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GILMAN DISAPPOINTMENT

After waiting so long for the decision in the Gilman case, challenging on an ex post facto basis both Marsy's Law long parole denial lengths and the Governor's right to reverse parole grants, prisoners, attorneys and advocates were disappointed recently when the 9th Circuit Court of Appeals found in favor of the state on all counts. In simple terms, the court upheld the legality of the long-term parole denial lengths promulgated under Marsy's Law in 2008, even as applied to those inmates who were convicted and imprisoned before, in some cases decades before, 2008 and the constitutionality of the Governor's reversal power over inmates similarly in prison since before that power was bestowed on the Governor's office in 1989.

The class action suit, on behalf of all California prisoners sentenced to life with the possibility of parole, has been in various courts for the better part of 10 years and has seen both advancements and setbacks. Most recently, a ruling in 2014 by the late Judge Lawrence Karlton, then of the US District Court, Eastern District of California that held both the denial lengths of Marsy's Law and the Governor's reversals were ex post facto and therefore illegal, garnered great attention and fostered numerous rumors that both those onerous provisions were no longer in force. It was that ruling by Karlton that was reversed on Feb. 22 by the 9th Circuit. The effect of this is that there is no change in the Board of Parole's present policy and ability to deny parole for up to 15 years, nor in the ability of the Governor to reverse the parole grant of any lifer convicted of murder, no matter when that conviction took place.

The 9th Circuit based it's ruling on the ability of inmates given long denials to seek and potentially receive an earlier hearing via the twin trails of Petitions to Advance (PTA) and the Board's sua sponte Administrative Review of 3 year denials at the one year mark. The court held these policies provided 'safety valves' that prevented the long denials of Marsy's Law from posing "a significant risk of prolonging …incarceration" and thus Marsy's Law, applied to all lifers, did not constitute ex post facto. Turning to the Governor's ability to reverse grants of parole made to those convicted of murder, the 9th Circuit held this was legal, as it constituted simply a "transfer of decision making power" to make

decisions on parole suitability from the BPH to the Governor and therefore ..”does not violate the Ex Post Facto Clause.” In articulating the decision the 9th Circuit judges noted there was no evidence the Governor had based the decision to reverse on any information other than that used by the board to grant parole.

The decision was rendered by panel of 3 judges from the over 40 jurists who sit on the 9th Circuit. The trio, Susan Graber, Consuelo Callahan and Carlos Bea, are all of moderate seniority, Graber ranking number 21, with Callahan and Bea numbers 33 and 34 respectively. Graber, on the court since 1998, was appointed by former President Clinton, with Callahan and Bea were both added by George Bush in 2003.

As to what next, the US Federal Public Defender’s office, who litigated the case on behalf of the Gilman class, is reportedly studying the decision before making any decisions on further litigation.

A LITTLE INSIGHT INTO INSIGHT

Among the most often cited reasons for denial of parole is a ‘’lack of insight’ into the causative factors of the crime, the impact of the crime and often, it seems, into life and behavior in general. Just what is insight? We’ve speculated, not entirely in jest, that it falls somewhere between hindsight and second sight. There is little dispute, however, that the accomplishment of insight is a highly subjective measure of suitability.

By simple definition insight is: ”the true virtue of a thing especially through intuitive understanding; penetrating mental vision or discernment, facility of seeing into inner character or underlying truth.” It is perhaps that last definition that is most applicable to parole…recognizing the underlying truth and inner character of who you were and why you did what you did at the time of your crime.

Psychologists, who rarely speak in a direct manner, define insight as “the recognition of sources of emotional difficulty” and “an understanding of the motivational factors behind one’s actions, thoughts or behavior.” In short, what caused you to believe your best option was to commit a crime; what happened in your life that changed your thought process to believe breaking the law was the right path. And perhaps more telling, psychologists equate insight with self-knowledge, and an understanding of cause and effect based on identifying relationships and behaviors in any given situation. Understanding those relationships sheds light on, and helps solve, problems.

So if you have insight, you’ve been able to identify events in your life that caused you to be who you were when you committed a crime. That isn’t as simple as losing a job and needing money. When

you have insight you have a feeling, an emotion or a thought that helps you know and understand something essential about yourself.

It may come gradually, as the result of a long period of thought and reflection or in a flash, as an epiphany or sudden understanding. But once you've achieved insight, you'll understand the reasons, the motivations behind your behaviors and, with understanding, comes the ability to change those attitudes and actions.

MENTAL HEALTH TREATMENT DOES NOT MEAN DENIAL

Receiving any sort of treatment for mental health issues has long been considered, at least by the inmate population, a sure fire way to be denied parole suitability. From being prescribed stabilizing medications to obtaining therapy from prison clinicians, the word on the yard is usually that engaging in these activities will kill any chance of suitability before the parole board.

