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CALIFORNIA LIFER NEWSLETTER™

Legislation & Initiatives

SENATOR GAINES WITHDRAWS ANTI-*LAWRENCE* BILL; SENATE COMMITTEE HEARING CANCELLED

Senate Bill 391 (Sen. Gaines) (#)

Please see *CLN* # 41, p. 1; #39, p. 5. SB 391 was to be heard in the Senate Public Safety Committee next week, but the bill's author, Senator Ted Gaines, pulled it amidst strong opposition from most quarters. The measure's purpose was to undo *Lawrence* and allow the Board to deny parole interminably based solely on the commitment offense.

Assuming Senator Gaines is not an ignoramus, SB 391 was purposely deceptive. LSA's Vanessa Nelson wrote:

> SB 391 is politically exploitive and unnecessary. Recently introduced by Sen. Ted Gaines (R-Roseville) with a flurry of co-sponsors, SB 391 is a sham, a political stunt and a reckless waste of legislative time and money. This politically exploitive bill is based not on fact, but on the desire of the sponsors to grab their 15 minutes of political fame through the old canard of tough on crime, facts be damned.

Gaines claims that the Board of Parole Hearings is not allowed to consider the commitment crime of life term prisoners when determining parole suitability. Gaines distorts and ignores the facts. While the California Supreme Court decision *In re Lawrence* precludes the crime from being the sole reason for denial, any study of parole hearing transcripts will reveal that overwhelmingly the commitment crime is one of the prime reasons routinely given for parole denial. A nearly two year-long study of parole hearings undertaken by Life Support Alliance that included reading scores of parole denial transcripts, collating the responses of nearly 500 prisoners to a post-parole hearing survey and personal attendance at dozens of parole hearings reveals a very different picture, this one supported by facts and numbers.

This study of parole hearings, far more penetrating than any presented by Sen. Gaines, revealed that over 65% of time the commitment crime was cited by parole commissioners as one of the reasons for denial of parole. In nearly 27% of the cases the crime alone was given as the reason for denial. Clearly, and contrary to Sen. Gaines' assertion, the *Lawrence* decision, while requiring parole commissioners to support their reasoning, has not prevented the board from using the commitment crime as a reason for denial of parole.

Perhaps the greatest absurdity perpetuated by the Gaines' bill is that it was inspired by the Jaycee Dugard case. By choosing to pedal his deceit on the back of this tragedy Gaines continues the victimization of Dugard and her family. Phillip Garrido, the convicted perpetrator, was never a life term inmate under the California system, was never required to appear before a California parole board to prove his suitability. The Garrido fiasco was a failure of California parole supervision, not parole granting. Even Gaines' office admitted to LSA that this bill would not have prevented the travesty of Jaycee Dugard's abduction. The sole reason to tie this unscrupulous bill to the Dugard case is to take unconscionable advantage of the publicity value.

The hard fact that Gaines neglects to

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WE'RE LATE AGAIN!

CLN sincerely apologizes for being late (for the second straight issue)! We wanted to wait for the publication of *In re Shaputis,* rather than producing a flyer or reporting late on the case in our next regular issue. We've also had problems with our printer. Hopefully, this has been resolved; we will try to publish issue # 43 by the end of February. Thank you for your patience.

California Lifer Newsletter (CLN) is intended as an informative, editorialized account of correctional, administrative, judicial, political, and parole news and events of primary interest to California inmates serving indeterminate prison sentences ("lifers") and their families. *CLN*'s reports and comments are not legal advice. Except as indicated, commentary in *CLN* is the editor's opinion, sometimes based on input from *CLN*'s readers.

We are not attorneys. CLN is written, published, and distributed by staff at Miller Consulting, a firm founded by Donald ("Doc") Miller, a former physician and lifer who obtained his law (J.D.) degree while incarcerated. Dr. Miller, assisted by his staff, including former lifers Joseph Wasko and John Dannenberg, contracts with several attorneys in this field to provide consulting services including research, brief-writing, and follow up in lifer litigation, administrative appeals, and prison related matters under the attorney's supervision.

As of January 1, 2012, approximately 97 lifers on whose litigation we have worked have been released from prison; we have obtained approximately 167 grants of habeas corpus relief—about 20 of these decisions have been published—e.g., ***In re Calderon*** (2010) 184 Cal.App.4th 620 (now depublished), 2010 WL 1882071; ***In re Barker*** (2007) 151 Cal.App. 4th 346; ***In re Lee*** (2006) 143 Cal. App. 4th 1400; ***Pearson v. Muntz*** (9th Cir. 2010) 606 F.3d 606, 2010 WL 2108964; ***Ledesma v. Marshall*** (E.D. Cal. 2009) 658 F.Supp 2d 1155; ***McCarns v. Dexter*** (C.D. Cal. 2008) 534 F.Supp.2d 1138; ***Milot v. Haws*** (C.D. Cal. 2009) 628 F.Supp.2d 1152; ***Rosenkrantz v. Marshall*** (C.D. Cal. 2006) 444 F.Supp.2d 1063; ***Saldate v. Adams*** (E.D. Cal. 2008) 573 F.Supp.2d 1303; ***Styre v. Adams*** (E.D. Cal.2009) 635 F.Supp.2d 1166; ***Englund v. Sisto*** (E.D. Cal. 2009)-F.Supp.2d-,2009 WL 3415215

We welcome comments, suggestions, and inquiries, but due to the quantity of correspondence, we cannot guarantee a reply.

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CLN will provide copies of state and federal court case decisions, including those marked (#) in this issue for a nominal fee or postage stamps; please see details on page 71, *CLN* Subscriptions & Services.

State Court Decisions

SHAPUTIS II

SUPREME COURT OBLITERATES SEPARATION OF POWERS; LEGISLATES FROM THE BENCH TO AMEND PENAL CODE § 3041 BY ADDING "INSIGHT" TO THE TWO PAROLE DETERMINANTS SPECIFIED BY THE LEGISLATURE (THE "TIMING" AND "GRAVITY" OF THE OFFENSE)

COURT MIS-STATES FACTS REGARDING SHAPUTIS' HIRING PSYCHOLOGIST; SUBSTITUTES PERSONAL, LAY SPECULATION ABOUT "INSIGHT" FOR SCIENTIFIC STUDIES REJECTING INSIGHT AS PREDICTIVE OF VIOLENCE, WITHOUT CITING ANY EVIDENCE WHATSOEVER FOR ITS CONTRARY THEORY

COURT EMASCULATES SOME EVIDENCE STANDARD; FAILS TO IDENTIFY A RATIONAL NEXUS SET FORTH BY THE BOARD THAT SHAPUTIS' LACK-OF-INSIGHT PROVIDES THAT WOULD ELEVATE EIGHT CONSECUTIVE LOW-RISK EVALUATIONS BY FORENSIC PSYCHOLOGISTS, TO A NOTION THAT HIS RELEASE TO SUPERVISED PAROLE CURRENTLY POSES AN UNREASONABLE THREAT TO SOCIETY

In the article that follows this one, John Dannenberg neatly summarizes the case of *Shaputis-II* and the Court's holdings. Here, your editor, not an attorney, relates his personal thoughts on the most irrational and arbitrary holdings of the High Court in what is most kindly cast as a predetermined decision designed to promote the Justices' personal beliefs. This was accomplished by omitting contrary facts and law and substituting the Justices' whim, speculation and personal bias for compelling evidence, published scientific studies, and the requirements for parole release set forth in a concise, unambiguous legislative statute.

The Legislature expressly opted in Penal Code § 3041 to restrict parole suitability and public safety consideration to the "timing" and/or "gravity" of commitment offenses. The High Court Justices personally disagree, based on a whim – it's simply illogical, the Justices speculate – that a person in his mid to late 70's in failing health who cannot recall the details or explain his criminality several decades earlier – would not pose an unreasonable threat to society if released to supervised parole. Why is it that the Court, as in *Shaputis-I*, cannot cite a single study or reference to support its "logic"? Because none exists. As uniformly determined in several published studies cited to the Court, its notion is false. *Insight into one's mindset decades earlier is* ***not*** *predictive of future criminality.*

The core of *Shaputis-II*'s "logic" is explained thusly by Justice Corrigan: *"Rational people, in considering the likely behavior of others, or their own future choices, naturally consider past similar circumstances and the reasons for actions taken in those circumstances."* The lay Justices thus concocted their own personal logic to overcome the *evidence* of eight consecutive low-risk evaluations by forensic psychologists (seven of whom were hired by the Board), two of whom fully expressly considered Shaputis' insight, and a plethora of published studies finding that a lack of insight into old behavior is *not* an indicator of future dangerousness. But then, Justice Corrigan was seated by Governor Arnold Schwarzenegger, who also seated the Commissioner whose decision Corrigan concocted this 'logic" to uphold.

In order to support its predetermined decision, the High Court deplorably misleads the reader into thinking that Shaputis by-passed the Board's psychologist by hiring his own expert in order to obtain a more favorable risk assessment. The court knew that to be false because in briefing and then at oral argument it was given contrary evidence. Summarily, the Board notified Shaputis *in writing* that it would *not* order a new psychological evaluation to be conducted for his new hearing, but would rely instead on the previous one (which the Governor and Court had used to reverse Shaputis' previously granted parole date). Because the validity of the prior evaluation was called into question (Shaputis was scarcely queried on his insight), his attorney astutely arranged for Shaputis to be evaluated by a renowned forensic psychologist – one with vast experience who has often been quoted and relied on by the State's courts and who currently provides evaluations for the Department. But when Shaputis appeared for his evaluation, he was shocked to meet one of *the Board's* assigned psychologists. When the psychologist refused to permit Shaputis to phone his attorney for guidance, Shaputis declined the interview.

Shaputis-II mischaracterizes a comment by the psychologist regarding Shaputis' social history, in its effort to justify the Board's discrediting the entire evaluation. In stating that Shaputis had not had tumultuous relationships, the psychologist, who has been employed by the Board and is keenly familiar with its codified parole suitability factors, was obviously referring to the legal definition – this factor is limited to relationships with individuals *other than the victims.* The Court was made aware of that.

The *Shaputis-II* court also changed the law in ruling that the Board need not state all of the reasons for its decisions on the record. The Court likened parole hearings to criminal trials, in which a judge need not set forth all of the grounds for a decision – a misguided analogy. Criminal trials are adversarial proceedings. Parole hearings are not – they are quasi-judicial fact-finding sessions. Were the Court's analogy applicable, how then can it hold Shaputis' exercise of his right to refuse to verbally discuss his offense, while the prosecutor in a criminal trial is not permitted even to criticize the defendant for refusing to testify, and the refusal cannot be used to convict the defendant?

Both psychologists – the one retained by Shaputis' counsel, based on an exhaustive interview focused on his insight, and the one conducted by the psychologist paid by the Board, based on the record, concluded

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MORPHING PAROLE HEARINGS INTO A NON-ADVERSARIAL PROCESS

By John E. Dannenberg

When we think of parole hearings, we think of "them" versus "us" – an adversarial battle grounded in "tough on crime" bias and politically charged anti-lifer sentiment. With the vast majority of hearings resulting in denials – concluding with such plastic admonitions as "remain disciplinary-free" and "earn positive chronos" – the current process only exacerbates lifers' frustration, demoralization, and loss of hope. Being found "unsuitable" is thus worse than just not going home, it is a regressive experience.

But what if the Board instead administered the law consistent with Penal Code § 3041(a)'s mandate to "normally" grant parole by *guiding* the unsuccessful candidate with specific goals so as to *achieve* eventual parole? The concept proposed here is to morph parole consideration hearings from adversarial grant/denial battles, into pre-parole guidance sessions wherein any unsuitability finding is supplanted with a suitability achievement plan tailored to that lifer's individual needs.

It has been said that a panel grants parole only after it gains a "warm and fuzzy" feeling about the lifer. This follows when the panel sees evidence of lasting change in the candidate's persona – often the result of a concerted effort by that lifer to alter his/her lifestyle by gaining a wholly new perspective. If the panel does *not* find this evidence, it usually just tells the lifer that his/her presentation is lacking in substance, credibility, or both. Often, the panel's decision amounts to little more than a kick in the groin, concluding with the empty gesture, "Good luck."

Gaining the credentials to be found suitable is much more than just "luck," however. It requires letting go of old feelings, negative associations (such as gangs, racial myopia, and drugs), and chucking the ingrained defensive mechanisms lifers often use to minimize their role in the crime. It requires setting positive goals, and doing the hard work to achieve them. But all this presumes that you know what these goals must be and that you have the resources available to gain them.

This is where a reoriented Board could make a difference. Currently, the panels,

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-EDITORIALS-

THE FATE OF LIFERS; THE ROLES OF POLITICS AND SEPARATION OF POWERS

By John E. Dannenberg and Don Miller

Part I.

Sadly, whether a rehabilitated lifer dies in prison or paroles is usually determined politically. The situation is unlikely to change until the voters' wrath over the budget crisis prompts the leaders of our three branches of government to dispense with their "tough on crime" actions and rhetoric.

Our state government mirrors the model of the federal government by having three competing branches: Legislative, Judicial and Executive. These branches "compete" in the sense that they have limited control over each other. The system basically works like this. The Legislature creates a new law, but it is not enacted unless and until the governor's (executive) time period to veto it expires. The law is nonetheless subject to interpretation by the judicial branch, which can include challenges to the law's constitutionality, as well as fine-tuning of actual legislative intent.

That is not the end of the competition. While legislators and the governor are directly elected by the people, judges are appointed by the governor, subject to confirmation by the legislature. State appellate judges serve a term longer than that of the governor, so their appointment has a lasting effect that transcends shifts in voter sentiment. Assembly members (legislative branch), on the other hand, are subject to reelection every two years, and must maintain a tight interaction with current voter sentiment.

It boils down to this: Each elected public servant is constantly concerned with his/her "poll" numbers – how he/she is faring for eventual reelection. Not surprisingly, they are also beholden to donations from special interest groups, which expect their chosen nominees to carry out their personal agendas.

Labor unions are well known special interest groups. For example, the prison guards union (CCPOA) sets union dues high so as to build up a "war kitty" for support of legislative and executive candidates who will push for increased prison

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SHAPUTIS II

By Michael Evan Beckman, Esq.

Legislating yet again from the bench in clear violation of the Separation of Powers doctrine and under the guise of upholding the separation of powers between the judicial and executive branches, in the latest incarnation of the ongoing Shaputis saga, the California Supreme Court once more ignored the legislative mandate set forth in Penal Code Section 3041 that parole is the rule, not the exception, reaffirmed its erroneous theory that the Board has almost unlimited discretion to make parole decisions, and gutted the already woefully inadequate "some evidence" standard for court review of parole denials. In doing so the Court distorted Shaputis' purported refusal to undergo an FAD psych evaluation which I clarified during oral argument, and completely ignored the fact I pointed out that there could be no nexus between Shaputis' purported lack of insight and his current dangerousness because all eight psychological experts who have evaluated Shaputis over the years found him to be a "low" or "no greater than the average citizen" risk of violence if released, including two state psychologists who found this despite opining that he lacks insight into his crime. The Court refused to even consider the Board's 5-6% parole grant rate over the past 21 years as evidence that the current dangerousness exception has swallowed the parole-shall-normally-be-granted rule mandated in Penal Code Section 3041(a), making it crystal clear why the Board feels no compulsion to give any credence to the Court's repeated but obviously hollow admonitions that the exception cannot swallow the rule.

The end result is that an aging, ill Richard Shaputis and many other lifers who have earned the right by law to go home, will die in prison. While that may not be a concern to the seven members of the California Supreme Court, it is a clear violation of the law. The sad truth is that in its implacable hostility to lifers and its disdain for the Legislature, the Court has sanctioned an egregious violation of due process.

Now that *Shaputis II* is over and Senator Gaines' invidious Senate Bill 391 to overturn the *Lawrence* decision has been withdrawn from consideration in the face of certain defeat, I believe it is now our turn. Since lifers have no hope of receiving fairness or justice from our highest state court, legislation needs to be introduced

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BPH News

COMMISSIONERS RESIGN AND RE-UP
More of the Same

Juliet McCauley, the only commissioner not of law enforcement/peace officer ilk, resigned on November 1st.

Pete Labahn, a former Riverside County Sheriff of 25 years, who resigned a year ago after one year on the job, asked for his old job back and was promptly re-seated by the Governor. Labahn's hyper-intellectual grounds for denying parole were off the wall. Now he's back.

The current BPH Commissioner lineup presents no cross-section as required by Penal Code § 5075: all are former executive branch/law enforcement/peace officers; less than 20% are female; 0% are from the State's largest industries; 0% are from the lower or lower-middle economic strata; 0% are qualified by education and training to predict recidivism (psychologists, psychiatrists, clergy, judges, clergy, etc.).

Arthur Anderson
Jeffrey Ferguson
Dan Figueroa
Cynthia Fritz
Jack Garner
Pete Labahn
Howard Moseley
John Peck
Michael Prizmich
Gilbert Robles
Terri Turner

BOARD LOSES AVENAL HEARING TAPES

All parole suitability hearings conducted at Avenal during the week of December 5-9, 2011, will be rescheduled. The Board reports that it lost the computer card on which those hearings were recorded. The Board is attempting to provide the same Panel(s) for the re-hearings, tentatively scheduled for early February 2012.

CLN is interested in learning whether any of these re-hearings produces a different result than the initial hearing.

LIFERS CAGED FOR THEIR PSYCHOLOGICAL EVALUATIONS AND ATTORNEY VISITS

The increased use of tiny (about 30" square) steel cages to confine lifers when they are interviewed by their attorneys and by the Board's psychologists has proliferated. The cages are placed inside the interview room. Because guards are not allowed to be present during these confidential sessions, staff's justification for caging – that it frees up staff – is nonsense. Caging the Department's best behaved inmates for these important sessions is asinine and unjustified.

Lifers, especially those who have never been caged for these sessions in the past, should inform their interviewers that a request by the psychologist or attorney to dispense with the cage is usually honored.

CLN would like to hear more details on the subject from all lifer institutions. The Board's help in eradicating this process (unless a rational ground for it exists in a particular case) could be effective.

BOARD INDICATES A WILLINGNESS TO REVISE AND IMPROVE LIFER HEARING PROCEDURES

The Board's new Executive Officer, Jennifer Shaffer, has consistently indicated a willingness to work to improve some longstanding problems and inequities in the parole determination process for lifers, including opposition to the unnecessary use of restraints at suitability hearings, increased education and training of the Commissioners, and divesting the Board of its control over the psychologists who perform critical lifer risk evaluations.

Ms. Shaffer has met with several involved parties, including this editor, for input on perceived problems and possible solutions.

