LIFE SUPPORT ALLIANCE

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BUTLER CASE WRAPS UP AT LAST

In early April, concluding that laws passed and agreements entered into in the last several years regarding incarceration terms for lifers *"create a new legal landscape wherein base terms no longer play a defined role in the Board's determination of parolee release dates*," the California Supreme Court unanimously reversed the First District Court of Appeal's earlier decision in long running In re Butler case. The short explanation of this decision is that the Board of Parole Hearings is no longer required to set a base or adjusted base term for inmates seeking release via parole. In essence, this ruling means there is virtually no other path to parole for a lifer, absent being found suitable at a parole hearing.

Former lifer Roy Thinnes Butler originally filed in 2012 challenging the constitutionality of the then BPH practice of not setting base or adjusted base terms of imprisonment for lifers until said prisoner was found suitable for parole. In 2013 the BPH entered into an agreement which required parole panels to set base terms at the first (initial) parole hearing (or if that hearing had already been accomplished, at the next scheduled hearing), regardless of whether the prisoner was granted parole or not. Butler was released in 2014, but the case continued with the court retaining judication over the matter to answer the continuing question (and legal filings from lifers) on whether the lack of base terms caused unconstitutional and disproportionate terms for lifers. Some 5 years after the settlement the ultimate answer, from Cal Supreme, is that term setting is basically now a moot issue, given changes in law and policy in the intervening years.

"In effect, California's current and mostly determinate sentencing laws, along with statutory reforms to the parole process, have all but rendered specific base term calculations for individuals subject to parole determinations unnecessary as a means of ensuring against unconstitutionally excessive punishment," the court noted in its findings. The justices held such recent changes as SB 260, elderly parole consideration and SB 230, took the place of base terms in protecting lifers from disproportionate sentences.

In explanation of the ruling the court noted*, "At the time of the settlement agreement (Butler I), "base terms" governed the earliest possible release date for inmates serving indeterminate sentences. Since then, changes to California's criminal justice system have altered the relevant statutory landscape, such that "base terms" no longer govern the release date of inmates subject to indeterminate sentences." YOPH laws and elderly parole guidelines provide possibility of relief at (on the whole) 25 years after incarceration, while SB 230 required that on a "grant of parole, the inmate shall be released subject to all applicable review periods. However, an inmate shall not be released before reaching his or her minimum eligible parole date as set pursuant to Section 3046."* In turn, 3046 barred release on parole until the prisoner has served either 7 years or the minimum term set by statute, whichever is greater, thus eliminating base terms as the controlling basis for release of life term inmates who do not qualify for youthful or elderly parole consideration.

All of this, however, is overshadowed, in the words of the court, by the fact that *"[T]he Board may not, however, release an inmate until the individual no longer poses a threat to "public safety," regardless of any base term calculation. In fact, we specifically instructed the Board to "eschew term uniformity" if public safety considerations warrant a sentence that went beyond a calculated base term. Thus, base term calculations were designed to set forth an inmate's minimum sentence, not to reflect the maximum sentence permitted by the Constitution."*

It is the impact of SB 230 that is perhaps the least understood of the changes noted by the court as having impacted the requirement to set a base term. Quoting again from the court ruling:

"This legislation excised the language from former section 3041, subdivision (a) requiring the Board to set parolees' release dates "in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public" — the very language on which the Board relied in devising the base term system. Because of this legislation, base terms no longer control the release date for nonyouthful, nonelderly inmates either. Instead, those inmates' indeterminate terms end when the inmate is both (1) found suitable for parole and (2) has served their statutory minimum term (subject, of course, to the Board's internal review procedures and the Governor's power to reverse a grant of parole or request further review."

"*The most important aspect of these changes, for present purposes, is that base terms no longer play a defined role in determining the release date for any inmate sentenced to an indeterminate term."* In simple language, no matter what length of sentence given, or how long a time served, if the BPH decides a prisoner is still a danger to the public, that inmate will not be granted parole, nor will any writs filed on the basis of disproportionately long incarceration times find favor in the courts.

The justices also addressed the argument of excessively long incarceration periods wrought by the BPH's parole determination process. *"An inmate serving an indeterminate sentence has a constitutional right to a sentence not disproportionate to his or her offense. Writing during a time when California imposed indeterminate sentences for most felonies, we noted that the "oft-stated rule that a prisoner has no right to a term fixed at less than maximum . . . is . . . subject to the overriding constitutionally compelled qualification that the maximum may not be disproportionate to the individual prisoner's offense."*

"Under the cruel or unusual punishment clause (art. I, § 17) of the California Constitution, there is no question that an inmate sentenced to an indeterminate term cannot be held for a period grossly

disproportionate to his or her individual culpability. Still,,,, we explained that … prophylactic measures are not necessarily required in the state's current, mostly determinate sentencing regime. [Past petitioners have contended] that such constitutional considerations impose upon the Board a general obligation to fix actual maximum terms, tailored to individual culpability, for indeterminate life inmates"].) Such a requirement, we explained, was necessary in a largely indeterminate sentencing regime — a regime that "imposed life maximums for a wide range of offenses, serious and less serious."

