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Public Safety and Fiscal Responsibility

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CONVERSATIONS WITH KERNAN

Secretary of Corrections Scott Kernan, the man in the middle in the implementation of Prop. 57, says the department is receiving, reviewing and considering copious comments on the newly released department regulations governing the implementation of Prop. 57. Kernan, speaking with LSA earlier this week, noted changes in those regs could happen and confirmed his department was working to provide regulations that provide a balance between incarceration relief and public safety.

As always the department will err on the side of public safety, but Kernan noted Prop. 57 provides a unique opportunity for many inmates to achieve early release. And he affirmed that other than the possibility of moving the date of a lifer's initial hearing forward via credit earning ability, Prop. 57 will have little impact on lifers as a group. And that includes third strikers, at least as the regulations are presently configured.

The regulations, the latest portion of which were released July 14, will be up for public comment until September 1, 2017. After that, if substantive changes are made to the released regs, the public comment period can be extended. However, Kernan indicated he hoped, and expected, to see the final version of implementing regulations for Prop. 57 to be finalized around the first part of December.

In discussing how the regulations were written Kernan noted one prime consideration was to provide for the sustainability of changes brought by Prop. 57. To accomplish this, the initiative says, in part, *"The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety."* That discretion, the decision of the Secretary of Corrections as to what changes can be made while still protecting public safety, is part of that reach for sustainability, providing for a measured consideration of the impact of provisions, and not just a blanket release.

Governor Jerry Brown, who, by all accounts, was personally responsible for much of the wording of the initiative, has expressed his intention to protect many of the changes recently wrought under his administration, by providing as much protection as possible from judicial challenges. A simple list of crimes that would be afforded release under passage of Prop. 57 would have left the initiative and those changes vulnerable to litigation. Assigning that decision to the Secretary of Corrections, with the caveat that his chief concern be protecting public safety, provides some legal cover to those changes.

Perhaps the most controversial aspect of the current regs is the exclusion of third strikers from relief under Prop. 57. That provision, Kernan acknowledged, is the area getting the most attention and comment. Will that provision be revisited, allowing the possible inclusion of at least some third strikers? Kernan, playing his cards close to the vest, refused to speculate, though conversations with other sources don't seem to provide much enthusiasm for that possible change.

Those who would like to weigh in on the proposed regs, with suggestions, comments or even complaints, can do so by writing to CDCR, Regulation and Policy Management Branch, P.O. Box 942883, Sacramento, CA 94283-0001. The public comment period will end September 1, when a public hearing (usually less a hearing than a CDCR staffer manning a tape recorder to catch the public's comments) will be held in Sacramento.

LSA's discussion with Kernan also covered the eagerly awaited but so far undisclosed new regulations covering family visits for lifers and LWOP inmates. Some 12 months after family visits were restored for lifers and LWOPs the revamped regs, outlining who can and can't participate, are still not out for public consideration and comment. They are, sources say, still 'in process.' And it's a long process. Writing the 10 Commandments took less time.

While not promising a firm date for the unveiling, Kernan did invite LSA to speak with him again in September on progress on this front. Although family visits for lifers and LWOPs are underway under the current regs, the exclusions in those regs continue to cause angst and puzzlement. Of prime concern are exclusions for those with a minor victim, a family member victim, domestic violence allegations/charges and charges for in-prison drug distribution.

We once again expressed to Kernan our concern about these exclusions, especially those involving a minor victim, as in many cases the prisoner in question was also a minor. Excluding those situations from family visits seems to fly in the face of the intent of the YOPH laws. Kernan acknowledged the seemingly opposing philosophies in these situations and reiterated his intent to make family visiting as inclusive as possible.

He indicted situations such as those above were under intense review and discussion by staff in CDCR and that there were considerable opposing opinions and voices. And it was clear from his comments and tone that those with drug beefs picked up while in prison would face a tough challenge in gaining access to family visits.

While not promising any specifics, Kernan did opine that the changes in family visiting regs would be 'strategic' and aimed at providing positive reinforcement for those who program. As with so many recent changes, family visiting access, Kernan noted, would be based on individual behavior and success.

