



BUTLER: EX POST FACTO DENIED

In a decision published just before Lifer-Line was released the Second Appellate District of the State Court of Appeals ruled that the constitutional power given to the Governor to reverse parole grants can be applied even to those prisoners who were convicted of crimes prior to the inception of the reversal power in 1988. This ruling thus continues the shadow of the Governor's reversal over all California lifers serving a term for first or second degree murder.

Robert Butler, convicted of a double murder in 1985 and granted parole in 2012 only to have his grant reversed by the Governor, had filed a habeas petition with the sentencing court challenging the reversal on two points; that the Governor had relied on new evidence in his reversal and the remaining evidence cited by the Governor did not show current dangerousness. The trial court granted Butler's petition on both points, noting that the Governor is not allowed to use new evidence to reverse and that he erred in deciding Butler did not meet parole standards. The court granted Butler's habeas petition and that finding was appealed by the Attorney General's office, resulting in the decision from the Second Appellate Division.

The appellate court, in siding with the state and using a highly deferential standard of "some evidence," noted it was not the court's job to "ask whether the inmate is currently dangerous because that question is reserved to the executive branch." The justices (Rubin, Flier and Grimes) instead considered "whether there is a rational nexus between the evidence and the ultimate determination that the inmate is still dangerous," and stated "executive decision of the Governor is upheld unless it is arbitrary or procedurally flawed."

In finding Brown's reversal decision was not arbitrary or procedurally flawed the court decided there was still "some evidence" of Butler being a threat to society. Regarding Butler's claim of ex post facto (he was convicted in 1985, several years before reversal power was given to the Governor) the court referred to the Rosenkrantz decision of 2002 in stating, "[T]he Rosenkrantz court has already addressed this issue and held that the gubernatorial parole review procedure does not violate ex post facto principles."

Regarding Butler's contention that the Governor relied on new evidence in the form of letters sent to the Governor after the parole hearing by the LA District Attorney's office and relatives of the victim(s), letters that provide what the Governor termed "new information," the court walked a fine line. LSA has noted in previous articles dealing with gubernatorial reversals that Brown often, in reversal letters, refers to "heartfelt letters" from victims' families. We have long been concerned that these "heartfelt" missives, offered after the parole hearings, where victims have considerable opportunity to express new information or concerns, were the basis for reversals.

It would appear that several courts, including the Second Appellate, share our understanding that the Governor's decision is to be based on the evidence before the board, excluding new evidence. Indeed, this order appears to uphold that standard, stating, "it appears that the trial court was correct when it determined that the Governor could not rely on new evidence."

But in a monumental display of parsing words the appellate judges then continue to explain that the letters cited by the Governor in his reversal decision constitute "new information," not evidence. Ever the astute politician and lawyer, Brown and company no doubt made every effort to portray his consideration of the new letters as something of an informational sidebar but not germane to his reversal decision.

"In short, the Governor differentiated between evidence, upon which he based his findings, and new information, as to which he made no findings, leaving those matters for the Board at a future parole hearing. Therefore, the Governor did not rely on the new declarations – he merely highlighted them as areas of concern that the Board had to resolve at a future hearing where Butler would have a chance to respond, thereby showing the Governor's awareness that he could not base his decision on the new materials."

So while the Appellate Court notes "[T]he effect of our decision is to reinstate the Governor's decision denying release," the actual effect is more far-reaching and chilling than simply the reversal of a single parole grant. The issues of ex post facto use of reversal power as well as when the line between when 'information' is used as 'evidence,' may well have to be adjudicated in a yet higher court.

COMBINED ISSUE

Apologies to all for our late publication and for combining November with December. We'd like to say we can blame it on someone else, but in honesty, there are times when writing for 3 newsletters, all going to print about the same time, just becomes too much. This will be a combined November/December issue of Lifer-Line, an event that hopefully won't happen too often.

