term of imprisonment" under section 2900. Accordingly, an inmate who has been released on parole is not entitled to credit for such continued incarceration against a fixed parole term.
>
> Given our analysis, we conclude that the superior court erred in finding Lira entitled to credit for his continued incarceration up to November 2008, Until that time, his incarceration was "lawful."

The Court of Appeal reaffirmed the amount of credit it had granted to reduce Lira's parole term, for the period between 2009, when he would have been released to parole but for the Governor's errant reversal, and the 2010 date when Lira was released to parole.

After reiterating its reasons, set forth in the original opinion, for setting aside Governor Schwarzenegger's 2009 reversal decision, the Court addressed a different issue – the length of Lira's parole term. Because Lira's commitment offense, a second degree murder, occurred in 1980, his statutory parole term was 5 years (Penal Code § 3000, et seq.). However, the parole discharge papers Lira signed in his counselor's office, and some other documents, erroneously indicated a parole term of 3 years. Lira had asserted that his term was 3 years, to which the AG acceded in briefing. Having realized the error, the AG asserted in petitioning for rehearing that the Court should deem Lira's parole term to be 5 years, compliant with the statute. The Court agreed that the CDCR's (often) errant paperwork cannot trump Lira's statutory 5-year parole term.

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The Court rejected Lira's claim that he was also entitled to "conduct [t. 15 § 2410] credit" (in addition to "custody credit") for the period of his unlawful imprisonment. The Court of Appeal, like the trial court, did not feel compelled to address this claim because Lira did not raise it until the time of his traverse in the trial court. Nevertheless, the Court of Appeal disposed of it:

> As discussed above, section 2900 provides only that an inmate is entitled to have all time "served" in custody credited against his "term of imprisonment." (§ 2900, subd. (c).) Moreover, inmates convicted of murder and sentenced to indeterminate terms are not statutorily eligible to earn post-conviction worktime or conduct credit. (See §§ 2931, 2933; In re Monigold (1983) 139 Cal. App.3d 485, 490, 188 Cal.Rptr. 698.)
>
> Lira claims that section 2410 of the Regulations entitles him to conduct credit against his parole term. Not so. That section provides in pertinent part, "[l]ife prisoners may earn postconviction [good conduct] credit for each year spent in state prison from the date the life term starts. Prior to the initial parole consideration hearing life prisoners shall have documentation hearings.... At the documentation hearings, the board shall document the prisoner's performance, participation, behavior and other conduct.... Credit shall not be granted or denied at these hearings. The documentation shall be used by the panel which establishes a parole date to determine how much, if any, credit should be granted for the years served prior to the establishment of the parole date."
>
> Although this section provides that an inmate can earn postconviction conduct credit, it does not require or authorize the application of postconviction conduct credit in excess of the base term against a life inmate's parole period. On the contrary the purpose of such credit is established in section 2400 of the Regulations. That section provides, in relevant part, "[t]he amount of good conduct credit that a prisoner sentenced for first or second degree murder may earn *to reduce the minimum eligible parole date* is established by statute. [Citation.] Life prisoners convicted of attempted murder do not earn these credits. The department will determine the minimum eligible parole date.
>
> The length of time a prisoner must serve prior to actual release on parole is determined by the board. The amount of postconviction credit a prisoner may earn *to reduce the length of time prior to release on parole* is determined by the board. This article implements Penal Code section 3041 and concerns only the board's exercise of discretion in determining whether a prisoner is suitable for parole and, if so, when the prisoner should be released on parole." (Italics added.)
>
> Under this section, postconviction conduct credit can only be used to reduce the length of time a prisoner must serve prior to actual release on parole. In other words, postconviction conduct credit can be applied to advance or accelerate the date upon which an inmate is released on parole. However, there is no statutory or regulatory basis to apply such conduct credit to reduce an inmate's parole term after release or advance or accelerate the inmate's discharge from parole.

The Court concluded: "We modify the order granting Lira's supplemental petition for a writ of habeas corpus. It shall now direct the Board to grant Lira custody credit against his parole term for the period of his incarceration between April 12, 2009, and April 7, 2010. As modified, the order is affirmed."

*****

APPELLATE PANEL HOLDS CUSTODY CREDIT CLAIM "MOOT"

In re John L. Batie (#)

__ Cal.App.4th __; 2012 WL 2947642
CA4(1) No. D059794 (July 20, 2012)

Three weeks after publication of In re Lira, supra, the First Appellate District, Division One, published a contrary opinion holding that claims like Lira's, above, and Batie's, to receive custody credit to reduce one's parole term following a reversed governor's veto of a prior parole grant, are rendered moot by the petitioner's subsequent release pursuant to a new parole decision. The Court of Appeal held in this case "that Batie's 2011 release has mooted all issues in the petition that concern release on parole." Although a court need not address a mooted claim, this Court went on to explain why it would deny Batie's claim were it not moot.

The Court acknowledged In re Lira, supra, but summarily, disagreed with Lira's reasoning on every issue. Adopting the AG's simplistic view and twisting statutory language, the Court held that because the parole period does not commence until an inmate's release from prison, any excessive period of imprisonment (which, obviously occurs before parole commences) cannot be applied to reduce that term.

Predictably, both Lira and Batie will become "moot" when the California Supreme Court resolves this split upon review – a process that may take two years or more and may again involve the sort of statutory and logical disfigurement the Court published in Shaputis-II.

*****

STATE SUPREME COURT HOLDS TEMPORARY STATUTE AFFORDING INCREASED JAIL CREDIT TO BE PROSPECTIVE ONLY

People v. James Lee Brown III (#)

____ Cal.4th ___; 2012 WL 2206892
No. S181963 (June 18, 2012)

Penal Code § 4019 governs the amount of presentence conduct credit afforded prisoners in local (jail) custody. For an 8-month period beginning on January 25, 2010, pursuant to a temporary amendment to the statute contained in a fiscal emergency budget bill, the amount of such credits was increased. Brown claimed entitlement to such credits, not only for the time during his confinement when the amendment was in force, but for the 3-year period of his confinement prior to its enactment.

In short, the Court concluded that "former section 4019 applied prospectively, meaning that qualified prisoners in local custody first became eligible to earn credit for good behavior at the increased rate beginning on the statute's operative date. We also hold that the equal protection clauses of the federal and state Constitutions …do not require retroactive application."

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WHICH IS LARGER – A "DUODECILLION" OR A "SEPTILLION"?

Moore v. California (#)

2012 WL 2370436 (unpublished)

CA2(7) No. B234484

Darrell L. Moore appealed from a trial court order dismissing his action for failing to serve the defendants with his amended petition. The Court of Appeal affirmed the trial court's action.

Moore had filed a pro per complaint against the State, Scott Kerman and others who were wardens or associate wardens of several state prisons. Moore sought $8 septillion in damages for breach of contract and violation of state regulations prohibiting CDCR employees from "engaging in any employment or activity inconsistent with or incompatible with employment by the Department." Moore amended his complaint twice. The second amended complaint sought $4 duodecillion in damages and $57.5 million in attorney fees. The Court of Appeal cast Moore's last amended complaint as "nonsensical and indecipherable [with] little or no indication of the nature of the action."

*****

COURT OF APPEAL ORDERS COMPASSIONATE RELEASE; OVERTURNS SUPERIOR COURT ORDER OF DENIAL AFTER BOARD FOUND INMATE SUITABLE

People v. Hampton Wade (#)

2012 WL 1759369 (unpublished)

CA1(4) No. A133674 (May 17, 2012

On May 17th , the First District Court of Appeal reversed a Lake County Superior Court order denying Hampton Wade's application after the Board found Wade suitable for compassionate release. Wade, convicted of a 1989 murder, is terminally ill with emphysema complicated by congestive heart failure and a multitude of severe ailments, confined to a wheelchair, and in need of continuous medical care. Compassionate release was recommended by Wade's assigned physician, specialists who cared for him, the Chief Medical Officer, and the warden. An en banc panel of the Board of Parole Hearings determined by a 10-1 vote that Wade met the criteria for compassionate release. Wade planned to live with his family in the Chico area.

At the superior court proceeding, the trial judge questioned the validity of the medical reports, specifically wondering why, since Wade had been ill for so long, it could be determined with certainty that his life would now be limited. The judge claimed to need more details about Wade's diseases.

> They tell me that he's in a wheelchair, he has oxygen. He's not bound to the wheelchair, he's not crippled, he can get up and walk around but he can't walk far without being severely short of breath. They give me no indication as to how far he can get in the wheelchair. He can stay in the wheelchair and go for blocks for all I know.
>
> Furthermore, they tell me that he's not able to run or push his wheelchair up an incline. That doesn't come across to me as being highly incapacitated, he's simply out of breath and mostly spends his time in a wheelchair.
>
> They … made a phone call with his niece who says we'll take care of him; and I don't doubt that the niece, Ms. Gillespie, and his sister are completely sincere; but they've never had custody of this individual—they've never [taken] care of this individual, I should say, they don't know what it takes. They can't watch him 24/7.
>
> His sister, tragically, is deaf, according to the report here, which tells me—and the two would be living together alone in a home, which tells me he could wheel himself right out the front door and she'll never know, she's not going to hear it.
>
> I don't know if there's a liquor store down the street. I don't know if there's alcohol in the home. I don't know if there are firearms or other dangerous weapons in the home, and apparently neither does the Board of Parole Hearings because they never bothered to check.
>
> I don't know if he has friends on the outside that might pick [him] up and take him to the bar down the street and have a good time, I don't know any of that. It has been made clear from the records and arguments here when he drinks he becomes extremely dangerous. I agree with [the prosecutor], I have no reason to believe he's no longer an alcoholic. Just simply because it's not been available to him in prison doesn't mean that once it becomes available to him he won't become a heavy drinker again.

After discussing the history of the compassionate release laws and the appropriate standard of review, the Court of Appeal held that because the trial court's decision was not supported by substantial evidence, it constituted an abuse of discretion to deny Wade's petition for compassionate release. The Court of Appeal held that the physicians' reports verified that Wade and his condition met the statutory criteria of being "terminally ill with an incurable condition caused by an illness or disease that would produce death within six months." All four doctors who examined Wade concluded that his prognosis was 'less than six months of survival.' The Warden and parole board investigators concurred."

Accordingly, despite the trial judge's speculation, the Court of Appeal concluded, "[b]ased on this record, there is overwhelming, uncontroverted evidence establishing the criteria for compassionate release under section 1170, subdivision (e)(2)(A). In fact, there is not a shred of evidence that appellant is not suffering from a terminal illness that 'would' produce death within six months." The Court likewise held that no evidence was presented suggesting that the conditions for Wade's release would pose a public safety risk. The Court of Appeal took the trial judge to task:

> The trial court's implied determination that appellant may present a threat to public safety if he were to be released is equally without evidentiary support. The trial court virtually ignored the evidence that appellant essentially is wheelchair bound, that he can only "walk several steps to get from his wheelchair to his bed," that "even this minor exertion causes severe shortness of breath," that if released appellant "will likely spend most of his time in bed or chair," that he requires the continuous use of bottled oxygen, and that he needs help getting dressed. Instead, the judge belittled appellant, by disdainfully concluding "he's not crippled," and then by spinning the most fanciful speculative scenario, without any factual basis, that, despite his unassailable limitations, appellant might "wheel himself right out the front door," and perhaps join "friends" who might "take him to the bar down the street and have a good time...."
>
> Equally lacking in factual underpinning is the judge's concern that the family "can't watch him 24/7." In fact, the Board's inves-

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tigation concluded that a family member would be home "at all times" to look after appellant.

Accordingly, the trial court's denial of appellant's motion because either he did not meet either criterion for compassionate release was not supported by substantial evidence, and was erroneous.

Based on those findings, the Court of Appeal concluded that the trial court abused its discretion in denying Wade's motion for compassionate release:

Even if section 1170, subdivision (e) gives the trial court discretion to deny a motion to recall a sentence or to resentence where the criteria for compassionate release fixed

under the statute have been met, it was abused here.

The only reason stated by the trial court for denying appellant's motion was the express or implied findings that he did not meet the criteria under subparagraphs (A) and (B), determinations we have concluded were made without substantial evidentiary basis. Indeed, the evidence supporting the existence of subparagraphs (A) and (B) in appellant's case was overwhelming. A trial court abuses its discretion where its decision exceeds the bounds of reason by contravening the uncontradicted evidence in the record. (*Conservatorship of Scharles* (1991) 233 Cal.App.3d 1334, 1340.) Thus, a trial court's exercise of discretion is " 'subject to reversal on appeal where no reasonable basis for the action is shown. [Citation.]' [Citation.]" (*Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1261.)

Rather than stating any other factor justifying its denial of appellant's motion, the trial judge simply stated that "[i]n this Court's view, [appellant] is exactly where he belongs, he's in custody and he should stay there." Where discretion is conferred, " ' "[t]he discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]" ' [Citations.]" (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118; *People v. Jordan* (1986) 42 Cal.3d 308, 316 [an abuse of discretion is found if the court exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice].) Such was the case here.

The Court of Appeal directed the trial court to "enter a new order forthwith granting appellant's motion for early compassionate release, and to recall his sentence as provided in section 1170, subdivision (e)(2). Good cause appearing, our decision is hereby ordered to become final as to this court immediately …The remittitur shall issue within 30 days, unless the parties stipulate to its immediate issuance …"

Hopefully, this decision will encourage the Board to refer more deserving compassionate release cases to the courts.

*****

COURT OF APPEAL REVERSES JURY'S AWARD OF DAMAGES TO INMATE'S ESTATE BASED ON HIS FAMILY'S FAILURE TO FILE TORT CLAIM; HOLDS CDCR IMMUNE FROM FAILURE TO PROVIDE NEEDED MEDICAL CARE

Yanira Castaneda v. CDCR (#)

__ Cal.App.4th __; 2012 WL 3041342

CA2(3) No. B229246 (July 26, 2012)

A jury found that the State violated Government Code § 845.6 when its employees knew or had reason to know Castaneda was in need of immediate medical care while in custody but failed to take reasonable action to summon care. The Court of Appeal first held that the trial court erred when ruling that the State was estopped from raising the heir's failure to file a government tort claim. The Court then held that, "as a matter of law, the State is immune to liability for the decisions that resulted in Castaneda failing to undergo a biopsy while he was in State custody," citing Gov.C. §§ 844.6 & 854.6.

The Court's summary of the facts reflects the horrendous medical care (more accurately, a lack of care) existing at North Kern (NKSP). Importantly, although Castaneda filed a timely tort claim, his family failed to do so upon his unfortunate death.

Using verbiage and a slant on authorities typical of a predetermined of politically-based decision, the Court of Appeal eradicated the jury's award of damages and absolved the Department of responsibility.

*****

SUPERIOR COURT REVERSES DECISIONS BY BOARD, GOVERNOR

In re Rudy Rodriguez (#)

Santa Clara County Superior Court

No. 137206 (July 6, 2012)

In this case the Board denied parole based on immutable pre-imprisonment facts, and an FAD psychologist's risk assessment of low-to-moderate in which the "moderate" end of the scale was likewise based on static historical facts. The court pointed out, "A score that is elevated only because of such immutable historic facts does not independently or in and of itself supply some evidence in support of a parole denial. Just as the static facts of the crime itself do have independent weight without a nexus, so too a psychologist's finding based on static factors needs a nexus to remain probative of current dangerousness. That nexus was not articulated by the Board, nor is it supported by the record."

Using recently published Supreme Court law, the court also rejected the AG's argument that the Board was not required to consider Rodriguez' age and immaturity at the time of the commitment offense (he was 16 years old):

Directly on point is the precedent of *In re Barker* (2007) 151 Cal.App.4th 346,376-377, which overturned a parole denial, in part, because: "the Board failed to consider Barker's age [16 years old] at the time he committed the crimes." Citing case law from California state and federal courts, and the United States Supreme Court, the *Barker* court explained the recognized scientific and legal authority establishing that minors who commit crimes are less culpable, and that this is a Constitutionally

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required consideration. (See also *Graham v. Florida* (2010) 175 L.Ed.2d 18.)

Recent authority on parole cases solidifies the court's power and obligation to reverse the Board when it ignores a central aspect of the life crime's dynamic. The California Supreme Court in *Shaputis II* reaffirmed that reviewing courts may "rel[yJ on evidence omitted from the decision below to conclude that findings were not supported by 'some evidence.' ... [R]eviewing court[sJ [a]re permitted to go beyond the evidence mentioned by the parole authority to conclude that a finding lacks evidentiary support." (*In re Shaputis(2011*) 53 Cal.4th 192, 214, n.ll (*Shaputis II*)).

Subsequent to *Shaputis II* the Court of Appeal has explained: "*Shaputis II* and the Supreme Court opinions upon which it relies make clear that we are to review the Board's decision to ensure that it satisfies two due process imperatives that are particularly relevant to this case. We must determine whether the Board's decision reflects due consideration of all relevant statutory factors and, if it does, whether its analysis is supported by a modicum of evidence in the record, not mere guesswork, that is rationally indicative of current dangerousness." (*In re Morganti* (2012) 204 Ca1. App.4th 904, 917. *In re Young* (2012) 204 Cal. App.4th 288, 304.)

In the instant case, the Board's failure to weigh and consider Petitioner's minority as a mitigating factor reflects a failure of "due consideration of all relevant statutory factors." Thus, the decision in this case does not comport with the first of the "two due process imperatives." Simply put, Petitioner was a minor at the time of his life crime and the Board gave this central and defining fact no consideration whatsoever. The Board's willfulness in purporting to analyze Petitioner's crime and rehabilitation in a vacuum, without reference to his minority at the time of the events themselves, infects the entirety of their decision and compels the conclusion that Petitioner did not receive individualized due process.

The very recent decision of the United States Supreme Court in *Miller v. Alabama* (2012) US LEXIS 4873 (*Miller*) establishes the significance of this factor in constitutional terms. There, the court held that a sentence of life without the possibility of parole cannot be imposed on juvenile offenders without consideration of their youth "...because juveniles have diminished culpability and greater prospects for reform." Citing prior case law the Court held: "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed," and "a sentencer [is] require[d] take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Therefore, any sentencing scheme "making youth, and all that accompanies it, irrelevant to imposition of that harshest prison sentence" is unconstitutional.