The Board has asked the Department to resolve the issue of the Deputy DA's being allowed to bring their laptops to lifer hearings, while lifers' attorneys are prohibited from doing so. The Board is investigating having the State place the hiring, training, and oversight of lifer hearing attorneys – currently hired and trained by the Board – in an outside entity. Several Commissioners have been enrolled in and attend law school training on the key factor in parole determination – evidence. Also being sought is a way to expedite the decision review process in select cases. Time will reveal the sincerity of these efforts.

SHENANIGANS IN OAL APPROVAL OF REGULATIONS GOVERNING FAD ASSESSMENTS UNDER SCRUTINY

Vanessa Nelson of Life Support Alliance continues to report on her dogged pursuit of answers to the mysterious manner in which some personal contacts apparently coaxed an official of the Office of Administrative Law (OAL) into a U-turn to approve the Board's proposal after the OAL had soundly trashed it based on the Board's utter failure to satisfy OAL rulemaking requirements. Without any further response to or resolution of dozens of inadequacies that led OAL to reject the proposal in the first instance, and without

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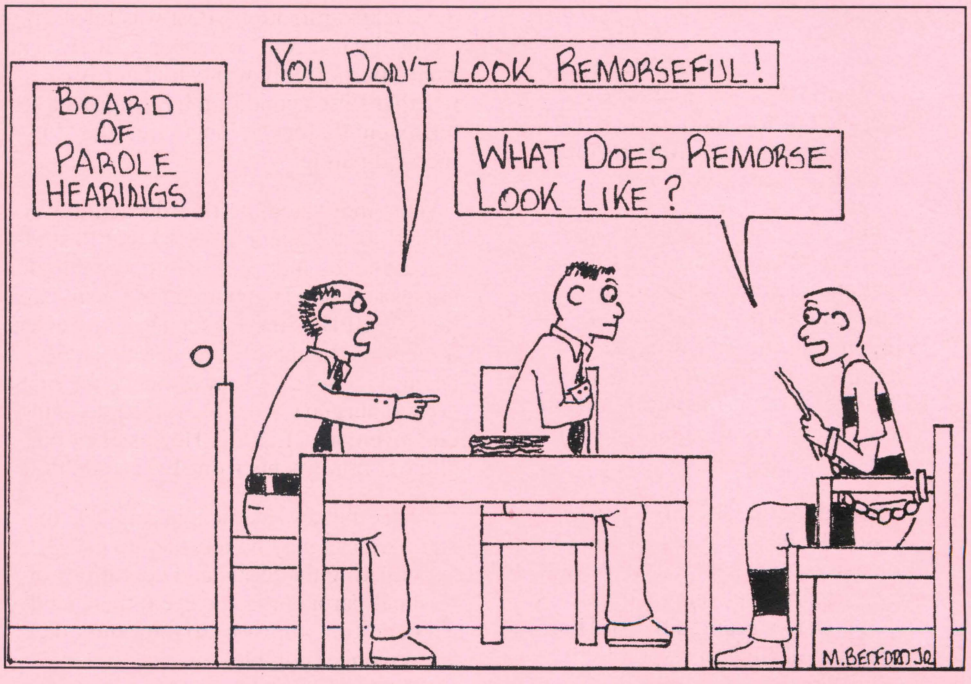

Federal Court Decisions

NINTH CIRCUIT ERRED IN REVERSING STATE SHAKEN-BABY SECOND DEGREE MURDER CONVICTION

Cavazos v. Smith (#)
565 U.S. ___; 132 S.Ct. 2; 2011 WL 5118826
U.S.S.C. #10-1115 (October 31, 2011)

Shirley Smith was convicted in California of second degree murder on the theory of assault on a child resulting in death. (CA Penal Code § 273ab.) The Ninth Circuit had reversed the state court judgment after determining that there was insufficient evidence within the state's expert opinion testimony to support a conviction "beyond a reasonable doubt."

The Ninth Circuit had relied upon *Jackson v. Virginia* (1979) 443 U.S. 307, which allows for such a reversal based upon insufficient evidence. The U.S. Supreme Court overruled, holding that it was a misuse of *Jackson* when a federal court reverses a state court ruling simply because it *disagrees with the state court.* Rather, the correct standard was whether the state court decision was "objectively unreasonable."

> The Court of Appeals in this case substituted its judgment for that of a California jury on the question whether the prosecution's or the defense's expert witnesses more persuasively explained the cause of a death. For this reason, certiorari is granted and the judgment of the Court of Appeals is reversed.

Dissenting justices Ginsburg, Breyer, and Sotomayor would have let the Ninth Circuit ruling stand, observing the weakness of the nonmedical evidence, newly advanced theories (since the 1997 conviction) in the field of shaken baby syndrome, and ineffective assistance of trial counsel.

Please see *Of Interest to Lifers*, this issue *(Clemency Petitions).*

HABEAS CHALLENGE TO BIAS AT INITIAL PAROLE HEARINGS SURVIVES MOTION TO DISMISS

Joseph v. Swarthout (#)
2011 WL 6293369
U.S.D.C. (E.D. Cal.) No. 11-0260
(December 13, 2011)

John Joseph had filed a pro per 28 USC § 2254 habeas petition alleging that the Board is biased against granting parole at initial hearings, given their documented record of a 99.7% rejection rate at initial hearings – versus the state law's requirement to "normally" grant parole at the initial hearing. (PC § 3041(a).) (Joseph had also challenged his 2009 parole denial, but this was dismissed earlier, pursuant to *Swarthout v. Cooke,* 178 L.Ed.2d 732 (2011).)

Magistrate Judge Gregory Hollows analyzed how "bias" is to be discerned in a claim of denial of due process of law. "In order to succeed on a biased parole board claim, petitioner 'must overcome a presumption of honesty and integrity in those serving as adjudicators.'" ... "To attempt to frame a claim of unconstitutional bias, a plaintiff must show that the adjudicator 'has prejudged, or reasonably appears to have prejudged, an issue.'" Bias, in turn, may be either "actual" or "systemic."

Joseph had claimed "systemic" bias – a policy of commissioners to not grant parole at initial hearings.

> Petitioner points to the BPH commissioner in his own hearing wherein petitioner avers he was told he was the best candidate for parole the commissioner had seen, that he had successfully rehabilitated, and that he put the R in CDCR; notwithstanding, the BPH simply refused to grant parole at initial hearings. Petition, p. 59. Petitioner's claim is that this alleged practice violates the statutory presumption that prisoners will be granted parole at initial hearings. *Id.*

The court found these facts sufficiently specific to make out a claim of "systemic" bias.

> The instant allegations are sufficiently distinguishable, however, to frame a bias claim. Petitioner is quite precise in providing a percentage of denials, and in allowing that some (albeit a minuscule amount) initial BPH hearings result in parole grants. Nor are petitioner's allegations altogether conclusory, inasmuch as petitioner does allege specific supporting facts. ...
>
> In this case, that circumstantial evidence from which an inference can be drawn is the alleged 99.7% denials of parole despite statutory directive which might indicate that parole eligibility could very well be granted at a much higher percentage. Such an over whelming statistic of denial gives rise to an inference of a preordained determination, i.e., bias on the part of BPH decisionmakers. Although petitioner has, as respondent points out a significant burden to make the requisite showing of bias, and the undersigned by no means has made any factual findings of bias herein, petitioner has made sufficient allegations to withstand a motion to summarily dismiss.

Accordingly, Magistrate Hollows recommended the motion to dismiss be denied. If this is approved by the District Judge, the state has 60 days to answer the petition.

§ 1983 DUE PROCESS CHALLENGE TO BOARD'S USE OF "SOME EVIDENCE" STANDARD IS DISMISSED

Singer v. California Board of Prison Hearings (#)
2011 WL 6749827
U.S.D.C. (E.D. Cal.) No. 11-2932
(December 22, 2011)

Dana Singer filed a 42 U.S.C. § 1983 civil rights complaint against the Board asking for injunctive relief and damages for the Board's having denied him parole purportedly based on a finding of "some evidence," rather than on a preponderance of the evidence. Singer relied on the Board's definition in 15 CCR § 2000(b)(50), which provides: "Good Cause. A finding by the board based upon a preponderance of the evidence that there is a factual basis and good reason for the decision made."

The court denied any relief under a due process claim, citing to *Swarthout v. Cooke,* 131 S.Ct. 859, 861 (2011).

> [T]he Court specifically rejected the notion that there can be a valid claim under the Fourteenth Amendment for insufficiency of evidence presented at a parole proceeding. *Id.* at 862–63. Rather, the protection afforded by the federal due process clause to California parole decisions consists solely of the "minimal" procedural requirements set forth in *Greenholtz,* specifically "an opportunity to be heard and ... a statement of the reasons why parole was denied." *Swarthout,* 131 S.Ct. at 862

Singer's claim that the *federal* court should uphold a *state* administrative

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Of Interest

STAFF, (cont'd from page 10)

fraud, following an FBI investigation. Zamudio is charged with smuggling cellular telephones and tobacco products into the prison for which he reportedly received $33,600.00 between February 2009 and October 2010, via payments through MoneyGram or Western Union.

CDCR psychologist fakes her own rape, robbery. Laurie Ann Martinez, a senior psych at Folsom, faked her own rape, apparently to persuade her husband to move to a safer neighborhood. Martinez split her lip with a pin, scraped her knuckles with sandpaper, had her friend punch her in the face, and even wet her pants to give the appearance she had been knocked unconscious.

Charges filed by the Sacramento County DA allege that Martinez conspired with her friend to create the appearance that she was beaten, robbed and raped by a stranger in April in her Sacramento home. One of Martinez' prison co-workers ratted on her, telling police that Martinez had been talking at the prison about faking a crime at her home to persuade her husband to move from a blighted, high-crime area three miles north of the state Capitol.

It didn't work. Instead, the couple filed for divorce six weeks after the April 10 incident, according to court records.

Martinez reported she had come home that day to find a stranger in her kitchen. "As she tried to run away, the suspect grabbed her and hit her in the face," court records say in describing what she told police. "She lost consciousness and then when she awoke she found her pants and underwear pulled down to her ankles."

Missing from her home were two laptop computers, Martinez's purse, an Xbox video game console, a camera and numerous credit cards that Martinez said the stranger had stolen. In reality, the items were all at the home of her friend, Nicole April Snyder. Investigators say Martinez had Snyder punch her in the face with boxing gloves they bought for that purpose. Martinez began crying hysterically when police arrived, according to court papers.

Martinez is free on $50,000 bond. She was redirected to CDCR headquarters in May, and has had no contact with inmates since then. Snyder is charged with the same conspiracy counts, and a warrant has been issued for her arrest; she faces up to 3 years in prison.

Each count of wire fraud carries a maximum penalty of 20 years' imprisonment and a $250,000 fine.

"Bad Hair Bandit" turns out to be a prison nurse. In August, Cynthia Van Holland and her husband, Alonzo, were arrested following their robbery of an Auburn, California bank. Van Holland, appropriately nicknamed the "bad-hair bandit," met Alonzo when he was serving time at an Idaho prison where she worked as a contract nurse. Van Holland is believed to have robbed 20 or more banks in Oregon, Washington, and Montana.

CALIFORNIA SUPREME COURT REVERSES TWO DEATH ROW CONVICTIONS

Court Holds that Judge Acted Improperly in Removing a Juror who Questioned a Witness' Reliability in Gang Members' Murder Trial

After upholding nearly 50 consecutive death sentences, the California Supreme Court broke its pattern by reversing the convictions of a reputed gang leader in Los Angeles and his accomplice in two murders that sent both men to death row.

The Court unanimously ruled that Cleamon Johnson and Michael Allen, convicted of killing rival gang members Peyton Beroit and Donald Loggins in 1991, were denied a fair trial when a judge removed a juror who appeared to be critical of the prosecution's case. The court cited a lack of evidence to support Judge Charles Horan's decision to remove the juror for prejudging the case and relying on evidence outside the 1997 trial.

Johnson, known as "Big Evil," headed a gang called the *89 Family Bloods* during the 1980s and early '90s that authorities contend was responsible for about 60 killings in South Los Angeles. He was convicted of ordering Allen to kill the two rival gang members with an Uzi. Johnson also was charged with a third killing and two attempted killings but a different jury deadlocked on those charges in 1999.

The court said the juror who was removed was deliberating properly and relying on experience, not bias, to evaluate a prosecution eyewitness. The court explained, "It may be argued that Juror No. 11's conclusion was based upon a weak premise or rested upon an over-broad inference . . . Jurors, however, are the judges of credibility, and conscientious jurors may come to different conclusions. It is not the province of trial or reviewing courts to substitute their logic for that of jurors to whom credibility decisions are entrusted."

The DA has not determined whether to appeal to the United States Supreme Court: "We're disappointed but reviewing our options." Johnson's lawyers said they were "angry and frustrated" that it took so many years for the state high court to decide the case. "This case involved truly outrageous conduct by the trial judge, who kicked a juror off the case in the middle of deliberations because it was reported by another juror that he was not persuaded by the prosecution's case . . . . Reversal was a foregone conclusion."

Johnson sat on death row for five years before getting a lawyer to handle his appeal, and the California Supreme Court waited many more years to decide the case after it had been fully briefed. "One of the primary reasons these cases take so long is the shortage of competent lawyers willing to handle capital appeals in the California Supreme Court — and a key reason why is the perception that the court does not undertake a careful, meaningful review of these cases," the PD said.

Prosecutors said Johnson was a "shot caller" in the street gang and presented a witness who testified that he heard Johnson order Allen to kill the victims. The juror who was dismissed had expressed doubts about the witness's credibility. After two other jurors complained about him, Judge Horan interviewed the entire panel before discharging the juror.

CALIFORNIA'S PRISON POPULATION; 3-JUDGE COURT

CDCR recently updated the Three-Judge Court on its progress toward meeting the court's directive to reduce inmate population to 167 percent design capacity, or 133,000 inmates by December 2011. The report has not been made available to us, but the Department released this statement:

> "California has already reduced its prison population significantly over the past several years. Today, we have the lowest crowding levels in California's prisons since 1995. Our goal is to meet the Court's order by continuing to reduce prison crowding while

Continued on page 12

From *Life Support Alliance*

Vanessa Nelson of *LSA* has been extremely active in observing the BPH parole suitability hearing process for lifers. While I and perhaps some lifers and their attorneys may not agree 100% with her observations and suggestions (mainly due to personal experiences – and there is certainly more than one approach to this), Vanessa's observations and conclusions seem to be far more practical than what we've read from various lawyers, their newsletters, and would-be lawyers.

WHAT PAROLE HEARINGS HAVE TAUGHT US

Members of Life Support Alliance's executive board have been granted permission to attend parole hearings as non-participating observers. Since August of 2011 we have been in attendance at assorted hearings in a number of prisons and plan continue this monitoring activity in 2012. Our attendance at parole hearings marks the first time in dozens of years that stakeholders, other than attorneys, members of the media or Senate staffers, have been allowed to sit in on parole hearings.

We do not participate in the hearings, other than to identify ourselves for the record, but we do listen carefully, make copious notes and offer observations to Board of Parole Hearings Executive Director Jennifer Shaffer. These observations cover the gamete of hearing procedures and we do our best to note and comment on the good, the bad, and the truly ugly; and there have been several incidences of all three categories.

LSA undertook attendance in parole hearings in an effort to gain understanding ("insight" if you will) into the hearing process and the standards used by commissioners to determine suitability of prisoners. While we have reviewed literally hundreds of hearing transcripts and have gleaned from them much useful information, transcripts are one-dimensional and are no substitute for watching hearings unfold. Each parole panel, indeed, each prison, adds a different ambiance to the proceedings.

There are, however, several common threads running through hearings, virtually independent of who the commissioners are. In recent years the courts have granted parole commissioners what the courts have termed "broad discretion" in determining what factors are markers of parole suitability and how much importance or weight those factors carry. This was reiterated most recently in the late December California Supreme Court *Shaputis II* decision.

Herewith put forth those factors we have found to be the most frequently discussed and considered by current panels. As always, we remind our readers LSA is not an attorney group and we are not proffering legal advice; we are merely reporting what we have found to be the factors parole panels are currently considering.

Of all aspects of suitability considered by the panels the one most often discussed, mentioned and considered is self-help, a rather undefined and nebulous term that can mean anything from attendance at AA meetings to book reports. But by far the question most often asked potential parolees is whether they have attended AA/NA meetings, and if not, why not. Although many prisoners are reluctant to attend AA meetings because of the spiritual basis of the organization, it is, for better or worse, right or wrong, the hands down favorite of commissioners. This is not to suggest it is the only acceptable self-help program, but it is the best known, best documented and best understood by the commissioners and therefore the leading contender.

Other self-help strategies are viable, but the panels seem most accepting of those individualized activities that are tied to an organized program. Many prisoners who are unable to access AA/NA programs or for whom such programs are not comfortable have produced viable self-help strategies by reading self-help books and writing reports. These, however, are not your high school English class book reports. The books should be germane to character improvement on such issues as substance abuse, anger management and empathy and the reports need to be more than just a recitation of content; commissioners routinely ask prisoners what specifically they gained from reading the books and how they are prepared to apply those lessons to their lives.

And they are quick to identify and discount what they term "catch phrases," or words straight from the text; be prepared to put these ideas in your own words, even the 12 steps of AA. Commissioners often ask participants not only to identify a certain step of the 12 but also to explain how they use that step in their lives. Similarly, commissioners often question prisoners as to what they have learned from other self-help classes and how they are prepared to use these new tools in their return to society. Participation in any and all self-help programs, though they are often few and far between in some institutions, is looked at favorably the commissioners.

In all hearings the prisoners' "institutional history," or accumulation of disciplinary chronos, is discussed in great detail. And while commissioners will often discuss 115s that are years, sometimes decades old, those that seem to impact the outcome of hearings most are those involving violence, contraband and, most lately, cell phones. And, of course, the more recent the disciplinary action or the larger the number, the more problematic it is. This is one area in particular, where the advice and intervention of a competent attorney may make a significant difference and is also an area where the difference in commissioners is most apparent, as some seem able to get past old write ups easier than others.

A word here about attorneys. It has long been conventional wisdom that state-appointed attorneys do a less stellar job than those privately retained by prisoners. This problem was even briefly discussed in last year's commissioner confirmation hearings, when one commissioner confirmed for Senate Rules Committee members that at times the difference between a prisoner being granted a parole date or receiving a denial could be the attorney and moreover that private attorneys often had a better success rate. The parole hearings LSA has attended have been largely populated by state appointed attorneys; they have, on the whole, been routinely competent and in a few cases, notable advocates. But there have also been cases when even untrained legal eyes, such as ours, could note the failures. This is a major problem in the parole process that we hope to address with the BPH in coming months.