So here's a news flash we want to make very clear: Not True.

In fact, after a recent report on mental health and violence risk presented to the board the January Executive Board meeting, more than one commissioner sought out LSA/CLN to ask that we specifically let our prison readers know: if you have a history of or currently are engaging in mental health treatment, and indicate your willingness to continue such treatment if released including ways to do so in your parole plans, commissioners actually consider those plans a sign of understanding and responsibility. Whatever treatment is appropriate to your situation, medications, counseling, both, either in the past or on-going, the Board wants inmates to know such treatments are not, in and of themselves, a sign of automatic dangerousness and a reason to deny parole.

Commissioners listening to the presentation on the connections between mental health and violence, and being assured that one does not directly lead to the other, expressed their concern that they have often seen prisoners who end their mental health treatments either by ceasing to take prescribed medications or leaving therapy provided via CCCMS, in the months before a parole hearing in the hope that being able to say they are not participating in mental health treatment will give them a better shot at suitability. Often, however, the opposite is the case.

Appropriate medications for treating such on-going issues as bi-polar concerns or depression can in fact be stabilizing and those prisoners who exhibit this understanding and express their intent to continue this regimen often make a favorable impression on the parole panel. And those who are receiving counseling, individual or group, through CCCMS, should not be concerned that such sessions will put a damper on their parole consideration. The commissioners noted that those granted parole are routinely directed to attend POC, Parolee Outpatient Clinic, at the local parole office, in the first few months after release, whether or not they have received mental health treatment while incarcerated.

Yes, of course, there are those inmates whose mental illness is so pronounced as to render then unsuitable for parole and it was obvious from the Commissioners' comments at the January meeting that this situation, while not new to them, is troubling. They acknowledged that while denying parole to such individuals, who would have trouble coping in society, is sometimes necessitated by the need to protect public safety, such denials do not provide adequate treatment for those in this category.

Clearly, a Catch-22 situation for both commissioners and inmates. And as yet, no clear solution on the horizon. At the close of the January presentation on mental health issues and treatment Commissioner Montes, noting the panel members can suggest prisoners seek counseling or therapy, asked that at a future meeting the Board the California Correctional Health Care Services present information to the board on panel's direct referral of inmates for assessment to the state's mental health program.

So the message from the commissioners was clear: whatever is working, continue doing it. If your treatment regimen is proving beneficial and you recognize those benefits and plan to continue what's working, that fact should be a positive indicator for parole suitability.

THOMPSON TERMS VS. FUTURE DATES: NOT THE SAME

With the start of the New Year and the implementation of many bills affecting lifers, including SB 230, dealing with release dates and future parole, there is much confusion (as evidenced by the upsurge in mail on the subject) on those lifers found suitable for parole, but not subject to 'immediate release.' The difference between those who receive a date and go home 'immediately' and those who are released from their life term but not custody is sometimes the difference between future release dates and Thompson terms.

In the past, those lifers found suitable and having their term calculated to show a release date more than 6 months from the time of their hearing were give a release date to be served after completion of those remaining months; a future date. According to a December, 2015 report to the Board by former Chief Counsel Howard Moseley, the January 1, 2016 implementation of SB 230 "allows for the immediate release of inmates found suitable for parole by the Board of Parole Hearings upon reaching their minimum eligible parole date, subject to the board's decision-review process and the Governor's review. Going forward, inmates who reach the earliest of their minimum eligible parole date, youth parole eligibility date or elderly parole or elderly parole release date and who have been granted parole will be eligible for release." Thus no more future dates.

The so-called 'Thompson terms,' however, differ from a future release date. A Thompson term, for those lucky enough not to be under one, is a determinate sentence imposed on an inmate for a crime committed while in prison. This can be for anything from possession of drugs, to assault, to possession of a weapon or worse. Prisoners, including lifers, can come a foul of various laws, be tried, convicted and sentenced while serving their life terms. And when that occurs, the resultant sentence, 2, 3, 5 or more years, is called a Thompson term, in honor of a prisoner who attempted to litigate the matter.

Thompson terms are assessed for another crime, not the life crime. So while you may have done your time on that instant offense, you must still answer for whatever caused you to receive the Thompson term.

For those lifers found suitable, and who make it through the review periods, the BPH issues a memo to the prison, which authorizes the "immediate release" of the named inmate---but specifically limits that release to 'from their life term.' And that order applies only to the life term; it does not impact the Thompson term.

Double jeopardy? Not so says the Board. You are serving a life term for one crime, the Thompson term is imposed for yet another crime, this one after the life crime. So you aren't a victim of double jeopardy. The BPH as determined they (the Board) have no authority over determinate terms, other than those specifically outlined under elder, youth or medical parole considerations.

