THE PAROLE STEEPLECHASE

By Steve LaCheen

One of my most fervent empirically-based beliefs pertaining to the practice of law—or at least the practice of criminal defense as I have experienced it—is that, more often than not, there occurs, during the course of the representation, an unanticipated development or event no one could have foreseen, which, if not a *deus ex machina*, has almost as dramatic an effect on the ultimate determination of the matter. Writing that, the following clichés spring to mind. The only constant is change; there are enormous changes at the last minute; so, expect the unexpected.

Often, in my experience, the deciding factor in a given situation—the thing that makes reasonable resolution possible—is something that no one could have foreseen or prepared for. Indeed, it is often the very fact of being unforseen that allows everyone involved—warring, or at least sparring, opponents on opposite sides of the table (read "battlefield")—to be able to move toward the center of resolution without admitting error or, worse, losing face.

I have written of this phenomenon on several occasions in the past and will not repeat stories previously told, but the following history illustrates how the "X" factor impacted one of the most challenging federal parole cases I ever handled.

My inmate client was the former Insurance Commissioner of the State of Louisiana, who had been convicted of two separate offenses and given two separate sentences; the first, a 20-year sentence for accepting illegal campaign contributions when running for the office; the second, a five-year sentence for awarding state contracts to the insurance company which had made those contributions. Ordinarily, the parole commission would have simply stacked the sentences and the applicable parole guidelines, treating the two cases as one 25-year sentence, with parole eligibility at one-third (100 months); but not in this case, because the later offense was committed after November 1, 1987, and the five-year sentence was imposed under the new sentencing act, which did not have a parole component.

The parole commission treated the sentences separately. Since there was no parole eligibility on the five-year "new law" sentence, that had to be completed first. That calculation would require the inmate to serve 51 months on the new sentence (60 months less nine months' good time) before starting service on the 20-year old-law sentence on which the inmate would not be eligible for parole for 6 and 2/3 years (80 months); requiring incarceration of at least 131 months.

The Bureau of Prisons also treated the two cases separately, but reversed the order, requiring the inmate to serve the old-law 20-year sentence before being paroled to the new-law five-year sentence, which would have required him to serve at least 80 months and then serve an additional 51 months, a total of at least 131 months.

Our position was that the sentences were concurrent, and the 20-year old-law sentence made him eligible for parole at 80 months, by which time the five-year new-law sentence would have already been completed. Since the judge had not specifically ordered the sentences to be served consecutively, they should run concurrently by default; and the fact that there was no parole eligibility on the five years did not affect his parole eligibility at

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The difference to the client, of course, was that under the parole commission’s interpretation, he would not be eligible for release until he served at least 131 months; whereas under our interpretation, he would be eligible for release after service of 80 months, a difference of 51 months.

By the time I had been contacted by my client’s family, he had already been given a presumptive parole date. At his initial parole hearing, the parole commission had determined that, since he was not eligible for parole consideration on the five-year new-law sentence, he would not be parole eligible until he had completed that sentence, plus one-third of the old-law sentence; in other words, 131 months.

My client was serving his sentence behind the wall at the federal prison in Atlanta, and the parole hearing would be conducted by hearing examiners from the Southeast Region, with whom I had some, but limited, experience, having handled only a few hearings at institutions in that region.

What I had failed to fully appreciate was that the upcoming hearing was not an actual parole hearing at all, but a statutory interim hearing, to which an inmate was entitled every 18 months for the sole purpose of determining whether there had been any significant changes in his status since his last parole hearing. “SIH” hearings were conducted by a single hearing examiner, who had no authority to conduct a plenary review of decisions made by the commission at prior hearings. So, we would be presenting argument for relief to a single examiner with no authority. Not much to look forward to other than meeting my client and enjoying a pulled pork platter at Sonny’s Barbecue.

But I was wrong. As luck would have it, the hearing examiner was a self-described “old hand,” and, because we were one of only a few cases on the diminishing list of “old law” inmates still eligible for parole, he was in no rush; and, even though it was just an SIH hearing, he gave me free rein to make a full presentation to the tape-recorder, which he promised he would ensure would be heard at the regional office. Although he had no power to make any changes, he would see to it that our position was given consideration by the powers-that-be in due course.

We were, of course, elated that we had lucked out and found a sympathetic ear. Unfortunately, the word came back that the regional commissioner did not see our situation the same way, and nothing would be done to change the current order of things. To complicate matters, since this hearing had not been a parole hearing as such, I had nothing to appeal, administratively speaking. And I had no basis to go to court with a habeas corpus petition because we had not exhausted our administrative remedies. So, I decided to try a different tack.

I prepared an Administrative Petition for Extraordinary Relief, couching it in exactly the same terms as I would later use in a habeas corpus petition if need be. I had little hope for winning administrative relief; what I was hoping to do was to set the stage for an immediate appeal. By filing the petition with the National Parole Commission, I hoped to get a ruling which would be the equivalent of exhausting administrative remedies, and allow me to go to court without having to climb every rung up the administrative ladder, which would have taken a year at least.

The response I got, however, was not the response I had hoped for. I received a telephone call from an attorney for the parole commission who said the commission intended to respond to my petition, and that if there was agreement that my argument should be given further consideration, my client would be given a full parole hearing at the next scheduled hearing date at FCI Atlanta. That, of course, was not what I wanted; I wanted to avoid getting bogged down in the administrative process. We wanted to avoid further delay.

I explained that my client had already served more than the required minimum for parole eligibility, and that if we were right, then he ought to be given immediate consideration by the National Commission, which always had the power to deal with certain cases as “original jurisdiction” cases; and that’s what should be done in this instance to right the wrong already done.

My argument fell on stony ground until an unexpected turn of events set us on a different course. During a Friday afternoon telephone call, the parole commission attorney mentioned that she could not wait to get out of Chevy Chase and spend the weekend with her horse. “You sound just like my daughter,” I said. And just like that, our conversations took a different tack, and we were rounding the far turn and coming down the back stretch. The lawyer, as I learned, was, like my daughter, a dedicated rider who owned a horse and engaged in dressage and steeplechase competitions, and so it went, on and on and on; and the problem of my former insurance commissioner was carried across the finish line in record time.

In short, and shortly thereafter, with the recommendation of the hearing examiner and counsel, the parole commission reopened the case, and advanced my client’s presumptive parole date by 36 months, entitling him to immediate release at 90 months.

A week later, I met my client at the gate and drove him directly to Sonny’s Barbeque, where his family was waiting to celebrate his release. It was a great homecoming. And the ribs were good, too. ■

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