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CALIFORNIA LIFER NEWSLETTER

State and Federal Court Cases by John E. Dannenberg

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

STATUS OF *GILMAN V. BROWN*

Gilman v. Brown

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

This case, of continuing interest to all lifers whose crimes predated Nov. 8, 1988, but whose BPH grants of parole were reviewed by the Governor, remains set for oral argument in the Ninth Circuit on June 17, 2015 in San Francisco, at 0800, Courtroom 3.

1st DCA HOLDS THAT *BUTLER* DECISION UPHOLDING "PROPORTIONALITY RIGHT" AS ESTABLISHED IN *DANNENBERG* IS A SUBSTANTIAL RIGHT WHOSE ENFORCEMENT SUPPORTS AWARD OF ATTORNEY FEES

In re Roy Thinnes Butler

___Cal.App.4th___; CA1(2); A139411
May 15, 2015

Roy Butler's habeas challenge to his denial of parole was settled by the parties to accord him a new hearing. He was granted parole at that hearing, and has now been released. While that might sound like headline news to CLN readers, it pales by comparison to the court action that *followed* that amazing sequence of events.

The settlement agreement included

a concession by the Board to rewrite its rules regarding fixing of terms and the setting of parole dates. The attorney who was appointed to represent Butler later asked for an award of attorney fees because he had effected the enforcement of a "important right affecting the public interest," per PC § 1021.5. The State opposed such an award, stating no such new protection was actually afforded by the settlement.

The Court of Appeal responded with two rulings in their adjudication of the fee award claim. First, they found that Butler *had* gained enforcement of such a substantial right, and was entitled to attorney fees. Second, they found the fee request facially excessive, and ordered the parties to negotiate to something less than half the initial request.

At first glance, these two rulings might not seem so important to the average lifer. But, in fact, the first of the two is an incredibly concise – indeed, a stunning – analysis of how the Board has violated both California statutes and the California Constitution in its long-standing practice of denying lifer paroles.

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PO BOX 277
RANCHO CORDOVA, CA 95741
Contact LSA @ (916) 402-3750
lifesupportalliance@gmail.com

COURT CASES (in order)
Reviewed in this Issue:

***Butler* from pg 1**

In fact, the new *Butler* ruling brought back a flood of memories to this writer, upon whose 2005 Supreme Court case (which denied this writer relief from parole denial) the new decision was predicated. Many life prisoners have puzzled over the *In re Dannenberg* (2005) 34 Cal.4th 1061 decision that volubly reconfirmed the "proportionality" principles of *In re Rodriguez* (1975) 14 Cal.3d 639, 646-656, while yet damning them with faint praise by not following them!

A little *Dannenberg* case history is in order here. When this writer was denied parole for the third time, by a Board insistent on endlessly retrying him for the first degree murder of which he was formally, unanimously acquitted by the jury, he challenged his denial in the Marin Superior Court. (Case # SC112688A.) After briefing following its Order to Show Cause, that Court ordered an evidentiary hearing.

At that hearing, this writer (appearing *in pro per*) sought to show that there was a blanket policy against lifer paroles that was fomented at the Governor's level, and subserviently followed by the Board. To support claims of such unlawful bias, this writer subpoenaed then Attorney General Dan Lungren and Senator John Vasconcellos, as well as former BPT Chairman Albert Leddy. The first two evaded appearance on grounds they were high public officials (!), but Mr. Leddy gladly appeared. On extensive direct examination by this writer, Mr. Leddy revealed how he, as former Chairman, had been ordered by the Executive Officer of the BPT to "stop giving so many parole dates." He acknowledged that the BPT's practices were thus intentionally biased, and that the purpose of the law (PC §3041) was being pro-actively evaded.

In closing oral argument, this writer, complaining bitterly of the arbitrariness of such a biased policy, explained to the Court how he had overserved his term per the law (then at 15 years, vs. a 12 year calculated term, net of credits). He argued that there is in fact no such thing as a "suitability" hearing – that, under the law, there are only "*un*suitability" hearings, because the law *presumes* granting parole at the initial hearing. The Superior Court's order for a new parole hearing wherein it "expected" a grant of parole was stayed, however, pending what became a multi-year appeal process. (During that period, this writer declined to appear before the Board because he could not get a lawful or fair hearing.)

Very significantly, the Superior Court found that the *Board's regulations exceeded the authority* given the Board by the controlling statutes:

> To the extent they govern parole determinations for convicted murderers serving indeterminate sentences, the Board's regulations are set forth in 15 CCR §2402. 15 CCR § 2402 gives the Board much broader discretion than does PC § 3014(b). However, when an administrative regulation conflicts with a statute, the statute controls. Government Code § 11342.2. Therefore, the Board must obey Penal Code § 3041 without regard to the provisions of 15 CCR § 2402. The Board cannot adopt regulations which are beyond the authority conferred on the board and they must accord with standards prescribed by other provisions of law. Government Code § 11342.1. In this case, as will be demonstrated hereinbelow, the Board did not follow PC § 3041(b) or 15 CCR § 2402.

The First District Court of Appeal largely upheld the Superior Court, in a published decision (later depublished by the grant of review in the Supreme Court) which analytically supported the Superior Court based upon an affirmation of *Rodriguez*' "proportionality" holding. As this writer's very able appointed appellate counsel, Kathleen Kahn, wrote him after the DCA ruling:

> I am beginning to think that In re Dannenberg [1st DCA, A095299] is not such a bad opinion. It really nails down the Rodriguez rule we argued for, that the sentence must be proportional to the offense and

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.

***Butler* from pg. 2**

that "suitability" cannot be used as a dodge to avoid this rule. I think sooner or later we will have to take on the Court's repeated insistence that the "nature of the offense" can be used as a reason to find unsuitability.

That was in 2002. Today, 13 years later, the same Court of Appeal reasserted, with even deeper analysis, why the "proportionality" rule carries the day, and why current Board regulations that ignore this are inconsistent with PC § 3041.

At the core of the DCA's new opinion is the clarification and distinction between the two seemingly similar terms, "proportionality" and "uniformity." While they might *appear* similar (to the non-academic reader), they must be distinguished in order to properly interpret the intent of the Legislature in making the parole laws. And that is what the new *Butler* decision is about.

Curiously, the current *Butler* ruling is not a case q*uestioning the Board's policies* per se. Rather, it is an analysis of whether or not, and if so, why, attorney fees ought be awarded *Butler's* attorneys for their prior effort in gaining the settlement. At the crux of this issue was the question whether or not the earlier *Butler* decision was one enforcing public policy, as required by PC § 1021.5, to qualify to earn fees. This question could not be answered, however, without an exhaustive analysis of whether, and just how, such protection was conferred by the settlement order in Butler.

"Proportionality" was defined as similar terms for similar culpability in crimes. This factor is constitutionally protected under California Constitution Article 1, § 17. "Uniformity" was defined as similar sentencing for similar crimes (e.g., first degree murder, second degree murder, etc.). It was noted that the Board's regulations provide for "uniformity" by promulgating separate "matrices" for each type of life crime. And the Board's regulations provided for "proportionality," within each crime's matrix, by denoting culpability factors that either aggravated or mitigated the term to be served.

But the Court of Appeal took exception to the Board's regulations.

The Board's position is concisely summed up in the following provision of its regulations (which is not among the regulations referred to in the Stipulation and Order Regarding Settlement): *"Regardless of the length of time* served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." (Regs., §§ 2402, subd. (a), 2422, subd. (a), italics added.) This declaration of authority is staggering. Blinding itself to the fact that, as *Dannenberg* acknowledges, there is a point at which any sentence will become constitutionally excessive if it is "grossly disproportionate" to the prisoner's individual culpability for the commitment offense, the Board rejects any limit on its authority to deny a prisoner release from prison based on its prediction that he or she presents a public safety risk.

Importantly, the Court found that "proportionality" carries the day, even following the *Dannenberg* decision.

As we shall see, the base and adjusted base terms relate to proportionality, as well as uniformity. But even if, as the Board says, they related only to uniformity, the settlement would confer a substantial benefit on life prisoners because uniformity remains an important purpose of the DSL even after *Dannenberg*. In determining *suitability for parole*, the Board is required by its own regulations to consider "[a]ll relevant, reliable information available" to it. (Regs., §§ 2281, subd. (b), 2402, subd. (b).) Since the DSL was designed to discourage disparate sentencing, the resulting uniformity or disparity of a sentence is surely "relevant" to the Board's parole decision. Whether the prison term resulting from a denial of parole would be disparate to terms imposed on others who committed the same offense in similar ways and circumstances is not reduced to irrelevance simply because it is not controlling. Moreover, prompt term setting would make the Board, other interested parties, and the public, aware of the extent to which the denial of parole led to disparate sentencing.

The Court found the Board's proposed settlement to amend its rules inadequate.

Dannenberg explained that although dangerousness trumps uniformity, it does not trump proportionality. The *Dannenberg* majority stated: "Of course, even if sentenced to a life-maximum term, no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense. Such excessive confinement, we have held, violates the cruel or unusual punishment clause (art. I, § 17) of the California Constitution." (*Dannenberg, supra*, 34 Cal.4th at p. 1096, citing *In re Rodriguez* (1975) 14 Cal.3d 639, 646-656 (*Rodriguez*) and *People v. Wingo* (1975) 14 Cal.3d 169, 175-183 (*Wingo*).) "Thus, we acknowledge, [Penal Code,] section 3041, subdivision (b), cannot authorize such an inmate's retention, *even for reasons of public safety,* beyond this constitutional maximum period of confinement." (*Dannenberg*, at p. 1096, italics added.) The Board conveniently ignores this portion of *Dannenberg*, but it is the part of the opinion Butler most heavily relies upon. While *Dannenberg* focused on the base term matrices as a measure of uniformity in sentencing, nothing in the opinion suggests they do not also provide a basis upon which to analyze the proportionality of punishment resulting from the denial of parole.

As we shall explain, we agree with *Butler* that the base and adjusted base terms relate to proportionality, as well as uniformity, although we agree with the Board that the adjusted base term

***Butler see* pg. 6**

EDITORIAL

LIFE SUPPORT ALLIANCE
(916) 743-1654
(916) 402-3750

Public Safety and Fiscal Responsibility

EDITORIAL - THE ELEPHANT IN THE ROOM

There's always one, that elephant in the room that no one wants to talk about. Except that wasn't the case recently with LSA attended a day of hearings for several bills in the Senate Public Safety Committee. We were there to speak on and support various pieces of legislation affecting lifers—**SB 261** and **SB 759** in particular.

And so we did, along with a handful of others for each bill, sometimes as many as 7 or 8, rarely more, individuals or representatives from various groups stepping to the microphone to voice their support or opposition to the various bills. Bills that affect public safety and prisoners. Actual people.

So we were a bit bemused, at first, when Sen. Richardo Lara (D-Bell Gardens) addressed the Public Safety Committee on his bill, **SB 716**, which would ban the use of bull hooks, sharply pointed prods. On elephants. Yep, elephants.

And as we were pondering how this bill came to be heard in the Public Safety Committee, we began to notice the stirring of the audience (small hearing room, standing-room-only crowd) as various individuals began to make their way to the line forming for mic access. More and more, until the line (for those supporting the ban) reached the door of the room. And when the call came for those in opposition, the same stirring in the crowd and forming of a line, nearly as long as the first.

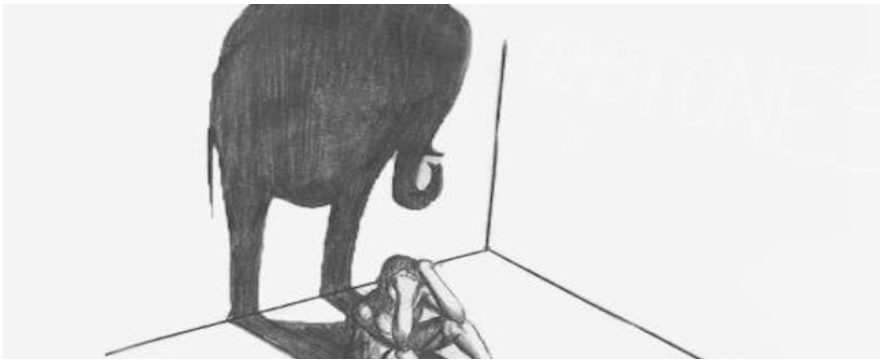
In all, more than 40 separate persons addressed the committee on this bill. More than 40.

Astounding.

We bow to no one in our concern for humane treatment of animals and banning of unnecessarily punitive and cruel implements or policies. We don't want elephants, or any living thing, treated cruelly.

But we couldn't help but marvel at the disparity between public concern, comment, outcry, for inhumane, unjust treatment of elephants and the same concern, exhibited through public comment, attendance, participation in legislative efforts aimed at ending unjust (excessive incarceration) and inhumane (solitary confinement) treatment of prisoners.

More than twice as many people spoke their feelings, their concern, about considerate and just treatment of elephants than could bring themselves to learn, study, comment, even care, about unjust treatment of the thousands of prisoners in CDCR by speaking on bills affecting those actual human beings. There's a commentary somewhere in this on the state of society; but we're not sure just what it is, or that we really want to know.



But for now, it seems to be our task to speak about that other elephant in the room; *lifers, their care and treatment.* And so we shall.

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does not necessarily represent the maximum punishment that may constitutionally be imposed on a prisoner.

The net result of this fee-awarding decision is that lifers now have a published decision to draw from in formulating writ petitions challenging denials of parole. On the negative side, the eventual outcome of this decision could get the Legislature involved. Under this decision, the Court has challenged the Board's contention (and regulations) that a *currently dangerous prisoner* who has served his "proportionate" term under his "uniform[ly]" set sentence may not argue to a Court that he must therefore nonetheless be released.

This writer has not attempted to repeat the entire decision of the Court in these pages, and strongly recommends that every lifer read this published case in the prison law library. As of this writing, the State has not filed a petition for rehearing or for review. The decision itself will not be final until, absent any appellate action, remittitur issues on July 15, 2015.

6TH DCA REVERSES SUPERIOR COURT GRANT OF RELIEF FROM GOVERNOR REVERSAL

In re Richard Sena

--- Cal.App.4th --- ; CA6; H040564
May 19, 2015

Upon request by the CA Attorney General, the Sixth District published its decision that reversed the superior court's grant of habeas relief to Richard Sena in his quest to challenge the Governor's reversal of his grant of parole.

This unique case involves two main issues. (1) Can the superior court, as a remedy in a lifer parole release writ petition, order a lifer's immediate release onto parole, and (2) is a rescission hearing for a

lately adjudicated serious rules violation grounds to take away an approved date? The answers are NO, and YES, respectively.

The facts are somewhat convoluted, and are repeated below to set the stage for the analysis.

On March 13, 1992, Sena was convicted of second degree murder. He is currently serving a sentence of 16 years to life for that crime.

On November 29, 2011, the Board of Parole Hearings (hereafter "the Board") granted Sena parole. The Governor reversed the Board's decision on April 26, 2012.

In a written order issued on September 18, 2012, the superior court reversed the Governor's decision, finding that the Governor's decision was not supported by some evidence. The order directed that Sena "be released per the terms of his parole within 5 days."

On October 3, 2012, while still incarcerated, Sena exposed his penis to a female correctional officer and masturbated in front of her. As a result of his conduct, Sena was the subject of a rules violation report.

Also on October 3, 2012, the Governor informed the Board that he would not appeal the superior court's September 18, 2012 order. That same day, apparently unaware of Sena's alleged rules violation, the Board issued a miscellaneous decision reinstating the November 29, 2011 parole grant.

At a hearing held on November 9, 2012, Sena was found guilty of the rules violation. At a rescission hearing on November 21, 2012, the Board found Sena to be unsuitable for parole, and it rescinded Sena's parole grant. At the rescission hearing, the Board cited Sena's October 3, 2012 rules violation as evidence that Sena posed a danger to society if released from prison.

On November 14, 2013, Sena filed a petition for writ of habeas corpus challenging the Board's rescission of his parole grant. In the petition, Sena argued that the superior court's September 18, 2012 order required his release from prison on September 23, 2012, and that the Board lacked authority to rescind his parole grant based on prison misconduct that occurred after September 23, 2012.

In a written order issued on January 13, 2014, the superior court granted Sena's petition for writ of habeas corpus and directed that Sena "be released on parole within 48 hours of the Attorney General's receipt" of the order. The superior court explained that its September 18, 2012 order required Sena's release from prison on September 23, 2012, that Sena was "illegally confined" after September 23, 2012, and that the Board could not rescind Sena's parole grant based on prison misconduct that occurred after September 23, 2012. The superior court emphasized: "[T]his Court's order that [Sena] be released on September 23, 2012 was binding and [the Board's] failure to comply is not excused."

The Governor urged the 6th DCA to reverse the superior court's January 13, 2014 order, arguing that the January 13, 2014 order was erroneous because the order it was predicated upon — the September 18, 2012 order mandating Sena's immediate release from prison — provided relief that "the law declares shall not be given."

The Court concluded that the September 18, 2012 order improperly directed Sena's release from prison on September 23, 2012, and that because the January 13, 2014 order was premised on the faulty notion that Sena had an absolute entitlement to release on September 23, 2012, reversal was required.

The Court relied on the recent *In re Lira*

***Sena* from pg. 6**

CA Supreme Court decision for its authority here.

> "[W]hen a court determines that a gubernatorial reversal of a parole decision is unsupported, the remedy is not an order for the inmate's immediate release; rather, the court vacates the Governor's reversal, reinstates the Board's grant of parole, and directs the Board to conduct its usual proceedings for a release on parole. This allows the Board to account for any recent developments reflecting on the inmate's suitability for parole, and to rescind its grant if appropriate." (*In re Lira* (2014) 58 Cal.4th 573, 582 (*Lira*); see also *In re Twinn* (2010) 190 Cal. App.4th 447, 473-474 (*Twinn*) [when a court sets aside the Governor's reversal of the Board's parole suitability determination, the court does not order the prisoner released from prison; the appropriate remedy is to direct the Board to conduct release proceedings, a procedure that allows the Board to consider the prisoner's current suitability for parole and to rescind parole if appropriate]; *In re Copley* (2011) 196 Cal.App.4th 427, 435-437 (*Copley*) [same].)

It goes without saying that any lifer with an unexecuted grant of parole should take extreme pains to not engage in misconduct

The superior court's unauthorized order literally eviscerated the Board's and Governor's power to reconsider a grant of parole based upon recent misconduct.

> This remedy, immediate release from prison without directions to the Board to conduct appropriate proceedings, was improper. (See *Lira, supra*, 58 Cal.4th at p. 582; *Twinn, supra,* 190 Cal.App.4th at pp. 473-474; *Copley, supra*, 196 Cal.App.4th at pp. 435-437.) Thus, the premise of the superior court's January 13, 2014 order—that Sena was entitled to release on September 23, 2012 and could not be penalized for prison misconduct occurring after that date—was faulty. Given that the January 13, 2014 order was based solely on the superior court's erroneous conclusion that Sena had an absolute entitlement to release on September 23, 2012, the January 13, 2014 order cannot stand.
>
> The DCA expressly noted that "public safety" trumped all other considerations. [Writer's note: compare and contrast this with the *Butler* decision above.]
>
> Indeed, the January 13, 2014 order was antithetical to public safety and contravened the Board's power to rescind a parole grant. Public safety is the paramount consideration in parole decisions. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1254; *In re Lawrence* (2008) 44 Cal.4th 1181, 1210.) Thus, "[e]ven after parole is granted, the Board is authorized to rescind the grant of parole, if unexecuted, for good cause." (*In re Caswell* (2001) 92 Cal.App.4th 1017, 1026; see also *Lira, supra*, 58 Cal.4th at p. 582 [the Board is authorized to rescind a grant of parole if recent developments demonstrate a prisoner's unsuitability for parole].) Good cause exists "where the prisoner has engaged in disciplinary misconduct subsequent to the parole grant." (*Copley, supra*, 196 Cal.App.4th at p. 437.) The superior court's January 13, 2014 order completely disregarded the Board's determination that, notwithstanding the previous unexecuted grant of parole, Sena's misconduct on October 3, 2012 evidenced his current dangerousness and unsuitability for parole. The superior court's failure to appreciate the Board's determination regarding Sena's current dangerousness was misguided and rendered the January 13, 2014 order improper.

