



NOT YET THE LAST WORD ON GILMAN

But the latest word is a good one

At the tail end of the month Judge Lawrence Karlton, senior jurist in the United States District Court, Eastern District of California, issued a ruling that, while stayed for 31 days, has the potential to impact thousands of lifers sentenced before 2008. In the long-running case of *Gilman v Brown*, dealing with the possible ex post facto ramifications of Marsy's Law and 1988's Prop. 89, which gave the state's governor the power to reverse the decision of the Parole Board to grant a lifer parole ('take' his date), Karlton's order now says those two relatively recent laws cannot be applied to those sentenced prior to the laws' effective date.

While we must emphasize that while Karlton's order, characterized as 'a humdinger' by some legal pundits, could be monumentally important. The implementation of the order was stayed by Karlton himself for 31 days, giving the state time to appeal, which it will undoubtedly do. In the interim, and until the order is finally enacted or the appeals completed, all lifers are still under the twin clouds of long denials and governor reversals.

Marsy's Law, enacted in 2008, prolonged the time between parole hearings from a maximum of 5 years, in graduated steps of one year, to the present maximum (and default) term of 15 years, with other denial terms being 10, 7, 5 and 3 years. Advocates have long held that this action, now applied to prisoners incarcerated decades prior to 2008, constituted an unlawful ex post facto jeopardy. Similarly, Prop. 89, passed by the voters in 1988, allowed the governor to unilaterally reverse a parole grant, a power not in any governor's hands prior to that time, is now applied to all lifers regardless of their sentencing date, another possible ex post facto action.

In the lengthy ruling (58 pages) Karlton delves into both historical and current factors of the laws as well as their impact on the prisoner population as a whole and individual inmates. Several individual cases are cited, illustrating the effect Marsy's law and Prop 89 have had on liberty interests of those prisoners, and, by extension, thousands of others. Karlton outlined instances wherein the application of denial time for parole hearings under Marsy's law, juxtaposed to similar denial times under the old law (i.e. minimum denial under the old law of one year infers the board would expect the prisoner to be suitable for parole after one year, vs. Marsy's law, which allows a minimum denial of 3 years, thus precluding that same prisoner, heretofore expected to be suitable in one year, from even being considered for parole for 3 years) which clearly showed the lengthening of incarceration times.

While the state's pet expert, Dr. Stephen Klein, pontificated that "it's too soon to know what the effects of Prop. 9 are," Karlton's decision rejects Klein's opinion, noting "Dr. Klein's testimony does not really bear on the question before the court, namely, whether Proposition 9 created a "significant risk" of longer incarceration. This is not the same as waiting to see what the different lengths of incarceration are, years from now and looking back to see whether they were longer after Proposition 9 passed. The question is whether, looking forward, there is a significant risk of increased incarceration. If the court were to rely upon Dr. Klein's testimony, this court could not reach any conclusion about the constitutionality of Proposition 9 until sometime in the indefinite future when all the class members had either been released or died." So saying, Karlton concluded, "Even if Dr. Klein's testimony were pertinent, the court rejects it."

The judge then further eviscerated Klein's contentions with several factual examples, concluding that Klein's speculations amount to "a red herring." That haze you see is Klein going down in flames.

While recognizing the Board's newly implemented policy of sua sponte advancing hearings and granting increasing number of Petitions to Advance (1045A), the court nonetheless noted "the advance hearing process can be rendered meaningless or illusory," and may in fact require prisoners "to make a showing beyond simple "suitability." The order also notes the roadblocks to successful PTA consideration presented by a lack of updated risk assessment before PTA consideration and inadequacy of assistance to prisoners in preparing a PTA, a subject LSA has frequently brought to the board's attention, including inmates often being told by their 'counselors' that there are no PTA forms available or the counselor doesn't know what the process is.

Turning to Prop. 89 and the Governor's ability to overturn parole grants, the court found "In practice the governors have used it [Prop. 89] to tip the scales against parole. Every governor since passage of Proposition 89 has done this and there is no evidence that this practice has stopped. Thus, while governors could use the law to review parole decisions to ensure that they are accurate and fair, they appear to have no such concerns about decisions to deny parole."

Karlton therefore declared, "The court accordingly DECLARES that Proposition 9, as implemented by the Board, violates the ex post facto rights of the class members. [T]he court further DELCARES that Proposition 89, as implemented by the governors of California, violates the ex post facto rights of the class members." In previous language the court had found all lifers convicted and sentenced prior to 2008 are members of the class of prisoners affected by the two law changes and thus the court action.

