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

Public Safety and Fiscal Responsibility

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STATE APPEALS GILMAN DECISION AT LAST MINUTE

True to form, the Brown administration waited until virtually the last moment before filing an appeal against the February decision by Judge Lawrence Karlton of the Sacramento Division of the U.S. District Court that would have swept away both much of the Governor's power to reverse parole grants and the long-term denial times under Marsy's Law. In late February Karlton issued a carefully documented and thoroughly explained decision labeling both the above laws ex post facto and thus unconstitutional. In that order Karlton ordered a halt to both reversals and long-term denials, but stayed, or suspended implementation of his order for 31 days to allow the state to appeal.

On March 27 the state did take that action, filing a notice of intent to appeal Karlton's decision. The state's action thus further suspends actions ordered by Karlton, until such time as the final adjudication in the Gilman case is made. And when will that be? Anyone's guess.

Karlton's Gilman order has caused the most 'buzz' in recent years, and actually would have more direct impact on lifers than the federal population cap litigation. Whereas the population cap is aimed at all prisoners and efforts to meet that level will only impact lifers tangentially, the Gilman decision is targeted specifically at lifers and the parole process. Whatever the eventual outcome of this litigation will have a direct and immediate impact on lifers.

Judge Karlton carefully and thoroughly laid out his reasoning and facts supporting his decision, giving perhaps the most complete and comprehensive example of what has happened to many lifers' sentences since the implementation of Marsy's law. As shown by the court's decision the incarceration time of many has been significantly increased since 2008.

If the courts eventually side with Judge Karlton and decide against the state, the ramifications could be massive. In theory, even those inmates given the minimum 3 year denial under Marsy's Law might have grounds for appeal, since the old minimum denial length was one year, and, as Karlton spelled out carefully and fully in his order, those given an unlawful 3 year denial (under the decision rendering that portion of Marsy's Law setting denial times as ex post facto and thus unconstitutional) would have potentially been wrongly held in custody an additional two years, had they been given the minimum denial under the old laws and found suitable at their next hearing.

If Karlton's decision regarding long denials is upheld, all those given denials under Marsy's law's provisions of 3, 5, 7, 10 and 15 years could potentially file appeals to reduce their denial length. Similarly, all those lifers incarcerated prior to 1988 when California's governors were given the right to reverse parole dates, and whose dates were taken by any California governor since that time could appeal those reversals, get them vacated and have parole grants reinstated.

While all this sounds complicated, Karlton's order goes to great pains to logically explain the facts supporting his decision and there can be no doubt that the real life examples he portrays undeniably show increased lengths of incarceration. All that remains to be seen is how long the litigation will continue, what the decision will be and, if it goes against the state, how much legal chaos and filings will occur.

Whatever happens, more litigation in this matter was inevitable.

The question of when the Board will, as agreed to under the terms of settlement In RE: Butler, will begin setting term calculations at an inmate's initial or next hearing was finally answered, now that both parts of the bi-furcated Butler case have been decided. In short recap, the Board, via Executive Director Shaffer, previously agreed in a court settlement to begin calculating the base and adjusted terms for all inmates at their next hearing, whether or not there is a finding of suitability, but under the terms of that settlement, that process would not begin until the second part of the case, Butler's appeal of his denial, was complete.

With that final portion of the case now finalized (the court decided Butler had been denied parole for unsupportable reasons, vacated the denial and remanded him for a rescheduled hearing within 60 days of the order) the term setting will begin. At two recent BPH confabs officials affirmed that beginning April 1 all inmates appearing at a parole hearing, initial or subsequent, found suitable or unsuitable, would have a base and adjusted term calculated and announced to them.

The Board was quick and continual in stressing to all parties that the base and adjusted term is NOT the final term of incarceration. Their concerns are that inmates at their initial hearing, being told their base term is decades long, will become despondent, when in fact their actual term of incarceration may be significantly less, when the application of post-conviction credits is calculated. And that cannot be done until a finding of suitability is made.

On the other hand, victims, hearing a decades long sentence length, may be, for them, unpleasantly surprised when notified of either a parole hearing or a grant and release many years before the end of the so-called term. In an effort to allay both concerns the Board continues to preface all discussions of term setting with the caveat that the base/adjusted term is not to be considered the total length of the term served.

The calculating of terms, in the past a rather arduous and error-prone process, will hopefully be made easier by updates and enhancements to the Board's LSTS system, which will, if the newly installed parts operate correctly, calculate the base and adjusted base term for the commissioners, who then have only to either announce it in the case of a denial or apply the post conviction credits when granting parole.