Accordingly, Sena's writ relief in the superior court was vacated and that court was ordered to enter a new order denying Sena's petition. It goes without saying that any lifer with an unexecuted grant of parole should take extreme pains to not engage in misconduct, which could threaten that grant. The most common such misconduct perpetrated by grantees is possession of a cell phone – perhaps to let loved ones know of their good news at Board. BAD IDEA!!!

JUVENILE SENTENCING RULING IN *MILLER V. ALABAMA* APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW

In re Norman Willover

--- Cal.App.4th --- ; CA6; H040757
April 16, 2015

The 6th District Court of Appeal held that the juvenile sentencing ruling in *Miller v. Alabama* (2012) 132 S.Ct. 2455, applies retroactively to cases on collateral review.

Norman Willover was 17 when he committed a series of offenses, including two counts of first degree murder, attempted premeditated murder, aggravated mayhem, and giving false information to a peace officer. The jury also found true various special circumstances and firearm enhancements. He was sentenced in 1999 to two consecutive terms of life without possibility of parole (LWOP) for the murders, a consecutive term of life for the attempted premeditated murder, and two consecutive terms of 25 years to life for the allegations that he personally discharged a firearm causing great bodily injury or death. The trial court stayed the terms for the remaining counts and enhancements.

In 2014, he filed the instant petition for writ of habeas corpus, arguing that he was entitled to resentencing because the trial court improperly *presumed* that LWOP was the appropriate sentence for the murders, in violation of *Miller v. Alabama* (2012) 132 S.Ct. 2455, which held that *mandatory* LWOP for those under the age of 18 at the time of their crimes was cruel and unusual punishment.

The Miller court summarized its holding as follows:

> Mandatory life without parole for a

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> juvenile precludes consideration of his [or her] 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 environment that surrounds him [or her]—and from which he [or she] cannot usually extricate himself [or herself]—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his [or her] participation in the conduct and the way familial and peer pressures may have affected him [or her]. Indeed, it ignores that he [or she] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his [or her] inability to deal with police officers or prosecutors (including on a plea agreement) or his [or her] incapacity to assist his [or her] own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it. (*Miller, supra,* 567 U.S. at __ [132 S.Ct. 2455, 2468].)

As to retroactivity, the Court relied on US Supreme Court precedent.

> We agree with the courts that have found *Miller* to be a new substantive rule rather than a new procedural rule, and we therefore conclude that *Miller* may retroactively be applied to cases on collateral review, such as petitioner's case. The *Miller* case effectively "alter[ed] the range of conduct or the class of persons that the law punishes" (*Schriro, supra*, 542 U.S. at p. 353), in that it barred LWOP sentences for juvenile homicide offenders unless the sentencing court determines, after a consideration of a number of case-specific substantive factors, that the defendant is " 'the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.]" (*Miller, supra*, 567 U.S. at __ [132 S.Ct. 2455, 2469].) *Miller* did not simply set forth a new rule regulating "the manner of determining the defendant's culpability," but a rule that sets forth the specific considerations to be made during a sentencing decision. (*Schriro, supra*, 542 U.S. at p. 353.) Because petitioner was sentenced at a time when the prevailing case law required a presumption of LWOP, there is a " 'significant risk' " that petitioner "faces a punishment that the law cannot impose upon him." (*Id.* at p. 352.)

Next, the Court looked at whether Willover's pending petition for relief for recall of sentence under PC § 1170 (d)(2) precluded *Miller* resentencing relief. However, intervening events and case law mooted this argument.

> In this case, the Attorney General originally argued that petitioner's habeas petition was premature because the trial court could still have granted his section 1170, subdivision (d)(2) petition. The Attorney General now informs us that the trial court denied petitioner's recall petition on April 3,

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2015. As *Gutierrez* held, the recall petition procedure provided by section 1170, subdivision (d)(2) does not provides a substitute for the resentencing process mandated by *Miller.*

Finally, the Court looked at whether the trial court had in fact properly considered the presumption *against* LWOP in weighing its sentencing decision. When Willover had been sentenced, the prevailing case law held that PC § 190.5(b), established a *presumption in favor of LWOP* for juvenile offenders who were 16 years or older when they committed special circumstance murder. Because of this, there was a significant risk that he faced an excessive punishment.

While the trial court had nothing positive to say about Willover at sentencing, it did make its decision in the shadow of the proposition that LWOP was the *presumed* sentence, unless facts augured otherwise. Accordingly, Willover's sentence was *not* made in the light of the contrary presumption, i.e., *against* LWOP, and remand was required.

Accordingly, the Court of Appeal vacated Willover's sentence and remanded to the superior court for a new sentencing hearing and decision.

*****

"DE FACTO LWOP" OF LONG SENTENCE NOT ENTITLED TO *MILLER* RESENTENCING, IN LIGHT OF NEW PC § 3051 REVIEW PROCEDURE

In re Adrian Gonzalez

CA4(2) No. E060770
April 16, 2015

Adrian Gonzalez was convicted of six counts of attempted murder and six counts of assault with a firearm and the special allegation for these counts that he personally and intentionally used a firearm; participation in a criminal street gang; and committing the aforementioned crimes for the benefit of a gang, for his involvement in a shooting at six people. He was sentenced to a determinate term of 81 years, four months plus four consecutive life terms.

On May 16, 2013, Gonzalez filed a petition for writ of habeas corpus (petition) in the superior court arguing under the authority of *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455, 183 L.Ed.2d 407] (*Miller*) and *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*) that his sentence violated his Eighth Amendment rights against cruel and unusual punishment. He alleged that at the time of the offense he was 16 years old and the 81 years, four months to life sentence amounted to a de facto life-without-the-possibility-of-parole (LWOP) sentence. The trial court granted his petition and set the matter for resentencing.

The State argued on appeal that since the California Legislature enacted PC § 3051, which entitles defendant to a parole hearing after he has served 25 years on his sentence, he was not subject to an impermissible LWOP sentence.

The Superior Court granted Gonzalez writ relief, from which the State appealed. But the same Court of Appeal recently issued its opinion in *People v. Scott* (Mar. 20, 2015, E060028) __ Cal. App.4th ___ (*Scott*) in which it concluded that § 3051 complies with the constitutional requirement that the state provide a juvenile offender with a meaningful opportunity to obtain release within his or her expected lifetime. The Court followed the findings in *Scott* as the law of the court and found that with the passage of § 3051, defendant is not subject to an impermissible de facto LWOP sentence and resentencing is not required.

The People contend that defendant is not entitled to be resentenced on his sentence of 81 years, four months plus life because with the enactment of section 3051, he is not subject to a de facto LWOP sentence. In *Roper v. Simmons* (2005) 543 U.S. 551, 574-575, the United States Supreme Court held that imposing the death penalty on juvenile offenders younger than 18 years is cruel and unusual punishment precluded by the Eighth Amendment. In *Graham, supra*, 560 U.S. 48, the high court extended the constitutional limitations on juvenile punishment, holding "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." (*Id.* at p. 74.) Later, in *Miller*, the court invalidated any sentencing scheme that mandates LWOP sentences, including for homicide offenses, for juvenile offenders and instead the offender is entitled to consideration of his background or age, i.e. "individualized sentencing." (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at pp. 2468-2469].)

In *Caballero*, the California Supreme Court considered the impact of *Graham* and *Miller* on a 110-years-to-life aggregate sentence for a 16-year-old defendant who committed several attempted murders. (*Caballero, supra,* 55 Cal.4th at pp. 265-266.) The court concluded that "[c]onsistent with the high court's holding in *Graham* . . . , we conclude that sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Id.* at p. 268.) As such, "the state may not deprive [a defendant] at sentencing of a meaningful opportunity to demonstrate [his or her] rehabilitation and fitness to reenter society in the future." The court provided as a remedy that "[d]efendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings." (*Id.* at pp. 268-269.) The court provided in a footnote as follows: "We urge the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release

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on a showing of rehabilitation and maturity." (*Id.* at p. 269, fn. 5.)

In response, the California Legislature enacted section 3051. (Stats. 2013, ch. 312 (Sen. No. 260).) It provides that those who commit crimes prior to reaching the age of 18 and are sentenced to a determinate term of years or a life term an opportunity to prove their rehabilitation and secure release on parole after serving a prescribed term of confinement.

In *Scott, supra*, __ Cal.App.4th, this court evaluated the above-mentioned authorities in deciding if the defendant in that case, who was 16 years old when he was convicted of several counts of attempted murder and sentenced to a 120-years-to-life sentence, was subject to a de facto LWOP sentence. (*Id.* at [p. *3].) In *Scott*, we concluded that section 3051 "has abolished de facto life sentences . . . by virtue of its provision for mandatory parole eligibility hearings after no more than 25 years in prison." (*Id.* at [p. *30].) Further, the Legislature in enacting section 3051 followed exactly the request in *Cabarello* [sic] to provide such parole eligibility mechanism. (*Ibid.*) Finally, "[t]he statute [section 3051] simply and clearly makes the current sentencing scheme constitutional by providing each juvenile offender, universally and on a specified schedule, with the meaningful opportunity for release within their lifetime that the Eighth Amendment demands." (*Id.* at [p. *31].)

Under section 3051, defendant will receive a parole hearing and will be given a meaningful opportunity for release during his lifetime. The Board of Parole Hearings will "take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (§ 3051, subds. (e), (f)(1).) Section 3051 provides defendant with a meaningful opportunity to obtain release - - as required under *Caballero* - - based on demonstrated growth and rehabilitation by affording him his first parole hearing well within his life expectancy. As a result, defendant's sentence is not a de facto LWOP sentence. Hence, he has no claim that his sentence constitutes cruel and unusual punishment under the Eighth Amendment.

Accordingly, the Court of Appeal reversed the superior court's ruling.

"DE FACTO LWOP" OF LONG SENTENCE IS ENTITLED TO MILLER RESENTENCING, NOTWITHSTANDING NEW PC § 3051 REVIEW PROCEDURE

In re Alexis Aguilar
CA6; H040784
April 10, 2015

The 6th DCA reached the *opposite* conclusion than that reached in *Gonzalez* above.

Petitioner Alexis Aguilar was convicted of first degree murder (PC § 187,(a)) and active participation in a criminal street gang (§ 186.22(a)) during jury trials held in 2008 and 2009. As to the murder conviction, the jury found true allegations that he personally used and discharged a firearm, causing death (§§ 12022.5(a), 12022.53(d)) and an allegation that he committed the offense for the benefit of a criminal street gang (§ 186.22(b)(1)). As to the conviction of active participation in a criminal street gang, the trial court found true the allegation that Aguilar used a firearm in the commission of the offense. (§ 12022.5(a).)

The trial court sentenced Aguilar, who was 17 at the time he committed the offenses, to an aggregate term of 56 years to life, which included consecutive terms of 25 years to life for the murder and the allegation that petitioner personally discharged a firearm causing death, a consecutive two-year term for active participation in a criminal street gang, and a consecutive four-year term for the firearm use allegation associated with that count.

In his habeas petition, Aguilar contended he was entitled to be resentenced. He contended that his 56 years-to-life sentence represents a de facto life without possibility of parole (LWOP) term in violation of the United States Supreme Court decision in *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455] (*Miller*), which held 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 punishments.' " (*Id.* at p. __ [132 S.Ct. at p. 2460].) Unlike the court above in Gonzalez, the 6th District vacated Aguilar's sentence and remanded for resentencing.

The Attorney General argued that Aguilar was not entitled to be resentenced, for three reasons. First, the Attorney General argued that the Legislature's enactment of PC § 3051 renders the claim moot, because that statute provides a meaningful opportunity for petitioner to obtain release, effectively rendering his sentence *not* a de facto LWOP sentence. Second, the Attorney General argued that *Miller* is not retroactive, and therefore that

***Aguilar* from pg. 10**

relief is not available on collateral review. Third, the Attorney General argued that Aguilar's sentence of 56 years to life is not a de facto LWOP sentence because he will have an opportunity for parole at about age 73, which is "well within his natural life expectancy."

The Court recounted the recent relevant case law.

> In *Graham v. Florida* (2010) 560 U.S. 48, 74 (*Graham*), the United States Supreme Court held that the Eighth Amendment prohibits imposition of a life without the possibility of parole sentence for juvenile nonhomicide offenders. Graham recognized that such a sentence is especially harsh for a juvenile offender who will spend more years and a greater percentage of his or her life in prison than a similarly sentenced adult. (*Id.* at p. 70.) Graham concluded that a nonhomicide juvenile offender is entitled to a sentence that provides "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.* at p. 75.) "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." (*Id.* at p. 82.)
>
> Two years later, the United States Supreme Court ruled 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 punishments.' " (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2460].) In *Miller*, the Court explained that its prior cases, including *Graham*, had "establish[ed] that children are constitutionally different from adults for purposes of sentencing." (*Id.* at p. __ [132 S.Ct. at p. 2464].) Specifically, "juveniles have diminished culpability and greater prospects for reform," making them " 'less deserving of the most severe punishments.' " (*Ibid.*)
>
> In *Miller,* the issue arose in two companion cases, both involving 14-year-old defendants, Jackson and Miller, who were convicted of murder and sentenced to LWOP. (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2460].) Jackson's case arose on appeal from the dismissal of a petition for writ of habeas corpus; Miller's case arose on direct appeal. (*Id.* at p. __ [132 S.Ct. at pp. 2461-2463].)
>
> The *Miller* court summarized its holding as follows: "Mandatory life without parole for a juvenile precludes consideration of his [or her] 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 environment that surrounds him [or her]—and from which he [or she] cannot usually extricate himself [or herself]—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his [or her] participation in the conduct and the way familial and peer pressures may have affected him [or her]. Indeed, it ignores that he [or she] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his [or her] inability to deal with police officers or prosecutors (including on a plea agreement) or his [or her] incapacity to assist his [or her] own attorneys. [Citations.] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2468].)
>
> While *Miller* held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," the court did not decide "that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . . ." (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2469].) However, the court indicated it believed that LWOP sentences for juveniles would be "uncommon" and limited to " 'the rare juvenile offender whose crime reflects irreparable corruption.' [Citations.]" (*Ibid.*) The court specified that before such a sentence is imposed on a juvenile in a homicide case, the sentencing court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Ibid.*, fn. omitted.)
>
> In *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*), the California Supreme Court held—in the context of a juvenile non-homicide offense—that a sentence of "a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy" is the "functional equivalent" of an LWOP sentence. (*Id.* at p. 268.) The court held that "*Graham's* 'flat ban' on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including [a] term-of-years sentence that amounts to the functional equivalent of a life without parole sentence." (*Id.* at pp. 267-268)
>
> The term imposed in *Caballero* was 110 years to life. (*Caballero, supra*, 55 Cal.4th at p. 265.) The defendant had been convicted of three counts of attempted murder, and the jury had found true various enhancement allegations. (*Ibid.*) The defendant's sentence was comprised of consecutive terms for the attempted murders and firearm enhancements. The *Caballero* court explained that the "functional equivalent" of an LWOP sentence is one in which the parole eligibility date "falls outside the juvenile offender's natural life expectancy," such that the juvenile offender has no "meaningful opportunity to demonstrate [his or her] rehabilitation and fitness to reenter society." (*Id.* at p. 268.)
>
> The *Caballero* court explained how its holding would apply when a juvenile offender is facing a potential de facto LWOP sentence: "Although proper authorities may later determine that youths should remain incarcerated for their natural lives, the state

***Aguilar* from pg. 11**

may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future. Under *Graham's* nonhomicide ruling, the sentencing court must consider all mitigating circumstances attendant in the juvenile's crime and life, including but not limited to his or her chronological age at the time of the crime, whether the juvenile offender was a direct perpetrator or an aider and abettor, and his or her physical and mental development, so that it can impose a time when the juvenile offender will be able to seek parole from the parole board. The Board of Parole Hearings will then determine whether the juvenile offender must be released from prison 'based on demonstrated maturity and rehabilitation.' [Citation.]" (*Caballero, supra*, 55 Cal.4th at pp. 268-269.)

The Caballero court also explained how its holding would apply to juvenile offenders who were previously sentenced to LWOP or de facto LWOP sentences: "Defendants who were sentenced for crimes they committed as juveniles who seek to modify life without parole or equivalent de facto sentences already imposed may file petitions for writs of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings." (*Caballero, supra*, 55 Cal.4th at p. 269.)

The Court next explained why PC §3051 did not moot Aguilar's claim.

We conclude that the enactment of section 3051 does not render petitioner's claim moot. *Caballero* establishes that it is the trial court's role to consider "all mitigating circumstances attendant in the juvenile's crime and life," thus enabling the Board of Parole Hearings to later determine "whether the juvenile offender must be released from prison 'based on demonstrated maturity and rehabilitation.' [Citation.]" (*Caballero, supra*, 55 Cal.4th at pp. 268-269.) Likewise, *Miller* establishes that the sentencing court must consider particular factors prior to imposing sentence. (*Miller, supra*, 567 U.S. at p. __ [132 S.Ct. at p. 2468].) In cases like this, where sentencing preceded *Miller*, the trial court generally will not have developed the *Miller* facts, which would not only be pertinent to the appropriate sentence but helpful to the Board of Parole Hearings when it makes the later determination of whether the defendant has demonstrated sufficient maturity and rehabilitation to warrant release on parole.

Our conclusion is buttressed by the California Supreme Court's resolution of a similar issue in *People v. Gutierrez* (2014) 58 Cal.4th 1354 (*Gutierrez*). In *Gutierrez*, the court considered the impact of *Miller*

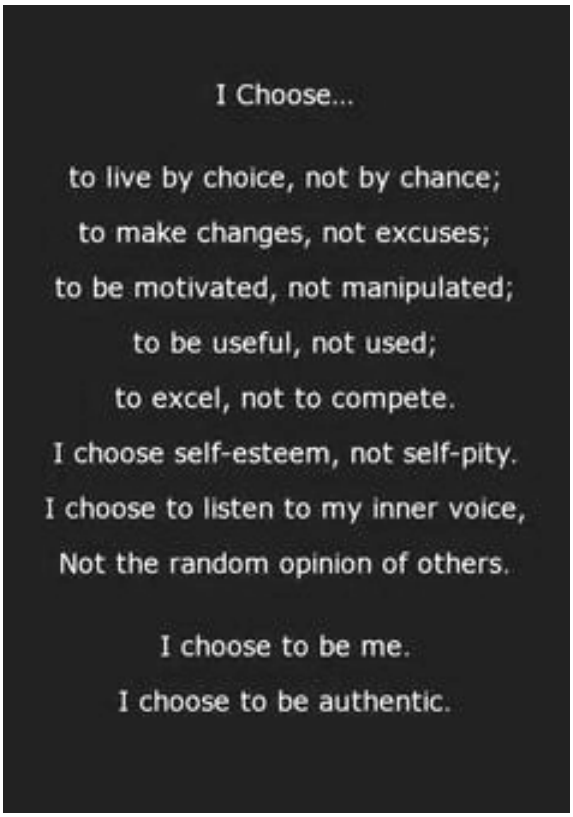
***Aguilar* from pg. 12**

on section 190.5, subdivision (b), which had previously been interpreted "as establishing a presumption in favor of life without parole for juvenile offenders who were 16 years of age or older when they committed special circumstance murder." (*Gutierrez, supra*, at p. 1369.) The California Supreme Court concluded that "section 190.5[, subdivision](b), properly construed, confers discretion on a trial court to sentence a 16- or 17-year-old juvenile convicted of special circumstance murder to life without parole or to 25 years to life, with no presumption in favor of life without parole." (*Id*. at p. 1360.) The *Gutierrez* court further held that "consideration of the *Miller* factors" is required when a sentencing court is determining whether to impose an LWOP sentence pursuant to section 190.5, subdivision (b). (*Gutierrez, supra*, at p. 1387.)