Under these principles it appears that the Boards failure to give any consideration Petitioner's age at the time of his offense and its impact on the question of insight justifies reversal of the Board decision and a new hearing comporting with due process.

The superior court also rejected the Board's reliance on an outdated disciplinary violation (CDC-115) to find Rodriguez unsuitable:

> Regarding Petitioner's disciplinary 115 for hoarding prescription medication, which occurred in 2005, the misbehavior is too distant, and the nexus is too speculative, to support a finding of dangerousness in 2011. The 115 derived from Petitioner's possession of prescribed allergy medicine in January of 2005 even though none had been dispensed to him since February of 2004. Respondent argues that he could have used the quantity he had to get high or sell it to others for this purpose. There is no evidence in the record to support such blatant speculation. There is no evidence of positive drug tests, other disciplinary write-ups, or notations in the psychological report.
>
> What evidence does exist is petitioner's uncontradicted explanation that, because he had been prescribed the Benadryl, he simply kept what was not immediately needed for future use. Although this incident does amount to a clear rule violation, it provides no nexus to a finding that Petitioner now presents an unreasonable danger if released. Any nexus is plainly lacking where the substance in question is not some form of illegal or intoxicating substance as was the PCP use associated with the commitment offense. More importantly, there is nothing in the record to contradict petitioner's sobriety since 1997 or his "comprehensive understanding of his substance abuse history and relapse prevention" [ref.]. There is also no evidence of a nexus between that rule violation and *current* dangerousness where the record establishes that Petitioner's "ability to refrain from future use in the free community is quite good at this time." [ref.]

The court also took the Board to task for failing to inform Rodriguez of what he needed to accomplish in order to be found suitable at his next hearing.

> As noted in the Order to Show Cause, the tenor of the Board's decision reveals an inchoate unwillingness to grant parole despite the fact that no meaningful recommendations were given and Petitioner was essentially told to "continue your good programming." The absence of specific recommendations or factors needing improvement is consistent with the fact that the record and the factors cited by the Board do not establish that Petitioner is unsuitable for release at this time.

The court directed the Board to afford Roldriguez a new parole hearing consistent with its decision. The AG has not appealed.

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In re Byron Kenneth Mills (#)

Santa Clara County Superior Court
No. 76347 (May 7, 2012)

In this case the court set aside the Governor's reversal of Mills' 2011 BPH parole grant chiefly because the Governor relied on an outdated, superseded psychological evaluation to contest Mill's insight, remorse, and acceptance of responsibility for his crime.

In 1980, while attempting to reconcile with his wife, she admitted sleeping with another man. Mills lost control, strangled her and, when she fell to the floor, summoned help, but it was too late. Mills' 31-year prison record had been exemplary, his psychological reports were favorable (low risk, except for static pre-commitment factors), and he had completed extensive programming. Mills

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frankly and openly expressed his remorse, insight, and acceptance of responsibility at his hearing, and the Board granted him parole.

The Governor reversed based on excerpts from an outdated psychological evaluation to claim that Mills "still appears to lack insight," and "has not shown genuine remorse." (Emphasis by court.)

> The Governor in this case has attempted to justify his rejection of the more current psychological report and adoption of the older and less favorable report on the basis that he found it to be more "in-depth and comprehensive" and because he says that the current report does not "adequately address[] the concerns raised" in the older one. These findings are not supported in the record. Indeed, the Governor's rejection of the most recent psychological report in favor of an older one, is invalid per Shaputis II. The California Supreme Court has recently explained: "Usually the record that develops over successive parole hearings has components of the same kind: CDCR reports, psychological evaluations, and the inmate's statements at the hearings. In such cases, the Board or the Governor may not arbitrarily dismiss more recent evidence in favor of older records when assessing the inmate's current dangerousness." (In re Shaputis, supra, 53 Cal.4th, p. 211.)
>
> Here, the Governor asserted that he was choosing to rely on the older report because he felt it was "more comprehensive." The Governor seems to believe, or at least he implies, that the reports represented the two different doctors' independent and unrelated assessments of Petitioner. If the reports represented separate experts examining the same evidence and coming to different conclusions then the Governor would indeed be allowed to choose the one he felt was more "in depth." But that is not the situation before us here. The second report fully takes into account, and builds upon, the older one.. In the very first sentence of the second report the doctor explains: "The current assessment serves as an update to the [prior one]." n page 2 the doctor notes that since the first report "Mr. Mills has continued to refine his insight. " On pages 3-4 the doctor noted Petitioner's continued good behavior, positive programming, and additional laudatory chronos, since the earlier report. And in the final section the doctor notes that the present "analysis of Mr. Mills' dynamic risk serves to supplement the risk assessment findings [of the older report]." In light of the above evidence, the Governor's reliance on the outdated report is squarely the sort of "arbitrarily dismiss[al of] more recent evidence in favor of older records" which was disapproved in Shaputis II.
>
> Petitioner is now 22 years past his MEPD. Assuming, without deciding, that the 2 year old prior report contained a modicum of evidence supporting the extremely cautious approach to parole that has become the norm, continued reliance upon it when there is a more recent report has become a violation of due process. (In re Shaputis, supra, 53 Cal.4th at p. 211. "[T]he most recent evidence as to the inmate's level of insight will be particularly probative on the question of the inmate's present dangerousness.")
>
> To the extent the Attorney General argues the Governor was entitled to make an independent assessment of Petitioner's insight and remorse, Respondent cites the correct and applicable law. But Respondent neglects acknowledging that the independent assessment must be based on relevant facts existing in the record. "One always remains vulnerable to a charge that he or she lacks sufficient insight into some aspect of past misconduct even after meaningful self-reflection and expressions of remorse." (In re Shaputis (2011) 53 Ca1.4th 192, 229, Liu concurring, quoting In re Ryner (2011) 196 Cal.App.4th 533, 548.
>
> See also In re Rodriguez (2011) 193 Cal. App.4th 85.) In this case the Governor's amorphous conclusion that Petitioner has not shown "genuine" remorse is made without a "factually identifiable deficiency in perception and understanding" (Ryner at p. 549,) and is made without an apparent nexus to present dangerousness. (See also Ryner, at p. 548: "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.")

The court set aside the Governor's decision and reinstated Mills' parole date set by the Board. The AG has not appealed.

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"LACK OF INSIGHT" UPHELD FOR LIFER'S "DETACHED" DESCRIPTION OF KILLING

In re James Mackey (#)
2012 WL 3090268 (unpublished)
CA3 No. C070029 (July 31, 2012)

James Mackey didn't deny what he did; it was *how he described* what he did, that cost him a parole date.

Mackey's first degree murder involved an elaborate plot to kill a real estate agent who was a "thorn in his side." The plot variously involved hiring an accomplice, then obtaining a rope, 50 lb. weight, and boat, so as to sink the body in Lake Tahoe. After luring the victim to a phony real estate site there, Mackey shot him with a crossbow. But they were observed, and, in their panic, tossed the victim in the back of the car, planning to later throw him down an embankment in Sonoma County.

It is what happened next that the Board focused on. When they were ready to dump the "body," they found the victim was still alive. Mackey's crime partner gave Mackey one end of the rope, and asked him to pull on it (the other end was around the victim's neck). this is what Mackey told the Board he did:

> [Mackey's crime partner] said that he needed some help. I got out of the car and stood next to the door, the driver side door. [My crime partner] brought the end of a rope to me. And he told me to pull. And I pulled until he told me to let go.

The Panel got Mackey to admit that he knew the rope was around the victim's neck and that "you choked him to death after all that." But the Panel was upset that Mackey didn't *volunteer* the fact that he knew he was killing the victim by choking him with the rope.

The Panel parlayed this "detached" description of the murder into a "lack of insight," and for that reason denied parole.

> So, our question is, ... what caused all this, why did you do all this, and how close have you come to grips with the crime itself. And I want to point to a couple things, one in particular that I was really disappointed with. And that was just to illustrate how we don't think you have the level of insight that we think you can achieve, but haven't as yet. And that is when we spoke of the crime, you went through the brutal nature of this thing, you got to the place where you were going to dump the body, the remains, and he wasn't a body yet, he was still alive. And your description of what you did at that point you held, at the direction of your crime partner, you held the other end of a rope. You know, you choked that guy and you knew you were doing that at the time. You left that completely out, which separates yourself from the final act of murder. I mean, think about it. ...
>
> You said, I just held the rope. It's like you're holding on to a horse or something. It was much more brutal than that. And I mean, that is astonishing to me after going through the description of the crime, talking about how you kicked him and beat him.... But that description of holding the rope, where you're completely divorcing yourself from your act in this final demise of this poor man, was astonishing. I mean, I had to probe you a while to get that out of you. And I knew what happened. And you knew what happened. You knew what was going on.

The appellate court validated the Board's concern for Mackey's detachment.

> Although the Presiding Commissioner mistakenly recounted that Mackey said he merely "held" the other end of the rope (Mackey actually said he "pulled" the rope), and although Mackey has consistently maintained that he "pulled" the rope, this does not diminish the essential point underlying the Board's determination regarding Mackey's insight: Even after all these years, even after all the brutal acts Mackey admits he undertook in this offense, Mackey is still divorcing himself from the "final act" of actually killing Carnegie. That is, Mackey is reluctant to say, on his own, that he pulled the rope *so as to strangle Carnegie to death*. The Board found this reluctance "astonishing." The Board remarked that it had to "probe [Mackey] a while to get [this] out of [him]." Mackey even acknowledged he understood the Board's point.

The Court also approved the Board reliance on a statement by Mackey in a 1990 probation report that evinced "detachment."

> Also, as noted, the Board, in setting forth the circumstances of the offense, relied on Mackey's 1990 statement to the probation officer. That statement contains the following passage: "Mackey believes that he is to blame for Lawrence Carnegie's death. He believes that he was the catalyst for the murder. Although Blatt wanted Farley and Carnegie killed and depended on Mackey to be the 'middle man' to set up the killings, Mackey feels that if he had tried to talk Blatt out of the murders, Blatt would not have followed through with plans to kill either man." There is a certain detachment in this passage that mirrors Mackey's detachment from the end of the rope that choked the life out of Carnegie. (See *Shaputis, supra*, 53 Cal.4th at pp. 214–215, fn. 11 [court review under the "some evidence" standard is not limited to the evidence explicitly cited by the Board or the Governor in its decision, but extends to the entire record].)

The Court of Appeal cited *Shaputis-II* in validating the Board's lack-of-insight finding as a nexus to current dangerousness:

> This evidence involving insight constitutes "some evidence"—a "modicum of evidence"—of "a material deficiency in [Mackey's] understanding and acceptance of responsibility for the crime" (*Ryner, supra*, 196 Cal.App.4th at p. 548), which supports the Board's conclusion that (1) Mackey lacked insight into his offense, and (2) this lack of insight was, as the law on parole suitability requires, "rationally indicative of [Mackey's] current dangerousness (*Shaputis, supra,* 53 Cal.4th at pp. 214, 219).

Although the Court went on to find that *all*

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other BPH regulatory factors were favorable to parole, it found Mackey's deficient description to constitute the *Shaputis*-required modicum of evidence:

> We conclude that the Board's parole denial is supported by "some evidence," a "modicum of evidence." (*Shaputis*, supra, 53 Cal.4th at pp. 198–199.) The horrific circumstances of the commitment offense, together with the evidence of Mackey's lack of insight into the offense, support the Board's conclusion that Mackey "currently poses a threat to public safety." (*Id*. at pp. 220–221.) There is a "rational nexus" between this evidence and the Board's determination of current dangerousness. (*Id*. at p. 221.)

The moral of this story for lifers is to be sure not to "sugar-coat" your description of what you did, when recounting the commitment offense to the Board. That notwithstanding, neither the Board nor the Court of Appeal suggested a theory by which Mackey's mere failure to state, rather than to imply, that his act actually killed the victim, makes his release to supervised parole an unreasonable danger to society.

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LWOP/CONDEMNED POST-CONVICTION DISCOVERY PROCEDURE (PC § 1054.9) EXPLAINED

Lionell Tholmer v. Superior Court (#)

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

Most CLN case reviews concern parole-eligible lifers. Here we review an unpublished decision that explains the post-conviction discovery process available to LWOP/condemned prisoners who seek a second bite at the apple on their non-parole-able convictions.

PC § 1054.9 is located in the pre-trial proceedings section of the Penal Code, under "discovery." It was established by the Legislature to be used by LWOP/condemned prisoners who seek to reopen their cases on a habeas corpus petition that would prove that material evidence in their case was known by the prosecution at the time of trial, but was not made available to the defense then. The appellate court's summary in *Tholmer* is instructive in understanding the novel venue afforded under PC § 1054.9:

> Through section 1054.9, the Legislature has provided a vehicle for an inmate, sentenced to death or life without the possibility of parole, to obtain postconviction discovery for a habeas corpus petition or motion to vacate a judgment. If the inmate makes a "showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b)." (§ 1054.9, subd. (a).) The exception of subdivision (c) of section 1054.9, inapplicable here, provides: "In response to a writ or motion satisfying the conditions in subdivision (a), court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The procedures for obtaining access to physical evidence for purposes of post conviction DNA testing are provided in Section 1405, and nothing in this section shall provide an alternative means of access to physical evidence for those purposes."
>
> "Discovery materials" are described in subdivision (b) as "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial." (§ 1054.9, subd. (b).)
>
> "The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant." (§ 1054.9, subd. (d).)
>
> Section 1054.9 has no time limit, and thus an inmate sentenced to death or life without the possibility of parole may file a section 1054.9 motion (or petition) years after his conviction. (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 304–305.) An inmate may file a section 1054.9 motion either when the inmate is preparing a habeas corpus petition or when he has already filed the habeas corpus petition. (*In re Steele, supra*, 32 Cal.4th at p. 691.) The motion may be filed by an inmate acting in propria persona. (*Burton v. Superior Court* (2010) 181 Cal.App.4th 1519, 1522.)

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

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

Applying this to the Tholmer's (LWOP) case, the appellate court reviewed the denial of such discovery by the superior court below. As to Tholmer's request to gain informa-

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tion regarding a gun purportedly used in the crime, the Court denied relief when it found that Tholmer failed to show the information's relevance, concluding that this search for past information only leads to "a dead end."

The Court took a different view of Tholmer's request for earlier statements and detective reports that were now, 18 years after the trial, missing from Tholmer's files which he needed in order to "reconstruct" his files to support a habeas petition. Since petitioner's trial counsel would have been able to request them at the time, and since it is reasonable to believe the prosecution still possessed these reports, it was error for the superior court to deny Tholmer's request for such data.

Finally, the parties conceded that it was error for the superior court to have denied Tholmer discovery of *his own* statements on record, which are likewise missing from his files. Accordingly, the appellate court granted his petition for writ of mandate, requiring the superior court to grant Tholmer's PC § 1054.9 motion as to the above items, so as to aid in reconstructing his files prefatory to his formulating a petition for writ of habeas corpus challenging his conviction.

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LACK OF CREDIBILITY RE CAUSATION FACTORS UPHELD AS NEXUS TO CURRENT LACK OF INSIGHT

In re Brian Montgomery (#)
2012 WL 3132444 (___Cal.App.4th ___)
CA3 No. C068098 (August 2, 2012)

Brian Montgomery was convicted of a 1990 attempted murder for shooting a police officer "eight or nine times" after the officer stopped him for speeding. It wasn't just the car's speed that brought on this shooting – Montgomery did not want the officer to discover the "speed" he had *in* the car. A repeat offender (five priors for burglary, battery, drugs, and weapons) who was on probation, Montgomery had numerous arrest warrants pending, notwithstanding his ongoing methamphetamine manufacturing and use, and his possession of a firearm. Montgomery was convicted of attempted murder, assault on a peace officer with a semiautomatic weapon, assault of a peace officer with a firearm, discharging a firearm from a motor vehicle, great bodily injury and use of a firearm, and was sentenced to 7-to-life.

In 2009, the Board denied Montgomery parole for three years. It based its decision on the gravity of the offense (being against a peace officer), on his blaming drugs for his misbehavior, and for a 115 he had received in 2007 for possession of tobacco. Montgomery successfully petitioned the El Dorado County Superior Court for a writ of habeas corpus, which ordered a new parole hearing. On the State's appeal, the appellate court *denied* the request for a stay. Accordingly, the Board held another suitability hearing in 2011 (wherein they again denied Montgomery for three years).

The appellate court applied the recent guidance of *Shaputis II* in rendering its decision, looking only for a modicum of evidence to support any reason relied upon by the Board that could serve as a rational nexus between the commitment offense and a current unreasonable parole risk.

Montgomery's psych evaluations were generally favorable over the years, but nominally agreed that if he were to revert to substance abuse, his risk of violent behavior would rise from low to high. This became central in the Board's reasoning. First, Montgomery had committed his crime while on probation from drug offenses; was in possession of drugs and drug manufacturing paraphernalia when arrested; and carried a gun because he "didn't want to go back to jail." Obviously, he was also addicted.

Second, Montgomery's 2007 115 for possession of tobacco cut sharply against his claims of substance abuse programming. The 115 was for giving his cellie, a smoker trying to quit, money to buy single cigarettes on the line, as well as playing a "joke" on him by leaving fake cigarettes (made without tobacco, but rather simulated with paper) to tempt him. The Board reasoned that whether in fact there was no tobacco in the "fake" smokes, Montgomery's act of taunting his cellie into thwarting his efforts to end his addiction was itself a showing of insincerity concerning addiction recovery programming as well as an ongoing intent to disregard society's rules for prohibited substances. As the 2008 psych evaluator wrote:

> Dr. Parsons also specifically addressed the 115 for possession of tobacco. She noted Montgomery was diagnosed with amphetamine dependence and that Montgomery's vulnerability to relapse could lead to future violence; "however, possession of tobacco alone does not indicate a connection to future violent behavior." She noted that while "tobacco does not cause the disinhibiting effects of alcohol, in Mr. Montgomery's case, his failure to abide by the prohibition of tobacco ... indicates that he did not follow the rules around contraband substances. This infraction indicates that Mr. Montgomery was willing to break the rules that are forbidden to him due to his life circumstances." However, she concluded Montgomery had not "demonstrated an ongoing pattern for the disregard for the rules and regulations of the institution, which would lead to conclusion that he is at risk for imminent recidivism to violent behavior." Thus according to Dr. Parsons, only ongoing disregard for the rules prohibiting possession of tobacco, or other contraband, would lead to the conclusion that Montgomery was a risk for having difficulty following the terms and conditions of parole.