Lest you think we've been loafing, the last 6 weeks have been pretty full. The Executive Board meeting of the BPH, attendance at a training session for state appointed lifer attorneys, four days of attending training for BPH commissioners, meeting with the Director's Stakeholder Advisory Group on Long Term Offender Programming (yes, that's you guys) on housing and programming needs for paroling lifers, a seminar for lifer families in Oakland and attending parole hearings and a meeting with the Governor's staff. And that was just October.

November was just as hectic. We were at elder parole hearings at CHCF, met with the lady lifers at CIW, held a lifer family seminar in Riverside, attended another BPH Executive meeting, presented at

a training session for advocates sponsored by the National Lawyers' Guild and met, once again, with members of the Governor's staff to discuss his reversals of parole and other lifer matters.

All that in addition to answering the 200 letters each month from lifers, responding to calls and emails, writing position papers (such as opposition to the introduction of drug dogs and ion scanners in visiting), working on pressing issues (prescription drug related 115s, for example), keeping up on proposed legislation, analyzing trends (see story on parole reversal stats) and even helping out paroled lifers with problems. And somewhere in the midst of all this, we try to have a life. At least once in a while.



REVERSALS: HOW BROWN STACKS UP

The last three-plus years have been something of a golden opportunity for lifers, long awaited but always elusive. Lifers are paroling in unprecedented numbers, juvenile LWOPs are seeing a chance of freedom and even third and second strikers may see some relief.

All these changes have come in the wake of a confluence of circumstances: massive prison overcrowding addressed by the federal courts, effects of judicial rulings (Lawrence and Gilman in particular) and a shift in political policy and proceedings. And the results have been remarkable.

According to CDCR's own statistics in the 20 year period from 1993 to 2013 the number of paroles granted catapulted from 19 in 1993 to 590 in 2013, a whopping increase. But of course not all of those granted parole actually attained their freedom. Despite changing political winds and the need to decrease the prison population Gov. Jerry Brown, who took office for the third time in 2011, has continued the practice of vetoing some parole grants made by his Board of Parole Commissioners.

But, as noted by Brown's Deputy Legal Affairs Secretary, "[t]he Governor's actions are a notable departure from prior administrations, which reversed parole grants between 75 and 98 percent of the time." Very true. At last analysis, during the first 3 years of his current term (first or third term, depending on when you start counting) Brown has reversed about 18.7% of parole grants before him. That, in itself, is a monumental departure from his predecessors.

During his 8 years in office Gov. Pete Wilson was presented with 170 grants by the parole board and allowed about 27% of them to stand. Gray Davis, in office for an abortive 5 years, declared that no one convicted of murder would parole on his watch. True to his word, Davis vetoed all by 8 of the 471 grants doled out 'under his watch.'

The Governor couldn't seem to make up his mind, reversing between 60 and 85% of the 2,064 grants made during his time in office, depending on the year and what political pressure was being exerted. The number of grants by the board actually rose considerably during the Schwarzenegger years, due in part to the Lawrence decision in 2008. About 70% of Arnold's reversals were later vacated by courts, resulting in those lifers eventually going home.

In office since 2011, Brown has so far racked up the following stats:

<u>YEAR</u>	<u>GRANTS</u>	<u>REVERSALS</u>	<u>% RATE</u>
2011	463	71	15.3
2012	377	91	24.1
2013	590	100	16.9

Figures obtained from the Governor's office indicate that for the year 2014, from January 1 through November 15, the parole board made 704 parole grants, of which 122 have so far been reversed by Brown, a rate of about 17.3%. If this trend holds through the last 6 weeks of 2014 and this year's reversal rate hovers about 17% the average reversal rate for Brown's first term will be in the neighborhood of 18%.

However, in calculating reversal statistics, as in calculating overall grant statistics, there are two ways of considering the numbers. The first is the number of reversals from the gross number of grants in any given year and the second considers the number of reversals against the number of grants given to those prisoners convicted of 187 PC violations.