The *Gutierrez* court considered whether section 1170, subdivision (d)(2) provided a substitute for the resentencing process mandated by *Miller.* (*Gutierrez, supra,* 58 Cal.4th at p. 1386.) Section 1170, subdivision (d)(2) provides a procedural mechanism for resentencing to defendants who were under the age of 18 at the time of the commission of their offenses and who were given LWOP sentences. If the defendant has served at least 15 years of the LWOP sentence, he or she may "submit to the sentencing court a petition for recall and resentencing" (§ 1170, subd. (d)(2)(A)(i)), so long as the LWOP sentence was not imposed for certain enumerated offenses (*Id.*, subd. (d)(2)(A)(ii)).

The *Gutierrez* court rejected the Attorney General's argument that the "potential mechanism for resentencing" provided by section 1170, subdivision (d)(2) "mean[s] that the initial sentence 'is thus no longer effectively a sentence of life without the possibility of parole.' " (*Gutierrez, supra*, 58 Cal.4th at p. 1386.) The *Gutierrez* court reasoned: "A sentence of life without parole under section 190.5[, subdivision](b) remains fully effective after the enactment of section 1170[, subdivision](d)(2). That is why section 1170[, subdivision](d)(2) sets forth a scheme for recalling the sentence and resentencing the defendant." (*Ibid*.)

The *Gutierrez* court further rejected the Attorney General's claim that section 1170, subdivision (d)(2) "removes life without parole sentences for juvenile offenders from the ambit of *Miller's* concerns because the statute provides a meaningful opportunity for such offenders to obtain release." (*Gutierrez, supra*, 58 Cal.4th at p. 1386.) The court held that what *Miller* required for juvenile offenders sentenced to LWOP was not a " 'meaningful opportunity to obtain release' " but a sentencing court's exercise of discretion " 'at the outset.' " (*Ibid.*)



Based on our careful review of *Miller*, *Caballero*, and *Gutierrez*, we conclude that the enactment of section 3051 does not render moot petitioner's claim that his sentence is a de facto LWOP sentence that violates the Eighth Amendment.

As to whether *Miller* is retroactive, the Court relied on its own recent published opinion in *Willover* as precedent.

> The Attorney General next argues that petitioner is not entitled to relief by way of a petition for writ of habeas corpus because *Miller* is not retroactive. This court recently held that *Miller* is retroactive—that "under *Miller*, habeas corpus relief is available in a case that is no longer pending on direct appeal." (*In re Willover* (2015) __ Cal.App.4th __, __ (*Willover*).)

Finally, the Court considered whether Aguilar's 56-life sentence amounted to a *de facto* life sentence. Again, the Court relied on recent precedent discussing both age, per se, and quality of life at that age.

> Petitioner's sentence of 56 years to life will make him first eligible for parole when he is approximately age 73. He claims his sentence is a de facto LWOP sentence because he is not expected to live much longer than age 73. The Attorney General contends that petitioner's sentence is a not a de facto life sentence because age 73 is "well within his natural life expectancy."
>
> Petitioner was born on June 16, 1989. He cites to a report indicating that the average life expectancy for a male born in 1990 was 71.8 years at the time of birth. Petitioner also cites to a report indicating that in 1997, when he was seven years old, the remaining life expectancy for a non-white male was 68.4 years, meaning that at that time, he was expected to live until about age 74. Finally, petitioner cites to a report stating that due to conditions of prison confinement, inmates are significantly less healthy than the general population. Petitioner contends that because he will be living in prison, his life expectancy will therefore likely be "considerably shortened."

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The Attorney General argues that petitioner's life expectancy could be as high as 79.3 years, based on different statistics. The Attorney General cites to data tables stating that at birth in 1989, a male was expected to live until age 71.7, while in 2010, a Hispanic 20-year-old male was expected to live until age 79.3.

Petitioner's reliance on data regarding his life expectancy at the time of his birth is misplaced. The determination of whether a juvenile offender is facing a sentence that will not provide him or her with "a meaningful opportunity to demonstrate rehabilitation and fitness to reenter society" (*Caballero, supra*, 55 Cal.4th at p. 268) should be made at the time of sentencing. Thus, the determination of whether a particular sentence is a de facto LWOP sentence may be based in part upon life expectancy data concerning the number of years the juvenile is expected to live at the time of sentencing. According to the life expectancy tables that the parties cite, life expectancy increases as a person ages, and thus petitioner's life expectancy at birth was shorter than his life expectancy at the time of sentencing, when he was 19 years old.

In 2009, a 20-year-old male would be expected to live another 56.9 years, and a 20-year-old Hispanic male would be expected to live another 59.5 years. (National Center for Health Statistics, Center for Disease Control, National Vital Statistics Reports (January 6, 2014) table A, vol. 62, No. 7.) Petitioner was 19 years, nine months old at the time of his sentencing hearing on March 26, 2009. At that time, he would have been expected to live until about age 76 or, if he is Hispanic, about age 79. (See also *People v. Mendez* (2010) 188 Cal. App.4th 47, 63 [in 2010, life expectancy for an 18-year-old American male was 76 years].) Thus, at the time of sentencing, petitioner's first parole opportunity fell only about three to six years before his expected death, without accounting for any reduction in life expectancy due to the health effects of spending 56 years incarcerated.

As noted above, the *Caballero* court indicated that the "functional equivalent" of an LWOP sentence is one in which the juvenile offender has no "meaningful opportunity to demonstrate [his or her] rehabilitation and fitness to reenter society." (*Caballero, supra*, 55 Cal.4th at p. 268.) Here, although petitioner might be eligible for parole a few years before the end of his life expectancy, his sentence does not give him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation (*Graham, supra*, 560 U.S. at p. 75; *Caballero, supra*, at p. 268), and his sentence "disregards the possibility of rehabilitation" (*Miller, supra,* 567 U.S. at p. __ [132 S.Ct. at p. 2468]). Petitioner's sentence is therefore a de facto LWOP sentence. A juvenile who is not eligible for parole until about the time he is expected to die does not have a meaningful or realistic opportunity for release, "no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes." (*Graham, supra*, 560 U.S.at p. 79.)

Because petitioner's sentence of 56 years to life is a de facto LWOP sentence, we conclude he is entitled to resentencing under *Graham, Miller,* and *Caballero*.

Accordingly, the Court vacated Aguilar's sentence and remanded for resentencing. To the extent that the several cases reported above disagree, they will be reviewed by the California Supreme Court before we know the final interpretation of the relevant laws.

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GOVERNOR IS IMMUNE FROM SUIT FOR PAROLE DECISIONS

Staich v. Brown
CA 4(3); No. G048449
April 10, 2015

Ivan Staich sued Governor Brown for damages and injunctive relief for reversing the Board's grant of parole. Staich also asserted that the Governor had relied upon portions of his Juvenile record that the trial court had long ago ordered deleted as "not substantiated."

Staich's first action was a habeas petition in the superior court, in which he sought reinstatement of his grant. The trial court denied his petition, and he appealed. In this appellate action, Staich tried to restate his "action" as a claim for damages, injunctive relief, and an order of contempt against the Governor.

The Court of Appeal held that the Governor was immune from suit for exercise of his official duties. It also held that Staich was collaterally estopped from bringing his claim on habeas into the superior court, because he had already had one such petition, and lost. The case unfolded thusly:

> In response to the Governor's denial of parole, Staich filed a habeas petition (No. M-14142) in Orange County Superior Court. He ar-

***Staich* from pg. 14**

gued, among other things, that the Governor wrongfully considered information from his juvenile case file, which the trial court had ordered removed from a presentence report in 1986. The 1986 order deleted certain portions of the probation report which were not to be sent to prison authorities. The court found some of the information included "unsubstantiated conduct" and accordingly could not be forwarded as part of a completed probation report. In a presentence report that exceeded 10 pages (it is not included in the record in full), 13 lines were removed from one page and approximately 14 lines were removed from another page. We do not know the content of the information removed, as an unredacted copy was not included in the record. There is no evidence the court ordered these records sealed, expunged, or otherwise removed from anything but the presentence report.

In its decision on the habeas petition, the court noted the relevant issue was whether "some evidence" supported the Governor's decision, a highly deferential standard. The trial court concluded the Governor's review met that standard, citing the negative psychological evaluation, and further found Staich's rights had not been violated. The court therefore denied the motion.

Staich then filed a writ of habeas corpus with this court, noting the Governor's decision had "overlook[ed]" numerous positive factors and refused to consider a new forensic psychologist report. He again argued the Governor considered the information removed from the presentence report. On April 13, 2012, this court denied the petition. Staich's petition for review by the California Supreme Court was denied on June 18, 2012.

On March 7, 2012, Staich filed an "affidavit filed as a complaint" against the Governor "for contempt proceedings." His "affidavit of truth" stated the Governor deliberately violated the court order removing his juvenile record from his prison file and placed those records into his reversal of the parole grant. The "affidavit" sought $1,000 from the Governor, payable to the trial court, and unspecified "monetary punishments" payable to, apparently, Staich. Most notably, he sought "punishment against the Governor by requesting reinstatement" of the parole grant.

On June 6, Staich also filed a motion for injunctive relief seeking to enforce the 1986 order "deleting plaintiff's entire juvenile record and a portion of his adult criminal records from being used by the Governor to reverse a valid parole grant . . . ." He sought to have his parole case placed "back to the status quo before the Governor illegally violated the . . . 1986 court order."

The Governor filed a demurrer, arguing: 1) habeas was the exclusive remedy for the relief he sought; 2) the court's order removing certain juvenile records was not directed toward the Governor, and was issued ex parte with respect to him; 3) the Governor is immune from liability for damages for parole decisions. Staich opposed, arguing the merits of his case and that a demurrer was not a proper vehicle to attempt to dismiss his "affidavit filed as a complaint." The Governor also filed an opposition to the motion for injunctive relief, arguing that Staich was collaterally estopped, by the denial of his habeas petition, from asking the court to reinstate his status prior to the Governor's denial of parole.

The trial court sustained the demurrer without leave to amend and denied the motion for injunctive relief. The court found Staich's affidavit was not merely an attempt to initiate contempt proceedings because it sought reinstatement of the parole grant, a remedy not statutorily permitted. Thus, the court construed the document as a combined affidavit and complaint. The court ultimately concluded the case was barred by issue preclusion based on Staich's prior habeas petition and sustained the demurrer. Staich now appeals.

The Court also explained why issue preclusion barred Staich from relief. With respect to the requirement of the same claim, in both the habeas petition and the instant case, Staich seeks remedy for exactly the same alleged wrong: the Governor's purported use of his allegedly "deleted" juvenile record in making the decision to reverse the BPH's grant of parole. As the trial court that heard the habeas petition noted: "[Staich] also asserts the Governor relied on false statements and reports of assaultive juvenile behavior that had been purged from Petitioner's juvenile case file." In his petition to this court, Staich alleged: "Governor's denial focuses primarily on using 'Court Ordered' deleted juvenile and portion of Petitioner's alleged adult records . . ." along with several other factors. In the instant case, Staich's entire basis for the contempt proceeding revolves around the Governor's alleged violation of a court order, specifically: "The Governor on his own accord made the decision to violate the May 30, 1986 'Court Order,' requiring deletion of affiant's entire juvenile record . . . ." In both the habeas and the instant proceeding, Staich seeks the same remedy: reinstatement of parole. "Affiant also seeks punishment against the Governor by requesting reinstatement of his September 14, 2011 valid parole grant." In his opening brief, Staich repeatedly argues the merits of the Governor's actions: "The May 30, 1986 Order Rendered by the Orange County Superior Court was in fact a valid 'court order' . . . and the Governor does not have the legal right to totally disregard this valid court order," "The Sentencing Court had just cause to delete the unsubstantiated records . . . ."

Thus, both the wrong alleged (considering the purportedly deleted juvenile records) and the remedy (reversal of the parole decision) are identical. "[F]or purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. [Citation.]" (*Boeken, su-*

***Staich* from pg. 15**

pra, 48 Cal.4th at p. 798.) Staich's claim that he asks for the additional remedy of monetary damages (from which the Governor is clearly and obviously immune under Government Code sections 845.8, subdivision (a) and 820.2) is irrelevant. Under the primary right theory, Staich seeks redress for the same alleged harm in this case as he did in the habeas petition.

Accordingly, the Court of Appeal affirmed the superior court's denial of relief, and ordered each party to bear his own costs on appeal.

DURING THE WEEKS OF APRIL 6 AND 13, 2015, THE CALIFORNIA SUPREME COURT GRANTED REVIEW IN THE FOLLOWING CASES

The Central California Appellate Project summarized recent grants and holds in the California Supreme Court. CLN readers should note which are the lead cases for issues and cases that might apply to their own pleadings.

Grants and Holds

* *People v. Allen* (Jan. 30, 2015, F067704) [nonpub.opn.], review granted 4/15/2015 (S224781)
* *People v. Andrade* (Jan. 20, 2015, B252846) [nonpub. opn.], review granted 4/15/2015 (S224790)
* *People v. Ivory* (Feb. 2, 2015, F068002) [nonpub. opn.],review granted 4/15/2015 (S224957)

Briefing deferred in *Allen, Andrade,* and *Ivory* is deferred pending decision in *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted 2/18/2015 (S223676/C073949), and *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted 2/18/2015 (S223825/F067946), which present the following issue: Does the definition of "unreasonable risk of danger to public safety" (Pen. Code, § 1170.18, subd. (c)) under Proposition 47 ("the Safe Neighborhoods and Schools Act") apply on retroactivity or other grounds to resentencing under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126)?

* *In re Wilson* (2015) 233 Cal.App.4th 544, review granted 4/15/2015 (S224745/B254093)
* *People v. Contreras* (Jan. 14, 2015, D063428) [nonpub. opn.], review granted 4/15/2015 (S224564)

Briefing deferred in *Contreras* and *Wilson* pending decision in *In re Alatriste* (2013) 220 Cal.App.4th 1232, review granted 2/19/2014 (S214652/B248072), *In re Bonilla* (2013) 220 Cal.App.4th 1232, review granted 2/19/2014 (S214960/B248199), and *People v. Franklin* (2014) 224 Cal.App.4th 296, review granted 6/11/2014 (S217699/A135607), which include the following issues: (1) Did Senate Bill 260 (Reg. Sess. 2013-2014), which includes provisions for a parole suitability hearing after a maximum of 25 years for most juvenile offenders serving life sentences, render moot any claim that such a sentence violates the Eighth Amendment to the federal Constitution and that the petitioner is entitled to a new sentencing hearing applying the mitigating factors for such juvenile offenders set forth in *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455]? If not: (2) Does *Miller* apply retroactively on habeas corpus to a prisoner who was a juvenile at the time of the commitment offense and who is presently serving a sentence that is the functional equivalent of life without the possibility of parole? (3) Is a total term of imprisonment of 77 years to life (*Alatriste*) or 50 years to life (*Bonilla* and *Franklin*) for murder committed by a 16-year-old offender the functional equivalent of life without possibility of parole by denying the offender a meaningful opportunity for release on parole? (4) If so, does the sentence violate the Eighth Amendment absent consideration of the mitigating factors for juvenile offenders set forth in *Miller*?

The U.S. Supreme Court granted certiorari in the following case:

State v. Montgomery (La. 2014) 141 So.3d 264, cert. granted 3/23/2015 (14-280). This case presents the following issues: (1) Whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison? (2) Does the U.S. Supreme Court have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to the decision in *Miller v. Alabama*, 567 U.S. __ (2012)?

Cases **from pg. 16**

PROP. 36 CASES

THIRD-STRIKER GETS 25-LIFE AGAIN UPON RESENTENCING APPLICATION

People v. Derrick Sledge

--- Cal.App.4th --- ; CA 4(3);
No. G048814
April 13, 2015

The 4th District Court of Appeal held that the trial court did not abuse its discretion by finding a third strike inmate would pose an unreasonable risk of danger to public safety if resentenced under the Three Strikes Reform Act (Pen. Code, § 1170.126; Prop. 36).

In 1999, Derrick Sledge was sentenced to 25-life under the Three Strikes law (Pen. Code, §§ 667, 1170.12). He had been convicted of check forgery (PC § 470(a)), possession of a fictitious instrument (PC § 476), and second degree burglary (PC §§ 459, 460(b)). After passage of Prop. 36, he petitioned for resentencing. The court denied Sledge's petition after concluding that he would pose an unreasonable risk of danger to public safety if resentenced. (PC § 1170.126,(f), (g).) Sledge appealed, arguing that the court abused its discretion in reaching that conclusion.

Sledge's history in and out of custody plagued him in his plea for leniency.

Apart from his commitment offenses, defendant has a lengthy criminal conviction history. Defendant first entered the criminal justice system in 1979, when he suffered a misdemeanor juvenile adjudication for petty theft (§ 484, subd. (a)) after stealing a pair of pants from a store. He was 16 years old.

In 1980, when defendant was 17 years old, he suffered a felony juvenile adjudication for forcible rape (§ 261, subd. (a)(2)). The victim was a woman in whose home defendant had been placed following the petty theft adjudication. She was awakened by defendant's hand around her neck. He covered her mouth, pulled up her dress and forced intercourse upon her for two or three minutes.

In 1981, when defendant was 18 years old, he was convicted of residential burglary (§§ 459 & 460, subd. (a)). Defendant and two male accomplices entered an occupied residence around 10:30 p.m. Defendant planned to take stereo equipment, but instead took a watch and a wallet and fled after the occupant woke up. He was sentenced to two years in the California Youth Authority (CYA).

In 1983, when defendant was still on parole for the 1981 offense, he was convicted of receiving stolen property (§ 496). Defendant was stopped driving a vehicle with two male passengers. A large quantity of stolen electronic equipment was stacked on the back seat. He was sentenced to two years in prison.

In 1985, while still on parole for the 1983 offense, defendant pled no contest to residential burglary (§§ 459 & 460, subd. (a)) and assault with a deadly weapon (§ 245, subd. (a)(1)), and he admitted personal use of a firearm (§ 12022.5). According to the arrest report, defendant entered the victim's residence by prying iron bars from a rear window. When the victims came home and noticed the front door was unlocked, defendant opened the door, pointed a gun at them, and ordered them inside. As they attempted to flee he fired one round over their heads and said he would blow their heads off. Defendant then pulled the victims inside, robbed them, and placed them in a bedroom closet which he nailed shut. Defendant was sentenced to eleven years in prison, was paroled in 1990, and after he violated his parole in 1993 was returned to finish his term.

Defendant has a record of minor rules violations in the Orange County jail. These involved using newspaper and books to cover his cell vent, and possession of contraband (extra issue and newspapers) in his cell.

Defendant also has a record of rules violations in state prison. Most were minor, such as delaying lock-up, covering a cell window, and possessing contraband. However, two were more serious and involved violent behavior. The first occurred in 1999, when defendant was involved in a fight with another inmate. They appeared to be exchanging punches, but none of the punches made contact and neither sustained any injuries. Defendant claimed he was defending himself. Even so, he was found guilty of engaging in behavior that could lead to violence, was forfeited 30 days of credits, and was counseled and reprimanded.

The second occurred in 2006, when defendant participated in a prison riot between black and white inmates. Defendant claimed he was not involved in the riot. Nevertheless, he was ultimately found guilty of participating and given a 90-day term in the segregated housing unit.

Sledge also had much going in his favor, as to in-prison achievements.

On the other hand, defendant has a laudable record of education and self-improvement while incarcerated. He has completed more than 70 religious courses, earned an associate arts degree, and completed 11 other educational/vocational courses, including vocational dry cleaning, stress management, language, arts, reading, writing, anger management, job acquisition, and an "Alternative to Violence Project."

Defendant has finished 12 comprehensive sessions of the "Fathers of Children United Stand" self-development program, which included

***Sledge* from pg. 17**

topics like self-control, overcoming fear, positive thinking, functions of leadership, importance of education, self-motivation, critical thinking, and practical life skills. In addition, defendant has completed the "Transcommunality and Peace Studies Class," affiliated with the "Barrios Unidos Prison Project of Santa Cruz, California."

Defendant has been praised for being "an excellent student," having "good work/study habits," and being "a pleasant individual." Supervisors have commended his work. He has been applauded for having an "exceptional" attitude toward supervisors and staff. He has participated in group activities, including playing softball and refereeing tennis, and been admired for his sportsmanship and dedication to his team.