Montgomery also told the Board that part of his previous triggers were tied to beatings and abuse by the police sustained by him and other member of his family. An examination of his record "did not support this ideation." The Board also criticized Montgomery's blaming the drugs, rather than his own deficiencies, as causation for the crime. Finally, the Board did not find credible Montgomery's accounts of the crime, where he minimized his acts by claiming he was afraid the officer might shoot him.

The appellate court reviewed the record looking for the existence, *vel non*, of the proverbial "modicum" of evidence to support any of the Board's reasons for denial, and found it:

> Montgomery explained his shooting of Deputy Pepper as the product of immaturity, bad experiences with law enforcement and drug-induced paranoid ideation. The Board did not find that

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explanation entirely credible. While it is clear, as the Board acknowledged, the shooting was committed while Montgomery was in the throes of a serious drug addiction, the shooting and its surrounding circumstances did not come about due to addiction alone. The Board did not believe Montgomery had adequate insight into other causative factors.

Montgomery's explanation of the shooting as solely motivated by drug induced paranoia and fear of law enforcement ignores that well before the shooting he had made clear to others his determination not to return to jail. Further, he was driving with a loaded rifle and 30 rounds of ammunition in his car. Montgomery's initial statement after the shooting confirmed that he had been frightened of going back to jail. It was not until 2004 that Montgomery first claimed the shooting occurred because he was paranoid of being shot by law enforcement.

As time went on, Montgomery continued to minimize his culpability for the offense by blaming it on drug-induced paranoia regarding potential harm to him by Deputy Pepper, rather than acknowledging that he effectively ambushed the deputy while on probation, speeding, in a car filled with drug precursors and paraphernalia, carrying a loaded rifle and extra ammunition, and admittedly seeking to avoid arrest on his outstanding warrants and the myriad of other offenses he was committing contemporaneously. These facts constitute the requisite "some evidence" to support the Board's finding that Montgomery lacked insight into the causative factors leading to his life offense.

As to the tobacco-related 115, the court found

The Board concluded that Montgomery's possession of tobacco during the incident resulting in his 115 reflected failure of his anti-addiction programming, as he was found in possession of tobacco, a prohibited addictive substance, despite having participated in tobacco cessation programs. As detailed immediately ante, Montgomery's psychological evaluations make clear the connection between his risk of relapse into substance abuse and risk of violent reoffense. His possession of tobacco is some evidence that Montgomery has not adequately addressed the triggers for his tobacco addiction, may not possess the tools to prevent a relapse, and is willing to violate rules to satisfy his addiction—an addiction that is illegal to nurture in prison. In the context of a life crime in which addiction played such a significant role, we find there is a rational nexus between this evidence and Montgomery's current dangerousness.

Even if we credit Montgomery's version of events surrounding the 115, we find some evidence of lack of understanding of addiction issues. Montgomery claimed he had been bartering ducats for tobacco with an inmate, Jeff, who was attempting to quit smoking, and he had intended to "play a joke" on Jeff and tempt him with (fake) tobacco. But Montgomery had expressed that his most significant accomplishment in prison related to his desire to give back by helping others address their addiction problems, to carry the message of AA/NA to other addicts, and practice all its principles in all of his affairs. His conduct in trying to a "play a joke" on Jeff by tempting him was not consistent with these goals and claims. Montgomery's behavior even as he described it could reasonably be construed to constitute some evidence that despite Montgomery's participation in therapy and self-help programs, the programming had not "germinated into true insight at this time and a true understanding of [his] addictive personality." Because his addiction was such a large part of his violent conduct in committing the life offense, this evidence of lack of understanding and implementing what he may have learned about addiction has a rational nexis [sic] to a finding of current dangerousness.

Paradoxically, Montgomery does benefit from the Court's adverse decision. In reversing and reinstating the 2009 denial, the Court of Appeal also vacated the subsequent 2011 Board hearing and 3-year denial (citing to *In re Copley* (2011) 196 Cal.App.4th 427, 435). Accordingly, Montgomery's next hearing will be later this year (2012) – three years following his now reinstated 2009 denial.

PAST VARIATIONS IN LIFER'S STORY HELD SUFFICIENT EVIDENCE TO DENY PAROLE

In re Malono Tolentino (#)
2012 WL _____ (unpublished)
CA1(2) No. A132302 (August 6, 2012)

Malono Tolentino was sentenced to 15-life upon his guilty plea to a 1994 murder. In 2009, at his second BPH hearing, he was denied parole for three years. The Solano County Superior Court denied his habeas petition in May 2011. Finding "some evidence" to support the parole denial, the court cited Tolentino's contradictory statements about the offense that cast doubt on his insight and acceptance of responsibility for it. Dissatisfied, Tolentino took a new petition to the appellate court. The crux of the Court's denial was that p*ast* variations in his description of the offense were somehow evidence of his *current* dangerousness. This posits Tolentino in a Catch-22 dilemma – either alter his story (again) by fabricating "facts" he does not recall or remembers differently to match what the Board professes to believe, or "parole" in a pine box.

Tolentino had pointed a gun at the victim's head, claiming he was merely scaring him, when "the gun went off," shooting him in the temple. Tolentino told various persons over the years that he had earlier emptied the gun of all its bullets, that he thought it was not loaded, and that he had no intent to kill his victim.

Tolentino, who would parole to the Philippines on an immigration hold, had an extensive record.

[T]he murder of Parayno came after years of arrests and convictions as an adult for illegal firearms and assault, some associated with drug use. He was convicted in 1989 of vehicle theft and evading an officer, had misdemeanor convictions in 1994 for brandishing a

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firearm and public fighting, and was on unsupervised probation in Solano and Napa Counties at the time of the murder. His last conviction was for an altercation with an employee in October 1994 at a veteran's home, which cost Tolentino a janitorial job he had held there since 1991. He explained at the current Board hearing that the 1989 convictions resulted from him being pulled over with others for speeding on motorcycles and him trying to evade police by fleeing on his motorcycle. The other 1994 conviction followed an arrest for assault with a firearm, terrorist threat, exhibiting a deadly weapon and battery, all stemming from a fight he had with his girlfriend. They had pushed each other, and he pointed a pistol at her as they struggled over car keys. He was high, and she was trying to "do the right thing" by keeping him from driving off.

Tolentino also explained some arrests that did not result in convictions. There were four in 1988: one for assault with a deadly weapon resulted from a fight that broke out "involving the people I was with"; one for possession of a switchblade was due to a knife his friend had; one for exhibiting a deadly weapon was for a knife being displayed in a group he was hanging around with at a park; and one for auto theft was for driving away in his girlfriend's car without letting her know. He could not recall why a warrant issued for receiving stolen property in 1990, but a receiving-stolen-property charge later that year resulted from a friend coming over to his apartment on a stolen motorcycle.

To his credit, Tolentino has done well in prison.

He had been discipline free throughout his incarceration, entered prison with a general education degree and adult high school diploma, and during custody availed himself of courses, accumulating since 2001 a sheaf of certificates in subjects ranging from personal and transitional skills, to substance abuse, and a 2009 certificate in vocational janitorial services. He won praise for peer leadership, attitude and work performance in his vocational studies, and praise for longtime and continuing work in culinary assignments.

Official reports of the crime related:

[Police] found the victim, Alvin Parayno, in the garage, dead from a single gunshot to the head. According to witnesses, Bayani Morales had arrived there around 2:00 a.m., and Parayno, Morales's friend, had arrived two hours later and was with Gabriel Neyra. Around 5:00 a.m., the witnesses heard the voice of their friend Aurora Dial outside, asking for someone to open the door. Morales went to the door, with Parayno behind him, but when Morales saw Tolentino outside, he ran upstairs and hid in a master bedroom, knowing that Tolentino was looking for him. He told Nebalasca that someone was at the front door, and Nebalasca went downstairs.

From his hiding place upstairs, Morales heard Tolentino shouting in a mixture of English and Tagalog. Tolentino called Parayno a son of a bitch, told him not to lie, and asked where Morales was. The downstairs witnesses, now evidently in the garage, saw that Tolentino entered in an agitated state with a revolver, and saw him "unload and re-load the revolver" as he spoke threateningly to Parayno, whom he suspected of hiding Morales. Tolentino told Parayno, "What if I shoot you now?" and pointed the gun at him and then the others as he spoke. The witnesses urged Tolentino to put the gun down, but it soon went off and struck Parayno in the right temple. Tolentino "apparently" said: " 'Oh my God. Oh shit. I didn't mean to do it.' "

At his presentencing hearing, the record states:

"[Tolentino] acknowledges accidentally shooting the victim with the revolver. He states that he went to the Nebalasca residence to contact Bayani Morales to 'scare him.' He states that he did not intend to shoot anyone." In a handwritten account appended to the report, Tolentino said he went to the house with Aurora Dial and Glenn David "looking for" Morales. "I confronted [Parayno] & I demanded the whereabouts of [Morales]. The victim denied that he knew where [Morales] was. I drew a revolver hoping it would scare the victim into telling me the truth, but it didn't. I took all the bullets out of the revolver except for the 2 that was left in the revolver's cylinder. I locked the cylinder into the chamber, pulled the hammer back & held the revolver up against my hip as I leaned against a wall. Words were exchanged between the victim & I when the revolver went off. I was startled as I jumped back, I couldn't believe that the gun went off & I had shot [Parayno]. I started crying & I remember saying I didn't mean it. Even though [Parayno] [and] I weren't close friends I think I could've simply just talk to him without using a firearm. I ask myself the same question everyday as to why I carried the gun & used it to take someone's life."

Tolentino's most recent description of the offense for his Board report (2006) was:

"I went to the house of Ariel Nebalasca along with two other individuals. The reason we went there was to look for Bayani Morales, who happened to owe money to the people I was with. When [Nebalasca] answered the door I asked him if [Morales] was there and he said 'no.' I remember drawing a revolver when I entered the house. I opened the cylinder and dumped all the bullets in my hand. Just as we entered the garage I closed the cylinder of the revolver and pulled the hammer back. As soon as I saw [Parayno] I asked him where I could find [Morales]. He said he didn't know and, that's when I began accusing him of lying. I became very angry and began raising my voice, threatening [Parayno]. I remember it was during this time that I pulled the trigger and the gun went off. I saw [him] get hit in the head as I jumped back. I opened the revolver's cylinder and saw that there were two bullets left inside. I remember going into shock as [Parayno] laid on the floor bleeding. I remember someone pulling my arm and telling me to leave. [¶] I ran out of the house along with the two individuals I was with and drove to their house. I drove to my parents[']' house and told everyone what had happened. My family advised me to surrender and confess my crime. I was apprehended about a mile away from home."

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Yet more descriptions of the offense came from his psych interview in 2010. After admitting all his concerns ultimately went back to drugs, drug transactions, and money owed,

> The evaluation added that, when asked about the presentence report stating that there were still two bullets left in the chamber, Tolentino "acknowledged, 'I was lying my butt off, was trying to make it look like an accident . . . told the Commissioners during my first hearing that . . . I dumped all the bullets out.' He explained that, when he entered the house, he entered through the kitchen and it was a dark room. He stated that he thought he dumped all the bullets out. [He] explained that he cocked the hammer of the gun 'to make Alvin [Parayno] believe there were bullets in there' and 'to threaten him.' [¶] Mr. Tolentino admitted that he deliberately pulled the trigger of the gun, stating, 'It was not an accident. I pulled the trigger.' However, he maintained that he did not know there were any bullets left in the chamber of the gun. When asked why he pulled the trigger on what he believed was an empty gun, Mr. Tolentino stated[:] 'At the time, I didn't know, to be honest with you. I have no explanation for it.' "

The psych evaluation resulted in a low-to-moderate risk assessment if released. But Tolentino continued to maintain to the Board that the shooting was an "accident."

> Tolentino was later asked about the tension between his idea of an "accident," his telling the psychologist at the evaluation that it was not an accident since he deliberately pulled the trigger, and his having no idea why he would pull the trigger on an empty gun. He tried to explained: "After [Parayno] was shot, we left the residence and we went to Glenn David's house. We were all trying to come up with a story to try to make it look like an accident. As you can see just how stupid it was, us even saying that I unloaded and loaded the gun. I don't know what we were thinking at the time, when we tried to make up the story that it was an accident. The truth of the matter is, when I entered the residence of Ariel Nebalasca, I moved Aurora Dial out of the way and entered first, because I did not want anyone to see what I was doing. I entered through the garage and I drew the revolver, opened the cylinder and dumped the bullets into my hand as fast as I could. When I entered into the garage, I saw [Parayno] sitting there, and that's when I pulled the hammer back, because I wanted him to get the impression that the gun was loaded."
>
> Asked to clarify the accident/no accident nature of his account, he added: "When the gun fired [and hit Parayno], no one bumped me to cause the gun to go off. My finger was on the trigger. I was the one who pulled the trigger and the gun went off. That's when I was surprised when it fired, because I thought I had dumped all the bullets out just prior to entering into the garage." He said he had put the dumped rounds into his pocket.
>
> His explanation of ineffectually trying to dump all rounds out of the cylinder highlighted longstanding information, since the presentence report of 1995, that people inside the house saw him unload "and re-load" the gun before firing. His explanation—evidently made for the first time at this hearing—was that he never did reload the gun but made up that detail with David to make it sound like an accident. This exchange between Commissioner Prizmich and Tolentino captures the evident surprise of this twist in the account:
>
> "[Q] Let me get this clear. Are you saying that you did not reload it?
> [A] I did not.
> [Q] All right. So, but the witnesses said you did. Why do you think? Why is there a difference there, do you think?
> [A] After the shooting, I went to Glenn David's house. We were trying to figure out what to say to the police. This is the story that we came up with to try to tell them.
> [Q] But these are witnesses that saw this, not Glenn David and you, that saw you load and unload the gun, right?
> [A] Yes.
> [Q] So why?
> [A] They were the very same people that tried to say the same thing.
> [Q] So you guys were all saying the same thing, that you loaded and unloaded the gun?
> [A] Yes, when we spoke to the police.
> [Q] You're saying you didn't load the gun.
> [A] I did not, I did not reload the gun, Sir."

The Board held Tolentino's inconsistent details against him.

> And we went over it all, to try to figure out just where your mind was in all this. This was a crime that made no sense at all. You weren't a party to any of this, and you were utilized by your crime partners to achieve their end. And you happily went along with it. And we do note that your prior criminal history, both the arrests and non-arrests, which I think is where that psychological evaluation wasn't as positive, because they looked at that as well." Referring again to further work and evaluation, he said: "[W]hat you've got to do and come to grips with, is total and complete responsibility, with no ambiguity at all with regard to what you did. You were the responsible party. You were the one that went in there. Whether you unloaded the gun and loaded the gun, or whatever the deal was. You were the one that shot this man. And you did so in the head.
>
> Fortunately for him, he died rather quickly. But his family was left, . . . and as you have articulated, was left with determining what to do for the rest of their lives, when such a tragedy occurred. And your family is, as well. You are indeed correct. The shame that you brought upon yourself and your family for those actions will be long lasting. . . . And we were left a little bit confused as to where you're at with your insight into this crime. Just how much responsibility you take."
>
> Prizmich further stressed: "There's no question, when you place yourself in this kind of situation, arm yourself,

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which is something that you were used to doing, for whatever reason before, but you were arming yourself. And then point a weapon of that nature at somebody and try to scare them even more, and pull the trigger, as you admit, and shoot. You're responsible, no matter what your intentions were. It doesn't matter whether you intended to shoot anybody or not. You got convicted of a murder in the second degree, you got a 15 years to life [term]. So you've got to come to grips, in no uncertainty at all, with everything that you've done. There cannot be any commentary with regard to, well, it might have been an accident, or it could have been, or I did this, or. You did it."

The appellate court applied the recent guidance of *Shaputis II* – to only look for the existence of a modicum of evidence to support any reason relied upon by the Board that could supply a nexus from the commitment offense to a conclusion of current unreasonable dangerousness.

Tolentino assails the Board's reliance on inconsistencies in his account, lack of adequate insight, and recidivism risk. We address those claims under a single heading because they are inextricably interrelated in this case and bear on both current dangerousness and continued reliance on the facts of the commitment offense.

To summarize, we read the decision as based on doubt about the safety of releasing Tolentino given the inexplicable nature of the murder, its purely drug-based motivation, its occurrence following a years-long spiral into criminality and violence, a haunting concession by Tolentino that the drug use turned him into a "monster" who cared nothing about others, a psychological evaluation that discerned an improving but still low-to-moderate risk of violent recidivism, report warnings that abstinence from drugs while in custody does not reliably translate to abstinence in the free community, some concern about his drug-management plans upon release, factual inconsistencies in his still-emerging account, and notions of "accident" suggesting that he was still coming to grips with the full extent of his responsibility for the murder.

Notable inconsistencies in Tolentino's accounts of the shooting included: pulling the trigger deliberately, not by accident, yet calling the shooting an accident because he did not mean to shoot anyone and thought he had dumped all rounds from the cylinder; saying he only used guns to hunt, not against people, but conceding that he used to carry guns for protection and had a conviction for brandishing a gun at a girlfriend; saying he held the cocked gun at his hip, then saying he waved it around; saying that decades-old information that witnesses saw him unload and reload the gun came from his cohorts (i.e., the "witnesses") and was a lie the three of them made up, whereas he had never before mentioned this, despite its potentially impeaching effect on his accident claim; and saying to a psychologist, "I was lying my butt off . . . trying to make it look like an accident" during his first parole hearing, but then saying at the current hearing that he only lied to the police and probation, not to the first panel.

