IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ROY THINNES BUTLER,
on Habeas Corpus.

A139411

ORDER DENYING RESPONDENT'S MOTION TO MODIFY ORDER REGARDING STIPULATED SETTLEMENT

BY THE COURT*

I.

Background

Petitioner, Roy Thinnes Butler, a parole-eligible life prisoner, challenged the constitutionality of the process used by the Board of Parole Hearings (Board) to determine whether prisoners such as him are suitable for release on parole. Butler maintained that the Board's practice of deferring the fixing of a prisoner's base and adjusted base terms—which measure life prisoners' individual culpability for the base offense and therefore "represent an approximation of the punishment the Board deems proportionate to the manner in which the inmate committed his offense" (*In re Butler* (2015) 236 Cal.App.4th 1222, 1243 (*Butler*))—until after he or she was first deemed suitable for release effectively eliminated any meaningful consideration of proportionality in sentencing during the most crucial portion of the parole process, and therefore facilitated imposition of constitutionally excessive punishment.

On December 13, 2013, before the completion of briefing, the parties settled their dispute by stipulating to an order of this court directing the Board to announce and implement new policies and procedures that would result in the setting of base terms at a

* Before Kline, P.J., Richman, J., and Stewart, J.

life prisoner's initial parole consideration hearing or, if that hearing had already taken place, at the next hearing resulting in a grant or denial of parole.

On December 16, 2013, we issued the order stipulated to by the parties. As material, the Order directed the Board to:

1. At its next publicly noticed meeting, "announce a policy of calculating the base term and adjusted base term for all life inmates at the initial parole consideration hearing" and to "implement this policy on the first day of the calendar month following the aforementioned meeting";

2. Establish the base term pursuant to matrices and directives found in specified sections of title 15 of the California Code of Regulations, and adjust the base term for enhancements pursuant to other specified sections of the same Board regulations;

3. Calculate the base term and adjusted base term at the inmate's initial or next scheduled parole consideration hearing that results in a grant of parole, a denial of parole, a tie vote, or a stipulated denial of parole;

4. Initiate the process to amend its regulations within 90 days of our Order so that the regulations reflect the term setting practices stipulated to by the parties and ordered by the court, in accordance with Government Code section 11340 et seq.;

5. Cite our December 16, 2013, Order and submit it as supporting documentation in the Board's initial statement of reasons, as required by Government Code section 11346.2, subdivision (b); and

6. "In good faith seek to complete the rule-making process as soon as reasonably practicable."

The purposes and significance of the foregoing requirements are described in *Butler, supra,* 236 Cal.App.4th 1222.

The last paragraph of the stipulated order provides that: "This court shall retain jurisdiction of this case until the amended regulations, conforming to the base term setting practices as described in this order, become effective."

At an executive meeting in March 2014, shortly after the Board commenced the rulemaking required by the stipulated order, the Board's Executive Officer announced

that the Board would on April 1, 2014, begin calculating base terms and adjusted base terms for all prisoners, the Board was updating its Lifer Scheduling and Tracking System database "to enable commissioners to enter the requisite base-term data," and the Board had provided commissioners and deputy commissioners memoranda informing them how to calculate base and adjusted base terms in accordance with the settlement. That month, the Board began calculating base and adjusted base terms "for all life term inmates" during their parole hearings.

However, at the Board's January 2016 meeting, the Executive Officer told Board members that the Governor had signed Senate Bill No. 230 (SB 230) (Stats. 2015, ch. 470), which amended Penal Code section 3041[1] and "would require the immediate release of any life-term inmate whose parole grant becomes effective once they have reached their minimum eligible parole date." In the Executive Officer's view, this change "eliminated the Board's authority to calculate base terms and adjusted base terms." The Board decided to continue calculating base terms and adjusted base terms as required by the settlement and stipulated order, and seek modifications of the court order that would relieve it of that responsibility. The Board represents that, since April 1, 2014, it has performed "approximately 7,000" base term calculations.

