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SB 261 CONTINUES TO ADVANCE

With this year's regular legislative session rapidly nearly a close SB 261, the much-anticipated extension of youthful parole factors to those under 23 years of age at the time of their crime, continues to advance in the legislative process. SB 216 recently cleared its last committee hurdle, passing out of the Assembly Appropriations Committee on a totally partisan12-5 vote, all nay votes coming from Republicans, all aye votes from Democrats.

After floor votes the bill will go the Governor's desk for his consideration and signature, a process that must be completed by mid-October. Chances of success appear to be good. Provisions of the bill would take effect in January, 2016.

As for other legislation introduced this session:

ASSEMBLY BILLS

AB 293—greater punishment for threats by inmates or inmates' family against prison or correctional staff. Signed into law.
AB 487—nullifies advanced hearings (PTA, etc.) if the victims are not notified. Passed to the Assembly floor, chances for passage limited due to time.
AB 512—Increases good time credits to reduce prison/jail time. Assembly Appropriations Committee, hearing postponed, will not be heard this year.
AB 672—expands eligibility for prisoners to participate in state ID programs (still excludes lifers due to time constraints). Passed out of of Senate Appropriations Committee; still alive by weak chances.
AB 920—allows registered crime victims' attorneys more access to information in a prisoner's C-file prior to a parole hearing. Committee hearing postponed; not this year.

SENATE BILLS

SB 6—exempts those convicted of killing a peach officer from consideration for medical parole or compassionate release. Under submission but held in Senate Appropriations Committee, no hearing scheduled; chances very slim.

SB 124—limits use of solitary confinement and SHU time. Held in Assembly Appropriations Suspense file, will be a 2 year bill.
SB 224—codifies the guidelines and considerations for elderly parole. Inactive by request of author; dead for this session.
SB 498—requires inclusion of certain juvenile statistics in CDCR reports. Under submission but held in Senate Appropriations Committee, no hearing scheduled; dead for this year.

RUMOR CONTROL: JOHNSON V. UNITED STATES

(From the July/August edition of California Lifer Newsletter, analysis from John Dannenberg)

There is a rumor running rampant in the CA lifer community that because of a recent US Supreme Court decision regarding vagueness of the definition of criminal conduct, everyone with a second degree murder conviction is getting their sentence reversed. Not true.

The US Supreme Court ruled recently, in interpreting a federal statute akin to the Three-Strikes law in California, that the 1984 definition in that federal statute under the Armed Career Criminal Act is unconstitutionally vague as to its terminology, “violent felony.” This is not a ruling about a California statute. It is not a condemnation of a California statute as unconstitutionally vague.

Johnson was convicted in federal court of being a felon in possession of a gun and was sentenced to 15 years under the Armed Career Criminal Act, wherein a defendant who has previously been convicted of three or more "violent felonies" is subject to an increased prison sentence. The district court had concluded that a prior state conviction qualified as a violent felony under the "residual clause" of the Act, which provides that an offense that "involves conduct that presents a serious potential risk of physical injury to another" is a violent felony (18 U.S.C. § 924(e)(2)(B)).

The US Supreme Court now ruled that the Fifth Amendment prohibits the taking of a person's liberty under a criminal law that is so vague it fails to provide adequate notice of the conduct it proscribes or allows for arbitrary enforcement. It applies not only to statutes defining elements of crimes, but also to statutes prescribing sentences. In deciding whether the residual clause covers a crime, a court is required to picture the kind of conduct that the crime involves in "the ordinary case" and to judge whether that abstraction presents a serious risk of physical injury. Here, the Court concluded that this wide-ranging inquiry "both denies fair notice to defendants and invites arbitrary enforcement by judges," thereby denying due process. There is uncertainty about how to estimate the risk because the assessment is tied to a judicially imagined "ordinary case," not real-world facts or statutory elements. There is also uncertainty about how much risk it takes for a crime to qualify as a violent felony. The Court overturned its contrary holdings in James v. United States (2007) 550 U.S. 192, and Sykes v. United States (2011) 564 U.S. 1.

Whether or not this ruling will be usable in arguing any pending direct appeal of a California state conviction or sentence is purely speculative, and would depend on a fact-dependent analysis. Moreover, there is no retroactivity application announced in Johnson. So the rampant rumor that “implied malice” as defined for past California state second degree murder convictions is now, under Johnson, unconstitutionally vague, is simply not true.

WHO'S ON PAROLE? A LOT OF LIFERS

Life Support Alliance is fortunate to be a member of the Director's Stakeholder Advisory group through the Division of Rehabilitative Programs, a body that meets regularly to consider virtually all aspects of rehabilitative efforts for individuals still in prison and for those on parole. Our hope, as a member of this group, is to provide input on the needs and prospects of lifers, both in light of what programs might be helpful in attaining suitability and what can help them on release.