"But it was not constitutionally required for the "narrower category" of serious offenders who receive indeterminate sentences under current law. Because of their culpability, there is a "diminish[ed] possibility" that these serious offenders will suffer constitutionally excessive punishment. We also emphasized that inmates may bring their claims directly to court through petitions for habeas corpus if they "believe, because of the particular circumstances of their crimes, that their confinements have become constitutionally excessive as a result."

"The mostly determinate sentencing regime now in effect reflects the Legislature's design to reduce the number of offenders receiving indeterminate sentences, thereby limiting the possibility that these serious offenders will suffer constitutionally excessive punishment. The Board promulgated base term regulations in response to the Legislature's instruction to establish "criteria" that would promote sentence uniformity for inmates serving lifetime sentences. The Board may not, however, release an inmate until the individual no longer poses a threat to "public safety," regardless of any base term calculation. In fact, we specifically instructed the Board to "eschew term uniformity" if public safety considerations warrant a sentence that went beyond a calculated base term. Thus, base term calculations were designed to set forth an inmate's minimum sentence, not to reflect the maximum sentence permitted by the Constitution."

The judges concluded their opinion by noting that at the time of the 2013 settlement base terms had an impact on the release date for life sentenced inmates*. "Not so today. Instead, the release date for indeterminately-sentenced adult inmates — like Butler — is now guided by the date when an inmate has served the statutory minimum term and is found suitable for parole based on statutory public safety-related criteria, subject to limited exception. These changes to California's criminal justice system do not diminish the societal interest in avoiding arbitrary parole determinations.*

"They do, however, dictate that base terms no longer directly control the release date for prisoners subject to indeterminate sentences. That these statutory changes are material to these parties' agreement requires, legally and practically, modification of the injunctive order by the Court of Appeal. Moreover, sentencing in California involves primarily determinate sentences and parole determinations involving public safety considerations — so specific base term calculations are not a constitutionally necessary measure for guarding inmates serving indeterminate sentences against disproportionate punishment."

Bottom line: the board is no longer required to set base terms; no matter how long your sentence, the key to parole is suitability; it is the province of the BPH to decide when an inmate is suitable for parole.

THE FALLING LEAVES…

Since the legislature increased the number of parole commissioners from 12 to 15 about a year ago, the BPH has had quite a challenge in keeping all 15 of those seats filled. In what has become almost a regular feature of the newsletters, we're once again reporting on the imminent departure of yet another commissioner.

This time we can reliably report Commissioner John Peck, serving as a parole commissioner since 2009 and the second longest serving member of the current board (only Arthur Anderson, appointed in 2008 has served longer), will be leaving in May. This brings to 5 the number of commissioners who have left seats on the board since the beginning of the year.

Others include Jack Garner, Cynthia Fritz, Troy Tiara and (as yet unofficially but reliably reported) Marisela Montes. Like Anderson, Peck was first appointed to the board by former Governor Arnold Schwarzenegger and one of the last remaining commissioners who pre-dates LSA's formation and interaction with the BPH.

Peck, with a long career as a correctional officer behind him at the time he joined the board, is usually considered one of the most down-to-earth and outgoing commissioners. No push over, and not prone to circumlocution, Peck was none-the-less receptive to comments and communication from other 'stakeholders' in the prison/parole arena and, in the early days of LSA's attendance at parole hearings, was helpful in explaining the process and proceedings.

Approachable and without guile, Peck successfully made the transition from the 'old' board to the 'new' parole board, adapting and evolving as the board's outlook and policy changed, under new direction, policy and information. All of which is not to say those in the prisoner advocacy are always agreed with his decisions; but he earned the respect of most and his human approach to decisions will be missed.

Brown has, in past months and with past resignations, been relatively quick to appoint new members. While neither Peck nor Montes have yet officially voiced their departure, both are expected to do so in the next few months. As the Governor fills any empty seats that may develop, we'll be on alert.

BROWN'S PAROLE REVERSALS HIT NEW LOW LEVEL

For those lifers convicted of first or second-degree murder, winning a grant of parole from the Board of Parole Hearings isn't the end of the battle. Under powers bestowed on Governors several years ago, this Governor, and those before him, can unilaterally reverse that grant of parole, known to prisoners as 'taking a date.'