Commissioners often examine in significant detail the parole plans and support letters presented by prisoners. Recently the commissioners have seemed to look with favor on those plans that include residence in transitional housing for 30-90 days immediately following parole. Even if the prisoner has family to whose home he could parole, the commissioners often make the case that readjustment to society after decades in prison is a daunting task (no surprise there) and transitional living facilities often provide a buffer that is helpful to that readjustment. Although not required, it is a component that is frequently viewed and commented on by the

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POLITICS, (cont'd from page 14)

A TV ad against Governor Dukakis in his subsequent U.S. Presidential bid depicted a revolving door for prisoners – and cost Dukakis the election. No political candidate since has forgotten this.]

Where is the end to this dilemma for lifers? Ultimately, it rests on two real life facts. One, the record of lifers on parole is unassailably exemplary, in fact, astounding. Their likelihood of committing a violent crime is statistically no greater than, and perhaps less than that of the average citizen. Two, elected officials, and their appointees, are stuck with an ever worsening state budget crunch. It just might occur to them that their own political lives – the largest concern guiding their decisions in office – would be lengthened if they (even if only quietly) used their authority to cut the huge waste in tax dollars resulting from keeping lifers incarcerated long past the punishment terms set by the Legislature, pronounced by the judiciary, and approved by the governor.

SHAPUTIS II, (cont'd from page 6)

5. *In re Prather* is overruled to the extent it prohibits the courts from exercising their habeas discretion to fashion any relief that is necessary to protect the inmate's liberty interest in parole, including an inmate's immediate release and imposition of monetary sanctions against the Board or governor for knowingly violating that interest.

While obtaining passage of such a bill will be extremely difficult, given the state's budget crisis and the extraordinary expense of incarcerating parole suitable lifers, now is as good a time as any to try. And if we do not succeed, perhaps we need to place this on the ballot as an initiative. In any event, we can no longer sit back and let the California Supreme Court give the Board and Governor carte blanche to violate the law and the constitutional rights of lifers with impunity.

Legislation

SENATE BILL 9, (cont'd from page 2)

of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(vii) The defendant has maintained family ties or connections with others through letter writing, calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.

(viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

INITIATIVE AMENDING THREE-STRIKES LAW PROGRESSING

Senate Bill 490 (Sen. Hancock) (#)

Please see *CLN* # 40, p. 6. While we await the Senate's action (a Public Safety Committee hearing on January 10th will review the measure for placement on the November ballot), SB 490, which will substantially amend the Three Strikes Law, is gaining momentum. (Please see other articles on the status of California's death penalty, in *Of Interest* section.)

The proposed ballot initiative would reserve the toughest penalty -- 25 years to life -- for the baddest of the bad, including murderers, rapists and child molesters. The initiative was drafted by a group of Stanford University law professors and stops far short of the extensive changes proposed under a previous reform measure that narrowly failed in 2004.

The Legislature and voters passed the Three Strikes Law in 1994 after several high-profile murders committed by ex-felons sparked public outrage, including the kidnapping from her Petaluma home and strangling of 12-year-old Polly Klaas. Since then, the courts have sent **more than 80,000 "second-strikers" and 7,500 "third-strikers"** to state prison, according to the state Legislative Analyst's Office. Though third-strikers make up just 6 percent of the prison population, they are responsible for a disproportionate share of the state's spiraling prison health care costs -- **at least $100 million annually** -- as they age and need more medical attention, according to the California auditor.

The previous measure, Proposition 66, sought to restrict felonies that trigger a "third" strike to violent or serious crimes. Under the existing law, life sentences have been issued for such relatively minor crimes as stealing a pair of socks, attempting to break into a soup kitchen to get something to eat and forging a check for $146 at Nordstrom.

In contrast, the new initiative allows certain hard-core criminals, including murderers, rapists and child molesters, to be put away for life for any felony, including shoplifting, while restricting the third strike to a serious or violent felony for everyone else. "We're making absolutely sure that these (hard-core) criminals get no benefit whatsoever from the reform, no matter what third strike they commit," said Dan Newman, a spokesman for the campaign.

The group, including Stanford Law

Continued on page 16

Of Interest

BUDGET CUTS, (cont'd from page 16)

Because of the large number of parole violators, or "churners," heretofore being returned to state custody for relatively short periods of time, the average reception center entrant remained in the prison system an average of 3.8 months, many never leaving the reception centers. The months from November 2010 through February 2011 will see the biggest changes and reductions in population, according to Meier.

The number of prisons housing reception centers will decrease and every county in the state, with the exception of Los Angeles, will be assigned a specific prison reception center where its prisoners will be received. Because of the numbers of prisoners committed to state custody from Los Angeles County, no one prison can adequately process all intakes, so prisoners from LA will be distributed over the state.

The prisoner cohort expected to be impacted the most by these changes is the female prisoner population, which Meier said CDCR expects to see drop by about 30%, over 2,800 prisoners by June 2012. Meier noted that while an average of 971 women prisoners were received into the state system in the months leading up to realignment, CDCR expects only 177 new female intakes each month by January 2012. As population reductions play out over the coming months the Department expects to see a significant reduction in the numbers of Level I and II prisoners as well. By June 2012, projections are for 4,700 less Level I inmates and nearly 4,000 less Level II inmates. Reductions in the populations of Levels III, IV and SHU housing are expected to be more limited.

It doesn't take a mathematician to figure out that as these changes play out the lifer cohort, now about 20% of total prisoners, will eventually constitute a larger share of the prison population. The eventual percentage of prisoners lifers will constitute depends on many variables, not the least of which is the number of lifers found suitable and released on parole. All this shifting has necessitated a change in the "mission" assignments of various prisons, in determining the security level of the inmates they will house.

Following is a simplified list of the changes in mission and housing level CDCR now expects to make. In all prisons listed the reception center facilities operated at those prisons will be closed CIM (RCE)-East has been converted to a Level II-III Sensitive Needs Yard; VSPW is being converted to a level-I/II Men's facility.

In November 2011
- DVI will convert to a Level III GP
- RJD Facility 2 will become a Level III SNY; one building in Facility 4 will be a Level III PWC
- San Quentin will no longer house a reception center and will become a Level II GP with significant numbers of lifers transferring from Solano

In December 2011
- Facilities A at High Desert, North Kern, and Wasco will become Level III GP

In January, 2012
- CIW and VSPW will deactivate their reception centers; all female intakes will be at CCWF VSPW will be converted to a men's level I-II facility.

In February, 2012
- The female SHU will move from VSPW to CIW
- LAC B yard will become a Level IV GP, with more opportunities available for Honor Yard programming
- LAC D will convert to Level IV, though final determination if this will be SNY or GP not yet made
- CCI Facility 3 will convert to a Level III SNY

One final caveat: as with all things CDCR, every decision is subject to change at the last minute. The above information represented CDCR's plan as of October 15, 2011.

RECIDIVISM RATE DROPS IN CA

CDCR has issued a bulletin based on its 2011 Adult Institutions Outcome Evaluation Report, which shows that the inmate recidivism rate has "declined" to 65% in 2011, a "significant" reduction of 2.4 percent, which equates, CDCR says, to 2,766 fewer offenders returning to prison and approximate savings to California taxpayers of $30 million.

"A major goal for CDCR and for other public safety officials is to prevent offenders from victimizing again after their release from incarceration," said CDCR Secretary Matthew Cate. "Even a slight drop in the overall percentage can equate to thousands of inmates who have not returned to prison and likely prevented the victimization of countless citizens. Reducing recidivism has been a primary goal for our agency, and this report shows that progress is being made."

Key findings in the report include:

Continued on page 18

Of Interest

SHU, (cont'd from page 18)

and inmates involved in acts of violence.

"Those are the people we should put in places like the SHU," he said. Former corrections officials say the transfer could extend to hundreds of prisoners if the department uses a criteria that focuses largely on an inmate's behavior. Corrections spokeswoman Terry Thornton said it was impossible to speculate on precise numbers until the new policy guidelines are finished.

A 2007 study commissioned by the corrections department recommended establishing "Security Threat Groups" and focusing on the biggest troublemakers inside those groups, so inmates are not locked in the Security Housing Units merely for alleged affiliation with a prison gang. Kernan said officials were looking closely at the report's recommendations but would approach any changes to the Security Housing Units with caution.

"We are not going to be pushed by the inmates or their advocates to change policy of this magnitude and get people killed," he said. "We're going to do it slow and methodical and make sure we're doing the right thing."

CALIFORNIA DEATH PENALTY TO BE EXECUTED?

As reported in this issue in *Legislation & Initiatives*, a proposed Initiative to extinguish the death penalty may be on the November 2010 General Election ballot. The California Supreme Court's new Chief Justice, Tani Cantil-Sakauye, urges the death penalty should be re-evaluated because it is no longer effective. A recent article in the *Los Angeles Times* detailed the Chief Justice's sentiments:

Chief Justice Tani Cantil-Sakauye, one of the high court's more conservative members, says the death penalty is no longer working for the state. [She] said in an interview that the death penalty is no longer effective in California and suggested she would welcome a public debate on its merits and costs.

During an interview in her chambers, as she prepared to close up shop for the holidays, the Republican appointee and former prosecutor made her first public statements about capital punishment a year after she took the helm of the state's judiciary and at a time when petitions are being gathered for an initiative to abolish the death penalty.

"I don't think it is working," said Cantil-Sakauye, elevated from the Court of Appeal in Sacramento to the California Supreme Court by former Gov. Arnold Schwarzenegger. "It's not effective. We know that." California's death penalty requires "structural change, and we don't have the money to create the kind of change that is needed," she said. "Everyone is laboring under a staggering load."

In response to a question, she said she supported capital punishment "only in the sense I apply the law and I believe the system is fair.... In that sense, yes."

But the chief justice quickly reframed the question. "I don't know if the question is whether you believe in it anymore. I think the greater question is its effectiveness and given the choices we face in California, should we have a merit-based discussion on its effectiveness and costs?"

Cantil-Sakauye's comments suggest a growing frustration with capital punishment even among conservatives and a resignation that the system cannot be fixed as long as California's huge financial problems persist. Her predecessor, retired Chief Justice Ronald M. George, was similarly disheartened. A former prosecutor who defended the state's death penalty before the U.S. Supreme Court, George concluded in his later years on the California Supreme Court that the system was "dysfunctional."

Cantil-Sakauye, 53, alluded to the pro-

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OF INTEREST, (cont'd from page 20)

Of Interest

JAIL, (cont'd from page 20)

evaluated after one year.

Editor: It is already deplorable in considering the extent to which California's jail and prison and inmates and their families, perhaps the State's most financially devastated citizens, are exploited. They pay three times the normal costs for a telephone call and to pay for ordinary store items received in packages, even small money orders sent in by families for their support are taxed up to half or more for restitution (half of which goes to state administrators). The CCPOA makes no bones about supporting higher imprisonment rates to promote the Guards' Union. It will probably cost Riverside's taxpayers twice as much money to try to collect fees from inmates and their indigent families as anything that may be collected.

PRISON DOCTORS BARRED FROM TREATING INMATES BUT COLLECT FULL PAY

The *Los Angeles Times* reports that at least 30 suspended health workers have cost California more than $8 million since 2006. California prisons have paid doctors and mental health professionals accused of malpractice an estimated $8.7 million since 2006 to do no work at all or to perform menial chores like sorting mail, tossing out old medical supplies, and reviewing inmate charts for clerical errors.

At least 30 medical professionals have collected their six-figure salaries for a cumulative 37 years in a kind of employment limbo after fellow doctors decided they were too dangerous to treat inmates but before the state's lengthy discipline appeals process made a final decision on whether they should be licensed.

Dr. Allan Yin, whose medical license was put on probation by the state Medical Board because of incompetence and gross negligence in connection with the deaths of two inmates and the near blinding of a third, received his $235,000 salary for more than a year and a half while performing such chores. "He actually functioned as, like, the mail courier. He delivered the institution's mail," said Nancy Kincaid, spokeswoman for California Correctional Health Care Services, the receiver in charge of the state's troubled prison health system.

A federal court imposed the receivership in 2005 after ruling that prison healthcare was so bad that it constituted cruel and unusual punishment. Since then receivers have been trying to improve treatment — and bring down the high cost of disciplining doctors — by replacing poor performers with more qualified physicians.

Dr. Radu Mischiu, a psychiatrist accused of failing to keep notes on interviews with patients, including one inmate who killed himself, has not treated an inmate since February 2006, records show. His duties have included sorting inmate mail at Solano. "Obviously the system is broken," said Mischiu, who earns $268,524. He said he is out on disability leave with a bad back but suspects he could be sorting mail again when he returns. "You put people on the sidelines but then you have to pay them millions. It's ridiculous."

Before prison healthcare fell under federal court control, doctors accused of incompetence were routinely sent home on paid leave for the duration of the internal investigation, which often took years. When the first receiver, Robert Sillen,

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Of Interest

SEMINAR, (cont'd from page 22)

Dickinson noted it does no good to simply lock people up and expect magical change. The present system, he concluded, was "unforgivable and unsustainable." Realignment, said the Assemblyman, is the promise of a safer California at a lower cost.

Notable comments and commenters on a panel addressing the issue of realignment were Terri McDonald; Director of Adult Operations for CDCR, Scott Brown, current lobbyist for CCPOA, and Scott Jones, Sacramento County's lately elected sheriff. Jones, a vocal opponent of realignment, decried the problems Sacramento and other counties will have dealing with the prisoners now being sent to their facilities instead of the state prison system. He complained the estimated number of prisoners counties would have to deal with was underestimated.

While the sheriff at one point admitted neither counties nor the state could "build [your] way out of" corrections problems, he none-the-less continues to campaign for more funds to expand the county jail capacity. Jones claimed there are many programs available in jail and estimated that 70% of those in Sacramento County custody had substance abuse problems.

Craig Brown, CCPOA's chief lobbyist and presence in the Capitol took the predictable line, with a twist. Brown claimed California "got where we are today" (the controversy of realignment) because of suits by prisoner advocates and the "miserable" [sic] failure of AB900, Schwarzenegger's attempt to build his way out of overcrowding. His characterization of AB 900 was perhaps the most accurate thing Brown said all day. He offered that overcrowding had "contributed" to sub-standard medical care for inmates.

(Pardon us, Mr. Brown, but California did not "get here" today because of prisoner suits; the state got to its present sorry position in corrections because it failed to deal with problems for decades, an attitude often fuelled by the CCPOA, and because would-be "tough on crime" Legislators enacted a plethora of laws increasing punishment beyond reason. Overcrowding isn't a contributor to sub-standard medical care; the US Supreme Court ruled it was the primary cause. Prisoner suits aren't the cause of the problem, they are the remedy.)

Brown went on to decry the loss of prisoner-manned fire camps due to fewer Camp-eligible prisoners (under realignment those prisoners will be held at the county, not state level), thus effectively endorsing slave labor. He predicted the failure of realignment due to lack of resources in counties. In a play to an audience that clearly was not buying into his line Brown suggested the most important thing corrections could do now would be to help with reintegration, though he offered no specifics.

The voice of reason on this panel was Terri McDonald, Director of Adult Operations at CDCR. Ms. McDonald said that while early estimates of inmate numbers going to counties may have been too low, it is too early to say whether or not those underestimates will hold true in the long term. She urged local governmental agencies to work with the CDCR in developing processes to deal with realignment and noted it was "time to stop assessing blame." Prison, she noted is a "societal system failure."

Among other notable comments and voices on panels throughout the day was Sahsa Abramsky, noted journalist, author and activist, who urged the conversation on corrections become a consideration of community improvement. He noted California is under-investing in communities at every level in an effort to massively fund prisons, a process he labeled a moral disgrace. We cannot, he argued, let a series of moral lapses make our only mandate incarceration.

Perhaps Abramsky's most urgent and on point observations came in his pointed response to Nina Salerno Ashford, of Crime Victims United. Salerno, mouthing the inflammatory and predictable line of tying all prisoners to "worst of the worst" child molesters, and claiming all three strikers have violent pasts, warned California is "willing to sacrifice a child" to cut costs.

Abramsky, chastised this sort of mindless demonizing, urging the public to stop being held hostage to fear-mongering sound bites from conservatives. David Warren, long-time prison issue advocate, had perhaps the best take on the attitude of victim's organizations when he noted that for victims there is never enough punishment.

Sen. Loni Hancock (D-Oakland), chairman of the Senate Public Safety Committee, gave the day's keynote address, laying out the three keys to solving California's corrections problems (and there was no disagreement that California has major corrections problems) are realignment, rehabilitation and recidivism reduction.

Sen. Hancock noted California is currently 49th in the nation in education funding, in no small part because of the state's failed and expensive prison system. The Senator, whose committee will consider all legislation dealing with corrections issues, said that implementation of

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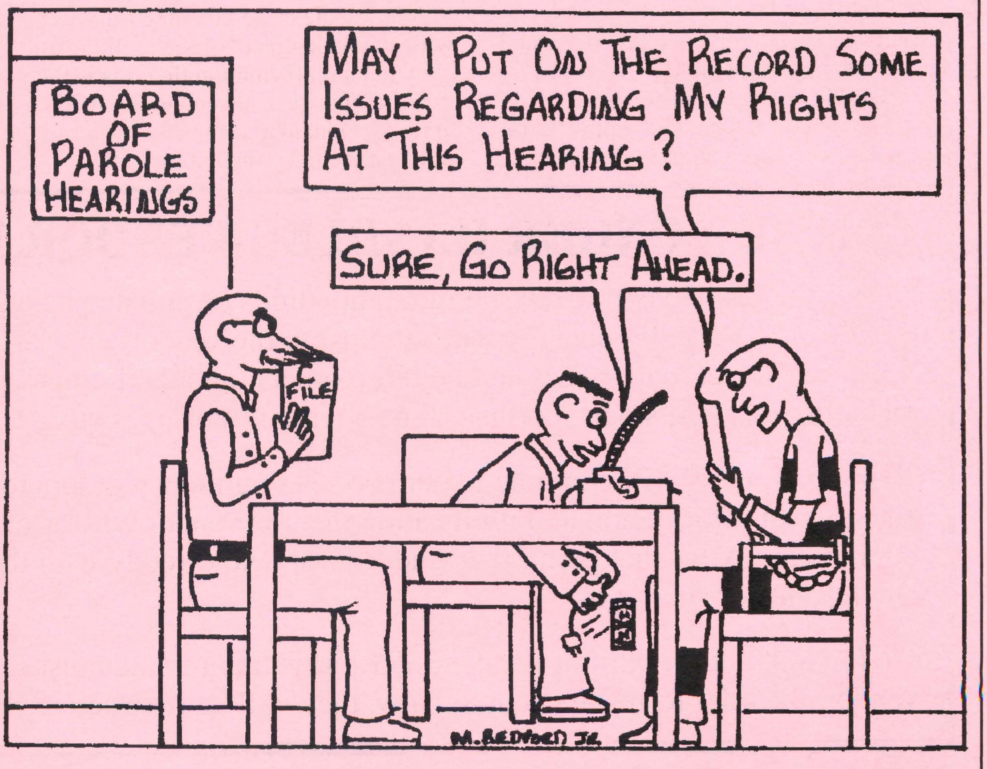

State Court Decisions

SHAPUTIS II, (cont'd from page 26)

> statement also failed to address the charge that he had molested his daughter, acknowledging only that he had "abused ... at least one of my daughters." In the statement, petitioner discussed his alcoholism, his "low morality," his deep regret, and his determination not to "again engage in such terrible conduct." However, the Board was left with no indication that petitioner understood why he shot his wife, what he had done in the incidents of molestation, or how his behavior affected his other daughters. A general recognition of moral deficiency and alcohol abuse is insufficient to explain an entrenched pattern of domestic abuse, child molestation, and a point-blank shooting. Indeed, the statement petitioner prepared with the assistance of counsel is so vague about the nature of his violent conduct that it might reasonably be deemed evasive.