There are, however, two groups of life prisoners for whom the Board has apparently never calculated base terms and adjusted base terms pursuant to the stipulated order. The Board determined that subsequent to the stipulated order it lost authority to set base and adjusted base terms for such prisoners for reasons additional to SB 230, and it has never set base and adjusted base terms for prisoners within these groups.

The first group are life inmates who committed offenses as minors and had served at least 15 years of incarceration. The Board states that under the amendments to sections 3041, 3046, and 4801 effectuated by Senate Bill No. 260 (SB 260) (Stats. 2013, ch. 31D), it has "no authority to set base terms for youth offenders who are granted parole because

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[1] All subsequent statutory references are to the Penal Code.

the law requires their immediate release from prison once their parole grant becomes effective."

The second group for whom the Board claims it has not and cannot set base terms and adjusted base terms are life inmates over 60 years of age who have served 25 continuous years of custody. The Board states that a February 10, 2014 federal court order in *Plata v. Brown* (N.D. Cal. Case No. 01-1351, Docket No. 2766), and the companion case *Coleman v. Brown* (E.D. Cal. Case No. 2:90-cv-0520) (the *Coleman* Order) required the Board to implement "an elderly parole measure that provides for parole consideration to inmates who are over 60 years old and have served 25 continuous years of custody." The Board states that it cannot set a base term for inmates eligible for elderly parole because, like all offenders under SB 230, and youthful offenders under SB 260, "they too must be immediately released from prison once their parole grant becomes effective."

II.

On January 28, 2016, the Board filed the motion before us asking to be relieved of the responsibility to set base terms and adjusted base terms for all life prisoners on the ground that SB 230 deprives it of the authority to do so, as also do SB 260, and the *Coleman* Order.

As the Board sees it, after SB 230, SB 260, and the *Coleman* Order, "the minimum eligible parole date is now the functional equivalent of the base term"; therefore, the only responsibility that should be imposed on the Board under the stipulated order is to "require that all life prisoners be notified of their minimum eligible parole date at the initial parole consideration hearing."

As we shall explain, the Board's authority to set base terms and adjusted base terms is entirely unimpaired by any of the changes in the law posited by the Board as depriving it of the authority to set base and adjusted base terms. At oral argument on this motion the Board virtually conceded that nothing it is required to do by the stipulated order is prohibited by SB 230, SB 260, or the *Coleman* Order.

Moreover, the minimum eligible parole date, which is normally seven years, is fixed by statute (§ 3046, subd. (a)(1)(2)), and already known by most life prisoners, so the notification the Board agrees to provide life prisoners has little if any value to them.

A.

SB 230 Does Not Make a Material Change in the Law Warranting Modification of the Stipulated Order

"It is settled that where there has been a change in the controlling facts upon which a permanent injunction [is] granted, or the law has been changed, modified or extended, or where the ends of justice would be served by modification or dissolution, the court has the inherent power to vacate or modify an injunction where the circumstances and situation of the parties have so changed as to render such action just and equitable. [Citations.] This principle governs even though the judgment providing the injunctive relief is predicated upon stipulation of the parties. [Citation.]" (*Welsch v. Goswick* (1982) 130 Cal.App.3d 398, 404-405.)

The statutory change in the law the Board primarily relies on, and the one that is most comprehensive, is the amendment of section 3041 resulting from SB 230 in 2015. Prior to the amendments, subdivision (a) of section 3041 required that the Board shall set "the release date . . . in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public," and "shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime." SB 230 deleted this language and added the following new language: "Upon 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 unless the inmate is eligible for earlier release pursuant to his or her youth offender parole eligibility date." (§ 3041, subd. (a)(4).)

