

# PAROLE MATTERS.

Spring 2009 Issue



**Parole matters. In this issue, we explore how the courts are favoring parole while Marsy's Law is resulting in longer parole denials. You will learn how to deal with both.**

**At this moment, there are two contradictory movements in the parole landscape. On one hand, the courts continue to reverse the Board and favor parole. On the other hand, Marsy's law has given the Board increased powers to issue lengthy parole denials. As a life inmate, it is vital you understand how and where these two trends intertwine. Read on, in the pages of Parole Matters, you will learn it all.**

Parole Matters is published by Charles Carbone, Esq. Charles is a parole and prisoner rights attorney for California prisoners. This publication may be construed as a legal advertisement.

## Two is now five: How Marsy's Law Is Affecting Parole Hearings.

Now that Marsy's Law applies to parole hearings --- until that is (if successful) it is overturned -- lifers must understand how Proposition 9 or Marsy's Law is changing parole hearings.

More importantly, lifers must understand how to craft arguments before the Board which account for the obstacles imposed by Marsy's Law.

### 1. TWO IS NOW FIVE.

In what may be one of the best indicators of the political nature of the Board, Commissioners are now using Marsy's Law to issue denials based on the tier of the denial instead of the actual years required to become suitable. In other words, if at a pre-Marsy's Law Board hearing, a lifer received a two year denial, this inmate could be said to have received a 2nd tier denial because two years (in a murder case) was the second shortest period of denial available with 1 year being the shortest denial. At that same pre-Marsy's Law Board hearing, a maximum 5 year denial was an option for the Board but they presumably did not select a 5 year denial because the Commissioners did not believe that the lifer needed 5 years to become suitable.

Now, however, under Marsy's Law, the same lifer is likely to receive a 5 year denial if the Board does not wish to issue a minimum denial. This raises an obvious and alarming question: Why would the Board issue a 5 year denial under Marsy's Law when the Board previously did not select 5 years, and instead issued a 2 year denial?

The answer is simple: 2 is now 5. Or the Board is responding to the implementation of Marsy's Law in a political, not empirical fashion. If a 5 year denial was not warranted pre-Marsy's Law, why would it be imposed post-Marsy's Law when not single fact had changed for the lifer. Well, indeed no facts changed for many lifers and in many cases lifers have become more suitable, but the law did change. And the Board in its politicized fashion has made the old 2 year denial a 5 year denial because they pay heed to the "term" or "tier" of the denial instead of actual years required of any denial.

In perhaps the greatest indicator that the Board observes politics ahead of empiricism (fact based), the Board is now issuing lengthy parole denials based on changes to the law rather than a single change in the facts in lifers' cases.

What to do about this? Call the Board on this lack of fact based decision making. Preferably, through legal counsel, point out how longer periods of parole denial were available but not selected pre-Marsy's Law, and how those longer parole denials still don't apply simply because the law has changed when the facts of your parole suitability have not.

Our best bet may be ultimately in the Courts when it comes to Marsy's Law, but until, if ever, it is overturned, the Board's lengthier denials can be seen for what they are -- completely disconnected from the facts of lifers' cases.

### 2. THE VICTIM'S PARTICIPATION IS BASICALLY THE SAME.

Despite the cheerleading around Marsy's Law for victims and their families, basically nothing has changed insofar as the participation of victims or their families. The only difference Parole Matters has observed under Marsy's Law is that Commissioners now explicitly tell victims and their families that they can directly comment on a lifer's parole suitability. In the past, victims were limited to talking about the impact of the crime although this rule was often violated by careless or bad Commissioners. Now, however, under Marsy's Law, the victims have the floor and can basically talk about any issue they want to including whether the lifer is suitable.

One thing that Parole Matters had anticipated but thankfully not yet seen is the appearance of "victim advocates" when the victim (or family) fails to appear at a hearing. Parole Matters had anticipated that victim's rights groups would send surrogate victim's "advocates" who are completely disconnected from the crime, but who -- because of Marsy's Law -- would speak at the hearing against parole. Fortunately, this has not happened yet, although we are still expecting to see this any day.

### 3. THE BOARD HAS GROWN LAZY ABOUT READING THE CRIME INTO THE RECORD.

One last problem affecting the Board is that they have grown increasingly lazy about entering 3 items into the record: (1) a description of your rights (to a timely hearing, present documents, etc.); (2) explaining the hearing procedures; and (3) reading the crime into the record. On all 3, the Board now relies on the parole attorney or references to the record.

Jimi Hendrix once asked "What if a 6 turned out to be a 9?" The Board of Parole Hearings has now done it. Except, a 2 is now a 5, and a 3 is now a 7.

The new boilerplate reason for a parole denial since Marsy's Law is "INSIGHT." Protect yourself against a denial based on "insight" by hammering on this topic during the hearing. Remember rambling is not a coherent, pointed presentation. Know what points you are going to make on insight BEFORE the hearing begins.