The BPH and CDCR have agreed that Thompson terms are to be served AFTER conclusion of the life term, and are not concurrent. This is supported by case law including IN RE Damien Coleman, published in May 2015. Many lifer attorneys are in disagreement with the board on this matter, and there has been some preliminary talk of filing on the issue, most especially for those long-serving lifers who have been incarcerated well past their MEPD—do those years of 'extra' time not provide sufficient incarceration to cover the Thompson term?

Apparently not, at least in the CDCR's view. And for now, there it remains. If you have a Thompson term, you'll stay in the tender care of CDCR until that determinate term runs its course. The good news—you are eligible for good time credits, which may shorten the actual time you'll be in custody.

As to the old 'future date' decisions, those, have indeed gone away via the enactment of SB 230, for those who have consecutive sentences or were found suitable before the final date of their calculated term---you'll be going home 'immediately' after being found suitable and prevailing through the review period. But remember, 'immediate' is a relative term for CDCR. Once the memo to release from the life term is received by the institution, it usually takes another 7-10 days for all the doors to open.

YOPH WITH A 'STANDARD' HEARING

The roll out of SB 261 is turning out to be significantly different than the roll out of SB 260. Among those differences is the scheduling of inmates who are eligible under the criteria of SB 261 to receive a Youth Offender Parole Hearing (YOPH), but who will receive notice that their hearing will be conducted under 'standard' parole hearing format. What's up? Scheduling and CRA backup, that's what.

Part of the consideration of YOPH procedure is a Comprehensive Risk Assessment (CRA) done to reflect the hallmarks of youth consideration outlines under the youth bills. Some inmates who have not received a CRA from the Forensic Assessment Division (FAD) that takes these youthful factors into account, but who have a parole hearing already in the Board's schedule, will not be able to receive those new CRAs in time to meet the scheduled hearing. Rather than postpone several already scheduled hearings the Board has opted to forge ahead with those scheduled proceedings, which, because these is no appropriate CRA, cannot be considered to be held under the full scope of YOPH. Should the prisoner be granted a date at those 'standard' hearings, all well and good.

If there is a denial at those proceedings, "Qualified youth offenders whose hearings are conducted as standard parole consideration hearings will be eligible to receive a separate youth offender hearing on or before January 1, 2018." In other words, if a YOPH eligible inmate receives a standard parole hearing and is denied parole, he/she will receive yet another hearing, this time under the full scope of YOPH, including a CRA that reflects youthful factors, before beginning of 2018. Thus, the potential for two bites of the apple within a 2 year period, regardless of the length of denial articulated at the hearing.

In the intervening time the FAD has assured the Board those lagging CRAs will be completed and delivered to both inmate and inmate counsel in a time frame that allows for full comprehension and possible appeal of any errors in said CRAs (perish the thought). In such situations the denied lifer need not file a PTA, as the Board will automatically reschedule a YOPH hearing as the CRAs are completed and delivered.

This practice will continue for those hearings already calendared for the first 6 months of 2016, by which time the FAD is expected to have caught up with the YOPH process. For those inmates whose hearings had already been slotted in the complex BPH scheduling process to have a hearing that would fulfill the requirement of CRA that addresses youthful factors the Board was faced with the choice of either postponing a large number of hearings and throwing the scheduling into chaos or allowing scheduled hearings to proceed, with the caveat of a new hearing, with the proper CRA, if the decision was a denial.

If you are a YOPH eligible prisoner who goes to your next hearing in the by the end of June, 2016 and have not received a YOPH-oriented CRA, consider that upcoming hearing your first shot, maybe a bit of a dress rehearsal. If you're found suitable, great! You made it. And if denied, contemplate the results, address the points outlined, study your new CRA and get ready for a return engagement in a quick turnaround time.

WHAT YOU CAN DO TO HELP

Our mission here at LSA is to do all we can to help lifers in every way we can. And there are some things you, as prisoners, can do to help us in that mission and support us.

We're all volunteers here and the help and support of you and your families makes our work possible. Stamps are a great help to us—we're answering 200 letters or more a month, that's $100 in postage costs alone. If you have an extra stamp or two—we really appreciate them. And you can help support us financially via food sales and other group activities. We're a non-profit 501 (c) (3) organization, just like many of those prison groups donate to. We've been very fortunate to have been the beneficiary of food sales from several prisons in the past and we hope that will continue.

If the administration at your institution feels they should be the ones to designate who gets those donations, let us know. Even if it isn't LSA that benefits from those sales, it should be the decision of the prisoners, not the warden, et al, about where those funds go. And we can help make that point.

We're here to inform and help you. Help us continue on that mission.