The gross number of grants and reversals are obtainable; however, for years prior to 2014 we don't have accurate numbers on how many of the grants given were to those convicted of murder. Those figures are, apparently, not kept by either the BPH or CDCR.

In 2012 Brown reversed 4 individuals he had also reversed in 2011. One of those is still incarcerated. In 2013 he reversed 13 men for the second time; 5 of those are still in prison. The Governor's office, in replying to our request for figures for 2014, maintains they do not keep a count of those prisoners reversed more than once. We'll have to wait for the annual report to ferret those out.

So, with the exception of figures provided by the Governor's office for 2014, we are left with considering the number of reversals against the gross number of parole grants. Of the total number of grants between January and mid-November, 575 were for 187 PC convictions, bringing the reversal rate to 21.2%, perhaps a more accurate figure in that those with a 187 conviction are the only cohort the Governor can reverse.

LIGHTEN UP-'TIS THE SEASON

Q: Why was Santa's little helper depressed? A: Because he had low elf esteem.

Dear Santa..... I was framed... ☹

STRIKE!!

STRIKE!!

SECOND STRIKE PAROLE

Although not lifers, many state prisoners serving time for 'second strike' convictions may soon be eligible for parole without ever seeing the inside of a board hearing room, as changes provided by a recent court order from the three federal judges overseeing the population reduction efforts. In mid-November the court ordered CDCR to establish and implement procedures to bring certain second strike inmates to parole hearings, beginning in early 2015.

Those second strikers must meet certain criteria to be considered for parole consideration, the most important being their crimes must have been non-violent of a non-sexual nature and they must have already, or by the time of their hearing, served at least 50% of their sentence. Beginning on Jan. 1, 2015, classification committees at each prison will refer qualified second strikers to the Board of Parole Hearings for review.

There are several other criteria which could impact an inmate's inclusion in this new parole review process, including recent SHU terms, serious RVR within the last 5 years and gang involvement, among others. Prisoners who are determined to be ineligible for this new consideration may appeal the classification committee's decision.

Once referred to the BPH for parole review the Board will notify all registered victims (if any) and the county prosecutor, who have 30 days to provide written comment on the potential parole. Following closure of the notice and comment period, "The Board hearing officer will review all relevant information, including the inmate's criminal history, institutional behavior, rehabilitation efforts, and written statements from interested parties, and will approve or deny the inmate's parole."

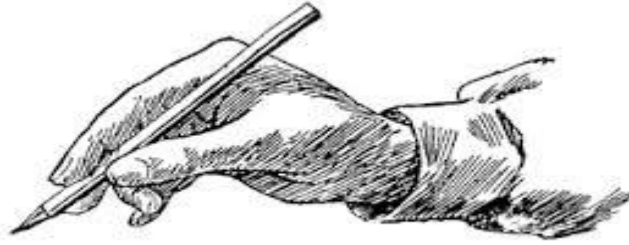
"Ultimately, the Board's decision will be based on whether the inmate's parole would pose an unreasonable risk to public safety. The Board will issue a written statement of the decision to grant or deny parole within 50 days from the date the case was referred to the Board or, if the inmate has not yet served 50 percent of his or her sentence, the Board will render its decision once the inmate is within 60 days of his or her 50 percent time served date."

If approved under this process the inmate will be released under the supervision of either the Division of Adult Parole Operations (DAPO) or community supervision (county supervised). If denied, the individual will be eligible for second strike parole consideration after their next annual classification review.

This review and decision by a 'hearing officer' is a departure from the BPH's usual 'hearing' practice as prescribed by law, wherein all parties, including the inmate and an attorney appear in person before a 2-3 person panel. Now, it appears, second strikers who meet the initial criteria, will only be reviewed in absentia by a BPH 'officer,' probably either a commissioner or deputy commissioner.

HO HO HO

What do you call a kid who doesn't believe in Santa? A rebel without a Claus.