The Board maintains that SB 230 represents a material change in the law requiring modification of the stipulated settlement order because the measure "eliminated the

Board's authority to set base terms when it deleted the requirement that the Board set a 'release date . . . in a manner that will provide uniform terms,' and now "requires the immediate release of a life prisoner whose parole grant has become effective and the prisoner has served his or her minimum eligible parole date. (Pen. Code, § 3041, subd. (a)(1)(4)." Thus, according to the Board, because it now "has no authority to hold prisoners granted parole to a base term that exceeds their minimum eligible parole date[,] . . . a prisoner's base term as set by the Board has ceased to have any legal significance." The claim is unsustainable.

First, the Board is confusing its base term fixing obligations—addressed in the settlement agreement—with its parole-granting authority, which SB 230 addressed. The Board's authority to set base terms does not derive from section 3041, and SB 230 has little to do with the setting of base terms or the constitutional principle of proportionality in sentencing.[2] Section 3041 vests the Board with the power to grant parole and prescribes the manner in which that power is to be exercised. As stated in *In re Dannenberg* (2005) 34 Cal.4th 1061 (*Dannenberg*), "section 3041 expressly instructs the Board to set an indeterminate life prisoner's parole release date, which is "the equivalent of [prison] term-setting in such cases," unless it finds the prisoner still dangerous and therefore unsuitable for release. (*Id.* at p. 1097.) As a result of the changes in section 3041 mandated by SB 230, the "release date" is now the date parole is granted. Contrary to the Board's argument, the stipulated order does not conflict with section 3041 by precluding the Board from releasing prisoners who have been granted parole but have not yet reached their base terms. The base term has never been considered the minimum term a prisoner must serve; its function is to indicate the point at which a prison term becomes constitutionally excessive. The base term now serves simply as an "approximation" of the punishment the Board considers proportionate to the culpability of a particular prisoner. (*Butler, supra*, 236 Cal.App.4th at p. 1243.) Thus, the order in

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[2] Which is related to but not the same as the principle of uniformity in sentencing, to which section 3041 formerly referred. (See *Butler, supra*, 236 Cal.App.4th at pp. 1231-1241.)

no way affects a prisoner's release after parole is granted; it simply requires the Board to calculate prisoners' base terms in a timely manner.

Second, we reject the Board's related arguments, set forth in its motion papers, that after SB 230 "the minimum eligible parole date is now the functional equivalent of the base term," and that because "[b]ase terms no longer represent an approximation of a proportionately appropriate prison term," and indeed "envision longer terms than minimum eligible parole dates," the continued calculation of base terms is "an idle act without any practical significance." These statements are perplexing. They suggest that SB 230 requires the Board to grant life prisoners parole on their minimum eligible parole dates, which is certainly not the case, and that the base term prescribes a minimum term before which a life prisoner cannot be released, which is untrue. As the words indicate, the minimum eligible parole date, which is fixed by the Legislature, not the Board (§ 3046, subd. (a)(1)(2)), does no more than identify the earliest time at which a parole eligible life prisoner may be released on parole; it does not specify the time at which he or she must be released. The function of the adjusted base term is not to set a release date but, as we have said, to indicate whether the denial of parole might result in constitutionally excessive punishment.

The purpose of the settlement and stipulated order is to alter the parole process so that the setting of the base and adjusted base term are no longer deferred until after the grant of parole (which may be long after the adjusted base term) but fixed at the initial parole hearing, so that parole officials know at the time they decide whether to grant or deny parole whether denial might result in punishment disproportionate to the individual culpability of the life prisoner.

Nothing in SB 230 indicates a legislative intent to interfere in any way with this advancement of the time at which the base and adjusted base term is calculated. The purpose of the measure was simply to eliminate delay in releasing prisoners found suitable for release and granted parole. The stipulated order actually facilities the goal of SB 230 because the Board's former practice of deferring calculation of the base term

until after parole was granted was one of the causes of the delay in releasing prisoners SB 230 sought to eliminate.

