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UPDATE: YOUNG AND BUTLER

As reported previously here and in California Lifer Newsletter, in January, after yet another denial of parole for Andrew Young, the appellate courts, frustrated by the Board's lack of compliance with previous directives in the case, ordered not yet another hearing for Young, but simply his release. In late March Young was indeed released. In a related development, in late May the California Supreme ordered In RE: Young II depublished, a move that makes the case no longer citable in future pleadings.

But, much like toothpaste escaped from a tube, it's hard to put everything back again. The Young case took both the board and the FAD to task in several areas and took the unusual step of calling out both the panel members and the FAD clinician by name for their errors. Those comments still reverberate and while the case may not be citable, the principals involved remain in play.

Within days of the depublishing of Young came the decision from the First Appellate Court in the latest installment of In RE: Butler, the case that last year promulgated an agreement between the BPH and the courts under which parole panels are now calculating and setting terms at a prisoner's first or next upcoming parole hearing, regardless of suitability decision. Prior to the agreement term calculation was done only when a grant of parole was given.

What was striking, however in this installment of the Butler case, was not especially the decision itself, which only will allow Butler, now released and reintegrating well, and his legal representatives to recoup reasonable attorney fees, but the comments, directed to the Board by Judge J. Anthony Kline. Judge Kline quotes the Board's regs 2402 sub (a) and 2422 sub (a) in noting;

> "Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison."

He concludes, again, quoting the Judge, “This declaration of authority is staggering.

> “Blinding itself to the fact that, as [In RE:] Dannenberg acknowledges, there is a point at which any sentence will become constitutionally excessive if it is ‘grossly disproportionate’ to the prisoner’s individual culpability for the commitment offense, the Board rejects any limit on its authority to deny a prisoner release from prison based on its prediction that he or she presents a public safety risk.”

Kline had considerably more to say on the effects of proportionality and uniformity of sentence and how those concepts are impacted by repeated parole denial, including, again quoting from the decision, “whether the prison term resulting for a denial of parole would be disparate in terms imposed on others who committed the same offense in similar ways and circumstances is not reduced to irrelevance simply because it is not controlling. Moreover, prompt term setting would make the Board, other interested parties, and the public, aware of the extent to which the denial of parole led to disparate sentencing” and “the Board’s position that it may deny a prisoner release on parole based on its determination that he or she presents a danger to public safety ‘regardless of the length of time served’ by the prisoner would remove all limits on the severity of punishment the Board can impose.”

Kline also quoted again from In RE: Dannenberg, “Of course, even if sentenced to a life-maximum term, no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense. Such excessive confinement, we have held, violates the cruel or unusual punishment clause. Thus, we acknowledge, Penal Code Section 3041, subdivision (b), cannot authorize such an inmate’s retention, even for reasons of public safety, beyond this constitutional maximum period of confinement.”

The judge thus reminded the Board that it is not Board’s purview to impose punishment, per se, and that the original purpose of setting a base term was to establish the constitutional limit of punishment by reference to proportionality. And while this portion of the Butler decision seems only slightly impactful to the board and its decisions, it is an interesting reference for the board on proportionality and uniformity of time served, especially as these concepts apply to lifers, sentenced decades ago to then-in-place terms of 7 to life and who are now still in prison 20, 30, 40 and more, years later.

CONFIRMATIONS KEEP FAMILIAR FACES

Confirmation hearings for seven of 12 parole commissioners were held recently before the Senate Rules Committee in Sacramento. And Life Support Alliance presented one of only two commentaries offered at the hearing on the ‘suitability’ of commissioners, and the only prisoner advocate to speak. The other voice? Crime Victims Action Alliance.

Over the life of LSA we have taken various positions on various commissioners, understanding that no commissioner always makes decisions we agree with. We also recognize that we cannot, if we hope to maintain creditability in the legislature and administration, always oppose every confirmation. And, after having attended more hearings than we like to count, and probably more than any given prisoner will ever have to endure, we’ve found several commissioners actually make understandable and responsible decisions.

So we pick our battles, support those commissioner who we feel, after observation, study and consultation with inmate attorneys, do a reasonable job. Others, who maybe aren't quite egregious enough to oppose or reasonable enough to support, we remain ambivalent on but lay out our concerns for the Senators. And still others we will flatly oppose.

As we related to the Senators, "Our decision to oppose, support or take no position on any given commissioner is not based on the percentage of grants or denials of parole given. We have long maintained that if the laws, procedures and court directives are followed by commissioners the parole grant rate will find its own balance and we believe events of the past few years have borne this out. We arrive at our conclusions not by emotion but by fact and analysis."