It clarified that the Board is not bound by the most recent evidence in the record (e.g., current psych evaluation), and may, upon finding reason to discredit newer reports, rely on older ones.

> Thus, just as the Board had grounds to doubt the reliability of Dr. Stark's psychological report, it was also reasonable for the Board to be unpersuaded by petitioner's written statement when it considered whether he had gained the insight that was found to be lacking in the *Shaputis I* proceedings. (*Shaputis I, supra*, 44 Cal.4th 1241.) Indeed, the same evidence that we found sufficient in *Shaputis I* was sufficient here to meet the "some evidence" standard, given the lack of a reliable record of his current psychological state. When there is a reasonable basis to conclude that the most recent evidence of an inmate's current dangerousness is less trustworthy than other evidence, a reviewing court must defer to the parole authority's evaluation of the record.

Judicial review for "some evidence" may include the entire record

In the only ameliorative consideration in the opinion, concurring Justice Goodwin Liu suggested that a reviewing court should limit its search for "some evidence" to that evidence actually relied upon by the Board or Governor. However, the majority was quick to rebuff this.

> Our concurring colleague suggests that "some evidence" review is restricted to evidence actually relied upon by the Board or the Governor. [] However, nothing in the requirement that a parole denial be accompanied by a "statement of [ ] reasons" demands that the parole authority comprehensively martial the evidentiary support for its reasons. (*In re Sturm* (1974) 11 Cal.3d 258, 272.) It is axiomatic that appellate review for sufficiency of the evidence extends to the entire record, and is not limited to facts mentioned in a trial court's statement of decision, for instance. [Citation.]
>
> It is of course a matter of routine to review the evidence referenced in the parole authority's decision. Because the "some evidence" standard is easily satisfied, that is usually sufficient for the reviewing court's purpose. But we have never limited the scope of review to the evidence specified by the parole authority. Indeed, this court has relied on evidence omitted from the decision below to conclude that findings were not supported by "some evidence." (See *Lawrence, supra,* 44 Cal.4th at pp. 1222–1226; *Rosenkrantz, supra*, 29 Cal.4th at pp. 680–681.) It would be a perversion of the deferential "some evidence" standard if a reviewing court were permitted go beyond the evidence mentioned by the parole authority to conclude that a finding lacks evidentiary support, but forbidden from doing so to confirm that a finding is supported by the record

Due process claims rejected

Shaputis had argued against the Board's denial based upon lack of insight violated his due process rights, in that (1) if he had denied guilt altogether, he would have been better placed, under PC § 5011(b); (2) denial for his failing memory of past events effectively converted his sentence to LWOP; and (3) he would be required to fabricate facts he does not recall, in order to gain parole.

As to (1), the Court noted that Shaputis did not deny his guilt, and therefore § 5011(b) was not implicated. It noted, however,

> that an implausible denial of guilt may support a finding of current dangerousness, without in any sense requiring the inmate to admit guilt as a condition of parole. In such a case it is not the failure to admit guilt that reflects a lack of insight, but the fact that the denial is factually unsupported or otherwise lacking in credibility.

The Court rejected (2) and (3) based upon Dr. Stark's findings:

> His retained psychologist did not detect any deficit in his memory. To the contrary, Dr. Stark reported that when she interviewed petitioner "[h] is thinking was rational, logical and coherent.... He presented as average to above average in functioning.... *His memory was intact. Both remote and recent memories were intact. ... There were no signs of a thought disorder. His judgment and insight appeared to be within normal limits.* In general his presentation was sincere and straightforward." (Italics added.) Thus, it does not appear that petitioner's memory presented any obstacle to his ability to demonstrate that he had gained insight into his criminal behavior.

The insight factor

The Court further settled an ongoing complaint in recent California lifer habeas petitions regarding the Board's use of the parole denial factor "lack of insight," subsequent to the Supreme Court's 2008 ruling in *Shaputis I* that had crafted that language. Lifers thereafter found that Board denials were routinely being grounded in the talismanic factor, "lack of insight," notwithstanding that the Board's regulations nowhere mention this term. The Court summarily rejected the suggestion that the Board's motives in such rulings were suspect.

> Here, the Court of Appeal majority commented that the increased reliance on lack of insight as a factor "is likely attributable to the belief of parole authorities" that it "is more likely than any other factor to induce the courts to affirm the denial of parole." That assertion is inappropriate. While it is not unusual for courts to "struggle[ ] to strike an appropriate balance between deference to the Board and the Governor and meaningful review of parole decisions" (*Lawrence, supra,* 44 Cal.4th at p. 1206), speculation regarding ulterior motives on the part of the parole authorities has no proper place in a judicial opinion. Moreover, it is not unusual for administrative determinations to follow the standards set

Continued on page 28

State Court Decisions

SHAPUTIS II, (cont'd from page 28)

In any event, the Court found that attempts to take the subjective "insight" factor out of Board determinations did not pass muster.

> [I]t is difficult to imagine that the Board and the Governor should be required to ignore the inmate's understanding of the crime and the reasons it occurred, or the inmate's insight into other aspects of his or her personal history relating to future criminality. Rational people, in considering the likely behavior of others, or their own future choices, naturally consider past similar circumstances and the reasons for actions taken in those circumstances. Petitioner's argument that the inmate's insight should play no role in parole suitability determinations flies in the face of reason.

Guidance for future appellate court reviews

To guide future judicial reviews of parole decisions, after noting that recently California Courts of Appeal had been "confused" about the proper scope of review, the Court summarized by laying out five "relevant considerations."

> 1. The essential question in deciding whether to grant parole is whether the inmate currently poses a threat to public safety.
>
> 2. That question is posed first to the Board and then to the Governor, who draw their answers from the entire record, including the facts of the offense, the inmate's progress during incarceration, and the insight he or she has achieved into past behavior.
>
> 3. The inmate has a right to decline to participate in psychological evaluation and in the hearing itself. That decision may not be held against the inmate. Equally, however, it may not limit the Board or the Governor in their evaluation of all the evidence.
>
> 4. Judicial review is conducted under the highly deferential "some evidence" standard. The executive decision of the Board or the Governor is upheld unless it is arbitrary or procedurally flawed. The court reviews the entire record to determine whether a modicum of evidence supports the parole suitability decision.
>
> 5. The reviewing court does not ask whether the inmate is currently dangerous. That question is reserved for the executive branch. Rather, the court considers whether there is a rational nexus between the evidence and the ultimate determination of current dangerousness. The court is not empowered to reweigh the evidence.

With this *Shaputis II* ruling, the Court has proactively elevated "insight" into a central factor for the Board to consider when determining suitability. The Court also substantially reduced the "wiggle room" for California courts to review challenges to lifer denials of parole, save those without a "modicum" of decision-supporting evidence in the record. Pending its resolution of *Shaputis II*, the Court had granted "review and hold" on four other favorable appellate lifer parole rulings (*In re Macias,* S189107; *In re Adamar,* S190226; *In re Loveless,* S190625; *In re Russo,* S193197). It now remanded those cases for reconsideration consistent with *Shaputis II.*

4th DISTRICT REVERSES BOARD IN A POST-SHAPUTIS-II "LACK OF INSIGHT" DENIAL DECISION

In re James Wing (#)
CA4(1) No. D059403 (January 5, 2012)

A scant three working days after the California Supreme Court mercilessly bashed the Fourth District Court of Appeal, Div. 1's opinion in *Shaputis II,* Division 1 granted the petition of a lifer who had been denied by the Board for "lack of insight." Citing to the Supreme Court's still valid guidance from I*n re Rosenkrantz* (2002) 29 Cal.4th 616 and In re Lawrence (2008) 44 Cal.4th 1181, and paying only passing attention to the newest *Shaputis II* ruling, the court found no evidence to support the Board's denial.

James Wing, then 41, was convicted of a 1994 second degree murder. He was sentenced to 15-life for the murder, plus 4 years for use of a gun. He was denied parole at his initial parole consideration hearing in January 2010, based largely on a generic, unsupported "lack of insight" finding by the Board.

Wing had gotten into a happenstance argument with four men coming out of a Taco Bell, as he drove by. Argument escalated into his driving past them threateningly, which resulted in them breaking a window in his car. Moore went back to his apartment, tracked down one of the men, and shot him. He later called 911 and confessed.

Wing had no history of crime or violence. He graduated from a community college with an AA degree. He has been married to his second wife since 1993, and plans to live with her upon parole. An honorably discharged veteran, Wing worked with computers for the Veteran's Administration for ten years.

In prison he was disciplinary-free, gained numerous chronos for assisting training other inmates on computers. His self-help programming included many anger management courses. Wing's psych evaluation reported "low" risk in every category, accompanied by expressions of genuine remorse.

During the hearing, Wing repeatedly expressed his remorse, and took unremitting responsibility: "I'm solely responsible for the murder of Mr. Moore." Wing explained how he had changed, especially in regards to reacting to his anger. One major impact on his reorientation came from the Breaking Barriers program, where he markedly changed his life through his "belief window."

The Board denied parole based primarily on its belief he lacks insight, because he minimized his actions as to the details of the shooting. The Board called the crime "a very reckless offense, a murder." But that was all the Board had, and they said so.

> You have very little else that is not in your favor. In fact is [sic], I didn't find anything. Your prior criminality. You have none. Your social history is stable, was stable, and continues to be stable. You have no

Continued on page 30

Letters to the Editor

We have received, and thank our readers for submitting some interesting letters and proposed editorials.

We will gladly publish your input, as space and content permit, but need the writer's permission to do so, and we reserve the right to edit or amend content. Thank you.

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PLEASE HELP KEEP CLN ALIVE

• *CLN* is acknowledged to be a crucial means of support for inmates, particularly for lifers in their quest for parole. The extensive collective information reported in *CLN* is not available to inmates from other sources, including the prison libraries.

• Each issue of *CLN* demands countless hours of time and an enormous amount of work. *CLN's* staff is comprised of but two (2) people.

• *CLN* is distributed free to prison libraries and the judiciary

• *CLN* is published and distributed at a net financial loss, which comes out of the editor's pocket. Accordingly, keeping *CLN* alive is a constant, never-ending struggle for time and finances.

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Lifer Scheduling and Tracking System

Commissioners Summary
All Institutions
November 01, 2011 to November 30, 2011

November 2011 BPH Statistics

Hearing Totals*	42	33	49	30	28	40	29	44	41	39	136	511	72**	439

Summary of Suitability Hearing Results per Commissioner

	ANDERSON, JR	FERGUSON	FIGUEROA	FRITZ	GARNER	MOSELEY	PECK	PRIZMICH	ROBLES	TURNER	BPH HQ	Total CMR Hrg	Hrgs Conducted w/ more than 1 CMR	Actual Hrgs Conducted
Suitability Hrg Total	24	22	27	23	27	20	28	30	29	33	86	349	72	277
Grants	6	2	2	5	3	9	6	4	4	8	0	49	13	36
Denials	7	13	22	12	10	9	9	15	22	16	0	135	33	102
Stipulations	5	1	2	2	7	0	6	6	1	1	5	36	10	26
Waivers	1	3	1	2	1	0	4	2	1	4	63	82	6	76
Postponements	3	3	0	2	3	2	3	3	1	4	11	35	8	27
Continuances	2	0	0	0	3	0	0	0	0	0	0	5	2	3
Split	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cancellations	0	0	0	0	0	0	0	0	0	0	7	7	0	7

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

Subtotal (Deny+Stip)	12	14	24	14	17	9	15	21	23	17	5	171	43	128
1 year	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
3 years	5	5	12	8	9	8	7	9	12	11	2	88	25	63
4 years	0	0	0	0	0	0	0	0	0	0	0	0	0	0
5 years	2	4	6	5	3	0	7	8	7	5	0	47	11	36
7 years	2	2	6	1	2	1	0	2	3	0	1	20	2	18
10 years	2	3	0	0	2	0	1	2	1	1	1	13	4	9
15 years	1	0	0	0	1	0	0	0	0	0	1	3	1	2

Waiver Length Analysis per Commissioner

Subtotal (Waiver)	1	3	1	2	1	0	4	2	1	4	63	82	6	76
1 year	1	2	1	1	1	0	2	2	1	3	33	47	4	43
2 years	0	0	0	1	0	0	2	0	0	0	19	22	1	21
3 years	0	1	0	0	0	0	0	0	0	1	8	10	1	9
4 years	0	0	0	0	0	0	0	0	0	0	1	1	0	1
5 years	0	0	0	0	0	0	0	0	0	0	2	2	0	2

Postponement Analysis per Commissioner

Subtotal (Postpone)	3	3	0	2	3	2	3	3	1	4	11	35	8	27
Within State Control	0	1	0	0	0	0	3	1	0	1	7	13	2	11
Exigent Circumstance	2	2	0	2	1	0	0	1	1	2	0	11	3	8
Prisoner Postpone	1	0	0	0	2	2	0	1	0	1	4	11	3	8

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

State Court Decisions

Taylor, (cont'd from page 34)

paroled, he was not safe to parole (!). The court rejected this tautology, noted that the psych nonetheless rated Taylor "low" risk overall, and went with that finding.

Taylor's 115 history consisted of 4 write-ups, the last being in 1996. The court found that the intervening 14 years of perfect behavior mooted this early history.

Finding no evidence that supported the Governor's reversal decision, the court granted the writ, vacated the Governor's reversal, and reinstated the Board's original grant. The court rejected, as "an idle act," the Board's request to remand the matter to the Governor, citing *In re Masoner* (2009) 172 Cal.App.4th 1098 and *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256-257.

In October 2011, Derrick Taylor went home.

In re James Thornton (#)

(unpublished), 2011 WL 5868515
CA4(1) No. D059052 (November 23, 2011)

James Thornton, now 49 years old, pled originally to a second degree murder committed at age 22, in 1984. His prison record was exemplary – only one CDC-115, over twenty years old; a psychological report announcing good insight and low risk.

Thornton had been found suitable in 2006, but Governor Schwarzenegger reversed. At his next parole hearing, in 2007, Thornton was denied for one year. At his tenth parole hearing, in 2009, he presented as very sincere, meaning the panel felt "comfortable" with releasing him, and it granted parole.

Again, Governor Schwarzenegger reversed, alleging that Thornton had insufficient insight and inadequate parole plans (no job). Thornton, *in pro per*, petitioned the San Diego County Superior Court, which denied relief.

The Court of Appeal issued an Order to Show Cause, and appointed counsel. In its independent review of the record, the Court of Appeal found there was no evidence to support the Governor's reversal. The Court rejected the Governor's reliance on citations from Thornton's 1988, 1991, 1994 and 2000 psych reports

> We note that as he did in *Lawrence*, the Governor relies on portions of stale psychological reports, which merely reflect the fact that over the course of time Thornton had psychological challenges to overcome. The Governor not only fails to recognize that later reports demonstrate Thornton has overcome the psychological issues reported in the earlier reports, the Governor fails to note that even the reports he relies upon show a steady improvement over time in Thornton's psychological health. As in Lawrence, the stale psychological reports are not probative with respect to Thornton's current risk to public safety.

Likewise, the Court threw out the Governor's argument regarding lack of insight.

> We must also reject the Governor's conclusion that Thornton lacks insight into the circumstances which caused him to murder Collins. In this regard we note that when apprehended Thornton not only admitted to participating in the killing, but admitted to a version of events which was far more inculpatory than the version provided by Peoples and pled guilty to a more serious offense. We also note that Thornton has never challenged that more serious version of events or attempted to minimize the horrific nature the crime. Thus, even at the commencement of his incarceration, Thornton demonstrated a predisposition to accept responsibility for his conduct.
>
> More directly, the record shows Thornton has satisfied the examining psychologists that he developed sufficient insight into the profound insecurity which led him to not only associate with Peoples, but to let Peoples control his actions. Significantly, in addition to the psychologists' conclusion and his own thorough explanation of what he now accepts as the dynamic which led him to commit murder, the record is replete with evidence, by way of the numerous self-improvement programs and vocational training Thornton has completed, of Thornton's continuing and consistent effort to develop the self-confidence, emotional security and connections to others which were absent from his life at the time of the commitment offense. These accomplishments demonstrate that, in addition to being able to articulate an understanding of his prior psychological condition and deep seated insecurity, Thornton has plainly internalized that insight into his daily life.
>
> The contrast between the record here—in which by both word and deed Thornton has shown his understanding of the circumstances which led to his crime—and the record presented in Shaputis could not be more dramatic. Given this record, the Governor's contention Thornton lacks insight is simply unsupported by the record.

As to being a danger to society because he did not have a job, the court opined,

> Finally, we must reject the Governor's contention Thornton's parole plans are insufficient because he does not have a job offer. As Thornton notes, where as here, an inmate does not have a parole date, as a practical matter it will be almost impossible to secure employment. Thus the absence of job offer does not reflect on his dangerousness. (See *In re Criscione* (2009) 173 Cal.App.4th 60, 76.) What is far more probative is the relatively strict residential program he has been accepted into as well as the additional support programs, including job assistance, he has contacted and been invited to join.

Accordingly, the court held

> In sum then, the record here will not support the denial of parole and we are compelled to reinstate the Board's grant of parole.

However, the court rejected Thornton's claim for credits against his parole term for the excess time incarcerated since the now reinstated date. Thornton's crime post-dated 1982, placing him under the ambit of Penal Code § 3000.1, which requires "five continuous years on parole" – a phrase the courts have interpreted to mean no credits can apply.

> In addition to arguing that he is entitled to parole, Thornton contends that because he has been incarcerated for a period of time beyond the date he was entitled to parole, he should receive credit against his period of parole. Like the courts in *In re Chaudhary* (2009) 172 Cal.App.4th 32, 37–38, and In re Gomez (2010)

Continued on page 36

State Court Decisions

Lazor, (cont'd from page 36)

> State Prison's environmental problem with "organ-damaging/maiming/death-causing excessive levels of ARSENIC in its water, and thus also in almost all its foods (made with the tap water)." Lazor requested an immediate stay to prevent the parole denial decision from being finalized, other relief to get him "out of harm's and death's way," and contempt sanctions against the respondents.