As to relief for the class members Karlton declared "Going forward the Board shall apply Cal. Penal Code 3041.5, as it existed prior to Proposition 9 [Marsy's Law] to all class members. That is, all class members are entitled to a parole hearing annually, unless the Board finds, under former Section 3041.5 (b) that a longer deferral period is warranted." Speaking to the Governor reversals, the court

ordered “The Governor of California shall refrain from imposing longer sentences on class members than are called for by the application of the same factors the Board is required to consider, as provided for in Proposition 89.”

If Gov. Brown was indignant at federal courts telling him how many prisoners he could keep, imagine how he’ll take to the same federal court system potentially taking away some of his own, personal, authority. Karlton, however, stayed implementation of the order for 31 days, noting that after that time it was to be immediately effective, absent the filing of “a timely appeal.” That appeal is almost a certainty.

The order, dated Feb. 27, 2014, contains much more intrinsic information and fuel for further actions, all of which we are still digesting, while awaiting the response from the state. More will undoubtedly be heard on this new development, once the state begins its response.



UPDATES

3 JUDGE PANEL: The state and the judges, having reached an agreement in January on the timing of reaching the population cap (December, 2016) and methods other than early release to achieve that goal (including elder and medical parole expansion) all parties are now scrambling to institute those methods. The BPH is in the process of creating and implementing policies and procedures to advance the parole hearing dates of prisoners over 60 years of age and with more than 25 years in, as well as those suffering from chronic and debilitating medical conditions. No specifics are yet available, but sources at the BPH have promised to announce these new procedures as soon as they are formulated.

Also affected will be those prisoners already found suitable for parole but whose date was calculated at a future time. Those individuals are expected to enjoy a speedier release. We expect some additional information at the February BPH Executive Board meeting.

SB 260/YOPH HEARINGS: In January the BPH held 16 Youth Opportunity Parole Hearings (YOPH) for those convicted of a crime committed before they were 18 years of age. Results from those first hearings: 1 postponement, 1 cancellation, 7 denials and 7 grants. Net results, of the 14 hearings held to completion, the grant rate was 50%. It appears SB 260 is accomplishing its goal of providing additional, rational consideration to the immaturity and diminished culpability of juveniles involved in crimes. LSA continues to attend these hearings and will have more information as more hearings are completed.

NEW STATE APPOINTED ATTORNEYS: The new selected state appointed attorney panels begin in March. Under the new process an abundance of new attorneys will be representing lifers at their parole hearings, many of whom have not been counsel of record before. There is a bit of trepidation among inmates at the prospect of being represented by an unseasoned attorney and we understand that concern. However, prisoners face the same possibly detrimental situation should they be assigned to the case load of some of the long-time, and, frankly, underperforming state attorneys.

If you are assigned an attorney you aren't familiar with, let us know and we'll send you such information as we can find on the individual, and in return we hope you'll send us your estimate of their performance at your hearing.

CREDITS TOWARD PAROLE: The California Supreme Court left many legal observers and lifer advocates scratching our collective heads recently when they decided that if a Governor's reversal of parole is later found unlawful and the original parole date reinstated, that extra (and unlawful) period of incarceration, be it months, years or decades, cannot be counted against any time on parole. Ruling in *In Re: Lira* the court declined to provide the same protection against abusive and excessive incarceration to lifers as it provides determinant sentenced inmates.

The Lira decision effectively prevents those capriciously incarcerated through intervention of the Governor on their parole suitability simply because they are lifers from receiving any remedial credit for that extra time. Such lost time is called "temporary infringement" of liberty by the Court, though it does not define how many years or decades can qualify as 'temporary.' At this point, any change in this decision must come via legislative action.



STEP INTO OUR OFFICE

It appears LSA has finally become scarily official, opening a real office in January in Sacramento. Real desks, real computers for everyone, lots of filing cabinets and printers, room to put together our brochures and publications. And extra hands to help the process. Gail and Vanessa can finally begin to get the accumulating files, transcripts, reports and letters in one place and reclaim our homes.

Through the assistance and support of Capital Christian Center in Sacramento, Judson Enterprises of Gold River and many, many interested supporters we were able to find and attain affordable office space and equipment. Once we put out the call for help and donations of furniture and equipment a veritable plethora of individuals, groups and businesses stepped up to help and provide most of the needed items.

Best of all, the office provides space for many of those who want to help the lifer cause to come and do so, starting with our office manager Robin and recently joined by an intern, Mayra. Wow! We have staff!

A few things we ask you to remember, however. We are still a non-profit organization, dependent on donations for our expenses. None of those working for LSA are currently paid; we work from a sense of commitment and need to be part of the change. And we are not able to be in the office all day, every day.