Such was the case at the recent hearing. And while all were confirmed, a situation we expected in advance, it is nonetheless important to lay before both the Senators and the expectant commissioners, our concerns. Support from LSA is hard-won, but three commissioners, John Peck, Terri Turner and Brian Roberts, got a thumbs up. Peck we found to be "unpretentious and unflappable, courteous but in control of hearings." We noted Turner's "efforts to engage nervous and inarticulate prisoners to reach a real understanding of their life change," and Roberts, who we opposed at his initial hearing, had, we felt, evidenced "considerable growth and development in his decision making process and demeanor at hearings." This doesn't mean we've thrown in the towel, but that we recognize and acknowledge those commissioners who are making an effort.

Two commissioners, with whom we have no huge beefs, but have either true concerns or simply not enough feedback yet, Jack Garner and Michele Minor, respectively, got something of a pass. We did, however, explain our reasons to the Senate as follows: Garner, "his attention to detail is frequently less than rigorous, which causes us concern," and Minor, "we have not yet had the opportunity to observe her at hearings…but the input from our attorney partners is generally positive."

Two others, however, Marisela Montes and Amrit Singh, were singled out for our opposition. In addition to Montes' near legendary marathon hearings, we found issues with her "argumentative and dismissive" treatment of inmate counsel and her propensity to insert her personal and self-described "own speculation that an inmate will reoffend" to be objectionable. We also called into question her tendency to ask inmates with cell phone write ups "how the cell phone was acquired or names of other inmates with cell phones. This puts prisoners in an untenable, even dangerous position and is inappropriate. It is not the job of a parole commissioner to conduct an internal investigation."

Singh we opposed for her "propensity to revert to her role as a prosecutor in hearings, her demeanor toward inmates and inmate attorneys often bordering on that of a cantankerous judge." Also called into question was her record of lengthy denials, as we noted "For the past two years she had handed down more 15 year denials than any other commissioner. Overall her denials of parole tend to be for longer periods of time than those of her fellow commissioners, a fact that cannot be adequately explained as simply the character of prisoners appearing before her." We also noted her own lack of insight and expressed opinion that "everyone relapses."

As mentioned, Crime Victims Action Alliance was also there to offer up their recommendations, which were, interestingly, almost in direct opposition to ours. Imagine.

While LSA supported Turner and opposed Singh, CVAA's recommendations to the Senate Committee were the reverse. CVAA opposed Turner because, in their eyes, she granted too many dates. Turner's grant rate is a bit over 30%, not far from the average of all commissioners.

On the whole, the confirmation hearings went pretty much as we expected, all 7 sitting commissioners confirmed for the remaining two years of their 3 year term. So, barring resignation of a sitting commissioner, the denizens of the BPH will remain the same, at least for the next couple of years. Sometime within the next 12 to 24 months the remaining commissioners not reappointed and reaffirmed with this batch will be up for reappointment by the Governor.

Barring change from attrition, resignation or other exigent reasons, the next group of commissioners to sit in the hot (at least we'll try to make it pretty warm) seat of confirmation will be Arthur Anderson, Ali Zarrrinam, Elizabeth Richards, Peter LaBahn and Cynthia Fritz.

YPED VS. MEPD

In the menu of alphabet soups we all deal with via CDCR a new flavor has been added. Those eligible for YOPH (that menu offering is a staple now) are now also hearing about the YPED—Youth Parole Eligibility Date.

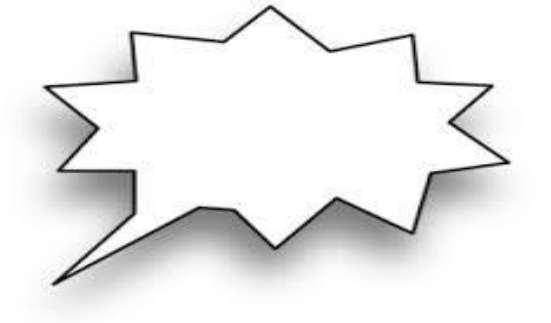
Since we've received many questions regarding this new term and what it means, we have included the definition as outlined in a new Administrative Directive from the BPH, issued recently. According to the BPH YPED is defined as (PC Section 2443) "the earliest date on which a youth offender is eligible for a parole consideration hearing, "and is set according to the following criteria: (1) if the controlling offense is a determinate term of any length, the YPED is the first day after the youth offender has completed 14 actual years of incarceration: (2) if the controlling offense is a life term of less than 25 years to life, the YPED is the first day after the youth offender has completed19 actual years of incarceration or (3) if the controlling offense is a life term of 25 years to life, the YPED is the first day after the youth offender has completed 24 actual years of incarceration."

As to scheduling, PC Section 2444 notes that "Youth offenders shall be scheduled for their initial parole consideration hearing in the year following their YPED unless the youth offender is entitled to an earlier parole consideration hearing pursuant to any other provision of law.

Non-YOPH lifers or inmates enter the parole cycle about a year prior to their Minimum Eligible Parole Date (MEPD), so qualified youth offenders will enter the hearing cycle upon reaching their YPED or one year before their MEPD – whichever occurs first.