Central to Lazor's angst was his desire to delay the court-ordered hearing until he had had a chance to administratively appeal several 115s that he didn't want used against him at Board. [A self-styled free thinker, Lazor had often crossed swords with CDC staff, earning an unenviable record of 115s.] The superior court's 2008 order had accorded him that latitude, permitting him to advise the Board when he had completed the administrative process, and make a demand for a new hearing to be held within 35 days thereafter. In fact, he made such a demand in April 2008, ultimately resulting in the June 2009 hearing.

The result of Lazor's "motions" was an Order to Show Cause by the superior court as to why the June 2009 hearing should *not* be considered the court-ordered hearing. In October 2010, that court ruled that Lazor was still entitled to a new hearing, whenever he announced that he had completed challenging his 115s. But that's where the rub came in. In the interim, Lazor had accumulated some *new* 115s, which he now also wanted to resolve before having his court-ordered hearing. The superior court permitted that, but the Court of Appeal ruled, in its November 2011 unpublished decision, that "its reasoning and conclusion are fatally flawed."

In his superior court traverse, Lazor had alleged that he had sent a letter to the Board on April 14, 2008, retracting his demand for a hearing. But there was no proof of service, and the Board never received it. Nonetheless, since Lazor submitted an alleged copy of this documentation to the appellate court, that court took it as evidence that the *real* reason for "withdrawal" was to clear up *new* 115s, not just earlier ones.

> The evident purpose of the demand provision in the March 25, 2008 order was to allow Lazor sufficient time to challenge the allegedly "invalid 115s and 128s against him" that the Board had considered in the parole suitability hearing overturned by the order. [fn.] Presumably, when Lazor made his April 14, 2008 request for a hearing, he had completed his challenge. Lazor's purported "notice" of withdrawal supports this presumption since it specifies that he had been issued new Rules Violation Reports that he wished to "clear up" before proceeding with the court-ordered hearing.

The Court then proceeded to disallow endless delays based upon the new 115s.

> The March 25, 2008 order cannot be reasonably construed as giving Lazor the unbridled power to set the court-ordered hearing whenever he so desired beyond the period needed to exhaust his administrative remedies and seek relief with regard to the allegedly "invalid 115s and 128s." ...
>
> It would be unreasonable to read the March 25, 2008 order as permitting Lazor to unilaterally and indefinitely delay his court-ordered hearing to challenge new rules violation reports and counseling chronos that were not within the contemplation of that order. ...
>
> Accordingly, the purported "notice" had no legal force or effect even if it was served on or received by the Board before June 9, 2009 because the March 25, 2008 order had no application to those new disciplinary matters. In view of this conclusion, we need not decide whether the forfeiture rule applies to Lazor's failure to object to the June 9, 2009 hearing on the specific ground that he had withdrawn his April 14, 2008 demand.

The appellate court summarized its findings.

> Lazor now complains that the June 9, 2009 hearing does not satisfy the March 25, 2008 order because the Board did not comply with his April 14, 2008 demand for the court-ordered hearing within 35 days of that request. This argument is unsound. The March 25, 2008 order did not bar appellant's pursuit of an appeal and the record before us does not reflect any unjustifiable delay in holding the court-ordered hearing on June 9, 2009. In any event, the underlying OSC was not issued on the ground that the Board had improperly "delayed" the parole suitability hearing mandated by the March 25, 2008 order. It issued upon the mistaken notion that the March 25, 2008 order empowered Lazor to call for the hearing in the future whenever he wanted it. We have rejected that construction of the order. Lazor is not entitled to another parole suitability hearing to satisfy the March 25, 2008 order as modified on appeal.

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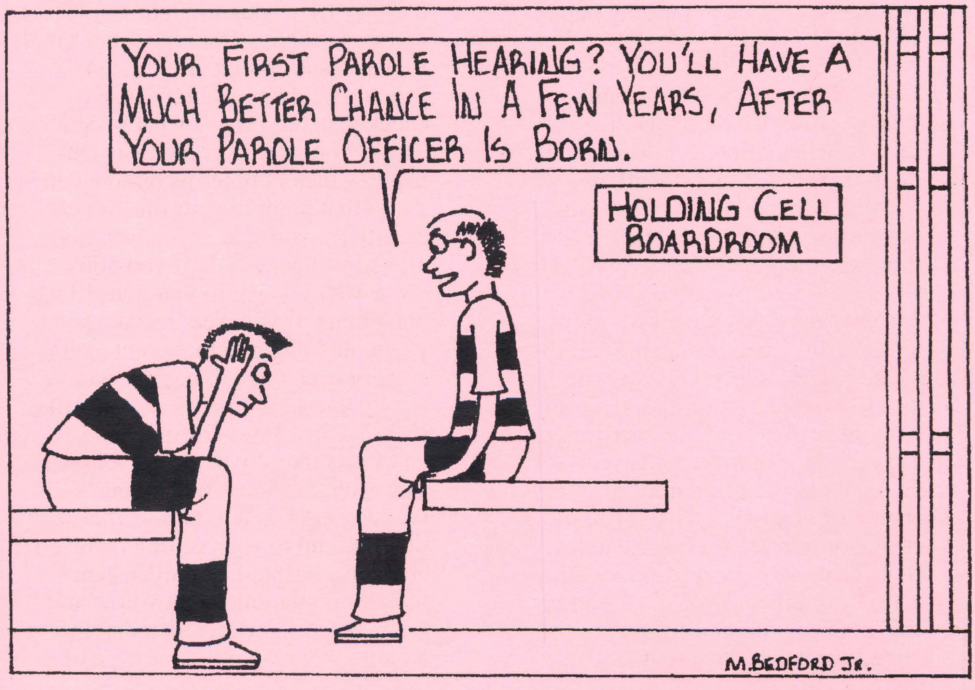

State Court Decisions

Salcido, (cont'd from page 38)

added.) How can you "guarantee the community," the district attorney asked him, that you will not "go back into that morally bankrupt condition and not reoffend?" These were questions about Salcido's character and background, not about the facts of the crime. These questions probed his insight into the root causes of his criminal actions, and as such, they were highly relevant. (*Shaputis, supra,* 44 Cal.4th at pp. 1259–1260.) "While it is improper to rely on a prisoner's refusal to address the circumstances of the commitment offense in denying parole, evidence that demonstrates a prisoner's insight, or lack thereof, into the reasons for his commission of the commitment offense is relevant to a determination of the prisoner's suitability for parole. [Citation.]" (*In re Rozzo* (2009) 172 Cal.App.4th 40, 62, fn. 9, italics added.) The Board's finding that Salcido lacked insight did not violate section 5011.

Salcido had further challenged the Board's reason, "we don't know your level of responsibility." The Court rejected this.

Salcido asserts that "[t]he Panel's comment that 'we ... don't know ... your level of responsibility' " was "plainly an indirect reference to [his] exercise of his protected right to 'refuse to discuss the facts of the crime' at the Board hearing, in violation of the rule requiring that the Board not hold such a refusal against a prisoner." We cannot agree. The Board's mere acknowledgment of Salcido's decision not to discuss the crime does not, without more, demonstrate that it held his decision against him. Here, the Board simply noted that it was "a little difficult to try and ask you questions when you're not discussing the crime. And I'm trying not to put you in that position but I don't understand when you agree with the probation officer's report, so you have culpability regarding Mr. Justice's death." Salcido responded, "Yes," and the commissioner immediately moved on to another line of questioning, asking whether he had "just live[d] life normally" for the next five years. The Board's comment was not a "barely-veiled ... criticism" of Salcido's decision not to discuss the crime, and it did not violate section 5011. (See *In re Lazor* (2009) 172 Cal.App.4th 1185, 1202, fn. 13 ["Consideration of whether an inmate accepts responsibility for the commitment offense does not conflict with section 5011, subdivision (b)...."].)

The appellate court went on to review the record, and, contrary to the finding of the superior court, found that there was "some evidence" to support the Board's denial decision. This included Salcido's pre- and post-murder violent criminal lifestyle, his hiding from responsibility for four years until cornered by forensic evidence in an ongoing police investigation, his failure to accept full responsibility for what had occurred, and his prison disciplinary history.

Finally, in a lengthy analysis, the Court rejected Salcido's complaint that Marsy's Law, in enabling longer parole denial intervals, was *ex post facto.* Although Salcido could have received his five year denial under either pre-or post-Marsy's Law formulas, the Court rejected his claim, noting that under Marsy's Law, one can either gain a longer interval *or the opportunity to have it foreshortened by applying for an earlier hearing.* The ex post facto question, however, remains unresolved until the California Supreme Court decides *In re Michael Vicks* (S194129), presently pending review.

Accordingly, the Court reversed the superior court's order, and ordered that court to issue a new order denying Salcido's petition.

***In re Efrain Reyes* (#)**

(unpublished) 2011 WL 6225421
CA6 No. H036891 (December 13, 2011)

Efrain Reyes was convicted in 1985 of the second degree murder of his wife, and sentenced to 15 years-to-life. Reyes told the Board this his close range firing of the shotgun into his wife's head was "unintentional." In July 2010, the Board denied him parole, based on the offense, his lack of insight into the magnitude of the offense, and his lack of insight regarding his depression. Reyes had petitioned the Santa Clara County Superior Court, which vacated the Board's denial, and ordered a new hearing comporting with due process.

Reyes felt obliged to marry his girlfriend at age 17, when she became pregnant. They went on to have six children, although the marriage was fraught with episodes of domestic violence, his drug and alcohol dependence, and his ongoing depression. Reyes had a prior conviction for assault with a deadly weapon, as well as for welfare fraud.

In prison, Reyes was treated until 2007 for a major depressive disorder with psychotic features. His two 115s in 23 years were non-violent. In 2009, the Board psychologist rated Reyes as low risk of psychopathy and general recidivism, low-moderate risk of violent recidivism, and low risk overall. Specifically, the doctor found:

Regarding insight, Dr. Kalich determined that "Mr. Reyes has good insight into the issues which led to his physical abuse of his wife and the life crime. ...

As to Reyes's expressions of remorse

Continued on page 40

State Court Decisions

Reyes, (cont'd from page 40)

> mized the shooting by stating that it was an accident. Currently, after viewing the autopsy report, he has accepted that he did shoot his wife at close range. However, he continues to maintain that he has no memory of shooting his wife.... Clearly, Mr. Reyes has made significant progress in assuming full responsibility, however it continues to be difficult for him to accept that he may have, albeit momentarily, intended the result of his actions." In 2010, Dr. Reynoso stated in her subsequent risk assessment that "it may be to Mr. Reyes' benefit to critically examine his true intentions towards his wife on the day of the crime." She also reported that "[w]hile his personal level of insight into the motives of his wife's shooting still remains limited, Mr. Reyes appears to have fairly good insight into his psychological processes, personal limitations and ineffective coping skills at the time....."

From this, the Court concluded,

> Thus, Reyes's own statements at the parole hearing and the psychological evaluations show that Reyes continues to deny that he intentionally shot his wife, despite the evidence to the contrary, which constitutes some evidence of Reyes's lack of insight into the nature of the commitment offense. There is also some evidence that Reyes lacks insight into the magnitude of the offense. Although Reyes maintains that his self-focused statements at the hearing were the result of manner in which the Board questioned him and do not reflect his actual attitude, we find that the Board could reasonably determine that Reyes lacks insight into the magnitude of the commitment offense because he generally views it in terms of the impact on himself, rather than the victim. ...
>
> As we have discussed, "where the record also contains evidence demonstrating that the inmate lacks insight into his or her commitment offense or previous acts of violence, even after rehabilitative programming tailored to addressing the issues that led to commission of the offense, the aggravated circumstances of the crime reliably may continue to predict current dangerousness even after many years of incarceration. [Citations.]" (*Lawrence, supra,* 44 Cal.4th at p. 1228.) Here, where the record shows that Reyes's current attitude towards the crime of murdering Laura includes a lack of insight into the magnitude of the offense and the impact on the victim, the aggravated circumstances of the crime constitutes some evidence to support the Board's decision that Reyes is unsuitable for parole because he is currently dangerous.
>
> Finally, the Court held that Dr. Kalich's 2009 psych evaluation, which noted that Reyes would need to continue treatment in the community, was at odds with Reyes' statement that he was cured of his depressive disorder, and thus demonstrated "lack of insight."
>
> In contrast to Dr. Kalich's 2009 report, Reyes told the Board at his 2010 hearing that he knew "that terrible depression will never come back," because he now has spiritual help and has been addressing the same issues for the past 25 years. Reyes therefore continues to display a lack of insight into his depression and the potential need for mental health treatment in the community in order to decrease his risk of violence. Thus, we find that some evidence supports Board's conclusion that Reyes's lack of insight into his depression, as well as his lack of insight into the nature and magnitude of his commitment offense, show that he currently poses an unreasonable risk of danger if released from prison. Reyes's continued failure to accept responsibility for the intentional shooting of his wife and to comprehend the impact on the victim, as well as his lack of insight into his potential need for mental health treatment after his release, show that he is currently unsuitable for parole.

Accordingly, the Court reversed the superior court's order, and ordered that court to issue a new order denying Reyes's petition.

In re Louis Oliverez (#)

(unpublished) 2011 WL 5138647
CA6 No. H036836 (October 28, 2011)

In 1993, Louis Oliverez and two crime partners fatally shot their victim, with five shots – the last being to the back of the head. Oliverez was convicted of first degree murder, conspiracy to commit murder, and grand theft. At their respective trials, all crime partners blamed the others.

At his initial parole hearing in 2010, Oliverez gave yet another version of the crime, which the Board compared with records of the convictions of his crime partners, as well as probation officer reports; the Board found Oliverez' credibility lacking. The Board found the crime, "this one in particularly [sic], as it is a first degree murder, was a little deeper in those characterizations." It also found Oliverez to be "manipulative," based on a 115 for falsifying a ducat, and related this back to

Continued on page 42

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See page 31 for details.

State Court Decisions

Oliverez, (cont'd from page 42)

> His manipulative nature is evidenced by his falsifying the ducat to get out of C-status, lying about his gang involvement to manipulate his placement in prison, making negative comments at the hearing about the victim, and giving different versions of the crime at different times, always choosing the version that would serve him best at the time.

The Court reasoned,

> As a result of Oliverez's lack of directness, manipulation of his circumstances, and his admitted dishonesty, the Board concluded that it could not believe him; he was not credible. Neither the superior court, nor this court, can disturb that finding. Credibility is the sole province of the finder of fact, which in this case is the Board. (*In re Tripp* (2007) 150 Cal.App.4th 306, 318.) Although neither lack of credibility nor manipulative behavior is specifically listed in the regulations as an unsuitability factor, both are quite properly considered in the parole suitability calculus. The circumstances identified in section 2402, subdivision (c) are merely illustrative of factors tending to show unsuitability. Section 2402, subdivision (b), expressly provides, "All relevant, reliable information available to the panel shall be considered in determining suitability for parole." Evidence that the inmate manipulates circumstances to protect his own interests and is generally not believable is surely some evidence that the inmate in not suitable for parole since he cannot be trusted to lead a blame-free life if released.

Summarizing, the Court held that

> Oliverez's inability to convince the Board that he accepts responsibility for the murder and that he understands what in his own makeup caused him to become involved is probative of his current dangerousness; the concern is that he could become involved in similar criminal behavior if released. Thus, there is some evidence to support the Board's conclusion that Oliverez is unsuitable for parole at this time.

Accordingly, the Court reversed the superior court's order, and ordered that court to issue a new order denying Oliverez' petition.

In re Steven A. Prellwitz (#)

(unpublished) 2011 WL 6141308
CA6 No. H036496 (December 9, 2011)

This is Steven Prellwitz's second reversal of a grant of habeas relief from the Santa Clara County Superior Court in the past six months. In CLN #40, we reported on the Sixth District Court of Appeal's reversal of relief granted by the superior court concerning Prellwitz' *September* 2009 Board denial. Today, we report on the same sequence of events, but now pertaining to his December 2009 Board denial. Little changed.

Steven A. Prellwitz was incarcerated in 1985 for the second degree murders of his mother and his sister. In December 2009, the Board concluded he was unsuitable. Prellwitz challenged the Board's decision in the superior court, which granted his petition for a writ of habeas corpus and ordered the Board to conduct a new hearing. On appeal, the state contends the superior court erred when it granted Prellwitz's petition, because "some evidence" supports the Board's decision. The Court of Appeal agreed, and reversed the superior court's order.

On May 11, 1984, then 26–year–old Prellwitz went to his parents' house and attacked his father with a rubber mallet, inflicting head and facial wounds and fracturing his father's arm. When Prellwitz's mother grabbed her son in a headlock, his father broke free and called police from a nearby 7–Eleven.

Arriving at the house to check on the safety of Prellwitz's mother and sister, police found the front door open and saw Prellwitz running across the living room. He threw an eight–to–10–inch kitchen knife in their direction. On the floor of a bedroom that showed "signs of a violent struggle," police found the blood-smeared bodies of Prellwitz's mother and sister, still in their nightclothes. His mother had "suffered eight mortal knife wounds puncturing her heart, lungs, windpipe, and stomach." His sister had suffered a mortal knife wound that punctured her windpipe and esophagus and four less serious knife wounds to the neck. Both bodies were also bruised and lacerated.

In 1985, a jury convicted him of two counts of second degree murder and one count of assault with a deadly weapon. The court imposed concurrent 15–years–to–life terms for the murders, consecutive to a three-year term for the assault.

Prellwitz did well in prison. He earned his associate's, bachelor's, and M.B.A. degrees in prison and acquired vocational certification in five trades. His file contains "a large number" of chronos praising his work habits and motivation.

He has participated in numerous Christian ministry and Bible study programs during his incarceration, including Conflict Resolution in 1996 and Christian Conflict in 2001. He completed two anger management programs, a 16–hour course in 2002 and a 26–week program in 2006. In 2007, he completed a five-session stress management program and a relationship awareness workshop. He prepared two book reports on family violence in 2009.

Prellwitz's psychological reports, while rating him "low risk," had qualifiers regarding his intellectualizing his feelings and raised questions regarding his true understanding of his anger exhibited in the murders. In 2008,

> Dr. Singh noted, as had other evaluators, that while Prellwitz had not yet accepted full responsibility for his actions, he had expressed remorse.

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State Court Decisions

Prellwitz, (cont'd from page 44)

> of these murders, doesn't match the way the bodies were defiled. And I can accept that you don't remember, but there wasn't anybody else there that could have caused that to happen."
>
> FN5. Prellwitz later tried to explain why he smiled. "I'm sorry I smiled, but ... in my earliest hearings all this was never brought up, and it was brought up in, I think, 2005 by [the district attorney] and it was objected to, and by [a] commissioner. And she had actually warned him that this—if I'm not charged with this why is this being brought up. So, that was my only—that was what I—."