The Board is also quick to reiterate that, despite a major news agency putting forth a story to the opposite, setting of terms will not in any way result in shorter overall sentences for lifers. The ultimate time served continues to be the aggregate of the adjusted base term and application of post-conviction credits.

In any case, all those going to hearings post April 1st should be more fully informed as to the basic amount of time the state believes they should serve for their conviction. This, in itself, is a major step forward and something long-serving lifers have been seeking for literally decades

~AND MORE CONFUSION~

Still apparently mis-understood and causing confusion in inmate, attorney and DA ranks is the new BPH administrative directive limiting the amount of new material submitted on the day of a parole hearing by either the inmate or his attorney. The Board recently adopted a limit of 20 pages, either single-sided or 10 pages double-sided that may be submitted on hearing day, not including material submitted as part of the parole packet prior to the hearing date. The Board is not limiting what can be presented to a mere 20 pages, only the amount of new material they will accept on hearing day.

As previously reported, the commissioners, recognizing the toll long hearing days take on everyone, from prisoners to attorneys to commissioners themselves, are seeking a method to provide assurances to prisoners that the last-minute material they offer to the board will receive adequate consideration. And in all frankness, to submit a massive amount of 'new' material on hearing day and expect the commissioners to give well-reasoned and adequate consideration to all of it during the deliberation process is unrealistic. Last minute submissions should be limited to just that—material arriving at the last minute.

But it would behoove the astute inmate to include as much as possible in his hearing packet early, so that commissioners have time to read and digest the contents. If there are items in the file or packet that are of particular importance and you fear they may not be in your file (would CDC make a mistake like that?), then perhaps those could be brought to the hearing, but submitted only if the file is incomplete.

OFFICE OF VICTIMS' RIGHTS AND RESPONSIBILITES MONITORING

A new mission we've taken on, because somebody has to do it

Yet another Administrative Directive from the BPH that appears to be causing much angst in some quarters is the new policy outlining procedures for participation in parole hearings via audio and video teleconferencing. Many DAs have been 'appearing' at hearings via these methods for some time, but under the new directive victims and their representatives could also add their input electronically.

The biggest discord in this proposed policy appears the concern of victims' rights groups and the CDCR's Office of Victims' Rights and Services that those victims, family or representatives, who first indicate they will appear electronically and then change their minds and wish to be at the hearing in person might not be accommodated, when they make that last-minute change.

LSA's concerns, however, are of a somewhat different nature; just how secure these conferencing calls would be. Per the directive, all parties participating via audio or video would have to affirm they will not record and use the hearings for other purposes.

But there is no way to monitor this, most especially in the audio conferencing aspect. While we understand fully that parole hearings and the results, via transcripts, are, at least in theory, accessible to the public, the BPH tightly controls who actually attends hearings and how they are recorded.

Witness the long-time ban on any prisoners' representatives attending hearings, broken only by BPH Executive Director Jennifer Shaffer a few years ago, when she authorized LSA to observe, but not participate in, hearings. Family members of prisoners, who would like to attend and show their support, are still barred from doing so.

Given that we have, in at least one case, already seen victims' family members take to YouTube to make a video pleading for funds to help fight parole and another create a similar video showing the "story" of the crime, we have great concerns about possible 'pirating' of hearing recordings for miscreant uses. Our hope and expectation is that those participating via video conferencing, probably in various DA offices in the state, would be constrained from recording the proceedings, but

with the advances in cell phone capabilities we are not at all sure recordings made in this manner could not go unnoticed or unchecked.

Those accessing the hearings via audio conference only could, it appears, do so from just about any location, once given the conference call number and access code. Theoretically there appears to be no way to monitor who is listening to the process and whether or not any recordings of the proceedings are being made. While we fully understand and support the protection of the victims' rights we are also concerned the rights of the prisoner be similarly protected.

At the most recent monthly meeting the Board also heard, once (or is it twice, or three times?) again, a complaint from victims' rights groups about the flow of agenda items at the meetings. Victims groups repeatedly grumble that the public comment item on the agenda is at the end of the meeting. They would prefer to allow public comment at the beginning of the meeting, when the numbers in the audience, seldom overflowing, are at a peak, as they unabashedly maintain this is their forum to spread their word to the public.

As constituted for some time now the Board's agenda has listed public comment at the end of the meeting. By that time many in the audience, who perhaps came for one specific item or case, have left, thus depleting the numbers available to hear any public comments, whether from victims' groups or from LSA, as we make it a point to speak at each BPH meeting.