One can—and Tolentino does—reason that those inconsistencies may be explained or deemed insignificant individually, but it is their combined effect in this case that makes them hard to dismiss, and therefore a basis for concluding that Tolentino's account of the shooting was still a work in progress. We also bear in mind, as we would even under more stringent review standards, that the panel had the unique opportunity to assess the significance of these inconsistencies by observing Tolentino's demeanor as he discussed them. (See generally *Shaputis II*, *supra,* 53 Cal.4th at p. 215 ["When . . . the parole authority declines to give credence to certain evidence, a reviewing court may not interfere unless that determination lacks any rational basis and is merely arbitrary"].)

Those inconsistencies, of course, support an inference that Tolentino lacked adequate insight into the commitment offense, and lack of insight in turn provides a rational nexus between the facts of that offense and current dangerousness under the some-evidence standard. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260.) Thus, while the record contains much that is positive about Tolentino having accepted sole responsibility for the murder—i.e., not blaming anyone else—the several inconsistencies do cast some doubt on the extent of his acceptance of responsibility.

In sum, the appellate court equated Tolentino's past attempts to explain the offense to a continued danger from lack of insight. It remains to be seen just what facts Tolentino must suddenly "remember," to satisfy the Board , that will coincide with witness statements and a with new BPH Panel's professed view of the offense.

• Editor's Note: CLN depends on input from lifers and attorneys for cases from the superior courts that we report on and are of interest to lifers (we have difficulty in receiving these decisions from most of the county superior courts). CLN appreciates receiving copies of these superior court decisions.

IN THE STATE CAPITOL

SB 542 IWF BILL; REVAMPED AND WORTHY OF SUPPORT

SB 542, Sen. Curren Price's (D-Los Angeles) bill to provide greater transparency and accountability to the Inmate Welfare Fund (IWF), cleared two hurdles in the Assembly in June and is now being considered by the Assembly as a whole.

The proposed legislation, which has undergone a 180 degree shift from its original language, would allow inmate councils (IFC's) and family/advocacy groups to have input and sway into the ways monies from the IWF are used at each institution. After passing the Assembly Public Safety Committee with no opposing votes, the bill was referred to Assembly Appropriations, for vote on August 16th.

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

Following meetings with LSA and groups on all sides of the prisoner welfare debate Sen. Price and staff concluded his original bill was not appropriate, but the IWF nonetheless needed attention. The Senator introduced an amended version of SB 542 that recognizes that the IWF needs examination, oversight and input from interested parties, including prisoners, as to how the monies are used at each institution. Sen. Price even took his inquiry to the source, meeting at San Quentin and Folsom prisons not only with administration officials, but with prisoners, for their input and suggestions. And as Sen. Price noted, the inmates had substantial knowledge of how the IWF is supposed to work and the problems experienced at each prison, as well as several suggestions for both use of IWF funds and oversight methods.

The new language in the bill provides *"The warden of each institution, in collaboration with at least two representatives from local or state advocacy groups for inmates and two members of either the men's or women's advisory council or similar group within each institution, shall meet at least biannually to determine how the money in the fund shall be used to benefit the inmates of the respective institution. It is the intent of the Legislature that the funds only be expended on services other than those that the department is required to provide to inmates."*

In short, prisoners and their advocates will now have a chance to say how money, collected from their purchases and their families, and meant to promote their welfare, will be spent. Recent studies, by both outside groups and the state Auditor's office, have suggested CDC has been less than stellar in performing their fiduciary duties regarding the IWF, from being unable to justify large portions of the money the department charges the IWF for 'administrative costs' to purchases that actually benefit inmates. Traditionally, about the only sure thing prisons could point to as where their share of the IWF monies went was to the operation of the canteen. In every prison all expenses to operate the canteen, from buying inventory to wages and benefits paid to free staff to the pittance paid out in inmate wages and even repair and purchase of equipment such as freezers, comes from the IWF.

Under the provisions of Sen. Price's bill prisoners and their advocates would now be able to push for IWF funds to be expanded beyond traditional expenditures as canteens and hobby crafts to the more forward-looking and reintegration friendly programs. Specifically the bill cites "*Reentry program services may include assistance obtaining or reinstating benefits, obtaining identification cards, linking inmates to services related to obtaining housing upon release, providing education and job training, coordinating contact with family members, and providing information about how to connect to social services, legal services, and connecting inmates with outside community health care providers upon their release from prison."*

At the invitation of Sen. Price LSA testified in favor of the newly-constructed SB 542. Other advocacy groups chose not to offer their support, indicating they feared CDC would be able to co-opt IWF funds to pay for those programs CDCR is legally obligated to provide to prisoners, such as basic education and even meals. After careful consideration, however, LSA concluded this effort deserves our support for three basic reasons:

1) The IWF has been too long neglected and Sen. Price is the first legislator to take note of the situation and make an effort to address the problem; while not a perfect bill, we cannot afford to let this opportunity to address the IWF pass by

2) The language included in the bill, noted in the above paragraphs, specifically prevents the CDC for shifting financial responsibility for mandated programs to the IWF

3) Prisoners and their advocates will now have a vote in how IWF monies are used and we trust those inmates and advocates who are already savvy and dedicated enough to be involved in MAC/WAC and advocacy groups to stand their ground if prison administrations try to exceed the limits of the bill.

We will continue to monitor SB 542. Although not all we could want, SB 542 is an important first step toward making the IWF truly beneficial for inmates and allowing prisoners to participate in their rehabilitation and reentry readiness.

IN THE STATE CAPITOL **from pg 35**

JUVENILE LWOP DECISION LITTLE IMMEDIATE CALIFORNIA IMPACT

In spite of the recent US Supreme Court decision on juveniles sentenced to life without parole, California prisoners in those circumstances cannot expect immediate relief or modification of sentence. That's because of one small but important word: mandatory.

In a 5-4 decision last month the nation's highest court ruled mandatory life without parole sentences for those convicted of crimes committed before they were 18 year old were unconstitutional, a ruling that affects some two dozen states where the sentence for some violent crimes, including murder, is a mandatory LWOP. In California, however, such sentences are not mandatory, but at the discretion of the judge.

But although the historic and controversial ruling by the Washington court isn't the automatic sentence modification for California inmates that it represents for prisoners in such states as Alabama and Florida, it is still an important indicator of the way justice should be served, according to Sen. Leland Yee (D-San Francisco), author of a bill to provide the same relief for California prisoners.

In a statement released the same day as the June 25 Supreme Court ruling Sen. Yee stated:

"Today's ruling was yet another step towards ending life without parole for juveniles. The Supreme Court recognized once again that children are different from adults, and 'the distinct attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.' Considering no other country in the world administers this sentence for kids, the punishment is clearly cruel and unusual.

The Supreme Court ruled unconstitutional the mandating of such sentences, which was the issue before them. While LWOP is the presumptive sentence in California, a judge may supersede and provide a lower sentence, and thus our state law is not directly affected by the high court decision.

With that said, the Court's ruling comports with the rationale of SB 9. As the Court opined, it is near impossible for a judge to distinguish at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile that can demonstrate the adult he or she has become. The Supreme Court has clearly stated that we must treat children differently due to brain development and thus I urge the Assembly to immediately pass this legislation."

Yee's bill passed the Senate and Assembly, and is now awaiting the gov's signature.

The majority opinion in the Supreme Court decision, authored by Justice Elena Kagan, noted the majority court's opinion that "that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishment." Kagan was joined in the majority by Justices Sonya Sotomayor, Justices Anthony Kennedy, Ruth Bader Ginsburg, and Stephen Breyer.

The majority opinion noted the unbending nature of mandatory LWOP sentences, commenting "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its' hallmark features—among them, immaturity, impetuosity and failure to appreciate risks and consequences. It prevents taking into account the family and home environments that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional."

"Children are constitutionally different from adults for purposes of sentencing," Kagan continued. "Juveniles have diminished culpability and greater prospects for reform." Supporters of the decision agreed with the transitory nature of the juvenile mind. Retired Michigan Judge Dennis Kolenda, who during his time on the bench had been left no option but to impose mandatory juvenile LWOP commented "A community that's got a soul has to recognize children are different and we need to treat them as different. Some are incredibly dangerous but we never know with kids how they're going to develop."

Writing for the dissenting minority Chief Justice John Roberts maintained the US Constitution does not prohibit state legislatures from mandating life sentences for juveniles. Roberts' opinion was shared by Justices Antonin Scalia, Clarence Thomas and Samuel Alito.

In California, where juvenile LWOP sentences are not mandatory but are too often handed down, the consensus among attorneys is that patience is in order. Because such sentences are not mandatory the Supreme Court decision will not have an immediate impact on juvenile LWOP here. Attorneys are advising those prisoners serving under these sentences to contact an attorney for the best advice and course of action. Another resource may be the Equal Justice Institute (EJI), located in Alabama and prime protagonist in the case. EJI also urges patience until the potential limitations of the ruling are worked out. Further information may be available from the EJI at 122 Commerce St., Montgomery, Alabama, 36104.

IN THE STATE CAPITOL from pg 36

SHACKLES MAKE FOR HARD LABOR-AND A LAWSUIT

Twice in the last two years a California Assembly member has brought forward and managed to pass a bill addressing conditions for prison inmates that would seem not only commonsense, but simply humane as well. And twice, two different governors with two different points of view have vetoed the bill.

Assemblywoman Nancy Skinner (D-Oakland) has been persistent in her intent to make sure pregnant California prisoners and their yet-to-be-born children are not put in jeopardy or unnecessary suffering by the use of tortuous restraints when the pregnant prisoner is being transported or is in labor. In both the 2009-10 and 2011 legislative sessions the Assemblywoman successfully navigated the bill process, both sessions getting her conservatively worded bill passed with virtually no opposition.

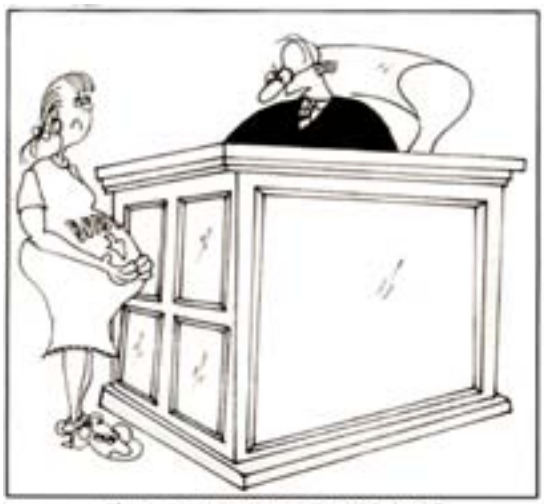
Both bills, AB 1900 in 2010 and AB 568 in 2011, were virtually the same, word for word:

"This bill would require that the standards ensure that women who are pregnant not be shackled by the wrists, ankles, around the abdomen, or to another person, including during time spent outside a correctional facility, during transport to or from a correctional facility, during labor, delivery, and while in recovery after giving birth, except that the least restrictive restraints possible may be used when deemed necessary for the inmate, consistent with the legitimate security needs of the inmate, the staff, and the public, and the restraints would only remain in place as long as the threat exists. The bill would require the authority, and later the board, to develop these standards regarding the shackling of pregnant women as part of its biennial review of its standards." (From AB 568)

The bill, by most evaluations, left the CDCR in control of what restraints to use on pregnant inmates, but did require the department to develop reasonable standards, by which the treatment of individual female inmates could be evaluated. As anyone who has dealt with CDC knows, to leave any part of prisoner treatment or conditions of confinement to the tender mercies of the department, without oversight or accountability, is a recipe for disaster.

Somewhat predictably, Conan the Schwarzenegger vetoed Skinner's fist bill, AB 1900 in 2010, stretching to base is veto on the development of such policy being outside the mission of CDCR:

"Additionally, this bill would require the Corrections Standards Authority (CSA) to develop guidelines



"I sentence you to hard labor."

concerning the shackling of pregnant inmates and wards during transport. However, CSA's mission is to regulate and develop standards for correctional facilities, not establish policies on transportation issues to and from other locations.

Since this bill goes beyond the scope of CSA's mission, I am unable to sign this bill."

Arnold's veto message, deflecting responsibility for vetoing the bill to the outside-of-mission ruse, ended with an incongruous "Sincerely." On the whole, given the time and personalities involved, not terribly surprising. In the waning years of his administration Schwarzenegger had become more and more knee-jerk regarding anything with even the slightest appearance of treating prisoners as humans, even at the risk of flaunting the law.

Everyone involved, however, had higher hopes for the fate of this legislation when Skinner got virtually the same bill passed the next legislative session and put before Govern Jerry Brown in the latter half of 2011. But on October 9th Brown vetoed the bill, with a veto message that while a bit less sanctimonious than his predecessor's one that still made little sense:

"At first blush, I was inclined to sign this bill because it certainly seems inappropriate to shackle a pregnant inmate unless absolutely necessary. However, the language of this measure goes too far, prohibiting not only shackling, but also the use of handcuffs or restraints of any kind except under ill-defined circumstances.
Let's be clear. Inmates, whether pregnant or not, need to be transported in a manner that is safe for them and others. The restrictive criteria set forth in this bill go beyond what is necessary to protect the health and dignity of pregnant inmates and will only serve to sow confusion and invite lawsuits.
I am returning Assembly Bill 568 without my signature," Brown wrote.

IN THE STATE CAPITOL **from pg 37**

Interestingly, the Governor's sentence referencing legal action may prove prophetic, in a reverse way. While Brown opined passage of the restraint restricting bill might invite lawsuit, this very event is happening now in Nevada.

The Associated Press reported the American Civil Liberties Union has recently filed suit against the Nevada Department of Corrections (NDOC) on behalf of former inmate Valerie Nabors. The suit alleges NDOC guards shackled Nabors' ankles while she was in labor and being transported by ambulance to a hospital.

The suit claims ambulance attendants informed the guards such restraints made it difficult to treat Nabors and calls such treatment cruel and unusual punishment, forbidden under the Eighth Amendment to the Constitution. Nabors was serving time for attempted grand larceny, and was not considered violent and NDOC later admitted she was not considered a flight risk.

Nevada recently passed legislation banning shackling inmates in labor. Perhaps Governor Brown and staff should take note.

SANTA CLARA DA PROMOTES 3 STRIKES CHANGE

Santa Clara District Attorney Jeff Rosen, in an amazing display of good sense, ethics and realism, recently told the San Jose Mercury Register that dozens of inmates originally from his county are serving life sentences under the Three Strikes law that they probably don't deserve.

Rosen also signaled his strong support for the November ballot initiative Prop. 36 that would modify California's drastic version of Three Strikes that has lead to many persons convicted of relatively minor crimes such as attempted breaking and entering, stealing food items or car theft. If Prop. 36 passes only those convicted previously of certain crimes, rape, murder, child molestation, would automatically qualify for a life sentence for any a third strike felony conviction. For all others, a third strike would have to be a serious felony conviction.

The particulars of Prop. 36 were drafted by Stanford University law professors and the NAACP Legal Defense fund and have, according to recent polls, the support of over 70% of voters. It has also garnered some strange bedfellows supporters. In addition to DA Rosen, fellow Democratic DA Gary Gascon of San Francisco and Republican DA Steve Cooley of Los Angeles County support the measure. Although two dozen states have Three Strikes laws, only in California can the third strike be any felony.

If Prop. 36 passes it will also establish a procedure for many sentenced to life terms under existing Three Strikes provisions to request a resentencing hearing, a hearing that could conceivably allow them to be released virtually immediately, if the court finds in their favor. Although such hearings are theoretically possible now, they are rare.

Under provisions of the initiative prisoners serving life for a non-violent third strike conviction could request a reconsideration hearing if they meet three basic criteria:

- They were never were convicted of rape, child molestation or murder.
- The third strike was a nonviolent felony,including possession for personal use or sale of a small amount of drug.
- They have no substantial disciplinary history while in prison.

Much like a parole hearing, the third-strike lifer would have to be judged not a risk to public safety by the hearing judge and could then also be sentenced to double the normal term for their third strike non-violent felony, plus any applicable enhancements. However, some have already served that required amount of time and could be released virtually at the end of the hearing.

Currently about 8,800 California prisoners are serving life as a result of Three Strikes sentencing. Estimates are that as many as 3,000 of those would be affected by passage of Prop. 36. The Legislative Analyst's Office estimates taxpayers would eventually see a savings of up to $100 million a year largely through reductions in the ever-escalating health care costs for aging inmates who are primarily lifers.

Santa Clara's Rosen has indicated that whether or not Prop. 36 passes he will likely pursue sentencing review hearings for about 116 prisoners out of his county that fit the criteria. But in case anyone should get the idea the DA might be soft on crime, Rosen opposes Prop. 34, which would repeal the death penalty.

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IN THE STATE CAPITOL **from pg 38**

LATE BREAKING NEWS IN THE CAPITOL

As CLN went to press the legislature took significant action on two bills of great importance to all prisoners, most especially lifers.

SB 9, Sen. Leland Yee's (D-Oakland) hard fought for bill to allow those sentenced to Life With Out Parole (LWOP) as juveniles, to appeal for a reconsideration of sentence, finally passed the Assembly by a minimal 41-34 margin. Sen. Yee has introduced and this bill before, and indeed this incarnation of juvenile LWOP reform came within one vote of passing the Assembly earlier in the session. Sen. Yee was able to bring SB 9 back for reconsideration, and earlier this year, following the historic decision by the US Supreme Court throwing out mandatory juvenile LWOP, expressed his hope that the federal decision would sway some California lawmakers.

Whatever the reason, in mid-August the Assembly finally found its humanity and passed SB 9. The bill now goes briefly back to the Senate for concurrence on some minor amendments made in the Assembly and then will be presented to Gov. Brown for signature.

Within hours of passage of SB 9 victims' rights groups were rallying their forces to mount a letter writing campaign to the governor asking for his veto. Life Support Alliance will be among those groups working our supporters on the other side, pulling out all stops in letting Gov. Brown know there is massive support for this important change. SB 9 would allow about 300 California LWOP prisoners sentenced as juveniles to appeal to the court for modification of sentence.

Also passed out of Senate committee was AB 1270, Assemblyman Tom Ammiano's (D-San Francisco) much anticipated bill that will allow media access to prisoners. Previously approved by the Assembly, AB 1270 cleared the Senate Public Safety committee on a 5-2 vote and now goes to the entire Senate for approval.