Defendant has also attempted to better those around him and become a leader to his peers. He has taken a course designed to reduce the spread of HIV throughout his prison facility. He was elected by his peers to the position of "Black Representative for F-Wing" where he is "the spokesperson for the entire inmate population at this facility."

The parties disagreed on the proper standard of review for a § 1170.126 resentencing denial decision. The Court articulated its standard.

Under the Reform Act, if the petitioner is statutorily eligible for relief, "the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) The prosecution has the burden of proving defendant's dangerousness by a preponderance of the evidence. (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1301-1305 (*Kaulick*).)

"In exercising its discretion in subdivision (f), [of section 1170.126] the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

There is a dispute between the parties about the applicable standard of review. Defendant contends we review the court's dangerousness determination for abuse of discretion, citing *Kaulick*. But *Kaulick* did not say that. The Attorney General argues the court's dangerousness determination need only be supported by "some evidence," also citing *Kaulick*. But *Kaulick* did not say that either.

What the Court of Appeal in *Kaulick* did say is: "A trial court's decision to refuse to resentence a prisoner, based on a finding of dangerousness, is somewhat akin to a decision denying an inmate parole. Such a [parole] decision need only be supported by 'some evidence' . . . . This does not mean that an inmate is otherwise eligible for release [under section 1170.126] but that release can be denied on a finding supported only by 'some evidence.' It simply means that the inmate remains subject to his initial sentence unless certain findings are made; these findings need not be established beyond a reasonable doubt." (*Kaulick, supra*, 215 Cal.App.4th at p. 1306, fn. 29.)

Several cases decided since *Kaulick* have now clarified that when a court denies relief under section 1170.126 because reducing a petitioner's sentence entails an unreasonable risk of danger to public safety, that discretionary determination is reviewed under the familiar abuse of discretion standard. (See, e.g., *People v. Da-*

***Sledge* from pg. 18**

vis (2015) 234 Cal.App.4th 1001 (*Davis.*) Using this standard, we consider whether the ruling, "exceeds the bounds of reason or is arbitrary, whimsical or capricious. [Citations.] This standard involves abundant deference to the trial court's rulings." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.)

Finally, the factual findings upon which a court's unreasonable risk determination is based are themselves subject to review under the equally familiar substantial evidence standard. Thus, we review the entire record in the light most favorable to the court's factual findings to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could make those factual findings by a preponderance of the evidence. (Cf. *People v. Bolin* (1998) 18 Cal.4th 297, 331.) But if the factual findings are not supported by substantial evidence, they cannot form the basis for an unreasonable risk determination. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 [court abuses discretion when factual findings critical to decision find no support in evidence].)

The Court of Appeal affirmed. PC § 1170.126(g) provides that a court may consider an inmate's criminal conviction history, disciplinary record, and "any other evidence" it deems relevant "in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." Sledge's inmate housing status (to a single cell due to his mental health issues that required isolation from others), use of a firearm during a prior offense, and failure to take responsibility for his actions, were all relevant "other evidence" of Sledge's dangerousness. A trial court may also consider evidence of charged offenses that a defendant is not convicted of committing. The trial court did not abuse its discretion by considering those facts, among others, in making its dangerousness determination.

After oral argument, the issue of Prop. 47's definition of "unreasonable risk to public safety" was raised. The Court dealt summarily with this concern.

On November 4, 2014, after oral argument in this case, the voters of the State of California approved the Safe Neighborhoods and Schools Act (Proposition 47). Among other things, Proposition 47 added section 1170.18, subdivision (c) (section 1170.18(c)). Section 1170.18(c) provides: "(c) *As used throughout this Code*, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (Italics added.)

As we have discussed at length throughout, the phrase "unreasonable risk of danger to public safety" is also used in section 1170.126, subdivision (f), and is central to the resolution of this appeal. Therefore, we ordered the parties to brief the question of whether the section 1170.18(c) definition applies to this appeal. This question is currently pending before the California Supreme Court. (*People v. Chaney* (2014) 231 Cal. App.4th 1391, review granted February 18, 2015, S223676 [Does the definition of "unreasonable risk of danger to public safety" under section 1170.18(c) apply retroactively to resentencing under section 1170.126]; see also *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted February 18, 2015, S223825.)

Two other cases decided after *Chaney* and *Valencia* also addressed this question, and both declined to retroactively apply the section 1170.18(c) definition of "unreasonable risk of danger to public safety" to resentencing under section 1170.126. (*Davis, supra,* 234 Cal.App.4th at p. 1006; *People v. Guzman* (Apr. 2, 2015, G049135) __ Cal.App.4th __ (*Guzman*)(maj. opn. of Fybel, J.) [definition under § 1170.18(c) does not apply to resentencing under § 1170.126] (conc. opn. of Aronson, J.) [definition under § 1170.18(c) does apply to resentencing under § 1170.126, but not retroactively].) We agree with *Davis* and *Guzman* on this question. And we too conclude "that the five words 'As used throughout this Code' [citation] were not intended by the voters to hamstring the Three Strikes Reform Act." (*Davis, supra*, 234 Cal. App.4th at p 1026.) Accordingly, we decline to apply the section 1170.18(c) definition of "unreasonable risk of danger to public safety" to this appeal.

***Cases* from pg 19**

PC § 3051 RENDERS JUVENILE OFFENDER'S 120-LIFE SENTENCE FOR A NONHOMICIDE OFFENSE CONSTITUTIONAL BECAUSE IT PROVIDES A MEANINGFUL OPPORTUNITY FOR RELEASE

People v. Javante Scott
--- Cal.App. 4th ---; CA 4(2) E060028
March 20, 2015

Javante Scott was convicted of three counts of attempted murder and other offenses with firearm and gang enhancements based on evidence that he participated in a gang-related, drive-by shooting that resulted in injuries but no deaths. Although he was a juvenile at the time of the crimes, he was tried as an adult and sentenced to 120-years-to-life.

In a habeas petition, Scott sought resentencing on the basis that his sentence was a *de facto* LWOP sentence in a nonhomicide case, which amounts to cruel and unusual punishment. (*People v. Caballero* (2012) 55 Cal.4th 262.) At his resentencing hearing, the trial court accepted the People's argument that the recent enactment of section 3051 cured any constitutional deficiency with Scott's sentence.

The Court of Appeal affirmed. *Graham v. Florida* (2010) 560 U.S. 48, held that sentencing a juvenile to LWOP for a nonhomicide offense violates the Eighth Amendment. Caballero extended *Graham* to sentences that are the functional equivalent of LWOP. It was uncontested that Scott's 120-years-to-life sentence was the functional equivalent to LWOP. However, section 3051 makes juveniles like Scott eligible for parole after 25 years, which is within a juvenile's normal life expectancy. "[T]he focal point of *Caballero* is the end result required by *Graham* and by the Eighth Amendment—that a juvenile offender must have a reasonable opportunity to obtain parole within his or her lifetime upon a showing of rehabilitation." Because section 3051 provides such an opportunity to Scott, his 120-years-to-life sentence does not violate the Eighth Amendment and resentencing is not required.

NOTE: Detailed reporting on this

***Scott*-from pg. 20**

published case is not being made here because Review of this case will very likely be granted since this issue is already currently pending in the California Supreme Court. (See *In re Alatriste* (2013) 220 Cal.App.4th 1232, review granted 2/19/2014 (S214652/B248072); *In re Bonilla* (2013) 220 Cal.App.4th 1232, review granted 2/19/2014 (S214960/B248199); *People v. Franklin* (2014) 224 Cal.App.4th 296, review granted 6/11/2014 (S217699/A135607).) Also, Justice McKinster dissented, concluding that "[t]he courts should not, and may not, abdicate their responsibility to take account of the offender's status as a juvenile in fashioning a constitutional sentence in the first instance."]

*****

DISMISSED FIREARM COUNT WAS IMPROPERLY CONSIDERED TO DETERMINE THAT INMATE WAS INELIGIBLE FOR RESENTENCING UNDER PROP. 36

P. v. Roland Berry

___Cal.App.4th ___; CA4(3); No. G049483

April 17, 2015

Roland Berry was sentenced in 2000 to a Three Strikes life term following his guilty plea to possessing a fraudulent check and a forged driver's license. Seven other counts were dismissed at the time of his plea, including some alleging he unlawfully possessed a firearm. Berry's subsequent petition for resentencing under section 1170.126 was dismissed based on a finding he was ineligible because he was armed with a firearm during the offenses to which he pled guilty.

On appeal, Berry claimed that because the counts alleging he was in possession of a firearm were dismissed, they should not have disqualified him from resentencing eligibility.

The Court of Appeal reviewed the relevant law.

Section 1170.126 was enacted by voter initiative in 2012, as part of the Three Strikes Reform Act. (Voter Information Guide, *supra*, text of Prop. 36, § 6, at pp. 109-110.) Among the stated purposes of the initiative, as explained to voters, was to "[r]estore the Three Strikes law [sections 667 and 1170.12] to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime" and to "[m]aintain that repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence." (*Id.* § 1, at p. 105.)

In accordance with those goals, section 1170.126 provides persons who were previously sentenced to indeterminate life terms under an earlier version of the "Three Strikes" law the opportunity to petition for recall of their sentences and resentencing to the term that would have been imposed for their crime under the revised Three Strikes law passed by the voters in the form of Proposition 36. Thus, section 1170.126, subdivision (a) states that it is intended to apply only to those "persons presently serving an indeterminate term of imprisonment . . . whose sentence *under this act* would not have been an indeterminate life sentence." (Italics added.) And subdivision (b) specifies that the relief to be obtained through a successful petition is "resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of section 1170.12, as those statutes have been amended by the act that added this section."

Consequently, the initial inquiry under section 1170.126 is whether an inmate who is already serving an indeterminate life sentence under the Three Strikes law, *would have been sentenced* to that same indeterminate life term under the revised sentencing provisions of the Three Strikes Reform Act. And the petition to recall the indeterminate life sentence is required to specify the exact basis for its imposition: "[t]he petition . . . shall specify all of the currently charged felonies, which *resulted in the sentence* under paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, or both, and shall also specify all of the prior convictions *alleged and proved* under subdivision (d) of Section 667 and subdivision (b) of Section 1170.12." (§ 1170.126, subd. (d), italics added.)

Subdivision (e) of section 1170.126

***Berry* from pg 21**

then details which inmates are "eligible" for resentencing, based upon *what they were sentenced for originally.* The first requirement is that "[t]he inmate is serving an indeterminate term of life imprisonment *imposed* pursuant to [the Three Strikes law] for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7." (§ 1170.126, subd. (e)(1), italics added.)

The second requirement is that "[t]he inmate's current sentence *was not imposed* for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(2), italics added.)

And the third requirement relates to prior convictions, specifying that the eligible inmate "has no *prior convictions* for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (§ 1170.126, subd. (e)(3).)

If the inmate meets these basic eligibility requirements, he or she must be resentenced in accordance with section 667, subdivision (e)(1) and section 1170.12, subdivision (c)(1) – i.e., to twice the term otherwise provided as punishment for the current felony – "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) Therefore, whether an *eligible* inmate actually *obtains* resentencing relief will depend upon the court's discretionary assessment of the inmate's dangerousness.

However, in keeping with the overarching purpose of the Three Strikes Reform Act, which was to retreat from the required imposition of unduly long sentences against "repeat offenders convicted of non-violent, non-serious crimes" under the prior Three Strikes law (Voter Information Guide, supra, text of Prop. 36, § 1, at p. 105), section 1170.126 also specifies that "[u]nder no circumstances may resentencing under this act result in the imposition of a term longer than the original sentence." (§ 1170.126, subd. (h).) Thus, the statute is intended solely to provide inmates with an opportunity to have their sentences reduced.

And in light of that clear intent, we cannot endorse the trial court's apparent belief that the mandate requiring the Three Strikes Reform Act to be liberally construed to effectuate "the protection of the health, safety, and welfare of the people of the State of California" (Voter Information Guide, *supra*, text of Prop. 36, § 7, at p. 110) means that all provisions defining an inmate's *eligibility* for resentencing under section 1170.126 must be construed against finding the inmate eligible. While we acknowledge that an important goal of the Three Strikes Reform Act is to prevent dangerous criminals from being released from prison early, that concern is not directly implicated in the initial determination of an inmate's eligibility for resentencing. It is only after an inmate is deemed eligible under subdivision (e) of section 1170.126 that the trial court undertakes the required assessment of that inmate's *dangerousness* pursuant to subdivisions (f) and (g) of the statute. No eligible inmate who is determined by the court to "pose an unreasonable risk of danger to public safety" (§ 1170.126, subd. (f)) will be entitled to resentencing.

The Court of Appeal thus agreed with Berry.

On the merits, we agree with defendant. The resentencing provisions of section 1170.126 are "intended to apply exclusively to persons . . . whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126, subd. (a), italics added.) Thus, the basic premise of section 1170.126 is that an inmate who is serving an indeterminate life sentence under prior versions of the "Three Strikes" law (§§ 667, 1170.12), but whose convictions and related factual findings would not have warranted such a sentence under the revised provisions of the Three Strikes Reform Act passed by the voters, is eligible to seek a recall of that earlier sentence. However, under the two-part analysis required by section 1170.126, an eligible inmate will not be granted resentencing relief if the court determines, in its discretion, that "resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) It is in making the latter determination that a trial court would properly expand its inquiry to factual matters beyond the scope of defendant's earlier convictions and the offenses for which the original sentence was imposed.

Because the trial court in this case relied on the evidence underlying the dismissed counts in assessing defendant's eligibility for resentencing – counts on which defendant was neither convicted nor had sentence imposed – it erred in dismissing his petition. The case is remanded for the court to determine whether defendant would pose an unreasonable risk of danger to the public safety.

In sum, under section 1170.126, subdivision (e), the initial determination of an inmate's eligibility for recall of his sentence must be based upon the convictions for which the inmate is serving time, the offenses for which sentence was imposed, and the inmate's prior convictions. These things cannot be established by referring to evidence underlying dismissed counts. While the trial court's arming analysis may have been appropriate in a case where

Berry **from pg 22**

the defendant was convicted of possessing a firearm, "it was not appropriate here, where all allegations involving firearm possession were dismissed as part of defendant's plea agreement." As a result, the trial court erred when it relied on the evidence underlying the dismissed counts in assessing Berry's eligibility for resentencing. The case was remanded so the trial court can determine whether Berry would pose an unreasonable risk of danger to public safety if resentenced.

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INMATE WAS INELIGIBLE FOR PROP. 36 RESENTENCING BECAUSE HIS COMMITMENT OFFENSE IS NOW A SERIOUS FELONY EVEN THOUGH IT WAS NOT SO CLASSIFIED AT THE TIME HIS CONVICTION BECAME FINAL

P. v. James Galvan
___Cal.App.4th ___; CA4(3); No. G049764
April 16, 2015

James Galvan appealed from the dismissal of his petition for resentencing under Prop. 36, arguing that the trial court erred in finding him ineligible for resentencing because the crime for which he was given a life term, assault with a firearm (PC § 245(a)(2)), was not considered a serious or violent felony at the time of the final judgment on his conviction.

Defendant James Galvan appeals from the dismissal of his petition for resentencing under Penal Code section 1170.126 (all further undesignated statutory references are to this code). He argues the trial court erred in ruling he was ineligible for resentencing under section 1170.126 because the crime for which he was given the indeterminate life sentence – assault with a firearm – was not considered a serious or violent felony at the time of the final judgment on his conviction, and thus it cannot be treated as such for purposes of evaluating his present eligibility for resentencing. He also claims that the separate finding that he committed his crime while armed with a firearm cannot be relied upon as a basis for denying him resentencing because his sentence on

***Galvan*- from pg 23**

that finding was stayed pursuant to section 654, and consequently his current sentence "was not imposed" for an offense appearing in section 667, subdivision (e)(2)(C)(iii) or section 1170.12, subdivision (c)(2)(C)(iii).

The Attorney General's initial response is to claim the dismissal is not an appealable order because it does not affect defendant's "'substantial rights.'" Although this may have been an arguable assertion when the Attorney General's brief was filed, our Supreme Court has since rejected it and concluded such dismissals are appealable. (*Teal v. Superior Court* (2014) 60 Cal.4th 595.)

The issue of whether the classification of an inmate's prior conviction must be determined as of the time his judgment of conviction became final, rather than under the sentencing law in effect when section 1170.126 was enacted, is currently pending before the Supreme Court. (*Braziel v. Superior* Court, review granted July 30, 2014, S218503.) However, as the court has not yet issued an opinion resolving the issue, we address it here and reject defendant's contention. Section 1170.126, subdivision (e) sets forth the specific eligibility requirements for resentencing under the statute. Among other things, it states that an eligible inmate is one who is serving an indeterminate sentence for a felony or felonies "that *are not* defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7." (§ 1170.126, subd. (e)(1), italics added.) This *present tense* reference to the statutes defining which felonies qualify as "serious" or "violent" makes clear that the pertinent classification for purposes of establishing eligibility for resentencing was based on current law in existence when section 1170.126 went into effect. And even assuming the alternative language relied upon by defendant, taken from subdivision (a) of section 1170.126, could be read as supporting a different interpretation of eligibility, we would disregard it under the well-settled rule that in the case of inconsistency between statutory provisions, the more specific provision controls over the more general one. Under a proper reading of section 1170.126, defendant is ineligible for resentencing because his conviction for assault with a firearm qualifies as a serious felony for purposes of that statute. Hence, the trial court properly dismissed his petition and we affirm its order.

The Court of Appeal affirmed based on precedent that is nonetheless pending review in the California Supreme Court. The issue of whether the classification of an inmate's prior conviction must be determined at the time that his conviction became final, rather than under the law in effect when Prop. 36 was enacted, is currently pending in the Supreme Court in *People v. Johnson* (2014) 226 Cal. App.4th 620, review granted 7/30/2014 (S219454/B249651). PC § 1170.126 specifies that a qualified inmate is one who is serving an indeterminate sentence for felonies that are not defined as serious and/or violent. The use of the present tense in defining which felonies qualify makes clear that the pertinent classification to establish eligibility for resentencing is the law in existence when section 1170.126 went into effect. Galvan was ineligible for resentencing because his conviction for assault with a firearm qualifies as a serious felony.

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PROP. 47'S DEFINITION OF "UNREASONABLE RISK OF DANGER TO PUBLIC SAFETY" IN PC § 1170.18(C) DOES NOT APPLY TO PROP. 36 RESENTENCING PETITIONS.

P. v. Marcelo Guzman

___Cal.App.4th ___; CA 4(3); No. G049135

April 2, 2015

In 2006 Marcelo Guzman was given a 25-life three strikes sentence upon his conviction for receiving stolen property with five strike priors. After passage of Prop. 36 in 2012, Guzman filed a resentencing petition. The trial court denied the petition, finding Guzman's release would pose an unreasonable risk of danger to public safety. He appealed.

The Court of Appeal affirmed. Prop. 36 requires a trial court to resentence an otherwise qualified third strike offender to a two strike term unless the court, in its discretion, finds that sentence reduction would pose an unreasonable risk of danger to public safety. (PC § 1170.126, subd. (f).) § 1170.126 does not define "unreasonable risk of danger."

In November 2014 the voters passed Prop. 47, which reduced certain felonies to misdemeanors and provides "as used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk the petitioner will commit a" statutorily specified new violent felony. (PC § 1170.18(c).) Although the phrase "as used throughout this Code" clearly refers to the Penal Code, this does not

***Guzman* from pg 24**

mean that the "unreasonable risk of danger" definition provided in section 1170.18, subdivision (c) applies to Prop. 36 resentencing petitions.

The sentencing scheme in each proposition addresses "different concerns impacting distinct categories of crimes, perpetrators, and victims." Importing Prop. 47's "unreasonable risk of danger" definition into Prop. 36 would significantly reduce the trial court's discretion to deny third strikers' petitions for resentencing, a possibility not mentioned in the Prop. 47 ballot materials and a result not intended by the voters.

This is not the first case interpreting this issue.

> Our holding is consistent with the Court of Appeal, First Appellate District, Division Two's opinion in *People v. Davis* (2015) 234 Cal.App.4th 1001, 1006 (*Davis*), in which the appellate court similarly held, "the Proposition 47 definition was not intended by the voters to displace the broader definition of the Three Strikes Reform Act already in use."