Prellwitz told the Board he was "in fear" when his mother picked up the knife in the kitchen, but he also said "it wasn't like she threatened [him]" then. He told the Board he stabbed her in the bedroom because he thought she had stabbed him, but he also said that "just a fury took over." Prellwitz's mother's injuries (eight mortal stab wounds to the neck, chest, and abdomen and "multiple blunt injuries") reflected that she had been stabbed in a fury rather than in self-defense. His sister's wounds were also in dispute.

> Although his sister suffered five stab wounds to her neck, he maintained that he "pushed it [a shard from the broken lamp] into her throat once, and then I shoved her up against the dresser...." (Italics added.) He rationalized that the one act of pushing her up against the dresser resulted in two cuts to her trachea: "I pushed her once and then shoved her up further against there, so I may—I think what it did was it just released the pressure and then hit her again because I—if I remember the reports, there was two cuts, two jagged cuts on her trachea." All of this evidence was more than sufficient to support the Board's finding that Prellwitz had not yet accepted full responsibility for his actions.

The Board was also concerned about Prellwitz' lack of sufficient insight and of genuine remorse.

> His lack of genuine remorse was also evident at the hearing. Asked if he "truly" had remorse, he responded only generally: "Yes. I expressed my remorse at my sentencing hearing ... and many times over the years." "I feel shame and remorse for what I did." Asked how he felt "now" about his mother and his sister, he replied, "[a]shamed and sad." He did not describe his victims' losses by, for example, expressing sorrow that his mother would not see her grandchildren grow up, or that his sister had her life cut short. In fact, the Board noted, he said nothing at all about his sister's loss. The Board could reasonably have determined from his responses that he was simply "verbalizing" remorse, "just ... saying it or intellectualizing it," which "means very little."
>
> There was also evidence that Prellwitz had not yet gained sufficient insight into his emotions. Eight psychological reports in the record describe his increasing *but still limited* insight. In the most recent, Dr. Montalvo recommended "intensive, individual therapy" to help Prellwitz "explore and become more comfortable with his emotions and learn to talk about his feelings." He spoke of the work Prellwitz still "needs to do in order to become more open and honest regarding his feelings," specifically, his need "to reduce his tendency to focus upon and argue about details and to intellectualize emotional issues." These, Dr. Montalvo, wrote, were "part of his comfort zone, whereas dealing with strong emotions has not been *and needs to be*." (Italics added.)

Prellwitz nonetheless argued that the Board failed to show any nexus between the commitment offense and current dangerousness. The Court disagreed.

> An inmate's lack of insight into his commitment offense can provide a logical link between the nature of that commitment offense and current dangerousness. (*Shaputis, supra*, 44 Cal.4th at pp. 1260–1261, 82 Cal. Rptr.3d 213, 190 P.3d 573 & fn. 20) Here, the Board clearly established that nexus when it told Prellwitz that "it's the why that is so critically important. You know, if a person knows why they did what they did, then they're not likely to repeat it.... You talked about being frustrated and angry, and that's what led to this commitment offense. But in the frustration and anger there is no why.... You had ample opportunities to stop these attacks, and you don't know why you did them.... You brutalized and mutilated ... your mother and your sister, and you don't know why other than the fact that you were frustrated and angry. That's not the bridge to suitability."

Accordingly, the appellate court found that because

> there was more than "a modicum of evidence" to support the Board's implied conclusion that until Prellwitz develops a greater ability to recognize, understand, and deal with his emotions, particularly his anger, he remains a current danger to society. (*Rosenkrantz, supra*, 29 Cal.4th at pp. 676–677, 128 Cal.Rptr.2d 104, 59 P.3d 174

The Court reversed the superior court's order, with directions to issue a new order denying the petition

In re Byron Mills (#)

(unpublished), 2011 WL 6330617
CA6 No. H036076 (December 19, 2011)

Byron Mills was convicted of the 1980 second degree murder of his first wife, and sentenced to 15 years to life. Mills became enraged when his wife, from whom he had been separated, had been sleeping with another man, and strangled her.

Mills was denied parole for three years at his September 2009 hearing, which was held as a result of a June 2009 superior court order directing a new hearing. [Additionally, Mills had *another* suitability hearing in April 2010, which was the result of an earlier superior court order for rehearing of an October 2008 hearing, wherein he was again denied parole.] Mills petitioned the Santa Clara County Superior Court to order a new hearing, which the court granted. The state appealed, and the Sixth District reversed the superior court order that resulted in the 2009 hearing. Although the 2010 hearing was not before the appellate court, the court found it unnecessary to respond to the state's complaint that the 2010 hearing mooted the appeal of the 2009 hearing, because the court found there was "some evidence" to support the 2009 denial.

The Board was specific in its statement of reasons for denial.

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CLN NEEDS YOUR HELP

(Cont'd from page 46)

Abuse of Visiting by Staff. Please see article on page 69 (report to LSA).

Psychological evaluation. Did the psych get the facts straight? Was sufficient time devoted to the interview? Was the psych rude, abrupt, in a hurry, or interruptive? Did the psych express any kind of bias or rudeness, or make inappropriate remarks? Were you caged? Details, please.

Were you solicited by a lawyer? Were you approached in a waiting or visiting room by a lawyer seeking to represent you? Did you already have an attorney at that time? Or did you receive a letter from a lawyer you don't know or didn't write to, regarding representing you at your hearing or in litigation? We want to know about lawyers who boast about their skills, their "grant rate," or who tend to undermine your relationship with another attorney or discredit another lawyer. *CLN* will respect anonymity, if requested

Mail at your institution. Delays? (How long after the postmark date do you normally receive first-class mail?) Are there problems with contents, weight, opening legal/confidential mail without you being present?

Guards selling cell phones or tobacco? *CLN* will respect your request to remain anonymous. Can you provide the names of guards and staff members who you know smuggle in cell phones, tobacco or other goodies to dell to inmates? Specifics? If you wish to provide this information by confidential mail, *CLN* can provide the name of a lawyer who would like to receive mail on the subject.

"Great Goods." This is the name of a company in New Hampshire that advertises in publications to buy stamps from inmates. *CLN* has received several complaints about the company, and BBB (the Better Business Bureau) rates them an "F" (the lowest rating) for their failure to respond to and resolve numerous complaints received, charges of fraud, etc., similar to the reports we receive. We have been unable to communicate with the company, and they have no business license. Input from inmates about their experience with this company may be helpful.

CLN
P.O. Box 68
Walnut, CA 91788

State Court Decisions

Mills, (cont'd from page 48)

Was based on a misreading of the Board's decision. The Board did not find Mills unsuitable based solely on the commitment offense. Instead, the Board's decision was based on evidence that Mills remained a current risk due to his current failure to accept full responsibility for his abuse of Rosemarie, his current minimization of his conduct, his continued inconsistent statements, and his present demeanor. These were all appropriate considerations under *Lawrence* and *Shaputis.*

The actual reasons for the Board's decision were also supported by some evidence. Mills did not dispute the Board's assertions regarding his demeanor at the hearing. The fact that Mills became angry, upset, and agitated at the hearing reflected that he has not yet learned to adequately manage his anger, which was precisely the circumstance that led to the commitment offense. Mills has long refused to acknowledge that he abused Rosemarie prior to the commitment offense, and he has minimized his abuse by claiming that he merely "restrained" her when she attacked him. As the Board pointed out, Rosemarie was a very small person, and Mills was a large man. Mills's refusal to acknowledge the true nature of his abusive domination of Rosemarie suggests that he has yet to learn enough about domestic violence to ensure that he will not engage in it in the future. Mills has in fact made numerous inconsistent statements about both the commitment offense and his conduct toward Rosemarie and others. The fact that his statements cannot be trusted is, as the Board stated, evidence that he cannot be trusted to adhere to his stated desire to remain nonviolent and may resort to violence. Like *Shaputis*, "despite years of therapy and rehabilitative 'programming,' " he has failed to come to terms with his "antisocial behavior," and the Board could therefore properly conclude that he is not yet suitable for parole. (*Shaputis, supra*, 44 Cal.4th 1259–1260.)

Accordingly, the Court ruled that

Since the Board's 2009 decision was supported by some evidence, the superior court lacked any basis for intervention and should have denied Mills's petition. The superior court's order is reversed, and the superior court is directed to enter a new order denying Mills's petition.

CREDITS AGAINST 1980 LIFER'S PAROLE TAIL AWARDED FOLLOWING ILLEGAL GOVERNOR REVERSAL

***In re Johnny Lira* (#)**

(___Cal.App.4th___), 2011 WL 6034460
CA6 No. H036162 (December 6, 2011)

The Sixth District Court of Appeal held that following Governor Schwarzenegger's 2008 illegal reversal of Johnny Lira's grant of parole, Lira was entitled to credit against his 3 year parole tail that began upon Lira's release on April 8, 2010.

In November 2008, the Board conducted a new hearing, found Lira suitable for parole, and set his term of imprisonment at 216 months (18 years). In April 2009, then Governor Schwarzenegger vetoed the Board's decision, finding that Lira would pose a danger if released. In November 2009, the Board held the next regularly scheduled parole hearing, again found Lira suitable for parole, and set his term of imprisonment at 228 months (19 years). In December 2009, before the Board's decision became final and effective, Lira filed a writ petition challenging the Governor's 2009 veto. He alleged that it was not supported by some evidence and thus violated his right to procedural due process. In April 2010, while Lira's petition was still

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State Court Decisions

Lira, (cont'd from page 50)

an unreasonable risk of danger to others if released. Accordingly, we conclude that the Governor's veto of the Board's decision to grant parole was erroneous.

As to credits, the Court ruled

[C]redit should be calculated starting from the date that the Board's 2008 suitability finding would have become final and effective but for the Governor's erroneous veto. That date would have been 150 days after the Board's finding on November 13, 2008: April 12, 2009. Thus since Lira was released on April 8, 2010, he is entitled to credit for the period from April 12, 2009, to April 7, 2010. ...

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

Late update: On December 21, 2011, both the state and Lira filed petitions for rehearing in the Court of Appeal. On January 4, 2012, rehearing was granted. Thus, the case will not become final until further briefing and argument has been considered by the Court.

PAROLE DENIAL BASED ON REFUSAL TO SNITCH OUT CRIME PARTNER, SURVIVES HABEAS ATTACK

In re Lonnie Morris (#)
unpublished)
CA1(3) No. A132191 (September 14, 2011)

Lonnie Morris was convicted of the murder of a San Francisco police officer during the course of a robbery in 1977; he became eligible for parole in 1984. He was again recently denied parole, based on his refusal to identify his accomplice. Morris' habeas petition to the First Appellate District Court of Appeal, challenging this denial, was denied without an order to show cause. But in an unusual event, Justice Pollack, who dissented from the denial, offered his reasons why he believed an order to show cause should issue.

[I]t is not among the factors that the Board of Parole Hearings (the Board) is authorized to consider in determining his suitability for parole. (Cal. Code Regs., tit. 15, § 2281.) The Board's attempt to justify its insistence that petitioner identify the accomplice before it will find that he no longer poses an unreasonable risk of danger to society if released from prison, on the basis that his continuing refusal reflects a lack of remorse and insight, is arbitrary and completely at odds with the record before the Board. I shall not belabor this dissent with an extended description of petitioner's crime, his salutary record of personal improvement while in prison, or of the many psychological evaluations that have found him to pose a low risk of future violence if granted parole.

The Board had minced no words when it relied exclusively on this reason to deny parole, as noted by Justice Pollack.

In explaining their decision to find petitioner unsuitable for parole, the members of the Board made reference to petitioner's previous youthful offenses and to the facts of his commitment offense, but they left no doubt as to their reason for denying him parole. According to the presiding commissioner: "But, of course, at this point, we're still concerned that you haven't identified ever the crime partner and as we noted, Commissioner Kane last year . . . advised that . . . when you go out of this gate, you need to go out clean. You don't need that hanging around your neck. You don't need that bringing you down and . . . to us, it shows that you really haven't internalized the - You don't understand the nature and the magnitude of this crime or you would take care of business. And we don't think that you do have the insight. . . . You haven't internalized some of this stuff or you would say, 'I want to come clean. I want to clear the books. I want to take care of business and name this person.' No matter what the consequences are. And that's our concern, because when you don't, you're minimizing and you're skimming the surface and that's what we believe. . . . And you're shining us on and you're saying hey, I don't care if he's walking out there. I don't care if he's a - he could be - he should be convicted of first degree murder. He's there doing the robbery. You know, and it just upsets me that we don't know that and [you] don't say anything." The deputy commissioner then added the basis for her decision, to the same effect. After reciting at length the many "admirable" activities in which petitioner has been involved while imprisoned and his "positive adjustments," the fact that he has not "received a serious 115 since 1985," has "offers for employment and for residence," and his noninvolvement in "prison-type violence," the commissioner explained,

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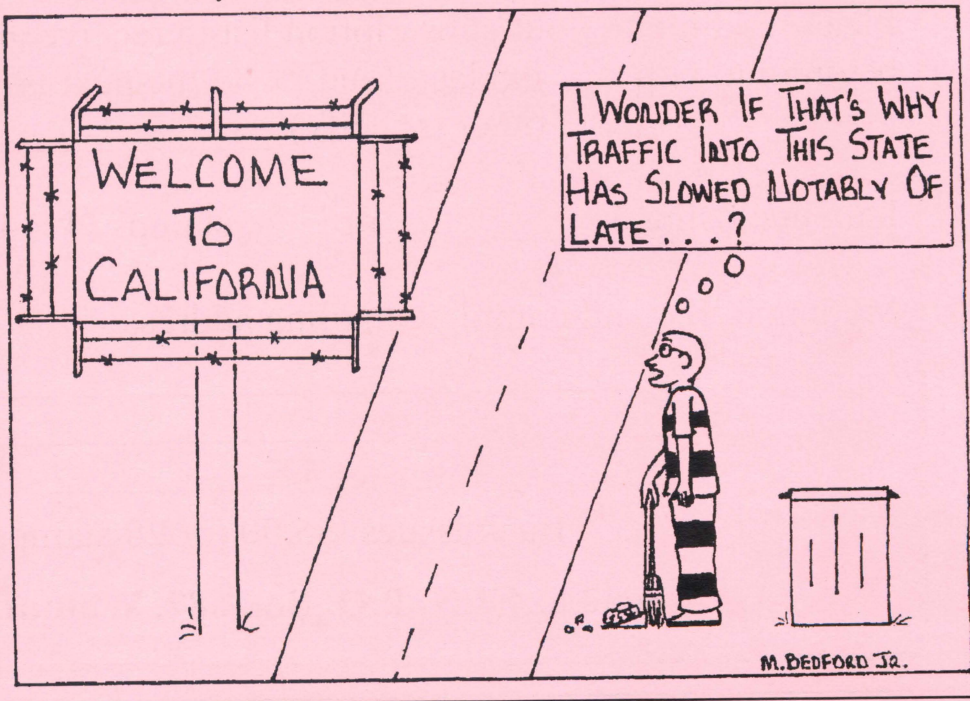

State Court Decisions

Morris, (cont'd from page 52)

is likely to commit additional offenses if released on parole.

Morris' petition for review of this denial was denied by the CA Supreme Court on November 2, 2011.

RECENT PRISON MISCONDUCT RULED "SOME EVIDENCE" TO DENY PAROLE

In re Howard Scott (#)

(unpublished) 2011 WL 5345399
CA2(1) No. B231398 (November 8, 2011)

Howard Scott was convicted of second degree murder in the 1987 shooting death of his cocaine dealer partner. He was denied parole in 2010, and petitioned the Los Angeles County Superior Court, which denied him based on its finding "some evidence" related to his most recent 115. Scott then took a new petition to the Court of Appeal, which considered the record de novo.

> The Board based its decision to deny parole on three factors: Scott committed "serious misconduct while incarcerated" (referring to the incident in the dental clinic); the commitment offense "was committed in an especially cruel manner . . . demonstrating exceptionally callous disregard for human suffering;" and Scott failed numerous grants of probation as a juvenile and an adult.

Since the principal issue here is whether his denial of parole in 2010 based, in part, on a CDC-115 received in 2007, was adequately supported by "some evidence," we review that incident.

> In February 2007, three years before the subject parole hearing, Scott received a "115" citation for "[f]ailure to comply with orders necessitating the use of force." The incident arose when Scott arrived a half hour late for a dental appointment and did not have his identification. Denise Garza, a dental assistant, told Scott he could not be seen because he was late but he could come back the next day if he filled out a form which she handed him on a clipboard together with a pen. In her incident report, Garza stated: "He took an aggressive stance [and placed] his left hand with the clipboard down and said you will not talk to me like that with an abrasive loud tone and clenched his hand around the pen and lowered it back like he was getting ready to hit me with his right hand while glaring at me with his eyes. . . . I felt scared for my safety so I stepped back." A witness, Maria Krause, stated in her report that she saw Scott "take an aggressive stance and put his hands down as he clenched his right hand with a pen in it." Krause ordered Scott to leave the clinic but he refused. "[A]s he started to lift his right hand up," Krause activated her alarm summoning help from the guards. Krause ordered Scott to "get down" but he failed to comply. When the guards arrived they ordered Scott several times to get down on the floor. When he did not comply two of the guards pushed him down. According to one of the guards, Scott actively resisted handcuffing by holding his right arm under his chest. According to Scott, the guard was pinning his right arm under his chest and he could not move it. On the resistance issue, the hearing officer concluded that Scott might have had his arm pinned underneath him and reduced the charge of "[r]esisting staff necessitating the use of force" to "[f]ailure to comply with orders necessitating the use of force."

Although Scott argued that this incident did not supply the requisite "some evidence" to deny parole, the appellate court disagreed.

> Here, the recent misconduct necessitating the use of force by prison guards is "some evidence" that Scott poses an unreasonable risk of danger to society if released at this time. (*In re Roderick* (2007) 154 Cal.App.4th 242, 273 [a prisoner's behavior in prison is relevant to his suitability for parole].)

Finally, the Court concluded it did not need to reach Scott's "lack of rational nexus" claim, since it already found "some evidence" in the prison misconduct reason cited by the Board.

> [W]e find no merit in Scott's contentions that the Board's decision must be reversed because it lacked a pro forma finding on the record that a "rational nexus" exists between Scott's conduct and his current dangerousness. (*In re Criscione* (2009) 180 Cal.App.4th 1446, 1461.) Due process calls for reasoning (*In re Lawrence, supra,* 44 Cal.4th at p. 1210), and here the Board's decision contains that reasoning. (See discussion at pp. 4-5, ante.) Nothing more was required.

Accordingly, Scott's petition was denied.