So when you write to us, please:

1. Be patient—we get roughly 200 letters a month, plus phone calls and emails from families. If you write us twice in two weeks on the same subject, you will only get 1 answer.
2. Please include your complete housing information in the body of your letter—envelopes get separated. If this issue of Lifer-Line came to you without complete housing information, please write us (P.O. Box 277, Rancho Cordova, 95741) and provide that info to us.
3. We aren't attorneys, and while we can provide you with a list of attorneys, we can't offer legal services or advice, nor reprints of court cases/decisions, DOM or Title 15.
4. Please be to the point on your issues; as much as we'd like to chat, there's a lot to do for lifers and not too many of us doing it. We can either read your complaints about basic prison issues (yep, it's not a day at the beach) or we can travel the state to parole hearings to take a look at the process and try to provide you (forgive the thought) insight into being found suitable.
5. Once again, we're a volunteer, non-profit group. Those of you who are being paid anywhere from 08 to 95 cents per hour via a pay number—are actually getting paid better than we are. So please don't ask us for free stuff, to find you a pro-bono attorney, to help find your relatives (yes, we've been asked that) or a pen-pal. That's not what we do.
6. If you are receiving Lifer-Line by mail not from a relative, but from LSA, you are on our indigent prisoner list. LSA, via our super and generous-hearted volunteers, is sending nearly 500 newsletters to those on the indigent list. If you don't need to be on this list----then help us get you off the list. If you have a friend or family member who has email, can receive Lifer-Line via email and send it to you—please have them do so. We can take you off the indigent list and make room for someone who really doesn't have an outside contact.
7. When we send out periodic survey (attorneys, FAD, LTOP program) please participate! We need your rubber-meets-the-road info!
8. LSA does not write support letters. Support letters are very important, but so is our reputation as an organization that bases positions on facts, not emotions. We can't, in good conscience, write support letters for individuals we don't know, can't speak to their character or suitability. To do so could well damage our credibility, which would be a disservice to all lifers.

And finally, while we appreciate (sort of) the personal offers, we're all happily married (to present or former lifers) or spoken for.

WHAT NOT TO SAY... AT YOUR PAROLE HEARING

Since LSA has been authorized to attend parole hearings as non-participating observers we have seen the gamut of good, bad, troubling and surprising decisions and behaviors, both from commissioners and inmates. One of the saddest things we have often witnessed is a prisoner talking himself out of a date or worse yet, into a longer denial of parole. While we advocate for paroling lifers we aren't Pollyannas; we know there are many lifers who are not ready to parole. Some not ready yet, some who, for various reasons, may never be ready. So, while we do not necessarily disagree with every denial of suitability, we nonetheless hope for the best outcome for all potential parolees.

Often we see inmates who answer commissioners' questions too quickly, before all the words are even spoken; and often those hasty answers are not on point, don't provide the information the commissioner is seeking or may actually muddy the waters of understanding. Discussing all aspects of an inmate's situation with legal counsel could certainly provide some help in many cases, at the least adequate counsel might be able to alert the prisoner to possible areas of inquiry and have him better prepared to answer difficult questions. In truth, these situations occur most often when the prisoner is 'represented' by a state-appointed attorney, some of whom seem perfectly happy to allow their 'client' to sink himself without the counselor throwing a lifeline in the form of advice or intervention. After all, they will be paid in any case and another lifer denied parole means another hearing for them a few years down the road.

Since LSA is not a legal firm and can't give legal advice, we can't tell you what to say or when to decline to answer. But we can offer up some recent scenarios that we think illustrate what we are concerned about. The following situations are mined from recent, real hearings (identifying information redacted) and hopefully will provide some food for thought. And possibly, some dark humor.

Commissioner: I see you have support letters from several women. How did you meet all these ladies? And how do you keep in contact with them?

Inmate: Through the internet. (Decision: denied 5 years)

Commissioner: So how much did that cell phone you had cost you and how did you pay for it?

Inmate: Cost me \$1000 but I didn't have to pay for it, 'cause I sold another one for the guy so he gave me one.

Commissioner: Oh, so you were involved in a criminal enterprise while in prison.

Inmate: Yeah, I guess. (Decision: denied 7 years)

Commissioner: Tell me, who do you think your victims are?

Inmate: The lady, her family and me.

Commissioner: You're a victim?

Inmate: Yeah, cause I been in here (XX years) and it wasn't even me that shot her. I deserve to go home and start my life over. (Decision: denied, 7 years)

We rest our case.