Inmates whose YPED occurs prior to their MEPD will enter the hearing cycle earlier than they would have otherwise based on their MEPD. Once qualified youth offenders pass their YPED, they may be released from prison (PDQ!) prior to their current MEPD, if they are found suitable and pass both the Board's decision review and Governor's review processes.

Neither YPED nor MEPD is not a guarantee of a grant of parole but they do indicate when an inmate enters the hearing cycle. So that no matter whether your hearing is scheduled as a result of reaching your YPED or approaching the MEPD, the factors of suitability remain the same and the work required is still yours to finish.



WHO SPEAKS IN VICTIM CAPACITY

Always of great interest and consternation at hearings is the impact statement of victims and victims' family members made at the end of the hearing. While in no way of minimizing the pain and loss of victims or impugning their right to participate in the parole process, we have seen those impact statements devolve into accusations of uncharged offenses, sheer speculation on the future behavior of prisoners, even threats.

Acknowledged by all parties is the increasing attendance at hearings by victims in recent months. Not only are victims attending more often, but it appears more victims or victim related individuals are requesting clearance to attend. Indeed, LSA has not been able to attend several parole hearings because of the numbers of victims in attendance at some hearings.

Often contributing to the confusion, emotion and even length of the hearings has been the propensity of all those attending hearings on the part of victims entourage to expect to offer up statements on everything from the impact of the crime (allowed and relevant) to the individual's projections or imagination of what a prisoner might do in the future. And since Marsy's Law each victims' family member is allowed to bring both an individual designated as a 'supporter' and others who will be the 'representatives' of that family member at the hearing. The representative is allowed to speak on behalf of the family member, while the supporter is there to provide emotional support to the family member only and is not there to actually participate.

Because of issues arising more often at hearings the BPH recently issued an Administrative Directive delineating the role of victims' support persons. The directive also defines as immediate family, those authorized by law to not only attend the hearings and speak (or have a representative speak for them), but to have a support person as well.

The directive defines 'immediate family' as "the victim's spouse, parent, grandparent, brother, sister and children or grandchildren who are related by blood, marriage or adoption." It is those individuals alone who are both entitled to attend parole hearings and speak or designate representatives (who may or may not be attorneys) to speak to the panel on their behalf. As noted I PC Section 3043.3 a designated family member "shall be entitled to the attendance of one person of his or her own

choosing at the hearing for support. The person so chosen shall not participate in the hearing nor made comments while in attendance."

Thus, regardless of how many victims/family members and supporters (one each, according to the law) attend the hearing, only the actual family members as defined or their officially designated representatives may speak to the panel. And while the law is pretty broad as to what they can speak about (and that, unfortunately, includes often baseless speculation on what might happen if the prisoner is found suitable and released, imagined crimes not charged and other 'defects of character') the same law also makes it clear that attorneys acting as representatives "may express the views of his or her client concerning the prisoner or the case"; in other words, the opinions expressed by an attorney acting as a representative must be those of the client and not the attorney.

The same section also gives direction to those prosecutors/DAs who might be representing victims at proceedings. Specifically, the citation notes those acting in this capacity must "express the views of the individual or individuals the prosecutor is representing." Thus, those DAs acting as a representative for a victim in a parole hearing must contain their remarks to the impact of the crime on the victim/family member. It is not an opportunity for a second closing statement or offer up his/her own views on the matter.

Hopefully these directives will provide some guidance and assistance to commissioners often faced with a phalanx of individuals, victims, family, representatives and supporters, all of whom want to offer up their contribution. We have seen and read instances in which tennis partners of the victim, babysitters employed by the victim and friends of victims' family members who may never have met the prisoner under consideration for parole have spoken on subjects from the crime rate in general to questions as to why parole hearings are even held (our response to that is, It's the Law).

Such ancillary comments, from individuals seeking an opportunity to weigh in on a situation about which they may have little if any knowledge, often add nothing factual or of probative value to the hearing, but do intensify the emotional atmosphere and add considerably to the length of the hearing.

STILL IN SUSPENSE

In response to the many letters from prisoners, not to mention calls and emails from family members, here is the latest news on SB 224 and SB 261, the extension of elder and youth parole eligibility respectively. As of the end of May, the latest news is; there is no news.

Both bills still remain in the suspense file of the Senate Appropriations Committee, awaiting passage of a state budget before consideration by the committee and full Senate. This is standard procedure for all proposed legislation that will cost money to implement. When a state budget is finally passed these bills, along with the many others waiting in suspense (not to mention the suspense of their supporters), will be considered in light of their fiscal impact and the financial shape of the state.

Should both bills pass Appropriations they will head to the Assembly for consideration and if they find success there, on to the Governor's Desk for his consideration and signature or veto. Only then will either measure become a new law that will impact prisoners, and then not until January 1, 2016.