COURTS CONCEDE THE CASES ARE "CLOSE," BUT STILL RULE IN FAVOR OF THE BOARD

In re Oscar Maela (#)

(unpublished) 2011 WL 6357777
CA4(1) No. D059853 (December 20, 2011)

In 1988, a jury convicted 22 year-old Oscar Maela of the second degree murder with use of a gun, which had occurred during a drug purchase. He was sentenced to 17-life. Maela was most recently denied parole in July 2009, for three years. After being denied habeas relief in the San Diego Superior Court, he petitioned the Court of Appeal, asking for a new parole hearing and for relief from Marsy's Law (*ex post facto* increase in parole denial interval).

Maela's record didn't help him. He had numerous juvenile crimes, and spent two years in CYA. He was convicted of attempted escape from county jail. Between 1989 and 1996, Maela accumulated 13 115s, including for fighting, stabbing an inmate, and participating in a race riot. To his credit, he has been discipline-free since, and debriefed from the Mexican Mafia gang in 2000. He went on to earn his G.E.D. and learn several vocations, receiving positive chronos along the way. He also immersed himself in NA. All of this resulted in his latest psychological evaluator finding him a "low risk" if paroled.

Maela's prison record includes gaining a G.E.D, being 7 units short of gaining his Associate of Arts degree, 11 years of positive work reports in PIA, and certificates in sewing machines and as an electronics technician. His self-help and programming includes Alternatives to Violence, Criminal Gang Members Anonymous, Success Ahead, Stress Management, and Fathers Behind Bars. His three CDC-115s, two for possession of marijuana and one for cell fighting, were in the 1980s.

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State Court Decisions

Maela, (cont'd from page 54)

released. Instead, Maela printed material from the internet about different groups that could aid him if he was paroled. While the undeveloped relapse prevention plan by itself does not warrant caution, the undeveloped plan coupled with Maela's sporadic substance abuse training and the fact Maela was under the influence of PCP while he committed the life offense raises a concern about Maela's danger to society upon being released.

The Court of Appeal admitted then that the record might well be weighed in favor of release. However, the *court's* role in reviewing parole denial petitions is solely to look for "some evidence," not to reweigh the evidence it finds.

Were it our responsibility to evaluate the various factors appropriate to a determination whether Maela constitutes a current threat to public safety, we might very well conclude that evidence in the record tending to establish his suitability for parole far outweighs any evidence demonstrating unsuitability for parole. Yet, this is not our role. (See *Shaputis, supra*, 44 Cal.4th at pp. 1260–1261.) Instead, we have reviewed the record, in a light most favorable to the Board's decision (*In re Morrall* (2002) 102 Cal.App.4th 280, 301) for "some evidence" to support the Board's denial of parole. Based upon the totality of the circumstances, we are satisfied the Board's decision meets this extremely deferential standard, albeit the evidence appears modest. Maela was under the influence of PCP at the time he committed his life offense. He also admits to having used alcohol and drugs since the age of 12. His substance abuse training has been sporadic over the last few years, and he only began his involvement with Amity in 2009. He had previously assaulted his wife and was hesitant to move in with her if he was released, choosing instead to live in the Amity residence. A couple of times during the suitability hearing, Maela made statements that could be construed as evidencing his lack of understanding of the magnitude of his life crime. In addition, he failed to contact any group to set up a relapse prevention program.

In summary, this evidence can be predictive of Maela's current dangerousness despite the many positive factors that demonstrate his suitability for parole. (See *Lawrence, supra*, 44 Cal.4th at p. 1226["[o]ur deferential standard of review requires us to credit the [Board's] findings if they are supported by a modicum of evidence"].)

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LESS THAN 1% RECIDIVISM RATE FOR CONVICTED MURDERERS WHO PAROLED BETWEEN 1995 AND 2011

CDCR's statistics published last month confirm that far less than one percent of formerly convicted murderers who have been released to parole commit new crimes. Of 860 inmates who were paroled in the 15-year period between January 1995 and March 2011, who had served terms for murder, 5 committed new offenses, as shown. The resulting recidivism rate is less than six-tenths of one percent (0.58%), which is less than one-one-hundredth of California's overall Recidivism rate for parolees.

Post Release Criminal Activity of Convicted Murderers Who Have Paroled Since 1995 Data as of March 31, 2011

Recidivism behavior of murderers who returned to CDCR either as a new admission or with a new term over a 15-year time period. Although this 15-year murderer recidivism report is not directly related, or necessarily comparable, to the data presented in this 2011 Adult Institutions Outcome Evaluation Report, it is included for informational purposes.

New Crimes, If Any	Number of Paroled Inmates	Percent	Sentence For New Crime
Burglary, 2nd Degree	1		Served 6 Months* (9/10 - Present)
Petty Theft with a Prior	1		Served 11 Months (3/09 - 1/10)
Possession of a Weapon	1		Served 10 Months (7/05 - 5/06)
	1		Served 4 Months (5/09 - 9/09)
Robbery	1		Served 11 Months* (4/10 - Present)
Sub Total for New Crimes	**5**	**1%**	
No New Crimes	**855**	**99%**	
Total	**860**	**100%**	

*Offenders still serving time for offense.

State Court Decisions

Goldner, (cont'd from page 56)

> The purported lack of an adequate relapse plan does not support the Board's decision.

Goldner's 2008 psych evaluation resulted in "low" risk ratings in all categories. In 2010, the evaluation changed to "low to moderate," based on the psychologist's *speculation* that Goldner *could* revert to alcoholism. As the Court acknowledged,

> Goldner makes a compelling argument on the merits as to whether his ambiguous psychological assessments are favorable or unfavorable. It is odd that he is now considered to be a higher risk than in the past based on the same basic pool of historical information. But the Board was entitled to credit the most recent psychological assessment, which deems Goldner a low to medium risk rather than a low risk. And the 2010 assessment is not without a basis for its analysis, as there is uncertainty as to whether Goldner can actually refrain from alcohol abuse outside prison and thereby avoid the triggers for his criminal behavior.

In its conclusion, the Court indicated the weakness of the rationale supporting Goldner's parole denial.

> This is a close case. Goldner cannot erase his past: He is an alcoholic who committed horrible crimes and generally led a disreputable life prior to his imprisonment. But the Board is not entitled to deny parole indefinitely and systematically to all alcoholics and drug addicts based on a generalized, unsupported fear they could resume their prior lifestyle upon release, despite years of treatment and abstinence. Moreover, two of the Board's rationales—supposed lack of insight and lack of a relapse prevention program—are dead ends.
>
> The Board's ultimate decision is supported by the cruelty of the alcohol-fueled murder, Goldner's social history as a young adult addicted to alcohol, the 2010 psychological assessment linking Goldner's current dangerousness (low to moderate, not simply low) to his ability to prevent himself from drinking alcohol, and the Board's judgment that Goldner had not yet adequately prepared himself to cope with the temptations of life outside prison. Goldner's efforts to reform his ways are commendable. However, it is not for this court to usurp the discretionary role of the Board. The Board duly considered all of the evidence put before it and all of the factors prescribed by its guiding regulations. Taken as a whole, the Board's stated rationale for denying parole sufficiently "establish[ed] a rational nexus" between its concerns and "the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1210 .) There is some evidence that, if Goldner were released now, he would still pose a risk to the public despite the progress he has made while in prison.

Nonetheless, the Court ordered that the trial court's order granting Goldner's petition for writ of habeas corpus be reversed.

ANGER REPORTED IN 115s RULED "SOME EVIDENCE" TO DENY PAROLE

In re Earl Weston (#)

(unpublished) 2011 WL 5843008
CA4(2) No. E052826 (November 22, 2011)

Earl Weston, an admitted drug addict, pled guilty to a 1988 murder with special circumstances, in exchange for a sentence of 25 years to life. At his initial parole hearing, in 2005, the Board denied him for four years. In 2009, his subsequent hearing resulted in a three year denial. The denial was predicated on the commitment offense, lack of insight or remorse, and Weston's disciplinary history. Weston challenged that decision in the Inyo County superior court, which granted his petition for a writ of habeas corpus in December 2010 and ordered the Board to conduct a new hearing.

> In its memorandum of decision, the court criticized the Board's reliance on certain factors. First, the lower court noted that virtually all first degree murders (other than felony murders) are calculated and that murders by definition involve callousness. It thus concluded that in the appropriate context of all first degree murders, defendant's offense was not exceptionally cruel or callous.

Next, the superior court took issue with the Board's determination that defendant's reasons for the killing were trivial, finding that "[i]n a drug-addled state," defendant and another individual irrationally agreed to kill the victim. The court concluded that while the purpose was unjustified, "nonetheless, as a motive, however improper, it is at least understandable and not trivial."

The superior court also determined that the Board inappropriately relied on defendant's concededly improper behavior in custody, the most recent incident occurring eight years prior to the hearing. Further, the court concluded the Board improperly attributed to defendant a lack of remorse and insight as to the seriousness of his crime because the defendant exercised his right not to discuss the circumstances of the crime at the hearing. Finally, the superior court stated the Board appeared to consider the fact that the BPH had chosen not to provide a more updated psychological evaluation, and improperly weighed it adversely to the grant of parole. The court thus concluded the Board's finding of unsuitability for parole had either no or legally insufficient evidentiary support.

On appeal, the state contended the superior court erred in granting the petition, because "some evidence" supported the Board's decision. The appellate court agreed, and reversed the superior court's order.

The appellate court found the Board's determination that the crime, even for a first degree murder, was exceptionally grave.

> In this case, the commitment offense was especially heinous, atrocious, and committed in a cruel manner, within the meaning of title 15, California Code of Regulations, section 2402, subdivision (c)(1). The offense was carried out in a dispassionate and calculated manner: at midday on the date of the murder, the defendant and his associate dug a grave in a secluded spot prior to luring the victim to the location. The defendant and his associate partied with the victim until dark, when they decided it was

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State Court Decisions

Hunter, (cont'd from page 58)

> In response to questions from the Board, Hunter stated that Tanya died from "stab wounds" on her left side, possibly from a kidney injury. When the Deputy Commissioner sought to confirm that Hunter had stabbed her on the left side, he replied: "Yeah, the left side. That was definitely the puncture wound. And I hit her in her chest, made a big scratch." When asked how many times he stabbed her, he replied: "I would say, I know in her chest. I'm not for sure if I hit her twice in her chest, but I know I hit her definitely once on her side that I remember." When asked if he verified that she was dead, he said, "I was just swinging. I don't think I thought that through at the time, to make sure she was dead. But it was all a part of the, in the midst of the struggle." When later asked whether he might have inflicted as many as seven stab wounds, Hunter replied: "It could be. I just know of two or three major punctures that I did. I don't know if the rest was scratches or actual stab wounds. I mean, you know, puncture or cuts. I'm not for sure. Is stab wounds considered cuts too? Is it all the same? Then it may be so." Hunter was uncertain whether Tanya's body had any marks from being beaten, but he agreed there was a "great possibility" it did. When asked whether he had strangled her, he replied that he wasn't sure if that had been a cause of death, but admitted he "definitely choked her."

The Board offered its usual denial reasons.

> In explaining its decision the Board first noted the heinous and callous commitment offense: the murder of a pregnant woman, the mother of a five-year old, for a trivial reason and partying immediately thereafter. The Board noted Hunter's significant history of drug abuse, beginning at the age of 12 or 13 and continuing through the time he was incarcerated. The Board also based its denial on Hunter's "past and present mental state." It believed that in discussing his commitment offense Hunter minimized his conduct and was not credible. The Board noted that in discussing the crime, Hunter had not spontaneously discussed its effect on the fetus or on the five-year-old son of the victim, and thus, in the Board's view, failed to demonstrate appropriate remorse. The Board also noted Hunter's recent discipline for failing to report to work, terming it "significant misconduct." Finally, noting that Hunter murdered a pregnant woman who was also the mother of a five-year-old, the Board expressed concerns about his parole plans to reside with his brother, who has children in his home.

As its first ploy, the state floated a novel argument that Hunter's petition, filed 11 months after the hearing, was somehow "untimely," which the Court properly rejected.

> Capital habeas petitions are untimely if not filed within 180 days of the final date for filing a petitioner's reply brief in the direct appeal. (*In re Soderstein* (2007) 146 Cal.App.4th 1163, 1221.) The Attorney General asserts that this 180–day period serves as a benchmark for what should be deemed "substantial delay." Petitioner's superior court writ petition was not filed for more than 11 months after the Board's decision became final. The Attorney General contends the delay was substantial, unjustified, and does not fit into any exception to the habeas timeliness requirement.
>
> We do not agree that the considerations regarding the timeliness of a petition for habeas corpus challenging a criminal conviction apply to a petition challenging a parole denial. As pointed out in *In re Burdan* (2008) 169 Cal.App.4th 18, 31, in the parole denial context the record is simply a paper record, typically well preserved, and the finality of the petitioner's conviction is not at issue. Therefore, delay normally can prejudice only the petitioner. Because this is a parole denial case, it is not subject to the deadlines associated with habeas petitions challenging criminal convictions. There is no basis to deny this petition as untimely.

The Court then went on to search the record for evidence of a rational nexus between Hunter's current demeanor and his offenses.

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

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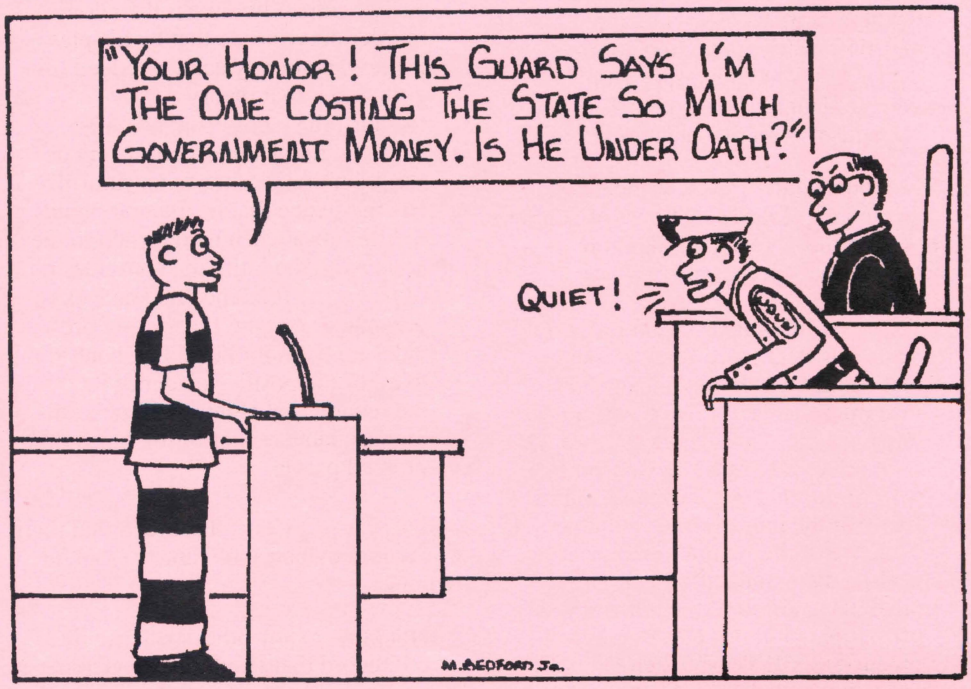

State Court Decisions

Hunter, (cont'd from page 60)

decision in concluding its "lack of insight" inquest.

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

Finally, the Court rejected the Board's reliance upon Hunter's 115 for alleged participation in a work stoppage. Hunter said he was totally focused on avoiding violent confrontations, and that he would continue to do so in life.

> The Board also referred to Hunter's 2008 discipline for not reporting to work as justification for its decision. The Board may rely on recent discipline as a basis for denying parole. (See, e.g., *In re Hare* (2010) 189 Cal. App.4th 1278; In re Reed (2009) 171 Cal.App.4th 1071.) But other than this single incident, there is nothing in the record to suggest that Hunter has evidenced unwillingness to abide by prison rules or that he is not a good worker. To the contrary, his supervisors speak highly of him; one supervisor described him as being a model for other inmates, displaying a "good attitude and work ethic." And the conduct for which he was disciplined in 2008 is not indicative of a disregard of authority, much less of future dangerousness. His failure to report to work on one occasion was an anomaly, which he explained by his desire to avoid exposure to violence in light of threats that had been made in connection with an inmate work stoppage. Indeed, the Board acknowledged the appropriateness of avoiding violent conflict and articulated no reason to believe that the choice Hunter made under the circumstances suggests he would pose a danger if paroled. (*In re Palermo, supra*, 171 Cal.App.4th at p. 1110 ["Nothing in the record supports a conclusion that [inmate] poses a threat to public safety because he once engaged in the unauthorized use of a copy machine, once participated in a work strike, and once was found in possession of a fan stolen by his roommate."].)

In its conclusion, the Court was very explicit in its absence of "some evidence" findings.

> The Board has not articulated a rational basis supported by "some evidence" to support its conclusion that Hunter will pose an unreasonable risk to public safety if paroled. There is no evidence that his mental state (including his remorse, acceptance of responsibility, or insight) indicates current dangerousness. There is no evidence that his narrative of the life crime is inaccurate or minimizes the significance, impact, or wrongfulness of his prior actions. Nothing in the record links his life crime, committed in 1984, with an assessment that he will pose an unreasonable danger if now granted parole. Nor has the Board articulated a rational nexus between the 2008 disciplinary event and a risk of future violence. In short, the record fails to provide any rational basis for finding Hunter unsuitable for parole.
>
> Because of the conclusion we have reached, we need not consider Hunter's additional contention that the denial of a further hearing for seven years violates the ex post facto clauses of the state and federal constitutions.

The Court ordered the matter remanded to the Board to promptly conduct a subsequent parole hearing in light of its opinion.

In re Carlos Jaime-Medrano (#)

(unpublished) 2011 WL 5343489
CA2(1) No. B232027 (November 8, 2011)

Carlos Jaime-Medrano pled guilty to a 1989 first degree murder, an alcohol-infused drive-by shooting committed when he was 19. Although it involved flashing gang signs, he claimed he neither knew the victim nor was a member of any gang. He was found unsuitable by the Board in December 2009, based on the gravity of the offense and lack of insight. The Los Angeles Superior Court denied his writ petition, finding the Board's reasons supported by "some evidence." Jaime-Medrano then petitioned the Court of Appeal, which issued an Order to Show Cause and appointed counsel.

Jaime-Medrano had no prior criminal record. In his two decades in prison, he received no 115s. Rather, his prison record is replete with vocational trade certifications, above-average work supervisor reports, and participation in AA since 1991. His parole plans, if deported to Mexico, include housing, work and AA sponsorship.

Jaime-Medrano's psych evaluations over the years are supportive of parole. His 2009 risk ratings are "very low" to "low," with concomitant acknowledgement of acceptance of full responsibility, genuine remorse and good insight into the factors of his offense. Previous risk ratings have placed him as "no more dangerous than the average citizen."