AB 1270 "would require the Department of Corrections and Rehabilitation, upon reasonable notice, to permit representatives of the news media to interview prisoners in person, as specified. The bill would forbid retaliation against an inmate for participating in a visit by, or communicating with, a representative of the news media." CDCR would no longer be allowed to restrict access to specific prisoners or group of prisoners, such as was the department's practice during the recent hunger strikes at Pelican Bay and other prisons. Media has long chafed under the department's refusal to provide access to prisoners and have been universally in favor of Ammiano's efforts to provide greater transparency and access.

The fate and impact of both these bills will be covered in greater detail in the October issue of CLN.

MAKING THE BEST OF THE SITUATION

An old gentleman lived alone in New Jersey. He wanted to plant his annual tomato garden, but it was very difficult work as the ground was hard. His only son, Vincent, who used to help him with the gardening was in prison. The old man wrote to his son and described his predicament.

Dear Vincent,
I am feeling pretty sad because it looks like I won't be able to plant my tomato garden this year. I'm just getting too old to be digging up a garden plot. I know if you were here my troubles would be over. I know you would dig the plot for me like the old days.
Love Papa

Dear Papa,
Don't dig up that garden! That's where the bodies are buried!
Love Vinnie

At 4 a.m. the next morning, FBI agents and local police arrived and dug up the entire area without finding any bodies. They apologized to the old man and left. That same day the old man received another letter from his son.

Dear Papa,
It was the best I could do under the circumstances. Enjoy the tomatoes.
Love, Vinnie

U.S. CAPITOL

US SENATE HEARS TESTIMONY ON RAVAGES OF SOLITARY

A hearing, held before the Subcommittee on the Constitution, Civil Rights and Human Rights, represents the first time lawmakers on Capitol Hill have taken up the issue of solitary confinement, a form of imprisonment that many human rights advocates believe violates the Eighth Amendment's prohibition of "cruel and unusual punishment" and that has drawn increasing scrutiny in recent months in the United States and internationally.

Solitary confinement "is inhumane and by its design it is driving men insane," a former inmate who spent 18 years in prison in Texas, a decade of that time in isolation on death row before being exonerated, told a Senate panel in a hearing on Tuesday.

The practice, which is widespread in American prisons, has also been the target of a growing number of lawsuits, including a class-action suit filed on Monday on behalf of mentally ill inmates held in solitary at ADX, the federal super-maximum-security prison in Florence, Colo. Last month, civil rights lawyers representing prisoners held for more than 10 years in isolation at Pelican Bay State Prison in California filed suit in federal court, arguing that solitary confinement is unconstitutional.

Senator Richard J. Durbin of Illinois, the assistant majority leader, began the hearing — which he said had the support of both Democratic and Republican committee members — by noting that more prisoners are held in isolation in the United States than in any other democracy and that about half of all prison suicides occur among inmates in solitary confinement.

"We can have a just society, and we can be humane in the process," Mr. Durbin said. "We can punish wrongdoers, and they should be punished under our system of justice, but we don't have to cross that line." He said he was working on legislation to encourage changes in the way solitary confinement is used.

With more than 250 people packed into two rooms, the hearing was "one of the best attended of the year," Mr. Durbin said, an indication "of the fact that the time is due for us to have this conversation about where we're going."

The hearing also included a testy exchange between Mr. Durbin and Charles E. Samuels Jr., director of the Federal Bureau of Prisons, who defended the use of solitary confinement for inmates who pose a threat to the safety of staff members or other inmates.

"Do you believe you could live in a box like that 23 hours a day, a person who goes in normal, and it wouldn't have any negative impact on you?" Mr. Durbin asked, pointing to a life-size replica of a solitary confinement cell that had been set up in the hearing room.

"Our objective is always to have the individual to freely be in the general population," Mr. Samuels responded.

"I'm trying to zero in on a specific question," Mr. Durbin said, adding, "Do you believe, based on your life experience in this business, that that is going to have a negative impact on an individual?"

"I would say I don't believe it is the preferred option," Mr. Samuels conceded, "and that there would be some concerns with prolonged confinement."

Mr. Samuels said that of the 218,000 prisoners the bureau is responsible for, only 7 percent are kept in isolation cells. The ADX supermax — where many inmates spend 22 to 24 hours a day in their cells and are denied visitors and other privileges — houses only 490 prisoners, or 0.2 percent of the total population, he said.

REMINDER

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

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

PRISON NEWS IN OTHER PLACES

TEXAS INMATES SUE DOC OVER HEAT ISSUES

Texas has long had a reputation for running some of the toughest prisons in the country, but inmates and their advocates say the overheated conditions violate the Eighth Amendment's prohibition against cruel and unusual punishment. They accuse prison officials of failing to supply enough fans, ventilation and water and refusing to follow local and national prison standards.

Inmates and their families have complained for years about the heat and lack of air-conditioning in the summertime, but the issue has taken on a new urgency. An appeal is pending in a lawsuit initially filed in 2008 by a former inmate claiming that 54 prisoners were exposed to Death Valley-like conditions at a South Texas prison where the heat index exceeded 126 degrees for 10 days indoors. And several inmates at other prisons died of heat-related causes last summer; a lawsuit was filed Tuesday in one of those deaths. A Texas law requires county jails to maintain temperature levels between 65 and 85 degrees, but the law does not apply to state prisons. The American Correctional Association recommends that temperature and humidity be mechanically raised or lowered to acceptable levels.

"The Constitution doesn't require a comfortable prison, but it requires a safe and humane prison," said Scott Medlock, director of the prisoners' rights program at the Texas Civil Rights Project, which is representing the former South Texas inmate who sued prison officials. "Housing prisoners in these temperatures is brutal."

A prison agency spokesman, Jason Clark, said that many prison units were built before air-conditioning was commonly installed, and that many others built later in the 1980s and 1990s did not include air-conditioning because of the additional construction, maintenance and utility costs. Retrofitting prisons with air-conditioning would be extremely expensive, he said.

As a result, the agency takes a number of steps to assist inmates, Mr. Clark said, and he disputed the criticisms of inmates and their lawyers about inadequate fans, water and ventilation. On hot summer days, he said, prison officials restrict outside activity, provide frequent water breaks, allow additional showers, permit inmates to wear shorts and increase airflow by using blowers normally used to move warm air in the winter.

BPH NEWS

BPH
EN BANC DECISIONS
JUNE/JULY

Over the past two months parole commissioners have shown a reluctance to grant recall of sentence under Section 1170 (e), so-called compassionate release. Under the statute any prisoner determined by CDCR physicians to be terminally ill with less than 6 months to live or who is permanently medically incapacitated can apply for a recall of sentence, an action that must be passed by the Board of Parole Hearings and referred to a court from the county of commitment, for concurrence and release of the ill prisoner.

In June and July the board has received a total of six such submissions and declined to refer five of them, postponing the sixth.

In the same time frame the board considered four parole grants in the en banc review, 2 for decision review (usually the result of a glitch in board approved parole plans), one split decision and one referred by the Governor. In all four of these cases the decisions to grant parole were affirmed.

JUNE: the petition of **Lasalee Anderson, D98823**, for compassionate release was declined, the board citing recent disciplinary action and the prisoner's expressed attitude toward substance abuse.

Also in June **Gilbert Lovato, B95450**, was declined for compassionate release, the board expressing concern with his "bad psychological evaluation" and classification score of 97. The board members also indicated they were dubious of the prisoner's terminal status, noting his "slow decline," that he was still ambulatory and that, despite medical staff's opinion, the board did not feel enough medical tests had been done to confirm his terminal status.

Dale Lozier, H 20362, whose parole plans were referred to the board for review, was affirmed for parole with alternate parole plans approved.

JULY: Refer of **Joaquin Cruz, D26061**, for recall of sentence was postponed.

Recall of sentence for **Thornton Gillis, AD 9072**, was denied. District Attorney from Ventura County opposed the recall, and the board found the prisoner's parole plans were not viable and in line with Jessica's Law. The board also gave their medical opinion that Gillis was still ambulatory and might live longer than the requisite 6 months.

The board also denied sentence recall for **Walter Jones**, **E 58590**, again on the basis of his parole plans not being in compliance with Jessica's Law and disciplinary problems. The commissioners noted Jones was still mobile and in light of that mobility and his 'lengthy criminal history' he was still too dangerous to release. The LA Deputy DA who came to offer the obligatory opposition said his department did not have sufficient information on the inmate's condition and thus questioned the terminal nature of his illness. (One of the requirements for a prisoner to be referred to the BPH for compassionate release is that he be certified as terminally ill by a CDCR doctor, who as a group are not known for their bedside manner and compassion.)

Jesse Palacio, C79987, was also refused recall of sentence, possibly because he was too ill. The board cited as reasons for their refusal Palacio's condition, which requires round-the-clock care, and dementia, all of which makes him too dangerous to release. A Deputy DA from Palacio's county of commitment, probably not even born when Palacio came to prison, also complained that Palacio has no parole plans (perhaps because he has dementia?) and recounted the prisoner's history, including juvenile crimes. Neither the young DA nor the board articulated a connection between Palacio's juvenile history and current dangerousness or how his current terminal illness and dementia exacerbates his public danger.

The board seems more comfortable in sustaining their own previous decisions, reaffirming their grant of parole to **Robert Jimenez, E 30258**, in spite of the decision being referred back to the board by the Governor and opposition at the meeting from victims. In an unusual move, Dr. Cliff Kusji, chief psychologist with the board's Forensic Assessment Division (FAD) spoke to the commissioners in support of the evaluation done by Dr. Monique Geca of the FAD, which concluded that Jiménez was a low risk to reoffend, one of the reasons cited by the board in granting parole.

Dr. Kusji said a review of Dr. Geca's evaluation revealed no errors. Kusji also noted Geca had explored the demand by the victim's family that Jiménez be required to take psychotropic medication and found this action would have no benefit on Jiménez' ability to function safely if released. The victim's family presented an acerbic opposition to parole for Jiménez, claiming not only that he should be required to take medication but labeling the low risk psych evaluation "fundamentally flawed," although presenting no evidence on either

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issue. The Deputy DA from the commitment county appeared equally embittered, accusing the board of granting the parole only because they were afraid of the courts, Jiménez having won a new hearing based on a writ.

The parole grant for **Richard MacKenzie, J 76688**, was also confirmed, following a split decision at his hearing. In yet another emotional, accusatory and highly-charged presentation several members of the victim's family members presented tearful opposition to MacKenzie paroling, faulting him for honestly recounting at this hearing the events of his crime, saying he showed no consideration for their feelings and chastising his family members for offering their support. The Deputy DA from LA County also speaking in opposition to the parole grant, maintained the prisoner was not credible in his remorse and offered the usual pejorative terms for the inmate.

He also obliquely suggested the Commissioner, who cast the vote in favor of the grant, was relatively new to the position and perhaps not as "seasoned" as the Deputy Commissioner, who, while serving as a DC for several years, also has a background in law enforcement. However, later in his soliloquy against the parole grant, the DA softened his criticism of the Commissioner, saying he hadn't meant to impune her ability. The board as a whole sided with the commissioner and voted to affirm the grant of parole.

Parole grant for **Joshua Swindell, J 83435**, was also approved, following finalization of alternate parole plans.

Lifer Scheduling and Tracking System

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

Hearing Totals*	37	36	39	30	32	30	2	35	31	37	24	36	163	532	26**	506

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FERGUSON	FIGUEROA	FRITZ	GARNER	LABAHN	MACAULAY	MOSELEY	PECK	PRIZMICH	ROBLES	TURNER	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	31	29	19	30	32	28	2	28	26	26	15	25	107	398	26	372
Grants	8	6	7	6	8	10	1	4	5	5	1	4	0	65	5	60
Denials	15	10	7	11	14	9	1	16	14	10	8	15	0	130	9	121
Stipulations	3	5	4	7	0	5	0	5	4	4	5	5	6	53	9	44
Waivers	0	2	0	1	0	0	0	1	2	4	0	0	64	74	1	73
Postponements	5	6	1	5	9	4	0	2	1	3	1	1	30	68	2	66
Continuances	0	0	0	0	1	0	0	0	0	0	0	0	0	1	0	1
Split	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	7	7	0	7

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

Subtotal (Deny+Stip)	18	15	11	18	14	14	1	21	18	14	13	20	6	183	18	165
1 year	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	11	9	3	8	9	11	1	5	7	8	8	7	3	90	9	81
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	2	5	7	6	3	3	0	7	10	3	4	10	2	62	5	57
7 years	4	1	1	4	2	0	0	9	1	3	1	2	0	28	4	24
10 years	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	1
15 years	1	0	0	0	0	0	0	0	0	0	0	0	1	2	0	2

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	2	0	1	0	0	0	1	2	4	0	0	64	74	1	73
1 year	0	0	0	0	0	0	0	0	2	4	0	0	43	49	0	49
2 years	0	1	0	0	0	0	0	0	0	0	0	0	12	13	0	13
3 years	0	1	0	1	0	0	0	1	0	0	0	0	5	8	1	7
4 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
5 years	0	0	0	0	0	0	0	0	0	0	0	0	3	3	0	3

Postponement Analysis per Commissioner

Subtotal (Postpone)	5	6	1	5	9	4	0	2	1	3	1	1	30	68	2	66
Within State Control	1	0	0	3	3	0	0	1	0	3	0	0	20	31	1	30
Exigent Circumstance	2	4	0	2	2	2	0	1	1	0	1	0	0	15	1	14
Prisoner Postpone	2	2	1	0	4	2	0	0	0	0	0	1	10	22	0	22

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

Lifer Scheduling and Tracking System

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

Hearing Totals*	34	32	36	37	25	44	29	48	15	31	34	35	24	193	617	56**	561

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FERGUSON	FIGUEROA	FRITZ	GARNER	LABAHN	MOSELEY	PECK	PRIZMICH	ROBERTS	ROBLES	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	29	31	27	35	24	36	24	24	4	21	24	33	24	123	459	55	404
Grants	7	3	6	6	4	12	9	5	0	3	3	9	6	0	73	11	62
Denials	18	20	11	21	7	15	13	15	3	15	17	17	10	0	182	32	150
Stipulations	3	4	7	0	4	3	0	0	1	1	1	4	4	7	39	5	34
Waivers	0	1	0	0	0	2	0	1	0	0	0	1	0	72	77	0	77
Postponements	1	3	3	7	6	4	1	3	0	2	3	2	4	36	75	7	68
Continuances	0	0	0	0	3	0	0	0	0	0	0	0	0	0	3	0	3
Split	0	0	0	1	0	0	1	0	0	0	0	0	0	0	2	0	2
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	0	8	8	0	8

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

Subtotal (Deny+Stip)	21	24	18	21	11	18	13	15	4	16	18	21	14	7	221	37	184
1 year	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	18	14	10	9	6	15	6	4	0	6	7	14	9	5	123	19	104
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	1	6	7	8	2	3	6	5	1	7	7	5	5	1	64	13	51
7 years	1	4	0	4	3	0	1	6	2	2	3	1	0	0	27	4	23
10 years	0	0	1	0	0	0	0	0	0	0	0	1	0	0	2	0	2
15 years	0	0	0	0	0	0	0	0	1	1	1	0	0	1	4	1	3

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	1	0	0	0	2	0	1	0	0	0	1	0	72	77	0	77
1 year	0	1	0	0	0	2	0	1	0	0	0	1	0	45	50	0	50
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	12	12	0	12
3 years	0	0	0	0	0	0	0	0	0	0	0	0	0	12	12	0	12
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	1	3	3	7	6	4	1	3	0	2	3	2	4	36	75	7	68
Within State Control	1	1	0	3	2	0	0	1	0	0	0	0	1	24	33	1	32
Exigent Circumstance	0	1	1	2	4	1	0	1	0	0	1	2	1	2	16	2	14
Prisoner Postpone	0	1	2	2	0	3	1	1	0	2	2	0	2	10	26	4	22

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

BPH NEWS from pg 43

PAROLE BOARD GETS 4 NEW MEMBERS, LOSES ONE

After being at least one commissioner short for nearly a year, the Board of Parole Hearings briefly had a full complement of 12 members, following last month's trio of appointments by Gov. Brown. And the addition of three new faces on the board also signals the success of intense and focused efforts by Life Support Alliance and California Lifer Newsletter editor emeritus Donald Miller to prevent the re-confirmation of long-time commissioner Michael Prizmich and confirmation of first term commissioner Gilbert Robles.

But just when it seems the board had stabilized, Governor Jerry Brown plucked one of the newer commissioners out of his board seat and into the chair of Chief Legal Counsel for the BPH.

First, a bit about the newbies:

Marisela Montes, 58, of Sacramento, has been a consultant at the California Prison Industry Authority since 2011. She served in multiple positions at the California Department of Corrections and Rehabilitation (CDCR) from 2006 to 2009, including deputy director of adult institutions and chief deputy secretary of adult programs. Montes was deputy director of administration at the California Department of Transportation from 1999 to 2006. She worked at CDCR from 1984 to 1999 in multiple positions, including chief of correctional planning and research, deputy director of parole and community services, assistant deputy director of parole and community services, associate warden at the California State Prison, Solano, assistant deputy director of administration, assistant director of affirmative action and staff services manager in peace officer testing and standards. Montes is registered decline-to-state.

Brian Roberts, 59, of Santee, has served as deputy commissioner at the Board of Parole Hearings since 2006. He served in multiple positions at the San Diego County Sheriff's Department from 1975 to 2006, including commander, captain, lieutenant and sergeant. Roberts is a member of the California State Sheriffs' Association and the Peace Officers Research Association of California. Roberts is a Republican.