The Secretary also confirmed that the department currently has no funds to renovate or expand existing family visiting units. He noted he hoped to see some funds for those purposes in next year's CDCR budget. He commended wardens in some institutions who are currently seeking ways to expand family visiting units, noting he hoped every avenue would be used, short of new construction. And he put paid to the rumor of expanding visiting days to include Thursday and Friday. While he does not oppose that increase, such an expansion, like so much else in CDCR, is a money issue, with no funds to provide the extra staffing required by visiting on those days.

We will certainly take the Secretary up on his invitation to speak with him again in September; stay tuned.

LEGISLATIVE UPDATE

As this legislative session begins its last lap, here is an update (as of our publication date) of the position of the bills potentially most impactful for lifers.

AB 620: Creates a pilot program to assist inmates dealing with trauma. This bill is currently in the Assembly Appropriations Committee suspense file, and is probably dead for this session. We supported this bill.

AB 1308: Extends the coverage of YOPH to those who were under the age of 26 at the time of their crime. This bill is now in Senate Appropriations Committee, where the viability of the cost will be assessed. We support this bill.

AB 1448: Would codify the Elderly Parole Process, making it a law and not just an agreement. The bill passed out of Senate Public Safety Committee and is currently in Senate Appropriations for consideration. We support this bill.

SB 394: Would automatically send LWOP sentenced before the age of 18 to a parole hearing after their 25th year of incarceration. This bill cleared the Senate and Assembly committees and is currently on the Assembly floor for a vote. We support this bill.

SB 421: Would create a tiered sex offender registration process, depending on the circumstance of the crime. This bill passed Assembly Public Safety Committee with amendments and was re-referred to Assembly Appropriations. We support this bill.

SB 620: Would allow the court to strike firearm enhancements in certain cases. This bill failed the Assembly floor vote; current fate undecided but prospects are poor.

WHAT IS SCR 48 AND WHAT WILL IT DO

A basic understanding of the legislative process starts with knowing the difference between AB and SB bills; or perhaps the most basic understanding is that there are, in California as well nationally, two houses in the legislature. In California those are the state Senate and the Assembly. Bills (potential laws) that originate in the Senate are labeled SB, and those starting in the Assembly..well, you get the idea. So what is an SCR?

More particularly, what is SCR 48, where is it in the legislative process and what, if anything, will it do to change laws relative to lifers? The short answer to the last part of the question is; nothing, yet.

SCR stands for Senate Concurrent Resolution. Breaking it down, this piece of quasi-legislation originated in the Senate, concurrent means the other chamber (the Assembly) agrees, with the language, the resolution.

According to the California legislature, a Continuing Resolution is "A measure that can be introduced in either House, but must be approved by both Houses and filed with the Secretary of State to take effect. The Governor's signature is not required." In fact, the resolution is not even submitted to the Governor, and thus a resolution, even one approved by both houses of the legislature, does not have the force of law.

In this case, SCR 48, which has passed the Senate and has good chance of passage in the Assembly, expresses the intention of the legislature to "recognize the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime." Specifically, if this resolution at some point becomes the basis for a bill, it would impact the felony murder law.

Quoting from the language of the resolution: "It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability; reform is needed in California to limit convictions and subsequent sentencing in both felony murder cases and aider and abettor matters prosecuted under "natural and probable consequences" doctrine so that the law of California fairly addresses the culpability of the individual." The language continues, the felony murder rule is "is fundamentally unfair and in violation of basic principles of individual criminal culpability," and "In California, people who commit a felony are not sentenced according to their individual level of culpability."

Cut to the chase, after several more 'whereas' statements, which lay out all the issues with the felony murder law, the resolution gets around to business, that the legislature "recognizes the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime." Thus the legislature has expressed its collective feeling that the felony murder rule is inappropriate, unjust and costly. Now, if only next legislative session, someone will just take that resolve and turn it into an actual bill, passage of which could actually change that practice.

PACKING YOUR BOARD PACKET

What should you bring to your parole hearing, your 'parole packet?' It's a question we're often asked, especially in light of the BPH's 'limit' of 20 pages of material submitted on the day of the hearing. And seemingly complicated by the CDCR's decision not to require lifer desk staff to scan into the C-file documents submitted by inmates.