During a recent DSAG meeting data regarding the parolee population, collate by the Department of Adult Parole Operations (DAPO) was presented that we found interesting, especially in combination with other information gleaned from conversations with other officials in the parole world. We assembled this information and, aside from presenting it here, offered this snapshot of the parole situation, to the parole commissioners at their August meeting.

Currently, according to DAPO figures, there are some 45 thousand individuals on parole in California, a substantial increase over the 26 thousand, plus or minus, originally expected with the implementation of realignment. Roughly 6 thousand of those parolees are in Los Angeles alone.
About 2% of that total are over 65 years of age, but the average age is 38. About 8% are women. Agents report that some 17% are fitted with GPS monitors, while 25% have former gang affiliations and about 16% retain a 290 designation. Some 30% are employed while another 2% are full time students.

For our interests the most important figures and information relate to lifers. Of the total parolee population, lifer account for about 7%. That translates to over 3,000 lifers currently on parole; undeniable proof that things in the lifer world have changed. A large share of that number have been released in the last 3-5 years. Last year alone saw over 700 lifers released.

Of course many individuals on parole fall into what might be termed co-occurring categories, and such is the case with lifers. Lifer, overall, tend to be older than the average parolee, more likely to be employed (those PIA jobs can and do translate into employment in the world) and slightly less than the general parole population are women.

Despite the uptick in the number of lifers granted parole and released, as a group they continue to exhibit the lowers recidivism rate of any cohort. Most parole regions are now staffed by agents with specialized case loads, including agents with only lifers under their supervision. The agents we speak with, and we speak with many, and often, report lifer parolees are the easiest to work with, most compliant and productive. They are also the most determined to give back and are involved in many pro-social groups and activities, including mentoring programs.

All of this is not to say that there are not still issues and difficulties in the world of lifer parolees, from recalcitrant agents to job and housing challenges. But on the whole lifers are making it in the world and helping each other in the process.

I'M OK, YOU'RE OK. WELL, MAYBE NOT YOU~

One of the constant and vastly irritating issues we come against in interaction with lifers and their families is something of an 'us against us' attitude, comparing lifer against lifer for greater or lesser heinousness or culpability of those long-ago crimes. It is, in fact, one of the first issues we address at family seminars, urging family and friends to get rid of that 'my lifer's OK, but I'm not sure about yours' mindset that separates, rather than unites, those concerned with prison reform.

We've had family members tell us their lifer isn't a criminal—just convicted of a DUI with fatal results—an accident, not a crime. Or that s/he's 'not like all those other criminals in there, he just made a mistake.' Or the one that really lights us up, 'I don't know why they let X out, s/he's a lot worse than my lifer/me.'

Recently there's been an upsurge in frequency of these conversations, largely revolving around the release of another of the men involved in a 1976 crime, the infamous Chowchilla bus kidnapping. We expect a hue and cry from victims' rights groups and unfortunately we've come to expect sensational and often inaccurate news stories as well. But what we don't expect, and have little patience for, is the wailing of some prisoners and family members about why this individual was paroled and not me/my prisoner.

To which we say, as politely as possible, zip it. In a nutshell, parole suitability isn't about who is prepared, suitable or ready in comparison anyone else. It's about the individual, where that person is in their rehabilitation and change, readiness to resume life in society and about how the board measurers that preparedness.

Does the board always get it right, are the most suitable lifers are always paroled? No, it's still a subjective evaluation by humans, and sometimes we don't think the parole panels make the best decisions. But it isn't about comparing prisoner X to prisoner Y. It's about evaluating both prisoner X and prisoner Y to see if either, or both of them, meet the standards of suitability.

Do they compare one lifer against another, deciding who is 'better?' No, there's no evidence of that, and we would howl in protest if there were. And since the commissioners aren't allowed to 'comparison shop,' we, especially those of us concerned with reforming the system, shouldn't either.
No one lifer should be compared to another on a better-than-worse-than crime scale. That harkens back to just the crime, and as we all should know, suitability should be less about the static factors of the crime and more about the current status of the individual involved and dishonors the Lawrence decision. In reality there aren't a static or limited number of parole grants available, so if someone else gets grant, they haven't taken 'yours' or diminished your chances.

An old 1971 Pogo cartoon pretty well sums it up, when Pogo Posssum, the veritable everyman, muses, "We have met the enemy, and he is us." Which is just a folksy way of saying, we're all in this together. And so we are.