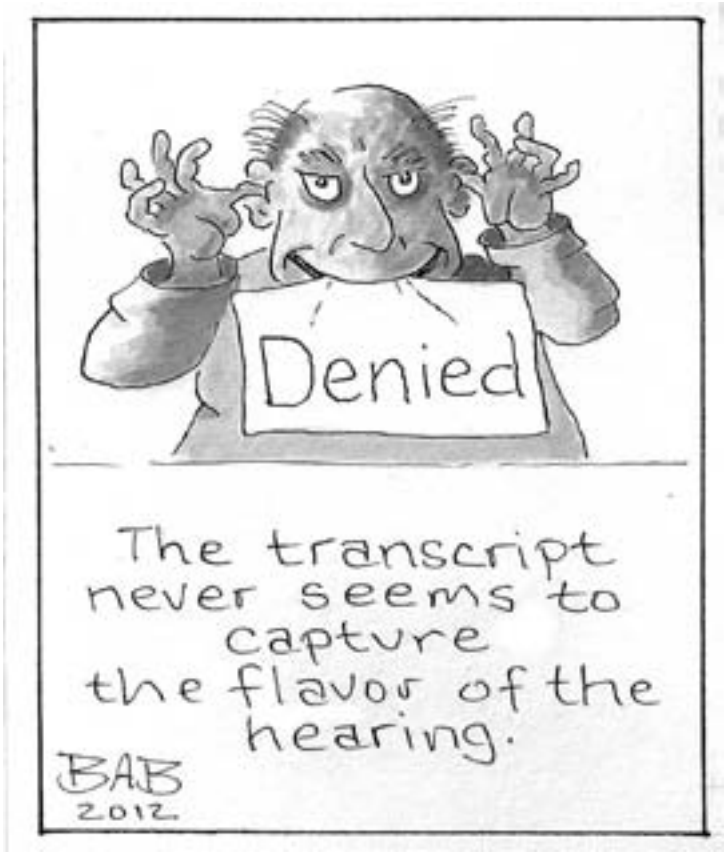
Ali Zarrinnam, 37, of Encino, has served as deputy commissioner at the Board of Parole Hearings since 2009. He served as a panel attorney at the California Parole Advocacy Project from 2004 to 2009, as partner at the Law Offices of Zarrinnam and Chakur from 2003 to 2007 and as an attorney at Finnegan and Diba from 2002 to 2003. Zarrinnam earned a Juris Doctorate degree from Southwestern Law School. This position requires Senate confirmation and the compensation is $111,845. Zarrinnam is a Democrat.

Amarik Singh was appointed to the Board of Parole Hearings on August 3, 2012, by Governor Brown. She previously served as special assistant inspector general at the Office of the Inspector General since 2007. Ms. Singh served as a deputy district attorney for the Kern County District Attorney's Office from 2005 to 2007 and as a deputy district attorney at the Tulare County District Attorney's Office from 1997 to 2005. She was an adjunct professor at the College of the Sequoias from 2002 to 2005. Singh earned a Juris Doctorate degree from the University of the Pacific, McGeorge School of Law. This position requires Senate confirmation.

Since Roberts and Zarrinnam have been DCs at lifer hearings for the last couple of years it is expected they will begin presiding at hearings shortly, fast-tracking around the usual training period for new commissioners. Both were present at the July BPH Executive Meeting and showed themselves to be both attentive and on-point, asking cogent questions on the issues and information presented to the board.

Starting salary for a parole commissioner is $111,800 (and change) and requires confirmation by the Senate in a two-part process. By law all governor appointees must be confirmed, first by the Senate Rules Committee (SRC) and then by the entire Senate, within 365 days of their appointment.

The two familiar faces now absent, Prizmich and Robles, dropped off the BPH after Senate Rules quietly signaled its intention to decline confirmation hearings for the pair. This is a face-saving tactic the SRC has used before, finding it less embarrassing and politically uncomfortable to simply not hold



BPH NEWS **from pg 46**

a hearing and let certain commissioners statutorily drop off the board than to publically reject them. Prizmich and Robles had been the focus of an intense, long term research and review of their decisions by LSA and Miller, highlighting their poor performance as commissioners, not just in denials, but in the quality and legal supportability of those denials.

Commissioner Howard Moseley, appointed to the board just last year and confirmed only months ago, swapped sides of the board dais, accepting Brown's nod in late July to become the Chief Legal Counsel, heading up the BPH legal team. While we felt Moseley, an attorney by training, was well on the way to becoming one of the better commissioners, well-grounded in actual law and consideration of court directive, in the long run these same traits may serve well in his new position. Many have long questioned the tone, attitude and advice emanating from the BPH legal division, which often seemed reluctant to embrace court directives to the board.

If Moseley can make progress in this regard it will be a step forward for all concerned. Moseley served at the Office of the Inspector General from 2004 to 2011, and as deputy attorney general at the California Department of Justice from 1996 to 2004. He was an adjunct professor at the University of the Pacific, McGeorge School of Law from 2006 to 2010 and in the U.S. Army from 1989 to 1995. Moseley's new position does not require Senate confirmation and pays compensation $124,896 per year, an upgrade from the $111,845.

There is no doubt that the face of the parole board has changed over the last 18 months since Brown became governor. Though no one could reasonably accuse the board, individually or as a body, of being soft on crime, liberal or even excessively kind-hearted, it is apparent that the current board is less dominated by retired cops than boards of the recent past. Prisoner advocates have long decried the board's use as a well-paid retirement venue for former sheriffs, police officers and prison guards.

To be sure, today's BPH board still has more than its fair share of these backgrounds (5 of the current 11 members are former sheriff, police, CHP or CCPOA members and four were employed in custody-related fields), but past boards have been 90 to 100% former custodial officers. When Moseley was a sitting commissioner, three of the present group were attorneys by training.

The obvious result of having so many custodial types on the parole board is the familiar overwhelming denial rate, but a side effect, perhaps just as interesting to the average California taxpayer, is the double-dipping phenomenon. Though not a new issue, with all the talk of pension reform wafting around the capitol, it is interesting to note the many BPH commissioners drawing not only their $111,000+ salary as commissioners, but often substantial pensions equal to or exceeding their parole board stipend.

Perhaps one of the biggest dippers to double his dips was former BPH Chairman Robert Doyle, who dropped off the board last year after failing to win Senate confirmation. The former Riverside County sheriff and member of the parole board since 2007 had worked his way up to a BPH salary of nearly $116,000 to supplement his retirement pension of over $193,000, bringing his total take from public resources at over $300,000 per year.

Who says crime doesn't pay—and well, at that.

*****

VNOK HEARING SURVEY

Life Support Alliance is beginning a new survey of lifers experiences at parole hearings, this time aimed at gathering information on hearings at which victims or their representatives appeared.

Preliminary indications from several sources have produced contradictory findings as to whether or not VNOK (Victims Next of Kin) attendance at hearings result in greater rates of denials than hearings at which no victims appear. Since 2008 and the enactment of Marsy's Law victims have had increased prominence in parole hearings and subsequent gubernatorial actions regarding parole grants. While other organizations are looking into the raw numbers in this situation, LSA has another objective in mind. Toward that end we are asking lifers who been through a hearing where victims appeared to complete the survey below.

In the course of this research we may contact individual inmates for further information on their individual experiences. Please feel free to contact LSA with questions or comments and please provide as many details as possible in your responses. LSA, PO Box 277, Rancho Cordova, Ca. 95741

NAME_____ CDC NUMBER_____

HEARING DATE_____ COMMISSIONER_____

DENIED/GRANTED/STIPULATED INITIAL/SUBSEQUENT

PRIVATE/STATE ATTORNEY ATTORNEY NAME_____

EVER FOUND SUITABLE/WHEN_____ IF SO, VNOK AT THAT HEARING_____

REVERSED?_____

VNOK@ANY PREVIOUS HEARING_____ NUMBER OF VNOK@THIS HEARING_____

ACTUAL RELATIVES OR 'REPRESENTATIVES'_____

DID VNOK CONTACT GOVERNOR W/LETTERS, PETITIONS_____

PLEASE PROVIDE DETAILS OF VNOK AND DA, COMMISSIONER COMMENTS, DID VNOK ADDRESS BOARD OR INMATE, HOW LONG DID VNOK SPEAK?

CDCR NEWS

CALIFORNIA OUT OF STATE INMATES COMING HOME

The reverse exodus has begun. In early July the CDCR Secretary Matthew Cate announced that the return of some 600 California inmates now housed in a privately run Arizona prison would begin "immediately," and just a few days later a CDCR spokesman confirmed the department would also bring home more than 2,300 Californians housed in an Oklahoma lock up, run by the same private profiteer, by the end of 2013.

Although Cate's message spoke to the gradual modification and eventual end of the contracts between the CDCR and Tennessee-based Corrections Corporation of America (CCA) the later announcement, relating specifically to the Oklahoma facility, is the direct result of a riot there last October. That incident resulted in injuries, including at least one stabbing, to 46 prisoners. Contracted in 2008 and staffed by privately hired and trained guards, North Fork Correctional Facility in Sayre, Ok., holds no local prisoners; all inmates at North Fork are from California, serving sentences imposed by California courts for crimes committed in California. But serving their time in Oklahoma.

It is one of four CCA facilities housing inmates sent from California beginning at the height of the prison overcrowding crisis; two others are in Arizona and one in Mississippi. Reports are that the California prisoners in Oklahoma are primarily of African American and Hispanic ethnicity and the riot had racial overtones.

According to Sec. Cate all 9,000+ exported California prisoners will be back in California facilities by the end of 2016. While Cate's original announcement addressed the 600 Arizona-housed inmates who will begin returning soon and promised another 4,000 would be brought back by 2014, it is unclear whether this number includes the 2,000+ from the troubled Oklahoma facility.

Contracting with private, for-profit prisons and moving California prisoners to those far-away locations has proven both controversial and costly, and not just in finances. While CCA charges the state between $61 and $72 per day to house California prisoners, the total cost of the state's contracts for all prisoners exceeds $280 million for 2012-2013. Aside from the monetary costs, groups from prisoner advocates to CCPOA have decried the move, albeit for different reasons. Prisoners' groups point to the increased difficulty in maintaining family connections when prisoners are carted across state lines and CCPOA bemoans the loss of jobs and money (and resultant political power) for their union.

Then there is the perception of transporting individuals—in chains—across state lines, against their will, for the financial gain of at least one party. The definition of slavery comes to mind.

Despite Sec. Cate's stated intention to return all California inmates to the state, total implementation of this plan still depends on the state's ability to convince the three judge federal panel that ordered the population reduction to agree to extend the population cap from 135% of design capacity to 145% of capacity. Further, the Legislative Analyst Office has suggested it may be more financially advantageous for California to continue out of state inmate contracts and cancel various prison and correctional facility construction projects begun under AB 900.

So that while as of now the CDCR proclaims plans to make all California prisoners truly prisoners in California, should the political, fiscal or public opinion winds change, this intention too, may be gone with whatever wind is blowing.

CDCR NEWS from pg 49

THE INMATE SHUFFLE BEGINS: SCORES, LEVELS CHANGE

With the confluence of realignment, changing classification designations and security level modifications, the next few months in California may look like a gigantic game of hide-the-inmate-pea-under-the-prison-walnut shell. As realignment pushes whole categories of prisoners out to community corrections the CDCR, tangled in its own scramble to keep fire camps and low level facilities filled, meet court-ordered population levels and monitor both closures of old prisons and construction of new health and in-fill facilities, is starting extensive changes in classification and close custody designations. These changes will lead to substantial shifts in populations and will allow many inmates, heretofore stuck nearly forever at one level, the chance to change levels and prisons.

The recently announced and now being implemented changes in classification numbers and level designations could potentially lead to a shift in both custody level and prison assignment of nearly 20,000 prisoners over a next year. Changes in classification numbers and categories, due to be applied either at reception or annual classification review, are expected to shift over 3,400 prisoners from Level III to Level II while the elimination of close custody label for some prisoners could move another 1,500 from Level III to Level II facilities. Increasing the cut off level for Level II designation from 27 to 35 points will bring another 7,700 from Level III to Level II institutions.

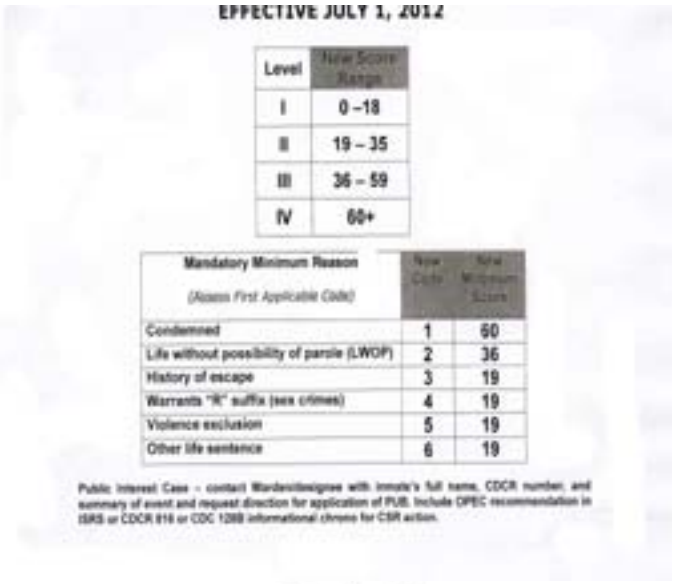
Clearly, there will be a population boom at Level II. CDCR acknowledges this, admitting all the changes will likely push Level II facilities statewide to 157% of design capacity. This will be off-set, as far as the federal court population cap is concerned, by changes that will eliminate restrictions that kept LWOP prisoners at Level IV, allowing a potential shift of 2,100 LWOP inmates to Level III and changes in top points for Level III will mean another 5,500 can move from Level IV to III. Other levels, from Reception Center to Condemned, are expected to remain at the same level of capacity, with the exception of Level IV, which is expected to drop from the present 181% to 125%.

One of the classification changes CDCR seems most satisfied with is the revision of Close Custody qualifications. Dropped from those categories requiring Close Custody were management concerns, gang dropout and high notoriety prisoners, with two new categories, Inactive Gang and Security Concerns, added. The new Close Custody guidelines also re-define cases of Public Interest, formerly and duplicitously known as High Notoriety.

The changes, all details of which are contained in revised Section 3377.2 of Title 15, were predicated on an examination of the classification system by several California universities, including UC Irvine, UCLA, Berkeley and Davis. Among the many conclusions of the study were that Mandatory Minimum Scores often trap prisoners who are not discipline problems in higher security level prisons than necessary, which often proved counterproductive and that there are no natural "tipping points," or numbers at which prisoners automatically become more dangerous. The university study recommended and CDCR agreed that classification point groupings could be modified 6 to 8 points within classes.

On the whole, the new changes will allow many prisoners to shift downward in security levels, which will, according to a CDCR representative, be "a huge help in opening [more inmates] to programming."

For more details on the new classification numbers and security level assignments see CDCR charts below.



EFFECTIVE JULY 1, 2012

Level	New Score Range
I	0 –18
II	19 – 35
III	36 – 59
IV	60+

Mandatory Minimum Reason (Reason First Applicable Code)	New Code	New Minimum Score
Condemned	1	60
Life without possibility of parole (LWOP)	2	36
History of escape	3	19
Warrants "R" suffix (sex crimes)	4	19
Violence exclusion	5	19
Other life sentence	6	19

Public Interest Case – contact Warden/designee with inmate's full name, CDCR number, and summary of event and request direction for application of PUB. Include OPEC recommendation in ISRS or CDCR 816 or CDC 128B informational chrono for C&R action.

Housing Plan

The Housing Plan includes the complete elimination of non-traditional beds and includes the following new standards for crowding within the specific bed types

Bed Type	Old Crowding Standard	New Crowding Standard
	CELLS	
Level IV GP Cells	190%	150%
Level III GP Cells	190%	150%
Level II GP Cells	190%	150%
RC Cells	190%	150%
Condemned	100%	100%
Over/Under Cells	160%	100%
	PROGRAMS	
EOP (Except CMF/CMC)	150 – 180%	150%
CMC – EOP	150%	100%
CMF	170%	130%
SHU	105 – 150%	120%
ASU	150 – 175%	125%
ASU-EOP	150 %	100%
PSU	100%	100%
	DORMITORIES	
Level II GP Dorm	200%	150%
Level I GP Dorm	200%	150%
MSF Dorms	200%	100%
RC Dorm	200%	150%
Female Dorms	200%	150%
Camps	100%	100%

CDCR NEWS **from pg 50**

CDCR MOVES TO HOLD FEWER INMATES 'CLOSE'

Along with changes in classification scores and categories, CDCR has begun implementation of major modifications in close custody status. Coming as a result of the 18-month long university generated study that convinced the department to drop some mandatory minimum categories, the changes in close custody status are expected to lead to a shift of over 3,400 inmates from Level III, held there by virtue of their Close Custody designation, to Level II status.

After determining LEF (Lethal Electrified Fence) facilities have a minimal risk of escape, the study recommended, and CDCR agreed, to remove risk of escape from the list of close custody categories. Also removed were the relatively undefined 'management concern,' 'gang dropout' and 'high notoriety' cases. These were replaced by 'Inactive gang,' defined as previously identified gang members who have not debriefed, but have not been considered to have been active in a prison gang for the previous 6 years, and 'Security concerns,' still a rather nebulous term that gives wide discretion to the administration of the individual prison.

The new category of Security Concern,' will include what is now termed "Public Interest Cases," an amalgamation of several previous terms all with the same basic meaning, but the use of 'high interest' 'special interest' and 'media interest' proved confusing. The new definition of "Public Interest Cases," which will be included in Title 15, Section 3000 is "an inmate whose crime/criminal history, public recognition, family ties, career or behavior in custody has resulted in extensive media coverage beyond the closest large city and its surrounding areas." Any prisoner now considered for this designation now goes through a multi-step process that includes referral for consideration as public interest designation by a caseworker, concurrence by the warden and the Office of Public and Employee Communications.

The changes also mean that lifers no longer must be within seven years of their MEPD to be removed from Close Custody designation; such decisions will now, according to CDC, be made based on individual case factors. After finally recognizing that lifers as a group evidence no more 'behavioral problems' than any other group, CDC has now decided that removing lifers from Close Custody earlier in their incarceration can be a "huge help" in making programming opportunities available to them.