## RECENT PAROLE CASES YOU MUST KNOW ABOUT.

As you may know by now if you are a regular reader of Parole Matters, we keep you informed on the latest, greatest, and worst state and federal parole cases. And rather than giving you more than what you need or can understand, Parole Matters presents the cases as they are viewed by the courts, lawyers and judges.

On these pages appear the list of the most recent parole case you need along with the actual importance of the case identified.

In re Dannenberg  
2009 WL 154815 (CA 6th App. Dist)  
Case No. H030031

This is a favorable case finding that the "heinous" nature of the life crime did not establish that the prisoner posed a present risk to public safety. The inmate had committed no further crimes since the life crime. The Court also ruled that the Board's conclusion that the inmate lacked insight was not supported by the record evidence.

Guardado v. Perez  
2009 WL 160622  
USDC N.D. Cal. 05-00194

This a good case where the failure of the inmate to admit to the particular version of the commitment offense known by the sentencing court was not evidence of a present risk to public safety, and the inmate had a right not to admit his offense.

Saldade v. Adams  
USDC ED Cal. (07-10-08)  
573 F. Supp. 2d 1303

This is a great case because it identifies several static features and when these no longer were relevant to a present risk to public safety: the inmate left his gang in 1993, his last 115 was in 1989, and his last drop of alcohol was in 1988. This passage of time was deemed relevant for these factors no longer being indicative as a present risk to public safety.

Carlin v. Wong  
USDC ND Cal. 06-4145  
2008 WL 3183163

This is another case for inmates who the Board has invoked "insight" as a reason to

deny parole because the Court overruled the Boarding in finding that a lack of insight was not present. Lacking insight could not be established merely because the inmate didn't know why he identified with the gangster mentality in the past. He had no 115s since 1986, and even though the most recent psyche. report said his insight was "partial," the risk assessment was low, and the inmate's insight did not pose a risk to public safety.

Jay v. Kane  
USDC N.D. Cal. 06-01795  
2008 WL 4891052 (11-12-08)

This is a positive case which says that the mere recounting of the crime -- even a heinous one where the inmate killed his mother -- was not evidence of a nexus to a present risk.

Solario v. Hartley  
USDC CD Cal. 08-4862  
2008 WL 5423449

This is an important procedural case which ruled that the AEDPA statute of limitations begins only after the 120 day period following the parole decision in which the decision is finalized.

In re Barker  
Cal App. Ct. A.120223  
2009 WL 148415

This is a great decision overturning the Governor's parole denial where the crime was not indicative of a present risk. The inmate's psychological reports had been supportive since 1999, and there was no evidence that old juvenile crimes against animals were not indicative of a present risk.

In. Re Aguilar  
168 Cal. App. 4th 1479

Another great case! The life inmate's offense was not evidence of current dangerousness because the crime was not a culmination of ongoing activity, domestic violence, substance abuse or mental illness. Further, there was no evidence of additional violence against women (his crime victim was his ex-wife. The court also chastised the Governor's staff for relying on outdated reports and psychological evaluations. Lastly, the inmate's 50 year old priors were no longer relevant to his parole suitability.

In re Singler  
2008 WL 5169825

This is a strong case where the court concluded that present risk to public safety does not hinge on whether the life crime was more egregious than other murders. This fact is only relevant if it informs the inmate's present risk to public safety. The Court also emphasized that the stress experienced by the inmate at the time of the crime was a relevant factor.

In re Burdan  
168 Cal. App. 4th 18 (2008)

This is an important case dealing with when an inmate can file a habeas petition challenging a parole denial or governor reversal. The Court favorably ruled that delays of over a year from the hearing date, and or 10 months after the Superior Court ruling was not an issue because the only prejudice would apply against the inmate. Additionally, the Court ruled that it could look beyond those denial reasons cited by the Governor for why the inmate was not suitable.

In re Vasquez  
2009 WL 130203

This is a good case where the overruled the Governor's conclusion that the crime was committed with "exceptional" callous disregard. Further, the inmate stopped minimizing his involvement in the crime (he previously claimed self-defense) since 2004.

In re Viray  
2009 WL 131999

This is a helpful case in which the court overruled the Governor's sole concern over a 27 year old crime because the old crime was no indicative of a present risk. The court also noted that the inmate had an INS custody hold and was likely to be deported, and therefore did not require parole plans in two different countries. The court stated he only need realistic plans for the future or marketable skills.

In re Gaul  
CA 2 No. 73930  
2009 WL 73930

This is a good case that took particular note of parole support coming from the District Attorney as well as the usual positives such as disciplinary-free behavior in prison despite a murder-for-hire life offense. Plus, the court reasoned that the Board could not rely on older less supportive psychological evaluations when there were more recent supportive

ones.

In re Cooper  
2008 WL 5077726  
CA 1. No. A116347

This is a strong case in which the court overruled the governor on the issue of his concerns over "insight" because the Governor's comment was based on outdated psychological evaluations and past hearings, as well as the plain fact that the record otherwise did not support a lack of insight.