TO WHOM IT MAY CONCERN

As issues, from gubernatorial parole reversals to new attorneys to commissioner reappointments, continue to move onto our radar and information on these issues moves to our readers via the newsletters we often mention, in thanks, the names of some of our volunteers and board members. From time to time we even publish an article by one of our supporters or workers and give full attribution to that individual. And, often we get letters from prisoners addressed to those mentioned individuals in care of LSA. So perhaps a bit of education is in line here.

Most of those who volunteer and work with LSA do so out of commitment to the cause of lifers, and have at least one, and sometimes more, lifers of their own to worry about. And most don't work at our small office in Sacramento—if they did, we'd have no room to breathe.

So while we will forward your on point letter to someone involved in a specific subject, please don't write to those whose names you see in Lifer-Line with anything other than pertinent questions or information. We open all mail and pass along those that warrant additional consideration and action by our extended supporters and staff.

Don't write asking for a pen pal, to explain your crime and ask for individualized attention or help from one of our little group. Don't ask us to interpret your sentence (we aren't lawyers), advise you on hiring and attorney (we can't give legal advice) find you transitional housing (we can send you a list, but the rest is up to you) or become your surrogate family. And for heaven's sake, don't proposition us!

If you are a veteran as well as a prisoner, our Board Member Vic Abrunzo, himself a veteran, is taking on those issues; you can send your concerns to his attention and we'll be sure he gets them. Attorney surveys and educational surveys should go to the attention of our Office Manager. And for the record, we don't buy stamps or assist in package procurement.

Problems with 115s and prescribed drugs, to either Vanessa or Gail; visiting and medical issues, to Gail; comments on commissioners' conduct at hearings, to Vanessa. Board Member Bob Driscoll is working on regulation changes.

Please keep your letters short and to the point—we don't need to know the specifics of your crime, whether or not you feel you were wrongly convicted (that ship has sailed), or unfairly sentenced. Nor do we need a sermon from the lay preachers among you—though we appreciate your concern for our souls, please refrain.

And we do appreciate stamps, though SASE, unless requested for a specific purpose, are not as helpful. Please remember to put your name, CDC # and complete address **in your letter**, as envelopes often get separated. In other words, we'll help with any issue we can, but you can help us by keeping your correspondence cogent, factual and non-personal.

WHEN AT EN BANC~STICK TO THE FACTS

En banc hearings are conducted by the Board of Parole Hearings at their monthly Executive Board Meetings (open to the public, which means us) in Sacramento. Typically, en banc hearings are the result of the Governor not being happy with a grant of parole, but unable to reverse the decision of the parole panel because the prisoner in question did not have a murder conviction. For those lifers the Governor cannot summarily take away their date, but can refer the decision to the whole 12 member parole board, along with a letter outlining his concerns about the decision.

En banc 'hearings' are not quite a hearing, although those in favor of seeing the prisoner parole as well as those opposed may speak to the board. But these comments are limited to 5 minutes each. Although inmate attorneys occasionally appear at the en banc to summarize and recap the reasons to grant parole, most often those speaking to the commissioners are friends and family of the potential parolee.

And thus the subject of our comments. Since we can't talk to all family members of each prisoner we're hoping if we pass along a few salient points to our constituents (lifers) they will in turn educate their family and potential en banc speakers. So please, discuss these issues with your friends and family who might want to go to Sacramento and support your parole, should you end up in en banc consideration.

It is your right to be heard at an en banc consideration. While it is certainly pro forma to thank the board for time and consideration, the commissioners are doing you no special favor in 'allowing' you to speak; be polite, business-like and succinct; there is no need to grovel. The Board understands this process is a right guaranteed under law; they will be attentive and hopefully consider what you say, but they are not granting you special dispensation to speak.