LSA, after checking with several sources, including Roberts Rules of Order, on the correct and accepted form for agendas and meetings, believes Public Comment is right where it belongs. The purpose of Public Comment is to allow the public in attendance to comment on many things, including actions taken at the meeting. It would be a bit difficult to comment on events of the meeting, prior to those events occurring. Or at least we think so.

The public comment item on the board's agenda is not a vehicle to inform the public, it is to allow the public to inform the Board. The only individuals who really need to be present for that purpose are the Board members. In the many times victims groups' representatives have complained about the placement of the public comment item on the agenda they have often said they wish to be able to present their opinion/comment early in the meeting, to as many people as possible, and then be able to leave, thus not bothering to stay and hear other opinions, facts or discussions.

Perhaps these individuals would do well to consider a viewpoint espoused by many public leaders, including BPH Executive Secretary Jennifer Shaffer, who first seek to understand, then be understood. Hearing the other side is always a worthwhile exercise. Public Comment at any governmental meeting is not a public forum; that's what press conferences, newsletters and publications are for. And victims' rights groups have plenty of those.

And lastly on our roundup of victims' vexations is a situation witnessed and overheard recently while attending parole hearings. While waiting for an escort to the hearing room our observer noticed two individuals entering the gate, one wearing blue jeans. The appointed escort, also noting the incoming attire and recognizing at least one of the individuals as a victims' representative, informed the CO clearing entrants that the jean-clad individual would be "accommodated," i.e. allowed in wearing blue jeans.

To say we were surprised would be understating the situation. Attorneys coming on prison grounds for administrative business have been told to leave the grounds entirely if wearing jeans, members of Inmate Family Councils, who were never going 'behind the wire' for meetings were refused if wearing

jeans, many visitors have been and continue to be randomly refused visiting because they are wearing BLACK denim.

While we understand the special situation of victims, the rights afforded to them both pre and post Marsy's enactment, we have yet to find any indication that any of these rights allows any victim or representative to be given a pass when it comes to adhering to the carefully stated laws governing attire. Perhaps, fortunately for all involved, the individual in this instance was simply a 'minder' for the VNOK representative and did not attend the hearing, so the issue was rendered moot. Until the next time…

THE GOVERNOR'S TRIGGERS

One of the questions often heard from parole panels these days is "Do you know.." or "What are your triggers?" And in addition to identifying, recognizing triggers, potential parolees are expected to know how to minimize or negate those triggers. In 2013 Gov. Brown reversed the parole grants of 100 prisoners. Many of the crimes represented in these cases share some common factors. These, we then conclude, are the Governor's triggers.

For the past two years we have carefully, mind-numbingly, read all the reversals handed down from the Governor's office for common characteristics and factors of the life crimes involved in the reversal decisions. Not only are there many common factors, the language of the reversal letters is so similar that it is apparent Brown's staff is reverting to 'cut and paste' when it comes to creating letters that can sink the hopes and efforts of so many. In this year's study it appears most of the same triggers remain, but the Governor appears to have added a couple of new moves.

Once again, the victims seem to be the main item on Brown's radar. If the victim of the crime is female, elderly, young or in some other way at risk, and most especially if that vulnerable victim was in some manner previously known to the inmate (wife, girlfriend, child, even friend,) there is a very significant chance the Governor will reverse the date. This was the most frequent factor in reversals; a female victim.

Any sort of aggravated circumstances in the offense, such factors as torture, children being present at the site and/or witnessing the crime, two charges for one crime (i.e. murder and robbery) and, for lack of a better word, overkill (two methods of fatal assault, i.e. shooting and stabbing) are always cited in reversal letters and clearly cause Brown great angst.

As in previous years any sort of gang affiliation, whether on the streets and/or in prison gangs will often cause a reversal, with the Governor often citing his lack of confidence in the prisoners' repudiation of the gang life. As to what would convince Brown of a former gang member's disassociation, that remains unclear.

And also a repeat, letters from the family of victims, which Brown often refers to as "heartfelt" can cause a reversal. In fact, it appears letters from victims and family to the Governor after parole has been granted may have more impact than those same letters do at the actual parole hearing. Interestingly, while the Governor often cites these missives as one of his reasons for reversal, nowhere in the law does it authorize him to consider such input.

By statute, the Governor can reverse the parole board's decision, in the case of those convicted of either first or second degree murder, after, and only after, considering all the factors presented to the parole panel at the hearing. Thus, if the Governor wishes to consider input from the victims offered at the hearing, he is within legal bounds. But reversal letters often particularly mention 'heartfelt letters'

sent to the Governor, thus not part of the record of the hearing, and, by extrapolation, outside of the items he is allowed to rely on. Shades of a lawsuit in the making.