The question is also currently pending before the California Supreme Court. (See *People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted 2/18/2015 (S223676/C073949); *People v. Valencia*(2014) 232 Cal.App.4th 514, review granted 2/18/2015 (S223825/F067946).]

Additionally, the Court of Appeal held that the trial court did not abuse its discretion in denying Guzman's petition. In denying his petition, the court considered Guzman's criminal past, which included five residential burglaries, three deportations, an illegal re-entry into the United States, a drug trafficking conviction, and commission of the life commitment offense (which involved possession of burglary tools and jewelry stolen from a residence) while on supervised release. Guzman does not contest the court's factual findings. The court did not abuse its discretion.

*****

PRISONER MAY APPEAL ORDER DENYING COMPASSIONATE RELEASE UNDER PENAL CODE SECTION 1170, SUBDIVISION (E).

P. v. Loper

___Cal.4th ___; CA Supreme Court, No. S211840
February 26, 2015

(Although this is not a lifer case, it applies to many lifers who are in declining health.)

Loper was sentenced in 2011 to six years in state prison. In 2012, the CDCR recommended that Loper's sentence be recalled pursuant to section 1170, subdivision (e) and that he be granted compassionate release due to his medical condition. The superior court denied CDCR's recommendation.

Loper, but not CDCR, appealed the trial court's decision. The Court of Appeal dismissed the appeal, finding that the trial court's denial was a nonappealable order. The California Supreme Court reversed the decision of the appellate court.

Section 1170, subdivision (e) authorizes only two parties to seek a prisoner's compassionate release: the Secretary of the CDCR or the Board of Parole Hearings. The statutory scheme does not authorize a prisoner to initiate a proceeding in the trial court for compassionate release and contains no express provision permitting a prisoner to appeal an adverse decision.

However, Loper's appeal was authorized by Penal Code section 1237(b) because the trial court's denial of compassionate release was an order made after judgment that affected his substantial rights. Section 1237 does not limit appealability only to parties who have authority to file the original motion.

In its ruling, the Supreme court disapproved *People v. Druschel* (1982) 132 Cal.App.3d 667 and *People v. Niren* (1978) 76 Cal.App.3d 850. In each of these cases, the trial court had denied a motion for recall and resentencing under section 1170(d) and the defendant attempted to appeal the denial. The appellate courts had dismissed the appeals on the ground that the defendant lacked statutory authority, or "standing," to make the motion.

. . . . . .

***Cases*- from pg 25**

IF YOU HAVE *TWO* 25-LIFE SENTENCES, ONE OF WHICH QUALIFIES FOR RESENTENCING, AND ONE WHICH DOES NOT, YOU ARE NOT ELIGIBLE FOR RESENTENCING

P. v. Teddy Young
CA 4(2); No. E061236
May 4, 2015

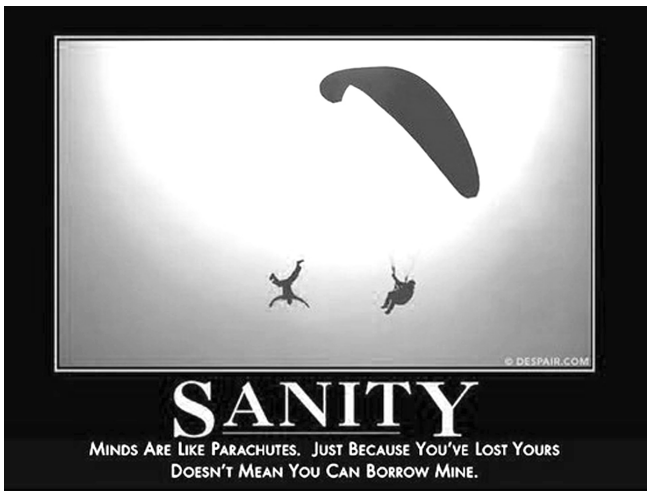
Defendant and appellant Teddy Jerome Young appealed after the trial court denied his petition under PC § 1170.126 for resentencing under Prop. 36. At issue is whether defendant's petition showed that he was eligible to be considered for resentencing. The Court of Appeal affirmed.

Young was plainly no stranger to crime.

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

Nonetheless, Young tried to do "damage control" by attacking the non-serious strike case.

On April 21, 2014, defendant filed a petition for resentencing under Penal Code section 1170.126. The petition sought resentencing solely for the Vehicle Code offense, which is not defined as a serious or violent felony. Defendant's petition asserted that, "[i]n passing Proposition 36 in the General Election of 2012, the electorate enacted section 1170.126," which, in pertinent part, "set up a mechanism for certain Three Strikers in prison to petition to have their sentences recalled and be resentenced." He argued that Penal Code section 1170.126, subdivision (e), applies per count, and not per case, so that he should be deemed eligible to petition for two strike sentencing on any nonviolent, nonserious felony conviction, notwithstanding the existence of serious or violent felony convictions arising from the same case or proceeding.



At the hearing on defendant's petition, the court opined that Proposition 36 was intended to distinguish between third strikers who were serving indeterminate life (third strike) sentences based solely on nonserious and nonviolent offenses, and third strikers whose third strike sentences were based in any part on serious or violent felonies. In other words, the only inmates eligible for resentencing as potential second strikers should be inmates who were serving indeterminate life sentences for offenses that did not include any serious or violent—i.e., true third strike—felonies. The court stated, "it would make little sense and fly in the face of logic to allow a defendant who has multiple counts . . . to pick non-strike . . . counts to litigate even though they're excluded from the strike count. That is an absurd result that could not have been intended." The court denied defendant's petition.

Defendant filed a notice of appeal from the trial court's ruling denying his petition; he seeks remand with directions for the trial court to consider his eligibility for resentencing on the nonviolent, nonserious count only.

The Court of Appeal explained its reasoning for denial of relief.

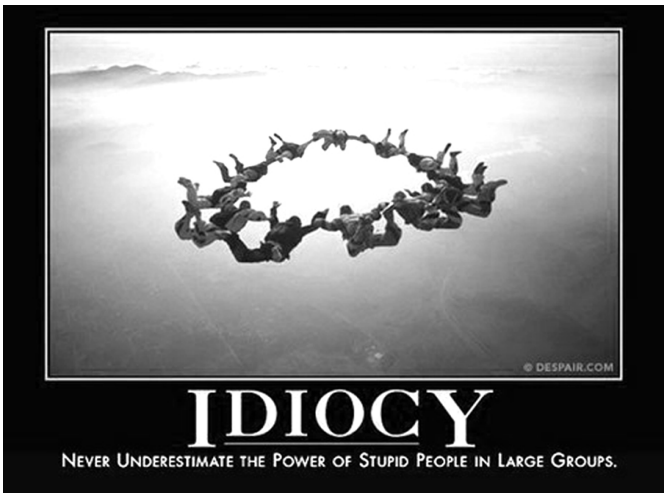
Penal Code section 1170.126, subdivision (e), sets forth the criteria for eligibility for resentencing: "(e) An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section

***Young* from pg. 26**

1170.12. [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." That is, the inmate may be eligible for resentencing if: (1) the inmate is serving a third strike life term for a felony that is not serious or violent; (2) the inmate has no specified "disqualifying factors" for any current offenses, such as certain sex offenses, drug charges, use of firearms or great bodily injury; and (3) prior offenses do not include specified crimes such as certain sex offenses, homicide crimes, certain assaults on peace officers, or felonies punishable by life imprisonment or death.

Defendant argues that he is eligible under section 1170.126, subdivision (e)(1), because he is serving an indeterminate term of life imprisonment imposed under the Three Strikes law for a felony that was and is not defined as serious or violent, namely, evading an officer, a Vehicle Code offense. Defendant urges that Penal Code section 1170.126, subdivision (e)(1), contains no suggestion that an accompanying serious or violent felony (for which the inmate will be ineligible to seek resentencing) renders the inmate also ineligible to seek resentencing on the nonserious three strike felony.

Arguably, Penal Code section 1170.126, subdivision (e)(1), is distinguishable from the language of section 1170.126, subdivision (e)(2), which makes it very clear that an inmate is made ineligible for resentencing on an otherwise eligible offense if the aggregate sentence also includes the specified disqualifying offenses. Under this construction, the difference in language between section 1170.126, subdivision (e)(1) and (2) would be deemed purposeful; subdivision (e)(2) would be meant to completely disqualify an offender whose aggregate sentence includes the disqualifying offenses, whereas subdivision (e)(1) focuses only on the offense for which the inmate seeks to be resentenced.



Against this possible interpretation, Penal Code section 1170.126, subdivision (e)(1), can be interpreted in an alternate fashion: The words, an "inmate [] serving an indeterminate term of life imprisonment," for a felony that is not serious or violent, do not include an inmate who is serving two life terms—one for a serious/violent felony and another for a nonserious/nonviolent felony.

We first look to section 1170.126, subdivision (a), which sets forth the objective of the statute. "The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment [for a nonviolent and nonserious felony], whose sentence under this act would not have been an indeterminate life sentence" under the Three Strikes law as amended by the 2012 act. (Italics added.) The use of the terms "exclusively" and "persons" imply that the overall intent of the statute is to exclude from its benefits any "persons" whose current commitment offenses include a serious or violent felony. This language also contradicts any suggestion that the Act, specifically section 1170.126, subdivision (e)(1), focuses only on the offense for which an inmate seeks resentencing, rather than on the offender as a whole. Rather, the statutory language refers specifically to an offender whose current commitment offenses include a serious or violent felony. A person "whose sentence under this act would not have been an indeterminate life sentence" cannot, by definition, include an inmate, one of whose commitment offenses is a serious or violent felony that is subject to an indeterminate life sentence. In other words, an inmate, like defendant, who is simultaneously serving life terms for one offense, not violent or serious, and for another offense that is violent or serious, is not a person "whose sentence under this act would not have been an indeterminate life sentence" under the Act.

Second, Penal Code section 1170.126, subdivision (d), requires the petition for recall of sentence to "specify all of the currently charged felonies, which resulted in the sentence . . . ." The specific requirement that an inmate list all of the commitment felonies indicates that each of the currently charged felonies affects the inmate's eligibility for resentencing, and that the sentencing court must consider all of the inmate's current felonies in making its eligibility determination, not just the felony for which the inmate requests resentencing. In addition, this subdivision clearly uses the term "sentence" to mean the combination of all terms resulting from all of the felonies of which defendant was convicted in the latest proceedings. Viewed in this light, the use of the word "sentence" in section 1170.126, subdivision (a), even more clearly indicates that having a serious or violent felony as one of his or her commitment offenses disqualifies an inmate from being resentenced on any of his or her indeterminate life sentences.

Third, as set forth in *People v. Yearwood* (2013) 213 Cal.App.4th 161 [151 Cal.Rptr.3d 901], the ballot arguments in favor of Proposition 36, which "have been recognized as a proper extrinsic aid in construing voter initiatives adopted by popular vote" (People v. Year-

***Young* from pg. 27**

wood, at p. 171), repeatedly and plainly stressed that truly dangerous criminals, namely those convicted of a serious or violent felony, would not receive any benefit whatsoever from the proposed amendments to the Three Strikes law. Examples of such language in the ballot arguments are: " 'Prop. 36 prevents dangerous criminals from being released early' "; " 'Prop. 36 will keep dangerous criminals off the streets' "; and " 'truly dangerous criminals will receive no benefits whatsoever from the reform.' " (*People v. Yearwood*, at p. 171, quoting Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, pp. 52-53.) These arguments indicate an intent by the voters that an inmate convicted of a serious or violent felony in the latest proceedings will not benefit, at all, from the reduced sentencing of the 2012 act.

For the reasons set forth above, we conclude that both the language of section 1170.126 and the evidence of voter intent support the conclusion that an inmate is not eligible for resentencing under the Three Strikes Reform Act of 2012 when any of the offenses for which he or she is serving a three strikes sentence is a serious or violent felony. We therefore affirm the superior court's order in this case denying defendant's petition for resentencing.

The Courts

UPDATE: YOUNG AND BUTLER

As reported previously here and in California Lifer Newsletter, in January, after yet another denial of parole for Andrew Young, the appellate courts, frustrated by the Board's lack of compliance with court orders in the case, ordered not yet another hearing for Young, but simply his release. In late March Young was indeed released. In a related development, in late May the California Supreme ordered depublication of *In re Young II*, a move that makes the case no longer citable in future pleadings.

But, much like toothpaste escaped from a tube, it's hard to put everything back again. *In re Young* took both the board and the FAD to task in several areas and took the unusual step of calling out both the panel members and the FAD clinician by name for their errors. Those comments still reverberate and while the case may not be citable, the principals involved remain in play.

"This declaration of authority is staggering."
Justice A. Kline

(speaking about Parole Board panels)

Within days of the depublication of Young came the decision from the First Appellate Court in the latest installment of *In re Butler*, the case that last year promulgated an agreement between the BPH and the courts under which parole panels are now calculating and setting terms at a prisoner's first or next upcoming parole hearing. Prior to the agreement term calculation was done only when a grant of parole was given.

What was striking, however in this installment of the Butler case, was not especially the decision itself, which only will allow Butler, now released and reintegrating well, and his legal representatives to recoup reasonable attorney fees, but the comments, directed to the Board by Justice Anthony Kline. Judge Kline quotes the Board's regs 2402 sub (a) and 2422 sub (a) in noting;

> "Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison."

He concludes, again, quoting the Judge, "*This declaration of authority is staggering."*

> "Blinding itself to the fact that, as *In re Dannenberg* acknowledges, there is a point at which any sentence will become constitutionally excessive if it is 'grossly disproportionate' to the prisoner's individual culpability for the commitment offense, the Board rejects any limit on its authority to deny a prisoner release from prison based on its prediction that he or she presents a public safety risk."

The Courts from **pg. 28**

Kline has considerably more to say on the effects of proportionality and uniformity of sentence and how those concepts are impacted by repeated parole denial, including, again quoting from the decision, "whether the prison term resulting for a denial of parole would be disparate in terms imposed on others who committed the same offense in similar ways and circumstances is not reduced to irrelevance simply because it is not controlling. Moreover, prompt term setting would make the Board, other interested parties, and the public, aware of the extent to which the denial of parole led to disparate sentencing" and "the Board's position that it may deny a prisoner release on parole based on its determination that he or she presents a danger to public safety 'regardless of the length of time served' by the prisoner would remove all limits on the severity of punishment the Board can impose."

Kline also quoted from *In re Dannenberg*,

"Of course, even if sentenced to a life-maximum term, no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense. Such excessive confinement, we have held, violates the cruel or unusual punishment clause. Thus, we acknowledge, Penal Code Section 3041, subdivision (b), cannot authorize such an inmate's retention, even for reasons of public safety, beyond this constitutional maximum period of confinement."

The judge thus reminded the Board that it is not Board's purview to impose punishment, per se, and that the original purpose of setting a base term was to establish the constitutional limit of punishment by reference to proportionality. And while this portion of the Butler decision seems only slightly impactful to the board and its decisions, it is an interesting reference for the board on proportionality and uniformity of time served, especially as these concepts apply to lifers, sentenced decades ago to then-in-place terms of 7 to life and who are now still in prison 20, 30, 40 and more, years later.

Board of Parole

BOARD BUSINESS

Following a recent trend toward short sessions the April and May Executive Meetings of the Board of Parole Hearings were short and business oriented. Many of the items on the agenda dealt with such internal issues as the updating of the Board's computer system, the progress of various legislative bills potentially affecting the BPH, and various administrative directives issued and contemplated by the Board.

While these have some impact on lifers and hearings, most were of relatively marginal interest to prisoners, being more of a procedural nature. These included updates on gate clearances for attorneys (a done deal for DAs and state appointed attorneys but still a program in the works for privately hired inmate attorneys), to the hiring of more Administrative Law Judges, better known in lifer hearings as Deputy Commissioners, in part to handle the expected increase in reviews of non-violent second strikers release and parole discharge.

A presentation was given by the Office of Victims and Survivors Rights and Services in light of National Crime Victims' Week, April 19-25.

Of note among the more routine topics (other than those given their own space in this CLN edition) were a presentation by the Office of Victims and Survivors Rights and Services in light of National Crime Victims' Week, April 19-25, and other activities of that office and a report from Chief Counsel Howard Moseley on the depublication of *In re Young*. Executive Director Jennifer Shaffer also discussed her outreach program, meeting with various stakeholder groups, including prisoners at various institutions. Shaffer noted she had spoken to LSA's lifer family seminar, as well as prison staff and parole administrators, providing what she termed "factual information" on the BPH. Those discussions had, she said been "fairly well received" (she was well received at the LSA event) and she hoped to visit all California prisons by the end of the year.

The report on the activities of the OVSRS, presented by Director Cynthia Florez-DeLyon, informed the board that in an average month the office receives 2,400 contacts (email or phone), 500 notification requests and assists 175 victims or VNOK in attending hearings. The office also 'finds' 175 'unknown victims' and collects $1.6 million in restitution. Our tax dollars at work.

Moseley, reporting at the May meeting on the depublication of *In re Young,* noted that the Board had requested the depublication, feeling the issues therein addressed were moot, as the Board was in compliance with the court order. Since depublication In re Young can no longer be cited as case law.

En banc results for both months appear elsewhere in CLN.

BPH STAKEHOLDER MEETING PROVIDES SOME INSIGHT

Of the many the many new and welcome stratagems implemented by the current BPH administration under the supervision of Executive Director Jennifer Shaffer is a quarterly meeting/conference call to cover changes, policies and developments involving parole hearings over the previous 3+/- months. These meetings/calls are open to just about anyone who chooses to be present either in person or via the toll-free call-in number and provide a chance for stakeholders (those of us who have an interest in parole) to not only hear a recap of the past quarter's events but to ask questions as well.

The first day of June saw the most recent meeting, with Life Support Alliance again nearly the only 'civilian' stakeholder in attendance. We were there in person, while others in the room all appeared to be government related in some fashion—members of the BPH staff, representatives from the Office of Victims and Survivors Rights and Services and a smattering of DAs were also in attendance. Those participating via phone appeared to be largely more DAs and inmate attorneys, both state and private.

Of the dozen or so business items on the agenda perhaps the results of specialized hearings held in conjunction with the 3 judge panel overseeing population reduction were of most interest to prisoners and the facts and figures presented were revealing. Shaffer noted the latest results available from hearings held under YOPH, Elderly

***BPH* from pg. 30**

Parole, Expanded Medical Parole, Non-violent Second Strikers and touched on speculation regarding whether plea bargains specifically excluding such special considerations would be acceptable to the courts.

Youth Offender Parole Hearings (YOPH), while not exactly the result of the 3 judge panel's oversight, still have the potential to impact the prison population. Since YOPH went into effect on January 1, 2014 (when SB 260 went into effect) the BPH has scheduled some 894 such hearings, 691 of those for Indeterminate Sentence Length (ISL), or lifers, the remaining for those Determinate Sentence Length (DSL) inmates who fall under the guidelines. Although, similar to regular parole hearing, many scheduled hearings are not held due to waiver, stipulation, postponement, etc. the results for those that are held reveal that grant rate of YOPH hearings in the first year, 2014, was about 27%, while the grant rate overall grant rate to date (from January, 2014 through April 30, 2015) is 19%.

The decrease may possibly be attributable to a couple of things. Those seen during the initial roll out of YOPH were often long-serving lifers who went in at a young age and had been repeatedly denied parole. Many were pretty well prepared and might likely have been granted parole at their next hearing, whether or not YOPH had been enacted, but the YOPH program brought them to hearings often sooner than in the natural flow of the system and perhaps provided that small, extra consideration that made the difference. In other words, they were the low-hanging fruit, waiting to be harvested via parole.

When DSL inmates, many of whom had never expected to be considered for parole and who often had impossibly long sentences that amounted, in all but legal language, to LWOP terms, often were unprepared for parole consideration. Shaffer noted the "significant disparity in grants" rate for DSL, a dismally low 4.7%, showed the unprepared nature of these prisoners and commented that CDCR, in light of these statistics was reassessing programming available.