CDCR's stance is that it's not the job of their clerical employees to scan into the file all documents presented by inmates, only those that are generated by a CDCR-approved, in-prison ILTAG, educational or vocational program. Too much time and money involved in scanning everything; and from what we've seen, the scanning that's done is sometimes upside down, sideways, one of two sides and any number of anomalies possible. Although the issue seems to have gotten better, it's sometimes perversely amusing to watch panel members all but stand on their heads trying to figure out how to read a miss-aligned document on their computer screens.

There are some guidelines prisoners can follow in creating their parole packet. Remember, your chronos, educational accomplishments, vocations—even RVRs—are probably already in the file available to the panel, so you don't have to present everything. And the page limit isn't as drastic as it seems, as the 20 page policy is a policy, not a rule, and commissioners can and do accept more than 20 page, within reason, if they find the offered material is helpful in making their decisions.

This policy, laid out in an Administrative Directive (policy statement) of the board in 2013, is meant to prevent the parole panel from being presented with a tome of written material at the hearing, with the expectation that the panel members will a) read all of it during the deliberation portion of the hearing and b) remember it enough to be of use. And frankly, that's a lot to ask of anyone. Even a parole commissioner.

So while the board still encourages prisoners to prepare book reports to supplement their self-help participation, don't expect the board to read, in its entirety, the multi-page reports you've done on various books. More likely, and more importantly, the panel members are likely to ask you face to face what you got out of a specific book and how you've been able to apply that information to your case and situation. The wiser idea, rather than submit several books reports themselves, is to submit a summary of the books you've read, and why those books were helpful to you and be prepared to discuss those books and how they helped/impacted you in your hearing—commissioners want to hear it straight from the primary participant—you.

Another important factor is that if your next hearing is a subsequent hearing the panel will be concentrating on what you've done since your last hearing, so you don't have to go back to square one and list all your accomplishments since you became a CDCR client. And support letters do not count toward that 20 page limit—you can have as many support letters as you can generate, and job offers, although the latter are not required to be found suitable.

Other documents you might want to consider including in the 20 pages (and that can be 10 double-sided or 20 single-sided pages) are apology/remorse letters (and if you've taken LSA's Amends Project workshop and received a certificate from that, be sure to have that available), letters of acceptance from transitional housing, and an acknowledgement of your character flaws or triggers and the tools you now have to deal with them. If you write your closing statement for the board, you are free to submit that, but the panel will also accept your oral presentation without a written copy.

And of course, parole and relapse prevention plans. Many inmates have found it helpful to have a list of AA/NA meetings in the area where they plan to parole, which lets the parole panel know you've thought ahead enough to find where you can turn for support on release. A word of caution here; don't use a one-size-fits all parole/relapse plan—this is your plan, created by you, to address your situation and needs. And the cookie-cutter plans are pretty easy to spot.

And while you don't have to submit all your chronos, certificates and atta-boys (or girl) at the hearing, as the panel should have them in the C-file, it's a good idea to have them on hand, in case something isn't in the file, you can provide your backup copy. Keep in mind, the commissioners are more interested in hearing from you, face to face, than reading how well you write.

THE NEW WORD ON CONFIDENTIAL INFO

A long time in coming, the BPH is at last implementing a strategy that hopefully will assist inmates and attorneys in dealing with confidential information at parole hearings. Long a subject of controversy, the use of confidential information in a denial has been seen by many (including LSA) as a blatant disregard for the right to confront accusers at a judicial action.

Last year the BPH announced formation of a new unit in Sacramento, which would review confidential information in C-files and present a summary to all parties, inmates, attorneys and DAs, in addition to commissioners, before a parole hearing, in at least an attempt to give prisoners a chance to speak to those allegations. That unit has had a difficult time getting underway, realizing somewhat after the fact the magnitude of the task before them.

Recently, however, the BPH announced those summary reports will be presented to all parties in the 10-day parole packet. Starting with hearing scheduled in August, 2017, each inmate and his/her attorney will receive a summary of items in the confidential file that the review unit feels are relative to possible suitability—and the bigger news is that the review will only go back, in most cases, 10 years before the date of the hearing. Confidential information more than 10 years old at the time of the current hearing is largely considered stale and irrelevant. Unless, of course, there are more current items in the confidential file alleging similar issues.