Although the Governor has previously used psych reports as one of the reasons he reverses a date, he is citing those reports more and more often in support of his action. Many of the psych evals referenced rate the inmate at moderate; however, it appears, like the board, the Governor appears confused about the definition of 'moderate.'

Also showing an increase in last year's reversals is the use of confidential information as a reason to reverse a parole date, often in spite of the fact that the parole panel has articulated in the decision their consideration of confidential information and conclusion that such alleged 'information' was unrelated to parole or unreliable. In Brown's thought process any confidential information, no matter how thoroughly investigated and considered by his own appointees, is too much. Interestingly, while inmates and attorneys complain they have no way to address these 'confidential' concerns, as they have no details about these allegations, the Governor often offers up more details and information about the confidential file than the parole panel does during the hearing.

Of the 100 individuals who saw their dates disappear via the reversals, 63 had CDC numbers of "D" or older and 4% were women, about in line with the percentage of women in the overall prison population. And in 9 cases, lifers suffered a second reversal at Brown's hands.

The Governor's reversal numbers and percentage appear to be creeping upward. This year reversals accounted for about 20% of grants given, up a couple of percentage points from the previous year. And while this number is a vast improvement over former Governor Swartzenegger's usual 80% reversal rate, we are still left wondering why any governor would choose to so often second guess (and in the case of multiple reversals of the same inmate, third-guess) his own hand-picked appointees. Brown has now been in office long enough to have left his mark on the parole board; all present commissioners were either appointed or reappointed by this Governor.

We have to ask, if Brown doesn't trust the considered judgment of his hand-picked representatives, then why did he appoint and/or reappoint them? We would suggest the Governor's attentions could be better utilized elsewhere in CDCR (perhaps in reaching the population cap?) than micro-managing his delegates.

In sum, it appears not only has Governor Brown not learned to recognize his triggers, let alone deal with them, he appears to be adding to his list. Therapy or shelf-help, anyone?

JUST A REMINDER

LSA publishes *Lifer-Line*, a monthly free publication and *California Lifer Newsletter*, a bi-monthly subscription periodical. We are an all-volunteer organization. We advocate for lifers, educate lifer families, the legislature, the CDCR and the public. We are involved in all things lifer-related***. But: we***

do not exchange stamps for cash, provide legal services, reprints of reports or laws, handle medical or legal research or issues or solicit pen pals. If you have a question or comment, please mail to us at PO BOX 277, Rancho Cordova, CA. 95741.

260 OR NOT: WHO DECIDES?

As SB 260, YOPH parole hearings continue to roll out and encouraging results start rolling in (initial grant rate for completed hearings is 50%) more and more inmates who might qualify for consideration under SB 260 are asking when and how they will be notified. According to BPH sources, for those inmates who have parole hearings scheduled between now and Sept. 30, 2014, they will be notified of their SB 260 status at least 90 days prior to the hearing date, and an attorney will be appointed.

For those who believe they should be considered under YOPH and do not receive a notice verifying their hopes or receive a notice indicating they will not be included (and whether or not these negative notifications will be sent is a subject of some uncertainty), an appeal may be filed with the BPH, as it was that agency that made the determinations on eligibility for this first spate of hearings. This can be accomplished by completing and mailing to the BPH an SB 260 Eligibility Reconsideration Form, available (so the Board hopes and believes) from correctional counselors. The Board has greater faith in counselors than do we.

For those lifers who expect, in the normal flow of events, to have a parole hearing after Oct. 1, 2014, their eligibility is being determined and notification will come from the CDCR's Case Records department. For instances in these cases when an inmate believes he/she has been wrongly disqualified under SB 260, that decision must be appealed through the usual inmate grievance, 602 process. Even less dependable.

This dividing of the screening process means that determinant sentenced prisoners, who the board does not anticipate calling to hearings until next year, will be screened by case records. Those, both lifers and determinately sentenced inmates who hope to be considered under SB 260 but have not yet served at least 15 years on their sentence will not be notified until they approach that benchmark. That is due to the perameters of the law.

In a recent meeting with stakeholders board representatives emphasized the importance of those appealing their elimination from 260 consideration using the correct form in their appeals. If this situation applies to you, get to your counselor soon and often, asking for that form. Or ask your family to retrieve it from the CDCR website and send it to you. If all else fails, send LSA an SASE and we'll mail you the correct form.

And for those of you who may have to travel the 602 path, LSA will continue to reiterate to the board the less than adequate consideration and response usually given to 602 issues, in hopes an additional method of appeal can be created. However, it is important to remember that simply having committed the crime before the age of 18 does not automatically qualify anyone for YOP hearings.