Overall, YOPH parole grants given in the 16 months between January, 2014 and April, 2015 numbered 172. A relatively small number, but we're pretty sure all those 172 prisoners are pleased to have been a YOPH recipient. Also in the mix is relatively unmeasurable impact YOPH consideration had on denial lengths, as commissioners were required to consider all the factors of youth in assessing that aspect as well.

By the terms of **SB 260**, which put YOPH into place, all those eligible for youth hearings when the bill was enacted were to be scheduled for a YOPH hearing by July 1, 2015. Shaffer reported that there were 1,001 hearings scheduled to be held under YOPH between January 2, 2014 and the looming July 1, 2015 date. This, she reported, represented all those legally required to be held in that time frame.

Elder parole, implemented shortly after YOPH, have seen 847 hearings scheduled through April, 2015, only 26 of those for DSL inmates. Those DSL inmates appearing at hearings seem to exhibit the same problems and issues as those in YOPH hearings, and out of the 26 DSL elder hearings there were no grants; 180 grants were given to ISL elder candidates, through April of this year.

Results from both these specialized hearings point to the importance of preparedness, programming and readiness. While the results for both YOPH and elder parole are disappointing, especially in regard to DSL prisoners, it is well to remember that these new considerations put those DSL inmates in the hearing cycle; though denied at their first-ever parole hearing, those prisoners will now be seen by the board again, and can seek to advance their hearing dates through PTAs and Administrative Reviews.

Absent YOPH and Elder Parole programs, many DSL inmates serving determinate sentence terms of 50, 75, even 150 years would never have a chance at release via parole. For long-sentenced DSL prisoners that possibility would otherwise be out of reach. And even if not prepared at their first hearing, every subsequent parole hearing will be held with those specialized considerations in place.

Expanded medical parole, a wholly different aspect of parole, began in July of 2014 and through early May, 2015, some 46 hearings had been scheduled, equally divided between ISL and DSL inmates. Shaffer noted there was 'no significant difference' in the outcome this cohort between ISL and DSL, with 19 grants given, 11 for DSL and 8 for ISL. Those considered for expanded medical parole must be suffering from chronic and progressive illnesses that impact either their physical or mental condition to the point that extensive assistance is needed to perform the tasks of daily living. Such parolees are placed

***BPH* from pg. 31**

in skilled nursing facilities, capable of meeting both their health needs and any security concerns.

Non-violent second strikes, while now being reviewed officially by the BPH, do not experience the usual parole hearing format. Each eligible second striker is reviewed by CDCR classification and if found suitable for consideration their case is referred to the BPH where Deputy Commissioners review the files and make a determination as to release or not. These prisoners do not appear before a parole panel. Through the end of April CDCR had referred 1,622 cases for BPH review, with 282 approved for release and 243 denied. The remainder of the cases already referred are either still under review or have not as yet met the 50% time served benchmark required.

In response to speculation on how the 3 judge panel would view plea bargains that, as part of the agreement, required the defendant (and eventual prisoner) to waive right to consideration under any of the specialized parole processes, Shaffer offered that there is no good answer. Officially the BPH has no opinion on the issue and while there has been speculation on how the federal judges would look at such instances, as yet none has arisen.

An issue LSA has been repeatedly hearing is that of CRAs arriving late to the prisoner, often days before a parole hearing, leaving little time to read, assimilate and dispute any problems. These late-arrivals were caused in large part by the injection into an already crowded parole hearing schedule of the large number of hearings required to meet YOPH and Elder Parole timelines, according to Shaffer, exacerbated by the retirement/leave of several members of the FAD.

Replacement 'parts' (new FADers) have been hired and are being trained (we refrain from comment) and BPH expects CRAs to be back on a timely schedule shortly. Just what 'timely' entails remains to be seen, as those prisoners wishing to contest their CRA for factual errors will still be hard-pressed to achieve that goal if CRAs are being presented 65 days (the goal) in advance of a hearing.

The new board processes put into place to advance hearings (Petitions to Advance (PTA) and Administrative Review (AR), have brought more prisoners to hearings more often, with varying results. Between July, 2013 and the end of September, 2014 the Board received 1,412 PTA requests, of which 1,170 were reviewed on the merits of the request. Just over 67%, 790 requests, were approved, with an additional 10 seeing either the denial or stipulation length decreased via the PTA, and some 370 PTAs denied. Shaffer indicted the board may see a slight drop in the number of PTAs filed this year, as such filings are only permitted every 3 years and many who submitted their request in the first rush of the program and were denied are now about in the middle of the 3 year cycle.

The AR process, which automatically reviews every 3 year denial of parole for those prisoners with a low and/or moderate CRA risk evaluation around the one year mark after the denial, looked at 1,143 such denials since the process was begun in January, 2013. Sixteen were screened out right away, those prisoners having received RVRs since the hearing date and thus not eligible for advanced consideration. Of the remaining, over 72% (818) did receive an advanced hearing. Figures on the success rate of hearings held in response to a PTA or AR were not available at the time of the meeting, but we have requested those numbers when tabulated.

In wrapping up the year Executive Director Shaffer touched on many of the changes the BPH has seen regarding notices, technological upgrades and training for both commissioners and inmate attorneys, as well as acknowledging several problems, some still on going, with those changes. Inmate attorneys still report problems getting their laptops into hearings and issues with gate clearances and Shaffer indicated the BPH is working on those issues, among others.

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BPH

EN BANCS IN APRIL & MAY

Actions by the parole commissioners at en banc hearings in April and May proved once again that simply being terminally ill, even in the eyes of CDCR medicos, is no guarantee of compassion or release by commissioners. In the two months time commissioners were asked to consider so-called compassionate release of 3 individuals, and all three came away still in CDCR custody.

April's Executive Meeting saw consideration of **David Moreno**, reportedly serving a 3 strikes sentence for robbery being met with skepticism by the board, which asked the Correctional Health Care Services (federal receiver's office overseeing prison health care) to confirm Moreno's condition qualifies him for consideration of release under PC 1170 (e). Despite pleas from a succession of family members offering to care for Moreno the board felt more information was needed.

The following month, May, **Bruce Fragosa** received similar scrutiny when the board asked the CHCS for more information on reported improvement in Fragosa's condition as well as the 'onset of his medical decline." A parade of VNOK opposed the consideration, all decrying the 'release' of Fragosa, including a victim advocate from Santa Barbara County. **Charles Villacres**, being considered under the same prospects, was denied release based on the commissioners' concern that Villacres was still ambulatory and had not participated in sufficient substance abuse programs.

Both months saw the continuation of a recurring theme with the board, confirmation of a denial of parole but rescheduling of a hearing for the sole purpose of recalculating term. These 'hearings' are held when the term calculation was discovered to be incorrect, usually due to the wrong matrix factors being used in the calculation and are only held when the recalculated term will mean a longer incarceration. **Kenneth Arnold, Kelly Eastman** and **Jamil Howard** found themselves in that slot in April with **Eric Beauchamp, Grady Breazeale, Keith Hart**, and **Kinglsey Williams** joined the 'whoops' crowd in May. And it's getting to be quite a crowd, as each month's meetings seem to feature 3-5 en bancs for the same reason.

Good news in April for **Leonard Cole** and **Robert Jeff**, and **Leonard Martinez** and in May for **Charles Chruniak**, all of whom saw their previous grants reaffirmed by the commissioners after the Governor requested reconsideration via en banc. Also breathing a sigh of relief was **Kenneth**

Renfrow, brought back in April for en banc consideration of his grant on an accusation of using fraudulent documents at his hearing. The board, after review of an investigation of the charges, found insufficient evidence to support the allegation and affirmed the grant.

Not so good news in April for **Kenneth Ferguson,** as the board referred his grant for recession hearing to consider whether the prisoner had sufficiently addressed his anger issues and ordered an investigation into Ferguson's programming regarding domestic relations. Ferguson had been down this road before and his last hearing was by court order. His attorney, Marc Norton, took all parties sternly to task for revisiting the same fallow ground again and requested the vote of each commissioner be recorded and reported. While the board didn't exactly comply with Norton's request, the decision did note the motion to refer for recession came on from Roberts, with a second by Garner. While the decision noted 'motion approved by a majority of commissioners present, it also reported Peck and Turner abstained and LaBahn was absent.

Also getting a second look will be **Dale Kincheloe,** based on new information to the board at the May meeting regarding his mental condition and alleged refusal to take prescribed medication. Kinchloe's attorney, Keith Wattley, informed the board there was an error in Kincheloe's CRA and there had been no refusal on the prisoner's part to take medication. Nevertheless the board vacated the grant and ordered a new hearing scheduled.

The final en banc consideration was something of a pro forma, with **Dirk Davis**, a long ago released and discharged prisoner, seeking the board's support in his application to Governor Brown for a pardon. Davis, now a college professor and an academic dean, received a favorable recommendation from the commissioners in his application to Brown.

Board's Information Technology System

Commissioners Summary
All Institutions
April 01, 2015 to April 30, 2015

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FRITZ	GARNER	LABAHN	MINOR	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	34	30	28	17	35	35	39	30	29	30	16	42	101	466	5	461
Grants	7	8	4	3	8	7	8	5	11	9	8	8	0	86	0	86
Denials	16	18	15	11	18	17	14	19	10	16	7	18	1	180	2	178
Stipulations	2	3	4	1	3	3	5	5	3	1	0	5	0	35	1	34
Waivers	0	0	0	0	0	3	0	0	0	0	0	1	35	39	0	39
Postponements	9	1	2	0	4	5	9	0	4	3	0	10	49	96	0	96
Continuances	0	0	3	0	2	0	3	0	0	1	1	0	0	10	2	8
Split	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	2	0	0	0	1	1	0	0	0	16	20	0	20

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

Subtotal (Deny+Stip)	18	21	19	12	21	20	19	24	13	17	7	23	1	215	3	212
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	9	6	16	10	9	11	13	9	7	8	6	14	0	118	2	116
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	8	9	3	2	8	6	3	7	6	9	1	5	1	68	1	67
7 years	1	4	0	0	4	2	3	4	0	0	0	0	0	18	0	18
10 years	0	1	0	0	0	1	0	4	0	0	0	4	0	10	0	10
15 years	0	1	0	0	0	0	0	0	0	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	0	0	0	0	0	3	0	0	0	0	0	1	35	39	0	39
1 year	0	0	0	0	0	3	0	0	0	0	0	1	19	23	0	23
2 years	0	0	0	0	0	0	0	0	0	0	0	0	8	8	0	8
3 years	0	0	0	0	0	0	0	0	0	0	0	0	8	8	0	8
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Postponement Analysis per Commissioner

Subtotal (Postpone)	9	1	2	0	4	5	9	0	4	3	0	10	49	96	0	96
Within State Control	1	0	0	0	2	1	4	0	2	1	0	0	37	48	0	48
Exigent Circumstance	8	1	0	0	1	1	5	0	1	0	0	10	7	34	0	34
Prisoner Postpone	0	0	2	0	1	3	0	0	1	2	0	0	5	14	0	14

Board's Information Technology System

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

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FRITZ	GARNER	LABAHN	MINOR	MONTES	PECK	RICHARDSON	ROBERTS	SINGH	TURNER	ZARRINNAM	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	**27**	**30**	**30**	**21**	**22**	**33**	**30**	**26**	**31**	**29**	**29**	**26**	**121**	**455**	**0**	**455**
Grants	9	10	3	8	5	7	11	3	3	8	11	7	0	85	0	85
Denials	12	18	15	11	13	20	15	17	22	15	17	15	0	190	0	190
Stipulations	1	2	0	1	4	3	2	6	1	4	0	3	0	27	0	27
Waivers	1	0	0	0	0	2	0	0	1	0	0	0	41	45	0	45
Postponements	4	0	7	1	0	1	2	0	4	1	1	1	71	93	0	93
Continuances	0	0	5	0	0	0	0	0	0	0	0	0	0	5	0	5
Split	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	1
Cancellations	0	0	0	0	0	0	0	0	0	0	0	0	9	9	0	9

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

Subtotal (Deny+Stip)	**13**	**20**	**15**	**12**	**17**	**23**	**17**	**23**	**23**	**19**	**17**	**18**	**0**	**217**	**0**	**217**
1 year	0	1	0	0	0	0	0	0	0	0	0	0	0	1	0	1
2 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
3 years	10	13	8	10	10	17	13	12	13	13	11	11	0	141	0	141
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	2	4	4	1	7	5	3	8	4	5	4	7	0	54	0	54
7 years	1	2	1	1	0	1	1	1	4	0	2	0	0	14	0	14
10 years	0	0	1	0	0	0	0	2	2	1	0	0	0	6	0	6
15 years	0	0	1	0	0	0	0	0	0	0	0	0	0	1	0	1

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	**1**	**0**	**0**	**0**	**0**	**2**	**0**	**0**	**1**	**0**	**0**	**0**	**41**	**45**	**0**	**45**
1 year	1	0	0	0	0	2	0	0	1	0	0	0	30	34	0	34
2 years	0	0	0	0	0	0	0	0	0	0	0	0	8	8	0	8
3 years	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	2
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	1

Postponement Analysis per Commissioner

Subtotal (Postpone)	**4**	**0**	**7**	**1**	**0**	**1**	**2**	**0**	**4**	**1**	**1**	**1**	**71**	**93**	**0**	**93**
Within State Control	1	0	2	0	0	1	1	0	4	1	0	1	67	78	0	78
Exigent Circumstance	3	0	5	1	0	0	1	0	0	0	0	0	3	13	0	13
Prisoner Postpone	0	0	0	0	0	0	0	0	0	0	1	0	1	2	0	2

Lifer Scheduling and Tracking System

Board of Parole Hearings
Lifer Prisoner Parole Consideration Hearing and Decision Information
For the Calendar Year 2014

	ISL	DSL	Total Hearings	January Hearings	February Hearings	March Hearings	April Hearings	May Hearings	June Hearings	July Hearings	August Hearings	September Hearings	October Hearings	November Hearings	December Hearings
Total Scheduled Hearings	**7949**	**138**	**8087**	**715**	**626**	**756**	**693**	**730**	**663**	**672**	**595**	**505**	**735**	**597**	**800**
Suitability	4705	6	4711	422	407	353	383	431	430	404	335	372	438	341	395
Other Hearing Types*	3244	132	3376	293	219	403	310	299	233	268	260	133	297	256	405
Scheduled Hearings	**7949**	**138**	**8087**	**715**	**626**	**756**	**693**	**730**	**663**	**672**	**595**	**505**	**735**	**597**	**800**
Suitability	4705	6	4711	422	407	353	383	431	430	404	335	372	438	341	395
PTA	1819	0	1819	219	154	224	199	206	154	161	103	26	151	136	86
Consultation	1219	127	1346	57	46	163	96	69	66	93	145	80	125	106	300
3 Year Review	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
En Banc	109	0	109	6	7	6	7	16	5	7	10	15	11	11	8
Rescission	10	0	10	3	0	1	0	1	0	0	0	1	1	1	2
Progress	40	1	41	4	9	4	4	4	5	2	2	2	1	1	3
PC 3000.1	28	3	31	3	1	3	4	0	1	4	0	4	7	0	4
PC 1170	19	1	20	1	2	2	0	3	2	1	0	5	1	1	2
Documentation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Suitabilty Hearing Results	**4705**	**6**	**4711**	**422**	**407**	**353**	**383**	**431**	**430**	**404**	**335**	**372**	**438**	**341**	**395**
Grants**	902	0	902	89	83	72	86	85	88	92	65	56	81	47	58
Split Decisions	8	0	8	0	0	2	2	0	2	0	0	0	1	1	0
Denials	1807	0	1807	130	123	131	142	193	160	159	144	167	179	127	152
Stipulations	284	0	284	19	22	17	28	24	26	36	13	31	24	18	26
Voluntary Waivers	512	0	512	71	55	38	35	32	40	51	49	39	38	34	30
Postponements	843	1	844	88	93	67	73	72	79	39	45	54	66	81	87
Within State Control - PP	572	1	573	60	72	44	56	45	53	25	34	35	38	63	48
Exigent Circumstances - PP	114	0	114	12	9	6	9	9	9	5	2	6	14	6	27
Inmate Requested - PP	157	0	157	16	12	17	8	18	17	9	9	13	14	12	12
Cancellations	287	5	292	21	24	24	13	21	29	22	12	22	42	28	34
Continuances	56	0	56	4	6	2	1	4	6	5	6	2	7	5	8
Term Calc	6	0	6	0	1	0	3	0	0	0	1	1	0	0	0

*Note: Other Hearings includes: PTA, Consultation, 3 Year Review, En Banc, Rescission, Progress, PC 3000.1, PC 1170, Documentation

**Note: The number of Grants is comprised of the number of results occurring during the scheduled hearings. It does not represent the number of inmates released. If the inmate had a future release date he/she would have remained in custody until that time.

The values in this report may differ from those previously published due to application updates.

***BPH* from pg 33**

WHERE THOSE QUESTIONS COME FROM

Having sat through more parole hearings than we care to count and read thousands of pages of transcripts, we've come to suspect, along with many Lifers, that parole commissioners follow something of a script in conducting hearings. Not just an agenda or outline, but familiar phrases and queries continue to crop up.

As part of recent training sessions parole commissioners were given a refresher course on interviewing techniques by Chief Counsel Howard Moseley. Moseley advised the commissioners to use 7 interview techniques for the most efficient and productive hearing.

Rapport Building and Information Gathering are the initial phases of the hearing. Rapport building is done not to develop a deep friendship between commissioner and inmate, but to alleviate (to some extent) stress in the situation, which can block recall of information and to establish a mutual communication. Commissioners were advised not to talk down to anyone participating in the proceeding or use too much jargon.

When the hearing moves on to Information Gathering, open ended questions are favored, as these allow the responder to use their own words and tell their own story. This is where to questions "Tell me about…," "What happened then," or "Why did you do that?" come into play.

Following initial Information Gathering it may be necessary to Refocus the Interviewee and Seek Clarification. If you stray too far off topic commissioners will often bring you back focus with questions such as "Sorry to interrupt, but can you speak more about.." or "Thank you, but I'd like to redirect your attention to.." Those are the times you know you need to discipline your thoughts, listen more closely to the question and provide more succulent and on point answers.

Commissioners will often revisit the same information in an attempt to seek clarification (Can you explain what you said earlier/ Can you tell us more about…) both in an effort to more fully understand information offered, but also to check the veracity and consistency of what's being said. Lifers often view these questions as attempts to trip them up, and so they can be, if you're trying to slide by or shade your responses. But they are also an opportunity for you to increase the commissioners' understanding of you and allow you to recover additional details from your memory, as you revisit the subject again.

The panel will then move on to Assessing Knowledge (that would be your knowledge of yourself and your programming) and Testing Future Plans (do you really have the tools to get along in society). They will check your knowledge by asking what lessons or tools you gained from specific programs, and your future plans by questioning how you will use that knowledge and tools and how you put those in practice.

The last, and perhaps most intimidating portion of the interview is Challenging the Interviewee. This is when insight is often most clearly displayed. Comparisons of past and present self, recounting how you've handled difficult situations in the (recent) past and details of how your relapse plan is tailored especially for you (and not cookie cutter) can be the capstone of a good hearing.

So when at your next hearing and the presiding commissioner tells you you're straying from the question, asks you to elaborate on your explanation or wants to know just what you plan to do when you're released, know that it isn't personal, harsh as it may seem. So take a breath, marshal your thoughts and respond. And remember, commissioners are individuals, some are more 'likeable' than others—and some, not so much.

SAVE THE DATE—MAYBE

Getting to a parole hearing is an arduous task, and not only for the lifers coming up for consideration. Scheduling is always iffy and something of a mystery. Rescheduling of postponed, cancelled or continued proceedings seems to be unpredictable and random, leaving everyone guessing about when they'll meet again.

With a nod to that confusion BPH staff at a recent meeting laid out how scheduling of hearings is done, the various considerations that go into setting a date and why, once determined, the date can change. Many of the first considerations are procedural, from is the 'No Later Than' date correct to whether the last hearing was continued and if so, have the issues causing the continuance resolved?