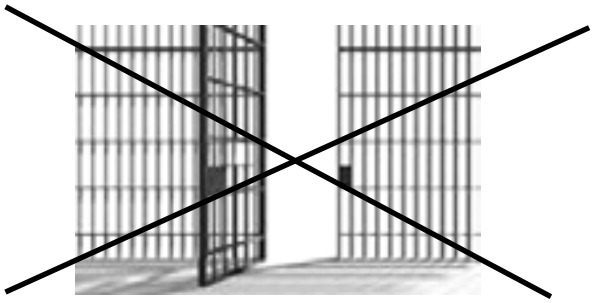
NON-BINDING SUMMARY OF CLOSE CUSTODY REGULATIONS EFFECTIVE JULY 1, 2012

Case Factor	Summary	Close A (in years)	Close B (in years)
Lengthy Sentence	Upon initial classification and custody designation for the current sentence: • LWOP, or • Multiple life terms, or • 40 years or more to serve 3377.2(b)(1)(A)	3	7
	Upon initial classification and custody designation for the current sentence: • Single life term, or • At least 25 years but less than 40 years to serve 3377.2(b)(1)(B)	1	4
Escape History	Escape with force or attempted escape with force 3377.2(b)(2)(A)	8	5
	Escape without force or attempted escape without force from other than a non-secure facility or from armed escort 3377.2(b)(2)(B)	5	5
	Plotting/planning to escape from other than a non-secure facility or from armed escort 3377.2(b)(2)(C)	2	5
Detainers	Active detainer for offense with possible penalty of: • Death, or • Lifetime incarceration, or • Total term of 50 years or more 3377.2(b)(3)	3	Until detainer is removed
Disciplinary History	In-custody murder of a non-inmate 3377.2(b)(4)(A)	Lifetime	N/A
	In-custody murder of an inmate within last 10 years 3377.2(b)(4)(B)	6	4
	Division A-1 or A-2 RVR 3377.2(b)(4)(C)	1	2
Inactive Prison Gang	Upon reduction from Maximum Custody due to reclassification as an inactive prison gang member or associate 3377.2(b)(5)	N/A	1
Security Concern	Designated "security concern" by ICC (see CCR section 3000) *Requires: CSR referral for SEC application; annual ICC review; DRB referral beyond 2 years 3377.2(b)(6)	N/A	1*

The Close Custody regulations can be found in their entirety in CCR section 3377.2.

CDCR NEWS from pg 51

CDCR'S NEW COMPAS POINTS IN THE WRONG DIRECTION



As reported previously in both California Lifer Newsletter (June, 2012, Vol. 8 No. 3 Issue #45) and in our sister publication, Lifer-Line (May, 2012, Vol 3 Issue 5) the CDCR has put forth yet another quasi-psychological test packet to further muddy the waters for prisoners, especially lifers, on housing, programming and parole. Following a mockery of a 'public hearing' on July 17, we fully expect the department to forge ahead with implementation of this ill-conceived and potentially damaging process.

The Notice of Change to Regulations 12-3 affecting Sections 3000, 3375 and 3375.6, published May 25, 2012, CDC proposes to have correctional counselors administer, during a prisoner's initial or annual review, this 'assessment tool;' which is in reality a battery of prejudicial and possibly self-incriminating questions. After this 'tool' is 'administered,' the 'data' will be used to "evaluate the offender's criminogenic needs" to "assist in placing offenders into rehabilitative programs for which they are best suited and to be consistent with their identified criminogenic needs."

The new test is an expansion of the Comprehensive Offender Management Profiling for Alternative Management (COMPAS) and consists of some 101 questions for men and 192 for women, supposedly covering all aspects of a prisoner's background and thinking from "family criminality" and "criminal thinking" to "leisure time." The purported purpose of the questions is to allow the department, in the persons of correctional counselors, to evaluate the housing and programming needs of all inmates in the state system and place them in the appropriate locations. While this purpose sounds not only fine and lofty, but even logical, the devil, as always, is in the details.

There are so many flaws in this plan it's hard to know where to start, but perhaps the test itself is a good place. No study, group, individual or organization with any sort of ethical or professional chops endorses the use of COMPAS as a predictive tool for inmates, most especially lifers. The March 2012 report by the State Auditor's office concludes:" "To ensure that the State does not spend additional resources on COMPAS while its usefulness is uncertain, Corrections should suspend its use of the COMPAS core and reentry assessments until it has issued regulations and updated its operations manual to define how Corrections' use of COMPAS will affect decision making regarding inmates, such as clarifying how COMPAS results will be considered when sending inmates to different prison facilities, enrolling them in rehabilitative programs to address their criminal risk factors, and developing expectations for those on parole."

Dr. Jennifer Skeem, who has been monitoring the results of COMPAS as administered to prisoners for several years concluded a 2010 report for CDCR by saying "Given the current state of evidence, we cannot recommend that the CDCR utilize the COMPAS with individual offenders. Although the COMPAS has a number of strengths, we strongly believe that more research and information are needed before CDCR can rely on this tool to meet its needs."*

Coupled with the admission by CDCR that counselors will have no additional training, (with the exception of computer competency on entering information from the tests) on use of the information, it's hard to see how any department would insist on using a system as questionable as this one. Although CDCR maintains the use of the results will be easily applied, as the use rests simply on a numerical scale associated with COMPAS, they refused to release that scale when asked to do so by Life Support Alliance (LSA).

Noted psychologist Dr. James Austin, who is currently completing a reliability and validity test of COMPAS for the Virginia Department of Corrections, has also expressed concerned with the lack of training. After reviewing the proposed assessment tool Dr. Austin commented; "Given the length and complexity of the instrument there will be major concerns about the reliability of the instrument as used by correctional staff that may not be properly trained in the instrument."

And despite the department's contention that results from the COMPAS assessment will direct inmates to the best, most helpful and fruitful housing and programming there is no information on what these programs are and how inmates will be assigned to them. There is, however, wide spread skepticism that this will occur, as even the state Auditor noted in the March report that even if COMPAS could, as claimed, identify up to 5 different needs areas, CDCR "has rehabilitative programs that address only two. Corrections as not established regulations defining how COMPAS assessments are to be used despite legal requirements to do so."

The questions themselves are noxious on many levels, being not only possibly prejudicial and self-incriminating, but sometimes confusing and, in the case of lifers, totally irrelevant. The potential for information gleaned from the responses to be construed in a prejudicial manner by counselors, parole commissioners, psychologists (most especially those associated with the Board of Parole Hearing's Forensic Assessment Division [FAD]) or other CDCR staff members is titanic. In particular the questions contained in the "Criminal Personality," "Anger," portions of the questions for men as well as the "Criminal Attitudes" section of questions for women prisoners could be miss-used.

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Prisoners will be asked if their parents/siblings/friends have been arrested, incarcerated, involved in drugs. They will be asked how they think others view them and what their attitudes were prior to incarceration. Other series of questions ask if prisoners had trouble finding jobs paying more than minimum wage prior to incarceration, how many times the individual had moved in the year before incarceration and whether or not their last civilian residence had a telephone.

For lifers who have spent decades in prison, trying to remember how many times CDCR has moved them from place to place is difficult enough, let alone casting their minds back years in past to details of their living arrangements before coming to prison. And those questions about the 'criminality' of their friends and family members could prove troublesome for free persons as well, given the results of this 'test' will be held in C-files, not medical or confidential files, and therefore available to a myriad of individuals.

In particular, answers to these questions could be highly detrimental to life term inmates, who are subjected to regular psychological evaluations (of questionable accuracy and value) by the FAD. Given the free access FAD clinicians have to prisoners' C-files, the answers and conclusions resultant from these COMPAS questions might contribute to FAD psychologists developing a presumptive, albeit unintended, opinion of the prisoner prior to their own evaluation. This same concern applies to BPH commissioners, counselors and others who might have legitimate access to inmate records.

As LSA noted in a comprehensive and documented written objection to this change, "In addition, there is a concern regarding those individuals who might be able retrieve this information in C-files through miss-use of passwords and access. As distasteful as it is for CDCR to contemplate, there are many instances of such miss-use. With the introduction of the Strategic Offender Management System (SOMS) computer system many persons within the institutions have access to prisoner C-files.

"To put the situation plainly, given the numbers of CDCR staff, both free staff and custodial, that have been convicted in recent years of nefarious activities including introduction of contraband, both illegal (drugs) and penologically banned (cell phones, alcohol) into prisons, it is not an unreasonable stretch to consider the possibility, if not likelihood, that such persons could find a use for information on individual prisoners. And given the personal and sensitive nature of the information that could be compiled from the proposed COMPAS questions it is not far-fetched to be concerned that a prisoner's safety, up to life, could be endangered by pernicious use of such information.

"As concerning as possible miss-use of information regarding prisoners is, the potential for unauthorized use of similar sensitive information relating to friends, family and associates of prisoners as a result of inmates' answers to COMPAS questions and maintained in the C-file is potentially litigious. Questions regarding possible or alleged arrests, past (alleged or perceived) drug use and/or incarceration of prisoners' family and friends offer opportunities for miss-use of such information, whether accurate or not. So long as innumerable persons have access to inmates' C-files the potential for these invasions of privacy exist. And therefore the possibility for litigation against the department and the state by non-prisoners, who may feel their privacy has been violated or reputations unfairly tarnished, exists."

While LSA was apparently the only attendee at the July 17 hearing to voice our objections in person, we are aware that other groups and individuals also submitted written objections, including many LSA supporters who responded to our call to action to voice their opposition. The hearing itself is something of a misnomer, as there are no officials, elected or otherwise, to actually 'hear' the issues. Instead, these administrative hearings are supervised by two to three CDCR employees, who monitor a recorder, from which a transcript of all comments will later be produced.

The department now as 30 days to respond to the issues and objections brought forth. Their response must be public and made available to all those who entered comments. Once that response is released we will review it and respond both to the CDCR and to our readers.

SECURITY LEVELS SHIFT WITH POPULATION CHANGES

As the population within CDCR changes with realignment, the need for various types of facilities changes as well. According to information presented in mid-July, the CDC plans to totally or partially convert fully a dozen prisons in the system, everything from closure of the aging Norco facility to flipping from female to male inmates through conversion of reception center yard to general populations.

Beginning this month (August) the first reception center conversions will take place with Facility D at Donovan becoming a Level III SNY yard and Facility F at SATF swapping to a Level II EOP (Extended Out Patient). High Desert will see its reception center yard Facility A convert to a Level III general population in October.

Also in October Valley State Prison for Women in Chowchilla will do a total 360, becoming an as yet unnamed men's facility, probably as a Level II SNY facility. The majority of women prisoners now at VSPW are expected to shift to California Correctional Women's Facility, also located in Chowchilla. The conversion is expected to be gradual, with the prison holding both men and women for a brief time, the men housed exclusively most likely on A Facility. The complete conversion is expected

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to take up to two months, barring unexpected complications.

Also in October the J-2 yard at California Medical Facility in Vacaville, now a Level III, will become Level II security. The department apparently will use the remaining two months of the year to stabilize and finalize these changes, with no other yard changes slated until the beginning of 2013.

But beginning in January, things are rolling again. Old Folsom, now a Level III, is expected to become a Level II general population and California Training Facility-North will also drop from Level III SNYs to Level II in February, with Ironwood changing its Level IV SNY Facility A to a Level III SNY in March.
April will see a run of conversions, Centinela moving Level IV GP Facility C to a Level II GP and Deuel Vocational Institute in Tracy will see two conversions that month, when four yards now designated Level III GP will become Level II and the remaining three yards, now reception centers, will become Level II GP yards.

The last yard conversion, at least so far announced, will occur in May when San Quentin's Alpine Section will move from reception center to Level II general population. In addition to these announced changes, reports are that some institutions, including California Men's Colony in San Luis Obispo, will be designated as facilities for those prisoners with chronic, but not acute, medical issues, with resulting transfer of prisoners.

The closure of California Rehabilitation Center (Norco) will be completed by Fiscal Year 2015/16 for an estimated saving of $160 million annually in operations and an additional savings of more than $200 million in repairs that won't be needed to the aging and expensive to repair wooden housing units, many not ADA (American Disability Act) accessible.

In October, 2006 the in-state population of prisoners reached an all-time high of 173,479, all crammed into a string of facilities designed to hold a maximum of 79,828 men and women. This left CDC struggling to justify perpetuating an overcrowding rate that topped 200% that included nearly 20,000 men housed in so-called "non-traditional" or ugly beds, primarily triple bunked in such unreasonable locations as gymnasiums. The overcrowding was largely responsible for the three judge panel ordering the department to reduce the overcrowding in order to facilitate provision of proper medical and mental care to prisoners. By June, 2013 the state must bring the inmate population in prisons (excluding camps and contact facilities) to a maximum of 112,032 inmates, or 137.5% of design capacity. As of mid-July, the numbers stood at 134,784 prisoners, or 151% of capacity.

One of the first signs of overcrowding to go were the 'ugly beds,' which began a precipitous decline in September, 2007 and with a few minor stumbles upward, continued to fall until January of this year, when the CDC proudly announced the end of ugly—at least in bed placement. So far the department has managed to keep the gymnasiums clear of bunks and there are even rumors of gyms once again being used for athletic activities.

THE CDCR SPIN
SNIPPETS FROM CDCR PRESS RELEASES, WITHOUT COMMENT

The California Department of Corrections and Rehabilitation is hoping to reduce its share of the state's budget over the next few years. According to Corrections Secretary Matt Cate, CDCR will take its portion of the of the general fund down to 7.5 percent in the 2015-16 fiscal year. As a comparison, CDCR, which is the state's biggest and highest funded agency, got 11 percent of the general fund in 2008-09.

"That'll allow us to get a handle on overall general fund spending, but also allow us opportunities for funding higher education and other priorities," Cate said.

The savings will come mostly from:

- Not having as many inmates: under prison realignment, the counties take responsibility for low-level offenders, which means they won't be the state's responsibility;
- Not having as many parolees: the parole load is expected to go way down, also a function of realignment;
- Closing facilities — specifically, the California Rehabilitation Center in Norco — and not building as many new prisons as previously proposed, meaning the state will not cash in on $4.1 billion in building bonds;
- And the Division of Juvenile Justice, which will not keep kids as long, along with juvenile parole, which will be completely eliminated.

Other changes include bringing back inmates from out-of-state private prisons, which will start with 600 coming back from Arizona this year. And, Secretary Matt Cate said, a renewed commitment to rehabilitation programs behind bars. According to Cate, the goal for the next few years is to get 70 percent of inmates participating in appropriate rehabilitation and educational programs. Another goal, which Cate said could be achieved within months, is getting the system out from federal court oversight.

Meanwhile, more money will flow to the county level (though not from the general fund) to cover realignment, starting with $5.8 billion this coming year. The state will also dole out half a billion dollars' worth of jail construction funds.

For those counties that've complained in the past about the formula for who gets how much realignment money, it looks like not much will change this year. Realignment funds will continue to be given out based on the number of inmates counties send to prison and the county population, rather than, as some had asked, crime rates.

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CDCR PRESS RELEASE 6/20/1

On June 20, the most recent count, California's prison inmate population was 121,129. This achievement is the result of Governor Edmund G. Brown Jr.'s public safety Realignment policy, which ensures that many lower-level offenders are punished and managed at the local level.

"We are ahead of schedule. We were required to get down to 124,000 inmates by the end of June and we actually reached that number in mid-April," said CDCR Secretary Matthew Cate. "The population drop is increasing our savings while allowing us to more strongly emphasize rehabilitation."

Under the Three-Judge Court's prisoner reduction order, affirmed by the U.S. Supreme Court in May 2011, the inmate population in California's 33 prisons must be no more than:

- 167 percent of design capacity by December 27, 2011(133,016 inmates)
- 155 percent by June 27, 2012 (124,000 inmates)
- 147 percent by December 27, 2012 (117,000 in mates)
- 137.5 percent by June 27, 2013 (110,000 imates)

Although it is fairly standard for prisons to house two inmates in a cell, a prison's design capacity is calculated based on one inmate per cell, single-level bunks in dormitories, and no beds in places not designed for housing. Current design capacity in CDCR's 33 institutions is 79,650. Realignment enables the State to safely reduce the inmate population as a percentage of design capacity without either quickly building a number of new prisons or resorting to early release of inmates.

CDCR PRESS RELEASE 6/28/12

Spending less taxpayer money on prisons. The operational General Fund budget of CDCR falls next year to $8.55 billion, nearly half-a-billion dollars less than the current year. When the blueprint is fully implemented, CDCR's budget will fall by more than $1.5 billion.

· Improving and expanding health care facilities and rehabilitative programming. CDCR has achieved and will maintain constitutional levels of medical, mental health and dental care, thus ending the significant cost of litigation and court oversight.

· Building and staffing a more efficient prison system. CDCR is changing its staffing levels and ratios to take into account the falling inmate population. In the 2012-13 budget, CDCR also gets authority to start work on more cost-effective prison housing. Infill projects will replace California Rehabilitation Center, and old and costly prison in Norco to be closed by 2016.

Many of the improvements in California prisons are due to the reduction in overcrowding made possible by Public Safety Realignment signed into law by Governor Brown last year. Since Realignment took effect, CDCR's offender population has dropped by approximately 23,000 inmates. Overcrowding has been reduced from a high of more than 200 percent of design capacity to approximately 152 percent today. These declines are projected to continue through further implementation of Public Safety Realignment.

APPOINTMENTS/JOB CHANGES

Paul Brazelton, 49, of Coalinga, has been appointed warden at Pleasant Valley State Prison. Brazelton has served in multiple positions at Pleasant Valley State Prison since 1994, including acting warden, chief deputy administrator, correctional administrator, correctional captain, correctional lieutenant and correctional sergeant. He served as a correctional sergeant at Calipatria State Prison from 1991 to 1994 and as a correctional officer at the Deuel Vocational Institution from 1984 to 1991. This position does not require Senate confirmation and the compensation is $130,668. Brazelton is a Republican.

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CDCR TO IMPROVE VISITING EXPERIENCE. THEY SAY.

Having never heard the old canard, "If it ain't broke, don't fix it," CDCR is rolling out the Visitor Processing Appointment Scheduling System (VPASS), the latest application being developed by CDCR. This online application will allow the department to offer "tools to the public to enhance their visiting experience." This new, statewide online appointment system will replace any and all online appointment processes now in place at many individual institutions, and often working well.

According to public relations handout recently released CDCR seems to have suddenly discovered the hardships families have been coping with for years; showing up in the early morning, hours before visiting begins, or even the night before, to secure a pass to see their loved one. This often entailed parking along adjacent dangerous or desolate roadways and being forced to move frequently or being ticketed by local law enforcement.