You have 5 minutes. The parole board already has the entire C-file available, with all chronos, vocations and the like before them. Don't waste time going over all those items. Speak to what you know of the personal change the lifer has made, how you have seen him/her grow and mature, become capable of making wise decisions and committed to getting along with society. Tearfully entreating the commissioners to "Please let Johnny come home, he'll never do anything bad again, his grandmother (or other relative) is getting old and wants to see him home, we need him at home to help out" does no good and provides the board members with no solid evidence to counter the Governor's concerns.

And don't say he's served enough time and deserves to come home. While all of that may be true, it is the sole purview of the parole board to assess when 'enough time' has been served, and, like anyone, commissioners don't like being told how to do their jobs. And remember, parole isn't entirely about time served—it's about whether the person convicted of a crime has rehabilitated. Read the Governor's referral letter, note what his concerns were and remind the commissioners how your prisoner has dealt with those issues. Recount your experiences with him/her, when you were able to see the new maturity and understanding the years of prison and self-help have imbued him with.

That's a lot to cover in 5 minutes, and the board is rigorous in adhering to that time slot—yes, they do have a countdown clock and use it. Note the points you want to cover, make sure you hit all the highlights and, if you have time left, expand on the most important ones. Attorneys who speak for their clients at en bancs follow this template because they know facts, not emotions, are what the board relies on.

COMPREHENSIVE RISK ASSESSMENT FOR
THE BOARD OF PAROLE HEARINGS FORENSIC ASSESSMENT DIVISION

IDENTIFYING INFORMATION

NAME AND CDCR #: Claus, Santa XX1234

DOB unknown, current age unknown

Controlling offense: Serial and habitual breaking and entering

County of Commitment: Every California County

Placement Score: 247points

MEPD: The Twelfth of Never

CDCR Forensic Evaluator: Dr. Paar T. Pooper

BACKGROUND INFORMATION: The prisoner is a poor historian of his past, claiming to have been born at the North Pole, remembering nothing of his childhood or events therein, He claims his family consists of elves and reindeer.

PSYCYOSEXUAL DEVELOPMENT AND SEXUAL ORIENTATION: Inmate Claus denies any sexual experiences or intimate relationships or interests. Clearly, this is outside the norm of society and therefore must be suspect in nature. In this clinician's opinion the inmate is either attempting to hide homosexual tendencies or possibly an aberrant sexual interest in animals; his fascination with reindeer is noted.

GANG AFFILIATIONS: The inmate denies any gang ties or related activity, but it is noted in his confidential file that he appears to engage in gang-related slang, including such phrases as "Ho Ho Ho," and "To All a Good Night," which in the latter instance may be a veiled threat of homicide and in the former, a derogatory reference to females.

SUBSTANCE ABUSE HISTORY: Clause denies any substance abuse issues, but has received several 115 RVRs for attempting to make egg nog in his cell. Nutmeg, a prime component of egg nog, may be addictive to some individuals, therefore the inmate's claims of no substance abuse issues should be viewed with suspicion.

PERSONALITY DISORDERS: Claus has a history of engaging in a pervasive pattern that would indicate the presence of a diagnosable personality disorder. His repeated efforts to befriend all individuals he encounters, inmates or staff, and to present them with gifts, indicates an Obsessive-Compulsive Personality Disorder and has resulted in dozens of 115 RVRs over the course of his incarceration.

RISK ASSESSMENT: Inmate Claus' future functioning is limited by his diagnosis of a personality disorder and the unclear ways that this might affect him in the future. Inmate Claus demonstrated a grandiose sense of self, maintaining "Christmas won't be the same without me." Although he presents few historical factors of risk his lack of insight into his reasons for entering countless homes at night and his failure to take responsibility for his actions, maintaining he was leaving, not taking items, indicate the inmate has a poor understanding of his actions.

The inmate presents a HIGH risk of recidivism in the community but a LOW risk of violence. The mean of these two evaluations is a somewhat elevated risk of committing unknown, random acts of kindness. As such Claus clearly represents a risk to society. This risk would undoubtedly increase in the holiday season.