BPH from pg. 37

Next comes figuring out when and how many commissioners will be available at the institution, as there are 3 categories of institutions. Ten prisons (ASP, CCWF, CIW, CMC, CTF, CVSP, SOL, SQ and FOL) are scheduled at a rate of 2 hearings per day, the rest are set at 3 per day. But then there are the remote prisons, (CMC, CTF, SVSP, CSVP, HDSP, CCC, ISP and PBSP) that require more travel time allotment. Other factors that impact scheduling are holidays, commissioners on vacation or leave, monthly board meeting and bi-annual training days and any local events, either at the prison or the community that would impact travel, lodging or availability of personnel.

After plugging all those factors into a blank calendar the scheduling system then send out required notices to everyone concerned, from prison staff, VNOK, FAD and ADA. And, we assume, although this was not mentioned, the prisoner involved, as well.

Assuming the tentative date has now been set, the actual holding of any given hearing can be impacted by a whole list of events, from waivers/postponements by the inmate, to a court-ordered hearing, to substitution of counsel. When all these swirling factors finally are computed and the dust settles, Viola, a hearing date!

Unless~there is a last minute emergency. Or the inmate is transferred. Or there are last minute additions to the calendar. In which case, the process begins again.

CHANGING YOUR ATTITUDE AND PRESENTATION

Oftentimes the way others see you is far different than how you think you're perceived. Off-hand, flippant comments that come from your mouth, not your brain, can cause more problems than you imagine. And once you develop a habit or pattern of these traits, they are hard to change and even harder to mask when you want to come across your best—at, say, a parole hearing. Below is advice from life coaches and motivational leaders on ways to make a good impression.

Say less than you're thinking. Don't let your tongue skid out of control. Use a low, calm voice that reflects the peace and confidence you feel inside.

Don't neglect to acknowledge good actions of others, be encouraging and not spiteful.

Be genuinely interested in others; no one is too unimportant for you to notice.

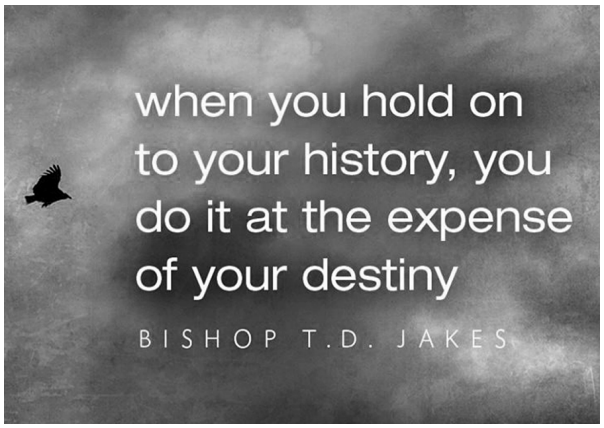
The mark of a superior and mature mind is to be able to disagree without being disagreeable; discussion needn't lead to argument, even when those in the discussion disagree.

Humor and sarcasm at another's expense is costly—to you, making you look small and needy.

Everyone, especially in prison, is carrying some sort of emotional load, so don't dwell on yours or burden others with your pains and disappointments.

Comport yourself so that no one will believe negative rumors or gossip about you. Reacting to such tales makes you appear too anxious to cast yourself in a good light.

Let your virtues speak for themselves and don't be too anxious to claim credit 'due' you. When others acknowledge your deeds and actions, without prompting, the value of that acknowledgement is increased.



BPH & CDCR- from pg. 38

WATCH YOUR BACK

By now all prisoners, especially lifers, should know the dangers of possessing a cell phone, particularly in terms of impact on parole hearings. Recent write-ups for cell phones can easily be the primary reason for a denial or the imposition of a longer denial length. And as a reminder, possession of a cell phone, once a rules violation, is now, in fact an actual crime, albeit a misdemeanor.

So it should come as no surprise that DAPO personnel, assigned to the BPH as investigators, have begun a push to look into those lifers who are engaged in social media. Facebook, MySpace, Mocospace, Twitter, just to name a few. Think you're on the down-low when you post pictures of yourself and others, just because you're using a nickname and no one would think to look for you? Think again.

At a recent BPH Executive meeting commissioners heard a brief report noting that investigators have been able, via subpoena of various social media sites, to get ISP addresses and track individual devices via cell tower pinging, sometimes to cell towers located just off prison grounds. Yeah, and it probably isn't staff posting images of inmates.

In recent months LSA has watched more than one lifer granted parole see his date jeopardized by alleged misconduct involving phone/social media, sometimes on a seemingly second-hand basis. We've reached out to the BPH for clarification on what constituted actionable social media participation by lifers---if you're doing selfies, or posing for another's cell phone clearly you're a thrill seeker and risk taker.

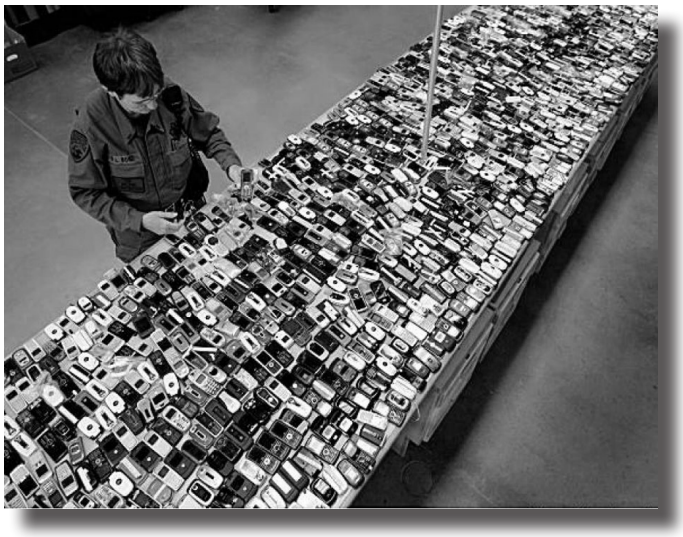
But what if you're caught in the background of a posted image? What if a relative maintains a FB page for you, posting photos, even legit ones, on that page? Does that, in BPH eye, constitute a rules violation?

In response to our queries BPH administration has indicated that they will be looking for unquestionable, direct participation by lifers in social media, and the investigators maintain they have little trouble making the determination on what is direct and what is indirect. While officials related there have only been 'a handful' of investigations so far, more could be in the works. And interestingly, those that seem to cause the most angst and problems are when lifers recently found suitable for parole are too excited to wait for a wall phone call to their family and use a cell phone to make that call.

That slight lapse could, and has, cost more than one lifer his grant. Similarly, even if you don't own a phone but allow yourself to be photographed inside your housing unit and send that photo via email to a relative, who then posts it on social media, that is likely to be considered direct involvement. Poof goes your date.

Whether you wish to continue to let someone on the outside manage a social media page for you is a decision only you can make. If all the photos or posts on that page are legit, pictures from visiting, second hand reports on how you are~those might be safe. But, if you're granted a parole date, those same pages might trigger BPH to take a closer look at you.

We offer this information, not to help anyone circumvent rules against cells, but just to give everyone, cell owner or not, a heads up on what can happen. Be aware, be very aware.



BPH and CDCR from pg. 39

A PERSPECTIVE ON ELDERLY PAROLE

As noted elsewhere, SB 224, a bill to codify and, as originally written, to expand the perimeters of Elderly Parole, was recently withdrawn from legislative consideration by its author, Sen. Carole Liu. With this action, which means codification of the process won't be considered until 2016, it might be well to reflect briefly on what that 'elderly' population in CDCR looks like.

At last official update there were, according to the department, 35 prisoners still in California prisons who are identified by numbers starting with "A." Ages within this elite club of "A" numbers range from 90 years old and a couple in their 80s, to a couple of relative youngsters, at 67 years old and less than half dozen in their late 60s. The rest populate the years in the 70s and 80s. The average age is 74, some have been incarcerated since 1955.

And although some of these long-timers may be serving LWOP or sentences for crimes that otherwise would exclude them from elder parole consideration, those odds are low. Even though the version of SB 224 that was withdrawn had been considerably scaled back, from the original proposal to cover those aged 50 years and over and with 15 years or more in, to simply meet the definition of elderly currently in use by the BPH (60 years and older with 25 years in), passage of even the amended version of SB 224 would impact most of this A group.

Some, over half, could even become double-dippers; not only would they qualify for elder parole, but for Youth Offender Parole Hearings as well. Only 16 of the 35 were 23 or over, ages that would not be covered by the expanded version of SB 261 that seems on the way to passage this session, and 7 of those were just 23, barely outside the consideration. One committed his offense at the hardened age of 15, fully a third were in their teens and the oldest two were 31 when their crimes were committed. Moving on to "B" numbers, there potential impact of el-

BPH and CDCR- from pg. 40

der parole really starts to show. There are 717 prisoners identified with the "B" prefix, ranging in age from mid-50s to 80s. When scanning through the pages (36 pages to be exact) of B numbers on CDCR's website, it becomes apparent that while not all this cohort would be caught if the net of elder parole were expanded, there are many who would qualify.

At present, while elderly parole consideration for those 60 years and older and with 25 years or more of incarceration time continues, plans to expand those guidelines are on hold until January, when the bill will hopefully be reassessed. And even if the age and time served markers remain where they currently are for elder parole, it is important to pass this bill, to codify elder parole considerations, put them into the law, so that this reasonable and practical process will not disappear with the cessation of federal oversight or change of administration at the BPH.

BPH and Politics

WHO SPEAKS IN VICTIM CAPACITY

Always of great interest and consternation at hearings is the impact statement of victims and victims' family members made at the end of the hearing. While in no way of minimizing the pain and loss of victims or impugning their right to participate in the parole process, we have seen those impact statements devolve into accusations of uncharged offenses, sheer speculation on the future behavior of prisoners, even threats.

Acknowledged by all parties is the increasing attendance at hearings by victims in recent months. Not only are victims attending more often, but it appears more victims or victim related individuals are requesting clearance to attend. Indeed, LSA has not been able to attend several parole hearings because of the numbers of victims in attendance at some hearings.

Often contributing to the confusion, emotion and even length of the hearings has been the propensity of all those attending hearings on the part of victims entourage to expect to offer up statements on everything from the impact of the crime (allowed and relevant) to the individual's projections or imagination of what a Lifer might do in the future. And since Marsy's Law each victims' family member is allowed to bring both an individual designated as a 'supporter' and up to two others who will be the 'representatives' of that family member at the hearing. The representative is allowed to speak on behalf of the family member, while the supporter is there to provide emotional support to the family member only and is not there to actually participate.

Because of issues arising more often at hearings the BPH recently issued an Administrative Directive delineating the role of victims' support persons. The directive also defines as immediate family, those authorized by law to not only attend the hearings and speak (or have a representative speak for them), but to have a support person as well.

The directive defines 'immediate family' as "the victim's spouse, parent, grandparent, brother, sister and children or grandchildren who are related by blood, marriage or adoption." It is those individuals alone who are both entitled to attend parole hearings and speak or designate representatives (who may or may not be attorneys) to speak to the panel on their behalf. As noted in I PC Section 3043.3 a designated family member "shall be entitled to the attendance of one person of his or her own choosing at the hearing for support. The person so chosen shall not participate in the hearing nor make comments while in attendance."

Thus, regardless of how many victims/family members and supporters (one each, according to the law) attend the hearing, only the actual family members as defined or their officially designated representatives may speak to the panel. And while the law is pretty broad as to what they can speak about (and that, unfortunately, includes often baseless speculation on what might happen if the prisoner is found suitable and released, imagined crimes not charged and other 'defects of character') the same law also makes it clear that attorneys acting as representatives "may express the views of his or her client concerning the prisoner or the case"; in other words, the opinions expressed by an attorney acting as a representative must be those of the client and not the attorney.

The same section also gives direction to those prosecutors/DAs who might be representing victims at proceedings. Specifically, the citation notes those acting in this

BPH & Politics- from pg. 41

capacity must "express the views of the individual or individuals the prosecutor is representing." Thus, those DAs acting as a representative for a victim in a parole hearing must contain their remarks to the impact of the crime on the victim/family member. It is not an opportunity for a second closing statement or offer up his/her own views on the matter.

Hopefully these directives will provide some guidance and assistance to commissioners often faced with a phalanx of individuals, victims, family, representatives and supporters, all of whom want to offer up their contribution. We have seen and read instances in which tennis partners of the victim, babysitters employed by the victim and friends of victims' family members who may never have met the prisoner under consideration for parole have spoken on subjects from the crime rate in general to questions as to why parole hearings are even held (our response to that is, "It's the Law").

Such ancillary comments, from individuals seeking an opportunity to weigh in on a situation about which they may have little if any knowledge, often add nothing factual or probative value to the hearing, but do intensify the emotional atmosphere and add considerably to the length of the hearing.

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COMMISSIONERS CONFIRMED, AMID RECOMMENDATIONS

Confirmation hearings for seven of 12 parole commissioners were held recently before the Senate Rules Committee in Sacramento. And Life Support Alliance/California Lifer Newsletter presented one of only two commentaries offered at the hearing on the 'suitability' of commissioners, and the only prisoner advocate to speak. The other voice? Crime Victims Action Alliance.

Over the life of LSA/CLN we have taken various positions on various commissioners, understanding that no commissioner always makes decisions we agree with. We also recognize that we cannot, if we hope to maintain creditability in the legislature and administration, always oppose every confirmation. And, after having attended more hearings than we'd like to count, and probably more than any given prisoner will ever have to endure, we've found several commissioners actually make understandable and responsible decisions.

So we pick our battles, support those commissioner who we feel, after observation, study and consultation with inmate attorneys, do a reasonable job. Others, who maybe aren't quite egregious enough to oppose, or reasonable enough to support, we remain ambivalent on but lay out our concerns for the Senators. And still others we will flatly oppose.

As we related to the Senators, "Our decision to oppose, support or take no position on any given commissioner is not based on the percentage of grants or denials of parole given. We have long maintained that if the laws, procedures and court directives are followed by commissioners the parole grant rate will find its own balance and we believe events of the past few years have borne this out. We arrive at our conclusions not by emotion but by fact and analysis."

Such was the case at the recent hearing. And while all were confirmed, a situation we expected in advance, it is nonetheless important to lay before both the Senators and the expectant commissioners, our concerns. Support from LSA/CLN is hard-won, but three commissioners, John Peck, Terri Turner and Brian Roberts, got a thumbs up This doesn't mean we've thrown in the towel, but that

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we recognize and acknowledge those commissioners who are making an effort.

Two commissioners, with whom we have no huge beefs, but have either true concerns or simply not enough feedback yet, Jack Garner and Michele Minor, respectively, got something of a pass. And two others, however, Marisela Montes and Amrit Sigh, were singled out for our opposition, all for reasons delineated later.

As mentioned, CVAA was also there to offer up their recommendations, which were, interestingly, almost in direct opposition to ours. Imagine.

While LSA/CLN supported Turner and opposed Singh, CVAA's recommendations to the Senate Committee were the reverse. CVAA opposed Turner because, in their eyes, she granted too many dates and did not give enough consideration to the family of victims. Turner's grant rate is about 30%, not far from the average of all commissioners and in the many hearings we have attended where Turner has been the presiding officer we have never observed the commissioner to be less than unfailingly polite and considerate to all factions.

But what seemed be stick in the craw of CVAA was the BPH Executive Board meeting in February of this year. As reported in the last issue of CLN, the public comment portion of the meeting, always the last item on the agenda, took on a bit of revivalist flavor, when Susan Burton, director of A New Way of Life transitional center in Los Angles brought several residents of her program, all former lifers, speak to the board on their experiences and success since parole. As innocent and uplifting as that sounds, CVAA still found reason not only to take umbrage at the events, but to mischaracterize and exaggerate those circumstances.

The junior Republican Senator on the committee, Anthony Canella (R-Yuba City), opened his questions to Turner by asking her to respond to a letter by his office from CVAA at the 11th hour. The letter, according to Canella, accused Turner of 'raising her fist in solidarity' with one of the former lifers from A New Way of Life. The letter left the impression, at least in Canella's mind (though it quickly became obvious that the junior senator had very little understanding of the BPH process) that this alleged display of 'solidarity' (i.e. favoritism) came during a parole hearing.

Canella indicated he had received the letter only late in the previous day. OK, so that was the allusion/impression/assumption. Now for the facts.

As previously reported, the member of A New Way of Life spoke at the February BPH meeting (not to be confused with an actual parole hearing) and credited much of her life change and outlook to her religious faith. She spoke movingly of how that faith had sustained her through her incarceration and continued to guide her in her new life. Her testimony left many on the board and in the audience moved and prompted several quiet calls of "Amen" at the close of her remarks. This, apparently, was what CVAA found objectionable.

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After Sen. Canella was assured that 1) No fists were raised, certainly not Turner's, and 2) the entire situation did not happen at a parole hearing he retreated from the subject. The Senator, did, however, appear a bit chagrined, and allowed as how perhaps the letter to his office had misinterpreted the events. Could be, Senator.

On the whole, the confirmation hearings went pretty much as we expected, with the only unusual factors being the separation of Turner and Peck from the pack of 7 sitting for confirmation for individual votes. Peck, like the 5 other commissioners considered as a body, was confirmed on a bi-partisan 4-0 vote, with Canella voting in favor. Turner, considered alone for a vote, passed on a 3-0 vote, with Canella abstaining. The senior Republican member and committee co-chair, Sen. Jean Fuller (R-Bakersfield) absent throughout the hearing.

So all 7 sitting commissioners were confirmed for the remaining two years of their 3 year term. Barring resignation of a sitting commissioner, the denizens of the BPH will remain the same, at least for the next couple of years. Sometime within the next 12 to 24 months the remaining commissioners not reappointed and reaffirmed with this batch will be up for reappointment by the Governor.

Barring change from attrition, resignation or other exigent reasons, the next group of commissioners to sit in the hot (at least we'll try to make it pretty warm) seat of confirmation will be Arthur Anderson, Ali Zarrrinam, Elizabeth Richards, Peter LaBahn and Cynthia Fritz.

SUPPORT OR OPPOSE AND THE REASONS WHY

Below is the substance of remarks and recommendations from LSA/CLN to the Senate Rules Committee as that body recently considered confirmation of 7 parole commissioners. In an accompanying article elsewhere in this issue the results of that committee vote and other relevant information regarding confirmations can be found.

Commissioner John Peck: Support. Mr. Peck interacts well and easily with all parties including inmates and inmate counsel, as well as victims. He is unpretentious and unflappable, courteous, but in control of hearings. He is respected by all factions in the parole process, including inmates who appear before him, in no small part because he is open and honest with them.

Commissioner Terri Turner: *Support.* Commissioner Turner who also interacts in a positive way with prisoners and inmate attorneys, while providing respect to all parties and conducting efficient hearings. Her efforts to engage nervous and inarticulate prisoners to reach a real understanding of their life change is encouraging and appreciated.

Commissioner Brian Roberts: *Support*. While we opposed Commissioner Roberts at his first confirmation, we have seen considerable growth and development in his decision making process and demeanor at hearings and we now support his confirmation. Mr. Roberts is fair and open with prisoners and willing to provide them with direction in their journey to suitability.

Commissioner Jack Garner: *No position*. While many of his past decisions were well reasoned and he has shown considerable development of judicial process and understanding, his attention to detail is frequently less than rigorous, which causes us concern.

Commissioner Michele Minor: *No position*. We have not as yet had the opportunity to observe her at hearings and transcripts from hearings where she has presided are too few for us to arrive at a conclusion. However, input from our attorney partners is generally positive.

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Commissioner Marisela Montes: *Oppose.* Commissioner Montes' hearings are often very lengthy affairs, which cover relatively minor issues in minute and unnecessary detail, adding nothing to the hearing but time. But of greater concern is her propensity to be argumentative and dismissive of inmate counsel and their objections, exemplified by her remarks to one attorney that the proceedings would be faster if he would not object. We also feel her criticism and characterizations of inmates who file appeals within the system as being 'manipulating' and still fighting that system is both prejudicial and ill-advised. Inmates are entitled to file appeals and should not be penalized or criticized for doing so.

In denying parole Commissioner Montes is apt to cite as a reason, in her words, her own personal "speculation" that an inmate will reoffend. The commissioner is of course entitled to her opinion and to deny parole, but such denials are to be supported on factual determinations, not based on personal 'speculation.'