VPASS is being touted as a way for individual prisons to "resolve the overcrowding issue" as well as help the institutions "facilitate efficient and speedy visitation processing." At present, it is set to roll out state-wide in September.

Many prisons have, often after much foot dragging and institutional resistance, finally joined the digital age and incorporated online appointments for visiting. Others, especially those more remote locations, have as yet failed to embrace appointments, let alone online scheduling. In many cases these remote prisons, due to their sheer out-of-the-way locations, do not experience the same numbers of visitors as other locations in only slightly-off-the-beaten-path spots.

The new system, initially slated to roll out around the end of May to coincide with SOMS use (more on that later) is now said to be ready after a "proof of concept" trial at Folsom. Whereas now at many prisons using online appointments visitors can simply send an email request for certain day and time and receive a confirming response, the new VPASS system prompts users through a series of 7 screens and menus to set up a visiting slot.

The new system will not be universally the same, ceding to individual institutions how far in advance appointments can be set, what times will be held for appointments and how many appointments will be set within each time slot. CDCR does note, however, "[w]hile we are encouraging visitors to use this new online appointment system, CDCR will continue to ensure the current phone appointments and walk-in systems are in place."

VPASS, once operational, will be accessed not through email, but via the CDCR website. The department plans to include an "Institutional Banner Message" on the site, to provide up-to-date information on visiting status at the prison.

In a shameless bit of self-promotion, the handout claims that following the Folsom test "the visiting public heaped praise upon Folsom State Prison for implementing this system."

It also claims walk-ins to visiting were decreased "to almost zero in a matter of weeks."

The other visiting 'improvement' recently unveiled by CDCR is the use of the Strategic Offender Management System (SOMS) in visiting processing. Rolled out in late May to promises of streamlined visiting processing, better record keeping and more time for actual visiting, SOMS has proven something of a mixed success. In the roughly two months since implementation the entire SOMS system has been down statewide at least 3 times, with other performance issues at individual institutions.

Initially it was widely reported that not all relevant information in prisoners' visiting card made the transition from the old method to the new and improved SOMS. In particular, information regarding visiting minors did not seem to make the transition and there were many reports of visitors who had been spouses of prisoners for years being listed as "friends" in the visiting records. All these glitches required individual corrective entries, which, in the initial weeks, often slowed visiting processing to a crawl.

On paper and in theory the use of SOMS in visiting (not one of the main uses originally proposed for the computer software) could provide more actual visiting time for families, primarily through the (reported) ability of SOMS to notify the prisoners' housing unit of a visitor when that visitor clears processing, instead of waiting for visiting room staff to make the notification. CDCR officials originally maintained they expected prisoners to be waiting in visiting rooms for their families to arrive, instead of the opposite.

SOMS is also said to keep accurate record of the "exact time a visit begins," defined as when both prisoner and visitor are in the visiting room, to facilitate fair treatment practices if overcrowding terminations are required. The new system also is supposed to eliminate the need for visitors to fill out passes each visit, as SOMS will produce a visiting pass with the visitors' names, name of the prisoner and even copy of his/her prison ID picture. Just in case family forgets who they are there to see.

There are also several possible applications for SOMS in visiting that are planned to be left to "local visiting policy." This is dangerous turf, as all visitors have experienced troublesome and nonsensical 'local' visiting customs. These possible options on SOMS include assignment of table, assignment of more than one inmate/visitor to a table, even whether or not to fill out the paper visiting pass.

So much 'local' leeway would seem to conflict with the stated benefit of SOMS, "Efficiency" and "Consistency."

If CDCR is indeed seeking consistency in visiting, processing passes should be the least of their worries. All visitors would appreciate consistency in such things as acceptable clothing policy, patio privileges, vending machine prices, fully stocked and cleaned restrooms and visitor processing during count time. And as for efficiency, well. CDC is still searching for efficiency at many levels.

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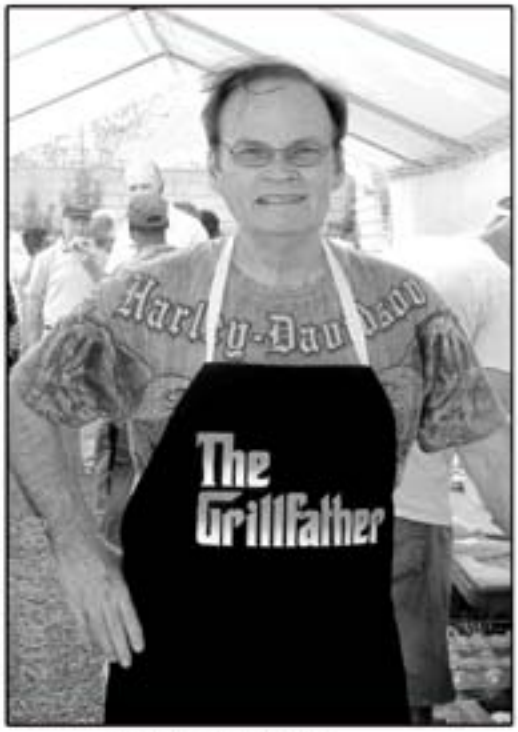

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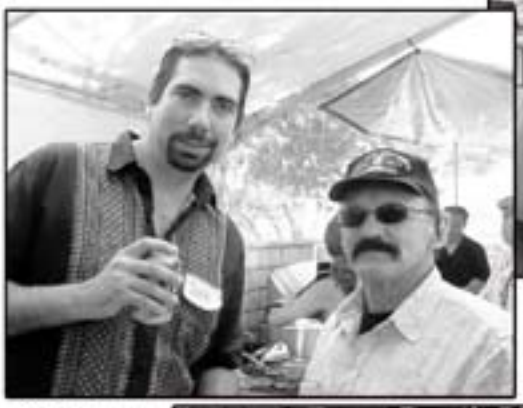

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Strategies To Keep Anger At Bay

THE AMERICAN PSYCHOLOGICAL ASSOCIATION

Relaxation

Simple relaxation tools, such as deep breathing and relaxing imagery, can help calm down angry feelings. There are books and courses that can teach you relaxation techniques, and once you learn the techniques, you can call upon them in any situation. If you are involved in a relationship where both partners are hot-tempered, it might be a good idea for both of you to learn these techniques.

Some simple steps you can try:

- Breathe deeply, from your diaphragm; breathing from your chest won't relax you. Picture your breath coming up from your "gut."
- Slowly repeat a calm word or phrase such as "relax," "take it easy." Repeat it to yourself while breathing deeply.
- Use imagery; visualize a relaxing experience, from either your memory or your imagination.
- Non-strenuous, slow yoga-like exercises can relax your muscles and make you feel much calmer.

Practice these techniques daily. Learn to use them automatically when you're in a tense situation.

Cognitive Restructuring

Simply put, this means changing the way you think. Angry people tend to curse, swear, or speak in highly colorful terms that reflect their inner thoughts. When you're angry, your thinking can get very exaggerated and overly dramatic. Try replacing these thoughts with more rational ones. For instance, instead of telling yourself, "oh, it's awful, it's terrible, everything's ruined," tell yourself, "it's frustrating, and it's understandable that I'm upset about it, but it's not the end of the world and getting angry is not going to fix it anyhow."

Be careful of words like "never" or "always" when talking about yourself or someone else. "This !&*%@ machine never works," or "you're always forgetting things" are not just inaccurate, they also serve to make you feel that your anger is justified and that there's no way to solve the problem. They also alienate and humiliate people who might otherwise be willing to work with you on a solution.

Remind yourself that getting angry is not going to fix anything, that it won't make you feel better (and may actually make you feel worse).

Logic defeats anger, because anger, even when it's justified, can quickly become irrational. So use cold hard logic on yourself. Remind yourself that the world is "not out to get you," you're just experiencing some of the rough spots of daily life. Do this each time you feel anger getting the best of you, and it'll help you get a more balanced perspective. Angry people tend to demand things: fairness, appreciation, agreement, willingness to do things their way. Everyone wants these things, and we are all hurt and disappointed when we don't get them, but angry people demand them, and when their demands aren't met, their disappointment becomes anger. As part of their cognitive restructuring, angry people need to become aware of their demanding nature and translate their expectations into desires. In other words, saying, "I would like" something is healthier than saying, "I demand" or "I must have" something. When you're unable to get what you want, you will experience the normal reactions—frustration, disappointment, hurt—but not anger. Some angry people use this anger as a way to avoid feeling hurt, but that doesn't mean the hurt goes away.

Problem Solving

Sometimes, our anger and frustration are caused by very real and inescapable problems in our lives. Not all anger is misplaced, and often it's a healthy, natural response to these difficulties. There is also a cultural belief that every problem has a solution, and it adds to our frustration to find out that this isn't always the case. The best attitude to bring to such a situation, then, is not to focus on finding the solution, but rather on how you handle and face the problem.

Make a plan, and check your progress along the way. Resolve to give it your best, but also not to punish yourself if an answer doesn't come right away. If you can approach it with your best intentions and efforts and make a serious attempt to face it head-on, you will be less likely to lose patience and fall into all-or-nothing thinking, even if the problem does not get solved right away.

Better Communication

Angry people tend to jump to—and act on—conclusions, and some of those conclusions can be very inaccurate. The first thing to do if you're in a heated discussion is slow down and think through your responses. Don't say the first thing that comes into your head, but slow down and think carefully about what you want to say. At the same time, listen carefully to what the other person is saying and take your time before answering.

Listen, too, to what is underlying the anger. For instance, you like a certain amount of freedom and personal space, and your "significant other" wants more connection and closeness. If he or she starts complaining about your activities, don't retaliate by painting your partner as a jailer, a warden, or an albatross around your neck.

It's natural to get defensive when you're criticized, but don't fight back. Instead, listen to what's underlying the words: the message that this person might feel neglected and unloved. It may take a lot of patient questioning on your part, and it may require some breathing space, but don't let your anger—or a partner's—let a discussion spin out of control. Keeping your cool can keep the situation from becoming a disastrous one.

Strategies cont.

Using Humor

"Silly humor" can help defuse rage in a number of ways. For one thing, it can help you get a more balanced perspective. When you get angry and call someone a name or refer to them in some imaginative phrase, stop and picture what that word would literally look like. If you're at work and you think of a coworker as a "dirtbag" or a "single-cell life form," for example, picture a large bag full of dirt (or an amoeba) sitting at your colleague's desk, talking on the phone, going to meetings. Do this whenever a name comes into your head about another person. If you can, draw a picture of what the actual thing might look like. This will take a lot of the edge off your fury; and humor can always be relied on to help unknot a tense situation.

The underlying message of highly angry people, Dr. Deffenbacher says, is "things oughta go my way!" Angry people tend to feel that they are morally right, that any blocking or changing of their plans is an unbearable indignity and that they should NOT have to suffer this way. Maybe other people do, but not them!

When you feel that urge, he suggests, picture yourself as a god or goddess, a supreme ruler, who owns the streets and stores and office space, striding alone and having your way in all situations while others defer to you. The more detail you can get into your imaginary scenes, the more chances you have to realize that maybe you are being unreasonable; you'll also realize how unimportant the things you're angry about really are. There are two cautions in using humor. First, don't try to just "laugh off" your problems; rather, use humor to help yourself face them more constructively. Second, don't give in to harsh, sarcastic humor; that's just another form of unhealthy anger expression.

What these techniques have in common is a refusal to take yourself too seriously. Anger is a serious emotion, but it's often accompanied by ideas that, if examined, can make you laugh.

LIVING THE REAL LIFE

Flozelle Woodmore

Vanessa Nelson
&
Flozelle Woodmore

Age or year when you entered correctional system:
I was 18 years old when I entered the correctional system in 1987.

Incarcerated where?
I was incarcerated at California Institute for Women (CIW) for six years prior to being shipped to Central California Women Facility (CCWF).

Year of release:
I was released on August 4, 2007.

Parole Board date given or release by way of court:
I was granted parole six times by the BPH prior to Governor releasing me.

Biggest challenge when you came home:
Discovering my son was serving a life sentence. Also it was difficult for me to accept and use cell phones.

Where do you live now?
I live in os Angeles, CA in my own home I plan to purchase.

What work are you doing?
I am the Assistant Director of A New Way of Life in which our mission is to help women and girls break the cycle of entrapment in the criminal justice system and lead healthy and satisfying lives. I also educate Lifer's Families and Friends from various cities and states better understand how they can help their loves ones improve their chances of parole.

Any milestones to report?
Although being on parole for five years has been a thorn in my side it was made easy for me to survive by simply keeping in mind where I been.

What's the big deal to you now?
The big deal to me is the lack of services given to those who have been released from prisons and how the system called war on our youth by giving them hundreds of years to life and or life without the possibility of release for crimes that have little or no evidence to justify such a horrific conviction. What disturbs me is how society has no conscience about slaughtering our youth in such a manner.

Words of encouragement to those you left behind**:**
Read your BPH Transcripts without fear for there lies your freedom.

The most exciting thing you did upon release:
The most exciting thing I did was hold my grand daughter who clung to me as if she knew me all her life. Seeing my daughter for the first time since she was five years old, who at the time of my release was 19 years old.

FACTOIDS

*Interesting, random and miscellaneous facts about the prison industry in California and the nation**

Annual market value of selling collect phone calls to prisoners and their families:
$1 Billion
Income from average pay phone per year: $3,000; from prison pay phone,
$15,000
In 1995 New York City spent $100,000 on Dial soap for use in city jails
Texas spent $34 million in one year to buy a meat substitute product for inmate meals
California built 21, or nearly 2/3 of its 33 prisons, in a 10 year construction boom between 1984 and 1994
Average age of a California prison inmate in 2012 was 39 years, the same for average prisoner in Federal Bureau of Prisons
Percent of prisons built in rural counties: 60%
Average percent of jobs going to residents outside the town where prisons are built: 80%
CCPOA spent over $100,000 to help pass California's 3 Strikes Law, mandating life sentences for 3rd time felony
Average years served in state prison by California inmates on 1st degree murder (sentenced before-1978): 34.5 years; (sentenced after-1978) 26 years [2012 figures]
In 2011 CDCR reportedly confiscated more than 14,000 cell phones, or about 1 for every 9 inmates then in the system
According to CDCR figures the overall recidivism rate for California parolees, (despite realignment and slightly increased parole rate for lifers) decreased by 2.4% to 65.1%
At the end of December, 2011 some 21,700 prisoners, or about 14.5% of the total inmate population, were serving life sentences for first or second degree murder convictions; in the federal system, nearly 6,200 prisoners, 3% of the federal prison population were serving life terms for the life crime category that includes murder
Ethnic breakdown in the federal prisons system in 2011; 35% Hispanic, 24% White 37% Black and 3% Other. In California, 41% Hispanic, 24% White, 29% Black and 6% Other

Prison population figures at the end of 2011; Federal Bureau of Prisons: 177,438; California, 148,807

**Figures may not equal 100% due to rounding*

Take It EASY

19 things it took me 50 years to learn by Dave Barry

1. Never under any circumstances take a sleeping pill and a laxative on the same night.
2. If you had to identify, in one word, the reason why the human race has not achieved, and never will achieve, its full potential, that word would be "meetings."
3. There is a very fine line between "hobby" and "mental illness."
4. People who want to share their religious views with you almost never want you to share yours with them.
5. And when God, who created the entire universe with all of its glories, decides to deliver a message to humanity, He WILL NOT use, as His messenger, a person on cable TV with a bad hairstyle.
6. You should not confuse your career with your life.
7. No matter what happens, somebody will find a way to take it too seriously.
8. When trouble arises and things look bad, there is always one individual who perceives a solution and is willing to take command. Very often, that individual is crazy.
9. Nobody cares if you can't dance well. Just get up and dance.
10. Never lick a steak knife.
11. Take out the fortune before you eat the cookie.
12. The most powerful force in the universe is gossip.
13. You will never find anybody who can give you a clear and compelling reason why we observe daylight savings time.
14. You should never say anything to a woman that even remotely suggests that you think she's pregnant unless you can see an actual baby emerging from her at that moment.
15. There comes a time when you should stop expecting other people to make a big deal about your birthday. That time is age 11.
16. "The one thing that unites all human beings, regardless of age, gender, religion, economic status or ethnic background, is that, deep down inside, we ALL believe that we are above average drivers.
17. The main accomplishment of almost all organized protests is to annoy people who are not in them.
18. A person who is nice to you, but rude to the waiter, is not a nice person.
19. Your friends love you anyway

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

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

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

INFORMATION SOUGHT ON LIFER ISSUES

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

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

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

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

HALF CENTURY IN PRISON: GREGORY POWELL DIES AT 79

Almost 50 years after being sent to prison a high notoriety crime Gregory Powell, "The Onion Field Killer," died this month in California Medical Facility, Vacaville.

Originally sentenced to death for the 1963 killing of a Los Angeles police officer, Powell's sentence was commuted to life in 1972, when California's then-death penalty was found unconstitutional. Powell, who was 79 at the time of his death, had been incarcerated since October, 1963; just 14 months shy of a half-century in prison. Although in announcing Powell's death the CDCR official news release maintained he died of natural causes, the real cause of his death was advanced cancer.

Denied parole 11 times over the span of years, he was due for release once, in 1982, but the parole board at that time bowed to public hysteria and rescinded his parole grant. Most news reports of Powell's death prominently mentioned the public interest in the case, fed time and again by the book "The Onion Field" authored by former LA Detective-turned-author Joseph Wambaugh, and the subsequent movie of the same name. Indeed, many speculated that the main reason Powell remained in custody for half a century was the high notoriety of his case, fed by interviews with Wambaugh every time Powell was up for parole. Wambaugh was unsurprisingly proud of his part in thwarting the parole system, commenting after Powell's death "I have no apology." Nor would we have expected one from such as Wambaugh.

Powell was last denied parole in 2010 and was considered for compassionate release in 2011, when his medical condition was judged terminal. However, Powell opposed his consideration for compassionate release, indicating he did not wish to put the families, his and the victims', through the publicity mill yet again. In the end, Gregory Powell proved his rehabilitation by evidencing more quiet dignity and compassion than the fear-mongers who work so hard to keep him and all lifers forever behind bars

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