Each year, the Governor is required to report to the legislature on those cases where he exercised this power, and just about every year Life Support Alliance gets that report, parses through the language and finds those items, facts of the case or prisoner, that constitute his 'triggers,' those factors that cause him to reverse those parole grants. This year was no exception. The "2017 Executive Report on Parole Review Decisions" was surprisingly short.

Of the 915 grants of parole handed down by parole commissioners in 2017, the Governor reversed 25 of those grants, the lowest percentage of reversals, indeed, simply the lowest number in decades. Indeed, 25 reversals out of 915 grants barely registers, percentage wise, at a mere 2.7%. Granted, percentages are a bit misleading here, as not all the 915 inmates granted parole were subject to the Governor's reversal; only those with a first or second murder conviction are vulnerable.

But a retrospective look at raw numbers is interesting. The number of grants handed out in 2017 was a record level, though the board has been on an upward trend for several years, ranging from over 600 to over 900 since 2012. And Governor Brown, in stark contrast to proceeding governors, while still exercising his ability to reverse dates, often repeatedly for the same prisoner, has done so far less often than others, which at time hovered around 80% reversals.

Over the last 6 years, the numbers look like this:

2012 Grants: 670	Reversals: 91
2013 Grants: 590	Reversals: 100
2014 Grants: 902	Reversals: 133
2015 Grants: 902	Reversals: 95
2016 Grants: 816	Reversals: 99
2017 Grants: 915	Reversals: 25

As mentioned, the Governor is only able to unilaterally reverse parole grants for those convicted of first or second-degree murder. And it appears, from analysis of last year's reversals, that he makes no distinction between first and second degree; of the 25 reversals, 14 had second degree convictions. Nor does being a YOPH lifer bestow any easier a ride, as 14 of the reversals were for prisoners who fell under YOPH laws.

What else triggers the Governor to reverse a parole grant? As in past years, it appears the characteristics of the victim are first in line. Once again, if the victim of the crime was female, a child or young person, elderly, or otherwise especially vulnerable, the Governor take special notice and is somewhat more likely to reverse.

Similarly, if the victim is being a police officer or other 'high profile' crime, the chances of reversal are greater. Although 3 of the reversals affected inmates who qualified for elderly parole consideration,

all of those individuals were convicted of crimes that could be considered 'high profile,' which, for the Governor, carries more weight.

Of the 25 reversals, one was a woman, who Brown acknowledged had been a victim of Intimate Partner Battering (often a mitigating factor), but the nature of her victim and the facts of the crime, held more weight for the Governor. One prisoner was even a formerly paroled lifer, returned to prison after about a year on parole after being convicted of a domestic violence incident. Although the parole board voted to give him a second, second chance, the Governor was not so sanguine, saying he was not convinced the inmate had control of his anger issues.

Indeed, the phrase, "I am not convinced" is prominent in many of the reversal letters. The Governor expresses his skepticism about the level of insight acquired by some granted parole, the genuineness of their remorse, and, in a trio of cases where there were concerns regarding the mental health of the potential parolee, their commitment to continuing on a treatment path. Brown also pulls several up short on their expression of responsibility, noting in several cases he feels the inmates are still 'minimizing' their participation or culpability in the crime.

In several cases Brown mentions family victims of the victim expressed opposition to parole for the prisoner. And former gang affiliation was also a concern, as were those individuals who had multiple victims, or where the victim was a member of their family.

And being reversed by the Governor and subsequently being found suitable again is no guarantee of Brown's acquiescence to release. Of the 25 reversals, 7 individuals had been reversed at least once before, several 3 time and for at least one, this was the fourth reversal of a grant.

UNDERSTANDING THE AMENDS PROJECT

The Amends Project, helping lifers and others, understand how to write an appropriate and impactful letter of apology and amends to their victims and victims' family, has been underway for just over two years now, during which time we've conducted the workshop for hundreds, of prisoners and issued a few hundred certificates of accomplishment as well. Some of the by-products of The Amends Project, aside from letters of real amends to victims, is an increased understanding of what making amends means, the deeper and less obvious consequences and impact of crime on those on both victim and perpetrator sides and how to try to heal those wounds. And that's our motivation for continuing to travel and present this workshop everywhere we can.

Of late, we've received several letters from prisoners, asking us to review their letters and send them our certificate, and even from some group sponsors at some institutions, asking us how to get certificates for the inmates they're working with. And while many victim impact groups and classes have an apology writing component, you'll forgive us if we think ours is pretty special and offers more insight into the process, benefitting the prisoner as much as the victim. So while it's flattering and nice that others seem to feel there is worth and merit in our certificate for an amends letter, we're holding fast to the position that the only way to get that certificate is to take The Amends Project workshop and go through the letter review process with Life Support Alliance. That's not to say that you can't write a good, impactful and sincere apology letter without participating in the Amends workshop, it only means we won't review or vouch for your letter unless you've gone through the process with us.