Her frequent requests to inmates convicted of cell phone usage to provide details of how the phone was acquired or names of other inmates with cell phones puts prisoners in an untenable, even dangerous, position and is inappropriate. It is not the job of a parole commissioner to conduct an internal investigation.

Commissioner Amrit Singh: *Oppose*. A former District Attorney, Commissioner Singh often reverts to her role as prosecutor in hearings, her demeanor toward inmates and inmate attorneys often bordering on that of a cantankerous judge when counsel offers more than cursory objections. The Commissioner frequently will rely on old information, often years old, to sustain a finding of lack of insight and she fails to fully consider the impact of factual errors in psychological evaluations.

Commissioner Singh has allowed inmates to be retained in restraints throughout lengthy hearings based simply in SHU housing despite the inmate's last disciplinary for violence having been issued more than 20 years ago. For the past two years she has handed down more 15 year denials than any other commissioner—last year the entire 12 member board issued only nine-15 year denials; Commissioner Singh was responsible for 4 of those. Overall her denials of parole tend to be for longer periods of time than her fellow commissioners, a fact that cannot be adequately explained as simply the character of prisoners appearing before her.

Perhaps most troubling is the Commissioner's often repeated comment that 'everyone relapses'. Such blanket statements are not only prejudicial, they are incorrect. Also of concern is the Commissioner's inability to understand and apply the connections between events in the inmate's life, perhaps those experienced when the prisoner was young, and the eventual crime. This, we feel, exhibits the same lack of insight, on the Commissioner's part, for which she frequently denies parole.

IRONWOOD MAKES OUR DAY

Our great thanks and appreciation to the lifers at Ironwood State Prison, who recently made LSA the recipient of a great boost to our funding, morale and helped enable us to keep on keepin' on.

A much appreciated and welcomed check for just over $1,500 came our way, courtesy of the Long Termers Group. Your contribution not only helps our coffers, but feeds our hearts and commitment. Thanks, Iron-men at Ironwood—LSA believes in lifers and we plan to see some of you soon!

BOARD OF PAROLE COMMISSIONERS

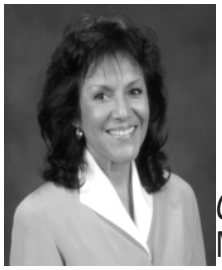
Some Lifers have asked us "what does Commissioner XXX look like?"and more than one had it very wrong (like male or female?). So here they are...

Commissioner
Arthur Anderson

Commissioner
Michele Minor

Commissioner
Brian Roberts

Commissioner
Cynthia Fritz



Commissioner
Marisela Montes

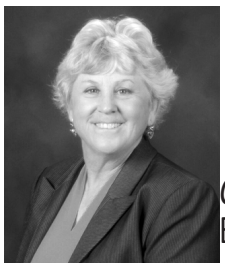
Commissioner
Amarik Singh

Commissioner
Jack Garner

Commissioner
John Peck

Commissioner
Terri Turner

Commissioner
Peter LaBahn



Commissioner
Elizabeth Richardson

Commissioner
Ali Zarrinnam

BPH -

ATTORNEY SURVEY- State or Private

Life Support Alliance is seeking information on the performance and reliability of Lifer attorneys in the lifer parole hearing process. Please fill out the form below in as much detail as possible, use extra sheets if needed. Please include your name, CDC number and date of hearing, as this will allow us to request and review actual transcripts; your name will be kept confidential if you desire. Details and facts are vital; simple yes or no answers are not probative.

NAME*_____ CDC #*_____ HEARING DATE*_____

COMMISSIONER_____ Deputy Commissioner _____

GRANTED/DENIED(YRS)_____INITIAL/SUBSEQUENT_____

EVER FOUND SUITABLE/WHEN_____

ATTORNEY_____STATE OR PRIVATE_____

HRG. LOCATION_____ PRIVACY with ATTORNEY _____

MEET BEFORE HRG?_____HOW MANY TIMES?_____

TIME SPENT CONSULTING_____FAMILIAR WITH YOUR CASE? _____

_____

OBJECT TO MARSY'S LAW?_____ OBJECT TO PSYCH EVAL?_____

LANGUAGE PROBLEMS?_____ WAS ATTORNEY PREPARED?_____

WOULD YOU HIRE OR RECOMMEND? _____ FILE A COMPLAINT? _____

Please provide details regarding attorney's performance, or lack of, including interaction with parole panel and/or any DAs present. Was attorney attentive during hearing, did s/he provide support/advice to you? Was s/he knowledgeable re: your case and/or parole process?

_____

_____

_____

_____

Mail to CLN/LSAPO Box 277, Rancho Cordova, CA. 95741.
We appreciate your help in addressing these issues.

Politics

SB 224—WHAT HAPPENED

As introduced at the beginning of this legislative session by Sen. Carol Liu (D-Glendale) SB 224 would have expanded the reach of elderly parole consideration from the present 60 years of age and 25 years incarceration to apply to those prisoners 50 years of age and who have served 15 years. LSA was an early supporter of this effort and spoke with Sen. Liu's staff early on; in fact, we testified in support of the bill at its consideration before the Senate Public Safety Committee.

Although always something of a reach, as it pushed the boundaries of what could be considered 'elderly,' Sen. Liu's staff was optimistic about passage of SB 224 this season. The bill did in fact pass the Senate Public Safety Committee and went on for consideration in Senate Appropriations. From there the news was not so good. Although held in the suspense file as expected, there were some other developments.

Endria Richardson of Legal Services for Prisoners with Children, one of the primary sponsors of the bill, provided this rundown of events:

> "SB 224 was amended on the final day to get out of Senate Appropriations to change the eligibility criteria for the program from 50 years to 60 years old, and from 15 years to 25 years served. This amendment happened with very little notice, and with no chance for input from any of the sponsors.
>
> "Then, last week, two days before the deadline to get the bill out of the Senate, we found out that Leg. Counsel had keyed the bill for a 2/3rds vote due to a conflict with Prop. 184. Since this was a voter-passed initiative, any change to the law would have to be approved by 2/3 of the Senate, rather than by a simple majority to get it off the floor.
>
> "Since the current elder parole program is the result of a federal court order, it can bypass this (terrible) Three Strikes conflict, and people who are currently serving Three Strikes terms that have a mandatory minimum term of more than 25 years are eligible for this program after serving 25 years.
>
> "We didn't want to write an amendment that would codify a less inclusive elder parole program than the one that is currently in place, and since we didn't have a sure 2/3rds vote, we decided to pull the bill and bring it back in January.
>
> "The current court-ordered program is still in place, so people eligible under the criteria should still be scheduled for and receive their parole hearings."

Richardson noted the sponsors and supporters (including LSA) of SB 224 intend to continue working on the legislation and hope to put it forth again in January, 2016.

YPED VS. MEPD

In the menu of alphabet soups we all deal with via CDCR a new flavor has been added. Those eligible for YOPH (that menu offering is a staple now) are now also hearing about the YPED—Youth Parole Eligibility Date.

Since we've received many questions regarding this new term and what it means, we have included the definition as outlined in a new Administrative Directive from the BPH, issued recently. According to the BPH YPED is defined as (PC Section 2443) "the earliest date on which a youth offender is eligible for a parole consideration hearing, "and is set according to the following criteria: (1) if the controlling offense

is a determinate term of any length, the YPED is the first day after the youth offender has completed 14 actual years of incarceration: (2) if the controlling offense is a life term of less than 25 years to life, the YPED is the first day after the youth offender has completed19 actual years of incarceration or (3) if the controlling offense is a life term of 25 years to life, the YPED is the first day after the youth offender has completed 24 actual years of incarceration."

As to scheduling, PC Section 2444 notes that "Youth offenders shall be scheduled for their initial parole consideration hearing in the year following their UPED unless the oyouth offdender is entitled to an earlier parole consideration hearing pursuant to any other provision of law.

Non-YOPH lifers or inmates enter the parole cycle about a year prior to their Minimum Eligible Parole Date (MEPD), so qualified youth offenders will enter the hearing cycle upon reaching their YPED or one year before their MEPD – whichever occurs first.

Inmates whose YPED occurs prior to their MEPD will enter the hearing cycle earlier than they would have otherwise based on their MEPD. Once qualified youth offenders pass their YPED, they may be released from prison prior to their current MEPD, if they are found suitable and pass both the Board's decision review and Governor's review processes.

PAROLE, FROM A TO Z

A-Accountability. Everyone is accountable for their actions, whether or not you were under the influence of any substance, emotion or person at the time of your crime. There are undoubtedly many factors that contributed to your decisions to take those actions, but once done, you, and you alone, are accountable for your deeds and decisions.

B-BPH. And these are the first individuals you are accountable to—the parole commissioners. Forget esoteric theories of individual sovereignty, claims of no BPH jurisdiction over prisoners, illegally long incarceration. Do you actually know anyone who has won release under these pie-in-the-sky claims? Get real. BPH is who you are answerable to.

C-Crime. That's why we're all here, dancing this dance. While *Lawrence* means the crime can no longer be the sole or primary reason for parole denial, it remains and will always be a central issue in any hearing. After all, if no crime had been committed, you wouldn't be in prison.

D-Decisions. Yours, mostly. Be real—don't refer to your crime as just a 'bad decision.' That, in itself, shows minimization. Understand where those decisions came from and the impact they had. Outline how you can and do make good decisions now.

E-Effort. Again, mostly yours. You are responsible for where you are and it's your job to get yourself out. Not your attorney, not your family, not program facilitators. You've got to put in the individual effort to make the life and mind change needed; there's no magic about it, just hard work.

F-Family. They can be your greatest asset and support system. Be honest with them. They can take it and if you can't be honest with those who love you, you'll have a hard time being honest with the board. And remember, we don't love the crime, but we do love the person.

G-Generalizing. Don't do it. The board is not concerned with general principles of rehabilitation or reform—they know all the buzz words too. Make your testimony of change specific to you, your situation and how you intend to use the tools you've learned. Don't just say "I've changed," tell them how you've changed and what that change translates to in actions.

H-Hearing. It's yours. This is your chance to show the BPH that you've done self-examination, the soul-searching and the work needed to be rehabilitated and ready for parole. Make the hearing about who you are now, what you've learned and are prepared to do.

I-Insight. Just a single word for being able to see the inner character or underlying truth, understanding the relationships behind thoughts, actions and behaviors. How did you come to do what you did, do you understand how to prevent similar actions in the future?

J-Justice. An elusive quality, don't expect it. Was your sentence unjustly long? Maybe, but maybe the victim was unjustly killed/injured. Don't approach your hearing with the attitude that you are owed justice or were a victim of an unjust system. That may be true, but the issue before the board is your crime and your suitability, not reforming the system.

K-Kangaroo court. No, it isn't. At one time parole decisions were pretty well decided before the hearing began—the answer was always no. Those days have gone and today chances for parole have never been better. Don't believe the oldsters who tell you you'll never go home—last year over 700 lifers did go home. Most will, you can too.

L-Life. Your possible term. Those two little words, 'to life,' in your sentence mean that, regardless of anything else, if you are never judged suitable for parole, the CDC can keep you for the rest of your life—forget the number of years preceding the 'to life,' or how many years you've done; end of life is, by definition, the possible end of your term.

M-Minimizing. Don't even consider 'sharing' the blame with anyone, even if you weren't actually the prime participant. You were there, you helped in some way, if nothing else by your willingness to participate, your involvement in a lifestyle that included criminal acts. Even fatal DUIs weren't just 'accidents.' The crash may have been an accident, but your decision to drink/drug and drive was an intentional act, and that's the crime that was prosecuted. Recognize that your decisions, even the decision to be passive, makes you a participant, not just a bystander.

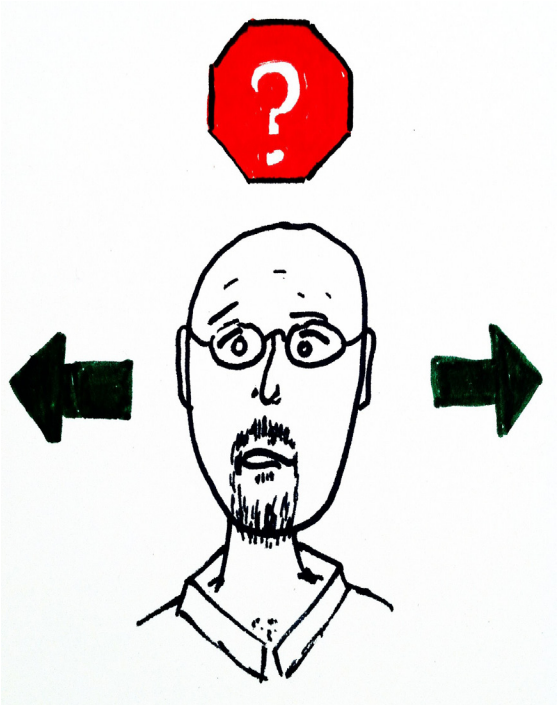
N-Narcissistic. Simply explained, being narcissistic means you are excessively preoccupied with your own adequacy, power, prestige and vanity, and unable to see the destructive damage you cause yourself and others. It may be your hearing, but it's about what damage you caused to others; understand and be prepared to address it.

O-Own it. Understand your crime and your part in it. Even if your memories of the 'facts' differ from the POR, if you honestly and consistently own your part in the event you'll earn points for veracity.

P-Parole Plans. Make plans where you have the best chance of success and support system. You no longer must go back to your county of commitment or last legal residence, so find the best place for you, consider your options and make your plans. Complete plans, no 'maybe I'll live with Mom or maybe I'll find an apartment.' Know where you're going and why.

Q-Questions. The Board will ask the hard ones—why did you commit the crime, how can you be sure you'll never get involved in that situation again, what would you say to your victim now? Not to mention what have you been doing with yourself while in prison. They have the questions—you'll need to have the answers.

R-Remorse/Responsibility. Accept it, understand the impact of your actions and don't be afraid to say you're sorry. Admitting wrong (responsibility) and truly feeling the impact of that wrong (remorse) is key to making the change in your life the board wants to see.



S-Suitability. That's the goal. Are you suitable for parole, no longer a danger to society? All the work you do, the self-help groups, the soul searching, the self-examination, are not just goals in themselves—they're just a way to help you reach to prize—suitability.

T-Time. No matter how long you've been in, the measure of your suitability is how you have comported yourself while in prison, how you have matured and changed. The passage of time alone will not bring you suitability.

U-Understanding. Understand how you got there—or as one commissioner said, 'how did it get to be OK, in your mind, for you to kill someone.' Understand how the problems, events of your childhood impacted your beliefs, how those beliefs led to your actions and what the results of those actions were. Understand how the dots connect.

V-Victims. It could be quite a list. Crimes impact whole families and communities, including your family. Recognize and speak to that, but remember, whatever may have happened to you in your life pre-life crime, you are not a victim for the purpose of this hearing. Also take heart—VNOK who appear at hearings can push the emotions of all involved. Under Marsy's Law they can and often do say just about anything, sometimes making unfounded accusations. Try to remember, this comes from unhealed hurt and commissioners are less moved by it than by fact.

W-Who are you. Now. That's what's important, so be prepared to 'compare and contrast' your now-self with that other person, the one you may not really recognize anymore, the one who committed the crime.

X-That unknown factor. There's always something. Don't get rattled if something unexpected develops. Stick to the truth—it's easy to remember and even if it hurts, it's what the commissioners are after.

Y-"You know." No, we don't, so stop saying 'you know' every fourth word. Yes, it comes from nerves, but it makes you appear hesitant, evasive and unprepared. Practice speaking to yourself or a group (maybe other lifers) so that this tired and useless phrase doesn't become your go-to anytime you open your mouth.

Z-Zen. Defined as "To come home to the present moment." When you've made the internal changes needed, understand and can speak to that change, you will be at home in the present moment and ready to parole. Zen.

Eccher/Chandler LIFER Picnic

Gary Eccher & Keith Chandler, HOSTS

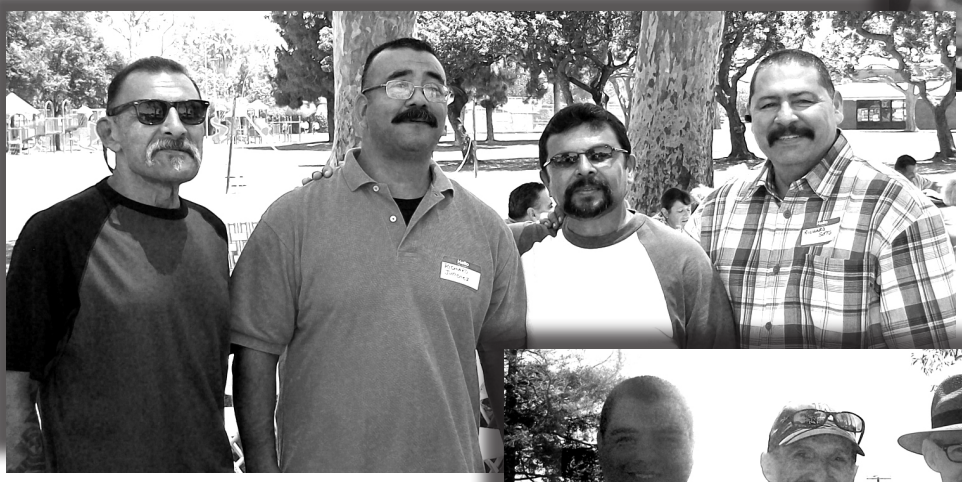
Great Food !!!

LSA- Vanessa & Mike Loveless-

LSA- Dave & Bob Huneke

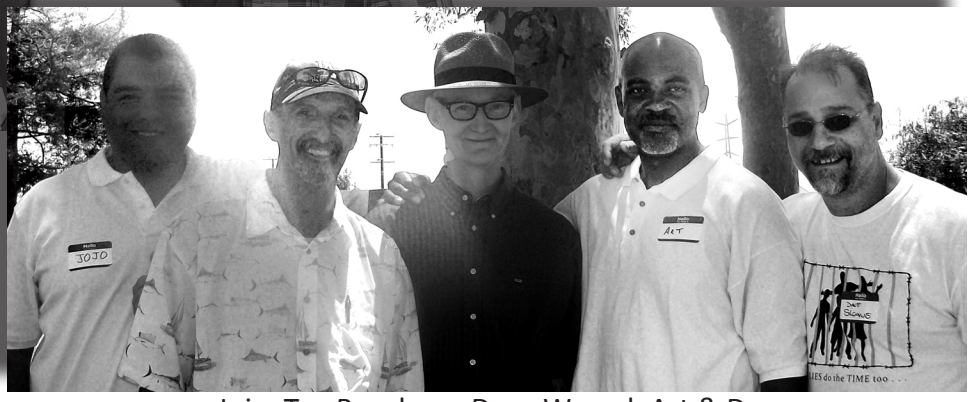
Sister Mary Sean & Doc Miller

JUNE 20, 2015



David Marcelo, Richard Jimenez,
Art Marcelo & Richard Soto

**Henry Boisseranc Park,
BUENA PARK, CA**



Jojo, Tap Burnham, Dave Wessel, Art & Dave

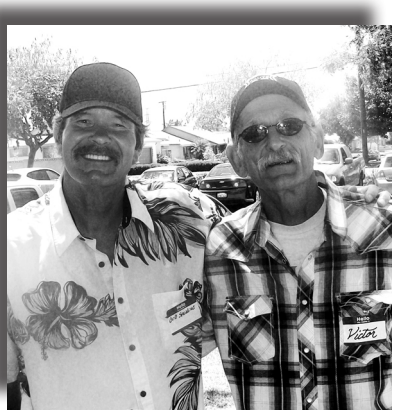
Jeannie & Ted Leleaux & LSA Vanessa

Loi and guest

Ron Lund & Best Friend

Lifer Attorney Marc Norton & LSA Vanessa

Jerry Collins & Stosh

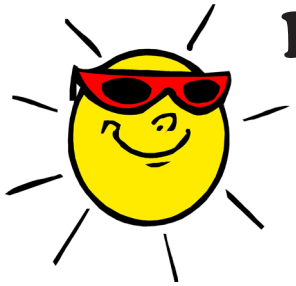


Bob Spedding & Victor

Red Crawley

Kevin

Mike & Sister



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