In re Davis  
2009 WL 207314  
CA 4 No. G039631

The court overruled the Governor because there was no evidence that the lifer was not truly remorseful.

In re Rockers  
2009 WL 163795  
CA 4, No. G03982

This is a great case where the lifer was found suitable by one panel and the next one (after a Governor reversal) found him unsuitable. The Court overruled the unsuitability and told the Board that they must find him suitable again unless there was "previously undiscovered and changes to his mental state."

In re Hill  
2008 WL 4840982  
CA 4 No. E043639

This is another good case which requires, once again, a nexus between the life crime and present risk to public safety.

In re Raymundo Macias  
CA 6. No. H033605

This is a good case which found no evidence that the inmate's crime demonstrated an unreasonable risk to public safety. *This case was won by Charles Carbone, Esq. and Parole Matters.*

In re Emmanuel Kurtz  
CA 6 No. H033765

This is another good case finding that the young age of the lifer (16) at the time of the offense was further proof of his suitability at present along with the fact that there was no evidence of present dangerousness. The Court of Appeals also here denied the stay of the lower court opinion pending appeal. *This case was won by Charles Carbone, Esq. and Parole Matters.*

In re Hayes  
2009 WL 180269  
CA 1 A119968

This is a great case where the Board's concerns over an "anger problem" were deemed pure speculation and contrary to the psychological evaluations. The court also ruled that even a heinous crime must have a connection to a present risk to public safety.

In re Nam Van Huynh  
2009 WL 190715

This is a similarly good case where the court overruled the Governor who failed to connect an "especially heinous crime" to a present risk to public safety. The crime was 20-plus years old.

Ramirez-Salgado v. Scribner  
2009 WL 211117  
USDC SD Cal.

This is a significant case which concluded that a prison lockdown can toll the prisoner's statute of limitations under AEDPA because of the prisoner's limited access to a law library and other means to litigate his case.

In re Cobos  
2009 WL 162060

This is a good case where the court acknowledged the importance of the inmate leaving a prison gang and his 30 year incarceration and 115 free behavior since 1988. Further, the court took note of the inmate's genuine remorse in overruling a Governor reversal.

In re Palermo  
2009 WL 330892  
CA 3. No. C058030

This is a good case where the prisoner showed remorse for what was likely an accidental killing. The inmate did have several 115s - including one as recent as 2002 for theft of state property. Plus, the court reasoned that an aggravated life crime itself does not establish present dangerousness especially when the killing was an isolated incident of violence.

In re Ross  
2009 WL 311847  
CA 3 No. C057249

This is an essentially bad case where the court did not believe the version of the crime that the lifer offered even though the court agreed that the crime itself was not necessarily proof of present dangerousness. The court did, however, look at the 11 prior criminal cases as indicative of his likelihood to re-offend.

In re Armstrong  
2009 WL 73972  
CA 4 No. D051629

This is a great case that concludes that not having a firm job offer can not act as a basis for a Governor's reversal of a parole grant.

**As you can see, a pattern of case law has now cemented itself towards these RULES of LAW:**

- 1. Any reason to deny parole must be connected to a present risk to public safety.**
- 2. Any concerns over "insight" must be supported and substantiated by the record including RECENT psychological evaluations.**
- 3. Reliance on outdated or stale reports -- especially when they conflict with newer information -- is not permitted.**
- 4. Even a heinous crime or an "exceptional" crime must offer proof of a present dangerousness.**
- 5. Dual parole plans are NOT required for lifers with INS custody holds.**
- 6. And leaving priors or gangs behind is credible and indicative of present suitability when contrasted against long-standing and significant programming and disciplinary-free behavior.**
- 7. Even partially limited insight is sufficient when the psychologist can still deem the lifer a low risk.**
- 8. The applicable statute of limitations on filing a Habeas Petition is still about a year; it runs from the date of 120 review after the parole denial; and can be tolled (or paused) for prison lockdowns.**
- 9. A 115 that is 5-7 years old is not necessarily a automatic reason to deny parole.**
- AND 10. You can't win unless you litigate your case in Court. Appeal your denial!**

As a continuation of past materials in Parole Matters, we provide you here another of a one-of-a-kind “flow chart” on the overall appeals process for criminal convictions. We know of no other instructional/educational tool like this. This one addresses federal appeals. ENJOY.

## LOOKING FOR THE BEST PAROLE ATTORNEY?

Yes, it does matter who represents you at Board. NOW MORE THAN EVER. With less frequency of your hearings because of longer parole denials due to Marsy's law, and more emphasis on winning your freedom in the courts, having the best parole attorney by your side is even more crucial. Make certain you are ASKING other clients of the lawyer you are considering whether they have done the job right. And make certain that your trust and hard earned money is in the right place. Ask questions: how many times will you visit me?; how will you prepare me?; what will you file with the Board?; what is your strategy particular to my case?; and what will be our likely reasons to appeal, if necessary? These are fundamental answers you should know before hiring the right lawyer.

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