On this record, the Board nonetheless denied him parole for the gravity of the offense and lack of insight. In essence, the Board could not rationalize how he could blow away a human being he did not know, for absolutely no apparent reason other than his friend in the car told him to do it.

> And that the nature of this crime does cry out for further exploration in that you willingly shot a human being for apparently no reason at all. There were a number of speculative reasons as to why this occurred, but the bottom line is none has been articulated to the Panel other than ... you were told to shoot him." Deputy Commissioner Roger Watkins added, "You'll see that it just doesn't make—it doesn't make much sense and it can't make people feel comfortable when you continue to say because somebody told me to do it."

The superior court's reasons for denial appeared disjunct.

> The court explained, "Petitioner's current thinking, in light of his prior criminal behavior and the facts of

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State Court Decisions

Medrano, (cont'd from page 62)

In re Prather (2010) 50 Cal.4th 238, 252.) ...

Next, the Board found petitioner's commitment offense was committed in an especially atrocious and cruel manner because "the motive for this is trivial in relationship to the offense, its impact and magnitude on all parties concerned." The Board also misunderstood or misapplied this factor. "The offense committed by most prisoners serving life terms is, of course, murder. Given the high value our society places upon life, there is no motive for unlawfully taking the life of another human being that could not reasonably be deemed 'trivial.' The Legislature has foreclosed that approach, however, by declaring that murderers with life sentences must 'normally' be given release dates when they approach their minimum eligible parole dates. (Pen.Code, § 3041, subd. (a).) ...

At his 2007 parole hearing, petitioner stated that he "shot twice." After reviewing the entire record, we have found nothing to indicate petitioner fired more than two shots. Even if the record supported the Board's finding that three or four shots were fired, the firing in the same volley of one or two more shots that missed the victim does not show that the crime was committed in a heinous, atrocious, or cruel manner. Two additional shots that missed would neither increase the victim's suffering nor demonstrate dispassionate and calculated manner.

Strangely, the Board also found Jaime-Medrano's immigration status a factor of unsuitability. The Court quickly rejected this notion.

The Board also referred to petitioner's immigration status and gang affiliation when discussing why it felt the commitment offense was especially heinous, atrocious, or cruel. These factors are not mentioned in the regulations, and they have no tendency to show that the commitment offense was especially heinous, atrocious, or cruel. Nor do they provide any evidence that petitioner would pose a current danger to the public if released on parole.

In rejecting the Board's reliance upon an alleged "lack of insight," the Court relied heavily on the recent *Ryner* decision.

"[A] 'lack of insight' into past criminal conduct can reflect an inability to recognize the circumstances that led to the commitment crime; and such an inability can imply that the inmate remains vulnerable to those circumstances and, if confronted by them again, would likely react in a similar way." (*In re Ryner* (2011) 196 Cal.App.4th 533, 547 (*Ryner*).) "Thus, an inmate's 'lack of insight' can provide a logical nexus between the gravity of a commitment offense and a finding of current dangerousness." (*Ibid.*)...

In addition, a finding that an inmate lacks insight is inherently vague and subjective. (*Ibid.*) "[A]lthough a 'lack of insight' may describe some failure to acknowledge and accept an undeniable fact about one's conduct, it can also be shorthand for subjective perceptions based on intuition or undefined criteria that are impossible to refute. [Citation] However, it is settled that the Board may not base its findings on hunches, speculation, or intuition." (*Ibid.*)

"Evidence of lack of insight is indicative of a current dangerousness only if it shows a material deficiency in an inmate's understanding and acceptance of responsibility for the crime. To put it another way, the finding that an inmate lacks insight must be based on a factually identifiable deficiency in perception and understanding, a deficiency that involves an aspect of the criminal conduct or its causes that are [sic] significant, and the deficiency by itself or together with the commitment offense has some rational tendency to show that the inmate currently poses an unreasonable risk of danger." (*Ryner, supra*, 196 Cal.App.4th at pp. 548–549, fn. omitted.) ...

Alternatively, the Board's "lack of insight" conclusion may be viewed as shorthand for his failure to articulate insight that perfectly matches the Board's subjective conclusions regarding the commitment offense. But the pertinent standard is lack of insight, not imperfect or incomplete insight, and any purported deficiency is only relevant to the extent it "shows a material deficiency in [petitioner's] understanding and acceptance of responsibility for the crime," so as to indicate current dangerousness. (*Id.* at p. 548.) Petitioner has long taken full responsibility for the murder, consistently expressed remorse, and demonstrated a high degree of insight into the deficiencies in his character and behavior that led him to shoot Romero. Petitioner's failure to provide a different or differently phrased explanation that satisfied the Board does not demonstrate a lack of insight, let alone current dangerousness....

In sum the Court found that the Board's denial reason "lack any evidentiary support," and granted his petition ordering the Board to conduct a new hearing consistent with due process and *In re Prather* (2010) 50 Cal.4th 238.

In re David Plata (#)

(unpublished) 2011 WL 5996401
CA2(8) No. B231749 (November 29, 2011)

David Plata was convicted of a 1995 attempted first degree murder. Plata had been found unsuitable in 2008; the Los Angeles Superior Court granted his writ petition and ordered a new hearing. In April 2009, the Board held that hearing, and again found him unsuitable based upon the gravity of the offense and a purported "lack of insight." Upon a new petition to the Los Angeles Superior Court, he was again granted relief in the form of an order for a new hearing. The state appealed, but the Court of Appeal affirmed the superior court.

In 1993, then 13-year-old Plata had been involved in a robbery. One of his crime partners testified against him and another crime partner, resulting in their convictions. In 1995, at the grand age of 15, he decided to "put some holes" into the snitch. Luring his victim into a supposed marijuana smoking event, instead, Plata pumped four bullets into him. When he cried out in pain, Plata fire two more bullets. Amazingly, the victim survived, and was able to testify against Plata once again.

Plata's last psych evaluation was favorable, noting that he had a "firm understanding of the underlying dynamics (i.e., poor anger control, criminal life style, immaturity – at age 15, and substance abuse) related to his violent behavior."

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State Court Decisions

Brown, (cont'd from page 64)

prisoner Kenneth Brown's petition for a writ of habeas corpus, ordering the Riverside County Superior Court to appoint him counsel to (1) investigate the appropriateness of DNA testing as to Brown's conviction, and (2) filing a motion for DNA testing, if counsel's investigation reveals that such testing would be appropriate under Penal Code § 1405(b)(1).

Brown claims his innocence, and that a DNA test will prove it. Under the law, he is entitled to appointment of counsel to make such a request, without first proving that his innocence will, in fact, be proven. The Riverside County Superior Court erred when it denied Brown's similar habeas petition to that court.

NEW, MORE LENIENT PETTY-WITH-A-PRIOR LAW IS RETROACTIVE TO REDUCE FELONY TO MISDEMEANOR

In re Bonny Hathaway (#)

(unpublished) 2011 WL 5189114
CA4(2) No. E054273 (November 2, 2011)

Bonny Hathaway was convicted in May 2010 of one count of Penal Code § 666, petty theft with a prior; she admitted a prior prison term enhancement. The court placed her on probation. In May 2011, she violated probation, and the court sentenced her to two years, four months.

In September 2010, the Legislature amended § 666 to require not one, but at least three priors, to invoke felony charges for the new offense. Hathaway filed a petition for writ of habeas corpus in the Court of Appeal, asking that she be given retroactive benefit of the new law. The state objected, on grounds that her case had become final in May 2010. The appellate court disagreed, noting that the trial court did not actually sentence Hathaway to state prison (and thus make her crime a felony) until after February 2011, when she violated probation.

Hence, Hathaway was entitled to the benefit of the September 2010 amendment to § 666, since it was agreed she did not have three priors. Accordingly, the court of appeal granted her petition and ordered the San Bernardino Superior Court to vacate her felony conviction, enter the conviction as a misdemeanor, and reduce her sentence appropriately. Habeas corpus was appropriate in this instance, the Court observed, because Hathaway was already overdue for release under the new law, and an appeal would not be timely decided.

PRISONER ENTITLED TO CONFIDENTIAL CORRESPONDENCE WITH DEPARTMENT OF VETERANS AFFAIRS

In re Larnell Crosby (#)

(unpublished) 2011 WL 5387634
CA3 No. C067435 (November 9, 2011)

After being denied his administrative appeal, and being denied relief in state superior court, High Desert State Prison prisoner Larnell Crosby filed a petition for writ of habeas corpus in the court of appeal, seeking to have his correspondence with the Department of Veterans Affairs ("DVA"), including its Office of General Counsel, treated as confidential ("legal") mail. The Court granted the petition, but did not additionally permit, as Crosby had asked, such confidential treatment for prisoner mail with a veteran's service organization ("VSO") of his choice.

Prison rules for confidential mail are established in 15 CCR §§ 3142 and 3143. These regulations, however, are silent as to confidential correspondence with the DVA. Crosby claimed that his claim was governed not by the regulation, but by statute: Penal Code § 2601. § 2601(b) provides a statutory right to confidentially correspond "with any member of the State Bar or *holder of public office*." (Italics added.) Crosby further cites,

> "Persons and employees of persons with whom inmates may correspond confidentially and from whom inmates may receive confidential correspondence include: [¶] (1) All state and federal elected officials [and] [¶] (2) All state and federal officials appointed by the governor or the President of the United States." (Cal. Code Regs., tit. 15, § 3141, subd. (c), italics added.)

The Court noted that

> [t]he Secretary of Veterans Affairs is appointed by the President and heads the Department, and the General Counsel is likewise appointed by the President. (38 U.S.C. §§ 303, 311.) Thus, under the express language of the regulation, petitioner is entitled to confidentially correspond with employees of the Department.

The attorney general complained that Crosby's requested relief was too broad.

> "Under [petitioner's] interpretation, the regulation would allow for him to communicate confidentially with an accounting clerk or the custodial staff because they are employed by the Department of Veterans Affairs." The Attorney General also broadly complains that petitioner's argument extends to field and regional offices of the Department. The Attorney General cites case law indicating deference is given to an administrative agency's interpretation of the controlling authority. (See *Calderon v. Anderson* (1996) 45 Cal.App.4th 607, 613.) The Attorney General suggests that petitioner's (and our) interpretation of the regulation is overbroad and, essentially, absurd.

The Court was not persuaded.

> Whether the regulation applies to communications with janitors or other employees who perform an entirely collateral function unconnected with the actual work of the Department is not before us. There is no assertion that petitioner's communications are with such employees. Given that the controlling language of the regulation is clear and unequivocal as applied to the limited facts presented, there is no need to imagine all the possible circumstances under which the language could be applied to reach a dubious outcome. Accordingly, we find meritorious petitioner's claim of a right to confidentially correspond with the Department.

The ruling as to confidential correspondence with VSOs went the other way. 15 CCR § 3141(c)(9) permits such correspondence with "a legitimate legal service organization," such as the ACLU and Prison Law Office. The Court thus looked into the legal status of VSOs.

> Regulations governing VSOs provide for the recognition of national, state, and regional or local organizations to assist veterans in pursuing their claims. (38 C.F.R. § 14.628 (2011).)

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State Court Decisions

Efstathiou, (cont'd from page 66)

(3)); (3) "claim[ed]" to be such a member in late November 2009 when he returned to prison, leading to his placement in ASU; and (4) engaged in a "thorough discussion" with the Department's ICC in February 2010 (at which the section 2933.6(a) amendment was the focus), but did not disabuse the ICC of his continuing active membership in the NLR.

Accordingly, Efstathiou's petition was denied.

In re Jason Lopez (#)

(unpublished) 2011 WL 6329840
CA3 No. C066644 (December 19, 2011)

In a virtually identical case to *Efstathiou,* the same panel of the Third District Court of Appeal reached the same conclusion in the petition of Jason Lopez, also seeking protection against newly enacted Penal Code § 2933.6 as to validated gang members. Here, Lopez was, and remains, an announced member of the Northern Structure (NS) prison gang. He believed he should continue to earn 15% credits after the effective date of § 2933.6, January 25, 2010.

However, on January 28, 2010, Lopez was taken to Classification and told that he was now a validated NS member, which foreclosed his earning any future conduct credits.

Lopez made similar legal arguments to the Court regarding denial of due process and *ex post facto* violations. For the same reasons announced in the *Efstathiou* ruling, the Court denied his petition.

SANTA CLARA COUNTY SUPERIOR COURT GRANTS HABEAS RELIEF IN THREE LIFER PETITIONS

In re Frank Bautista (#)

Santa Clara County Superior Court No. 81643
(December 9, 2011)

Frank Bautista, down since 1981 on a second degree murder conviction, had been granted parole in 2009, which the Governor reversed. The 6th District Court of Appeal granted his petition, and ordered the Governor to reconsider Bautista's case. The Governor reversed the Board again, citing an unusual reason: a pending investigation into confidential matters which *could* result in new information counseling against Bautista's parole. Importantly, the court noted, the Governor did *not* deny parole "because of a nexus between Petitioner's crime and the confidential information."

> I cannot allow Mr. Bautista to be released from prison until prison authorities have investigated these allegations and determined whether they are true and whether Bautista remains involved in these activities. The Board should consider the results of this investigation at Mr. Bautista's next parole hearing.

Bautista took his complaint to the Santa Clara County Superior Court, arguing that absent any new evidence, the Governor impliedly admitted that there was no *other* sufficient evidence upon which to detain him. The court ordered the state to produce any new evidence as of August 5, 2011. The state ignored that directive, which the court accepted as a concession that there "neither was, not will be, any further investigation and therefore there is no new evidence against Petitioner."

Accordingly the court ordered the Board's grant reinstated and Bautista's "release on parole forthwith." Baustista is no longer listed in the CDC locator, and is presumably on parole.

In re James Stevenson (#)

Santa Clara County Superior Court No. 203910
(December 9, 2011)

James Stevenson was sentenced to life for a kidnap-robbery, where the asportation was so slight that the District Attorney, at Stevenson's prior hearing, had admitted it barely met the minimum for a life offense. Nonetheless, the Board denied Stevenson parole in 2011for the standard reasons of the gravity of the offense, trivial motive and "moderate" risk ratings by the psychologist. [Note: Stevenson had another order from the superior court in April 2011, ordering a new parole hearing, but that order remains stayed by the Court of Appeal, pending its ruling. (H036813.) Presumably, the instant case comes not from a remanded hearing, but from a regularly scheduled one.]

As to the "moderate" risk, it was predicated solely on immutable historical factors. The superior court relied upon *In re Lira* (2011) ___Cal.App.4th___ for the conclusion that just as static facts of the crime may not suffice as reason to deny parole, absent a nexus to current behavior, so, too, the static facts underlying a moderate risk assessment are not sufficient, absent a nexus "probative of current dangerousness."

The court next rejected the Board returning "to the [*Lawrence*-determined "unworkable"] *Dannenberg* approach of weighing factors against hypothetical minimum elements," noting that the factors enumerated in the Board's regulations are not reasons in and of themselves for denying parole, but only for guiding assessment of public safety threat.

Next, the court found that the Board's terminology "appropriate weight" – ascribed to an unsuitability factor – was inherently so vague so as to deny the court "meaningful appellate review." Finding the motive of robbery "trivial" in a kidnap for robbery offense also missed the mark, and was disapproved by the court as "arbitrary and capricious." Similarly, the court found the Board's use of the terms "dispassionate" and "calculated" to be part of a standard script from a murder decision – and thus not giving Stevenson the individualized consideration that due process requires.

The court flatly rejected the Board's decision because it was admittedly to the wrong legal standard. The Board had stated that the psychological report "does represent some evidence to this panel as to your current and unreasonable risk of danger to society." Of course, "some evidence" is the *judicial review* standard, not the *executive* (administrative) decision standard.

Finally, the court didn't fall for the Attorney General's legal argument as to how she would have decided Stevenson's parole suitability.

> However, this does not salvage the parole denial because in the review of broadly discretionary decisions due process requires examination of the reasoning given, not the result achieved. ... It is fundamental and reversible error to use the wrong analytical approach to its duties.
>
> Because the Board did not employ the appropriate analytical framework in reaching its decision [citation], the petition is granted and the Board is directed to provide Petitioner with a new hearing, comporting with due process, within 100 days.

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State Court Decisions

Schermerhorn, (cont'd from page 68)

with a "lack of insight" there appears to be an eager willingness to make adverse "credibility" ratings.

The court expressed hope that the time is ripe "for the court of appeal to curtail the Board's unfettered subjective discretion, and distill an objective standard, for this finding, too."

Nonetheless, in reviewing the record for a "modicum" of evidence, found the Board's adverse credibility finding is sufficient to support the denial of parole. The court denied the petition on this ground, but left open Schermerhorn's claim of *ex post facto* application of Marsy's Law, until the California Supreme Court decides that issue in *In re Vick* (S194129).

LATE NEWS

MURDER CONVICTIONS BASED ON LYING SNITCH OVERTURNED

Last week the U.S. Supreme Court upheld a decision by the Ninth Circuit which reversed two murder convictions against Bobby Joe Maxwell, the so-called "skid-row stabber."

The Ninth Circuit had determined that Maxwell's convictions were based primarily on a jailhouse informant's lies. The informant was Sidney Storch, who was at the center of a scandal involving false testimony that defense lawyers said helped convict 225 defendants.

Predictably, Justices Samuel Alito and Antonin Scalia said they would have reversed the Ninth Circuit's ruling.

The State must give Maxwell a new trial or release him. Los Angeles County prosecutors did not immediately announce how they would proceed in light of the ruling. "The district attorney's office will evaluate it and announce a decision in the future," said a D.A. spokesperson.

Shortly after the convictions were voided by the Ninth Circuit Court of Appeals in November, District Attorney Steve Cooley said that he and his staff had begun analyzing the decision and might re-try Maxwell. He claimed there was corroborating evidence, and suggested there could be some DNA available.

Maxwell was accused of 10 killings of transients that took place between 1978 and 1979 in Los Angeles. Jurors convicted him of two, acquitted him of three and deadlocked on five of the charges.

The Ninth Circuit said the two convictions were obtained through Storch by prosecutors who had little physical evidence and had failed to get usable eyewitness identifications in lineups. One murder witness who viewed a lineup with Maxwell in it was quoted as saying, "You've got everyone up there that doesn't look like him."

The 9th Circuit focused on the false testimony of Storch and the prosecution's failure to disclose that the witness had made a secret deal with the prosecutor to win early release from his own prison sentence in return for his testimony.
The appeals court said Storch would glean information about inmates' cases from news stories and then claim they had confessed the details to him. (Storch died three years ago.)

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Please Inform LSA of Staff's Abuse of Visiting

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Write to: Life Support Alliance
P.O. Box 3103
Rancho Cordova, CA 95741

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