WHAT, WHEN AND WHY OF EN BANC HEARINGS

Less a hearing than a review, 'en banc hearings' are considered each month by the Board of Parole Hearings at their publically held Executive Meeting. These considerations are a source of considerable confusion and puzzlement, not only to prisoners, but to families and even institutional staff.

En banc, a term taken from Latin, in simple terms means consideration by the whole body. Whereas in a parole hearing the proceedings are conducted by a panel, composed of selected member(s) of the whole board, an en banc consideration means the decision made by the panel will be reviewed by the entire board. In the case of parole proceedings, this means all 12 (unless some are absent) parole commissioners that comprise the entire Parole Board, will review the decision and either affirm (agree) with the decision made by the panel or vacate (disagree) with the findings.

The en banc consideration is a bit of a mash up of a hearing and a discussion, in that while the prisoner is not present at the event his attorney and/or supporters can speak on his behalf, while those who might oppose release can also have their say. Opinions from both sides, pro and con, are limited to 5 minutes for each person. Attorneys for prisoners sometimes appear, to recap for the entire board the reasons the original parole panel found the prisoner suitable, though this happens more often when the attorney is privately retained, not state appointed. DAs in opposition almost always hold forth, with predictable opinions and prognostications.

What gets a parole grant to en banc consideration? Several factors. Any decision, grant or denial, can be referred for en banc review by the Governor (in certain instances), by a member of the parole panel that made the original decision, by BPH Chief Legal counsel, by the BPH legal team for cause or for medical concerns/issues.

Victims and victim's family members often appear either in person or submit written comments, which are often read by victims' advocates. But family members, friends and other supporters of the prisoner and the grant decision are also allowed their 5 minutes as well, another change from a parole hearing. We have written in the past about how to give an effective presentation at en banc proceedings, basically stick to the facts, not the emotions.

As to why a decision goes to en banc perhaps one of the most common reasons, and one in which the prisoner/family/supporters/opposition have the least input, is in the not-infrequent cases of incorrect calculation of the prisoner's term, either shorter or longer. If the recalculation is not adverse to the inmate, in other words, will reduce the time to be served, the correction is usually handled by way of a miscellaneous decision memo. A recalculation that would likely result in a longer term is done via en banc.

Those inmates who are in medical distress, either eligible for so-called compassionate release (within 6 months of death) or medical parole (permanently disabled or debilitated) are referred for en banc by the medical staff at the institution. If the BPH Chief Legal Counsel and/or his staff find some legal "t"

uncrossed or “i” un-dotted in their review of original panel’s decision (error of law), they can also ask the whole board to review and either put their stamp of approval or blackball to the panel’s outcome.

If a lifer granted parole but not yet released somehow garners a 115 or ‘new information’ regarding either misconduct or some aspect of behavior comes to the attention of CDCR, that new circumstance is relayed to the BPH, which can often trigger an en banc review to determine of those alleged new circumstances merit a withdrawal of the grant via a rescission hearing. A tie vote or split decision by the panel members (in the usual case of a panel composed of 2 individuals) will also be referred to en banc, but in these instances no additional comment is allowed by supporters or those in opposition, as the law decrees the board must rely solely on the information available to the original panel.

Perhaps the most confusing and worrying from a lifers’ standpoint, is the Governor’s referral. For those lifers with a murder conviction the Governor can summarily reverse that grant, or ‘take the date.’ But for those serving a life sentence for crimes other than a murder, the Governor cannot alone rescind that grant. What he can do is refer that decision to an en banc at the board, thus effectively saying ‘I disagree with the panel’s decision and I want all the parole commissioners to review it and see if they got it right.’

A non-scientific review of such requests by the Governor indicated the entire board usually stands behind their fellow commissioner on the original panel and affirms the grant. Usually, but not assuredly.

WOW! THOSE IRON(WOOD) MEN DO IT AGAIN!

We love hearing from prisoners, and we do, often. About 200 times month. And it always touches us deeply when those letters contain a donation from an inmate to help fund our work and efforts.

We were truly blown away recently to open correspondence from Ironwood State Prison and find inside not only a pleasant letter from the Warden—but sizeable check, courtesy of the Criminal Gangs Anonymous group at ISP. CGA made LSA the recipient of their fund raising efforts, to the tune of just over $2,300! Wow! You guys are fantastic!

This was our second, and so deeply appreciated, gift from the men at Ironwood; last CLN issue noted the Long Term Offenders group had also favored us with a sizeable donation. Another great group of guys.

Our great and deep thanks to the men at Ironwood—your generosity will do so much to help so many, not only prisoners, but their families as well. And we making plans to visit Ironwood, hoping to speak to any lifer or long-termer, in fact any prisoner, who wants to hear from us.

Thank you again, gentlemen, you make our point about the spirit and nature of lifers and we sincerely hope to see many of you soon.