As explained in *Dannenberg*, *supra*, 34 Cal.4th at pages 1096-1098, the enactment of the Determinate Sentence Law (DSL) in 1975 relieved the Board of the need to fix actual maximum terms for parole eligible life prisoners, as had been required under *In re Rodriguez* (1975) 14 Cal.3d 639 (*Rodriguez*), and of the need to consider uniformity in sentencing prior to determining whether a life prisoner is suitable for release on parole. However, *Dannenberg* recognizes that no prisoner, "even if sentenced to a life-maximum term, . . . can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense." (*Dannenberg,* at p. 1096.) Citing *Rodriguez,* the *Dannenberg* court acknowledged that "section 3041, subdivision (b), cannot authorize such an inmate's retention, even for reasons of public safety, beyond this constitutional maximum period of confinement." (*Dannenberg,* at p. 1096.) This acknowledgment implies that the decision whether to deny or grant parole should not be made without a prior Board inquiry whether the denial of parole might result in a constitutionally excessive sentence, which is all that the settlement and stipulated order seek to achieve.

The facts that the base term no longer represents the maximum term that can actually be imposed on a life prisoner, and uniformity in sentencing need not be considered prior to the grant of parole, do not mean the base and adjusted base terms are now meaningless; if it did the Board would not have continued setting those terms after repeal of the Indeterminate Sentence Law (ISL) and enactment of the DSL. As we have said, the base and adjusted base terms the Board has been calculating for more than four decades now "represent[s] an approximation of the punishment the Board deems proportionate to the particular prisoner's offense." (*Butler*, *supra*, 236 Cal.App.4th at p. 1243.)[3] By requiring the Board to calculate the base and adjusted base term at the

[3] The purposes of the base and adjusted base terms prior to the settlement and stipulated order is not clear because, under that practice, the base and adjusted base terms had not been calculated at the time of the initial and all subsequent parole hearings, and

initial parole hearing rather than after the grant of parole, the settlement and stipulated order better assure life prisoners will not suffer constitutionally excessive punishment, and that their terms will be fixed with sufficient promptness to permit any requested review of the proportionality of particular punishment resulting from a denial of parole to be accomplished before the affected prisoner has been confined beyond the constitutionally permitted term. Nothing in SB 230 indicates a legislative intent to interfere with those goals. Indeed, setting life inmates' base and adjusted base terms before they are granted parole—rather than afterwards, which helped create the delay SB 230 was designed to eliminate—is entirely consistent with the purposes of SB 230.

B.

SB 260 Does Not Make a Material Change in the Law Warranting Modification of the Stipulated Order

The Board acknowledges in its motion that, apparently without advance notice to Butler's counsel, it ceased setting base and adjusted base terms for youthful offenders who had served 15 years of incarceration, and inmates over 60 years of age who have

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were only calculated once parole was ultimately granted. Previously, under the ISL, the Board calculated base terms promptly after an inmate was received in prison, as required by *Rodriguez*, *supra*, 14 Cal.3d at page 654, footnote 18. However, that practice changed after enactment of the DSL, when the Office of the Attorney General sent a memorandum to all criminal deputies on August 22, 1979, stating that, "[i]n light of the fact that [after the enactment of the DSL] the [parole board] has no term fixing power . . . *Rodriguez* is no longer applicable." The Board acknowledges the authenticity of the memorandum, which was attached as exhibit A to Butler's writ petition and, so far as the record shows, was never formally made available to the public. The Board's decision to stop immediately setting base terms pursuant to *Rodriguez* and, instead, to defer setting them until after a prisoner's grant of parole appears to be based on the advice contained in the 1979 memorandum. The memorandum's conclusion, insofar as it applies to prisoners who remain indeterminately sentenced under the DSL, is legally questionable, because indeterminately sentenced prisoners are treated much the same under the DSL as they were under the ISL. Furthermore, if the Board believed *Rodriguez* was "obsolete," it remains unclear why it continued setting base terms at all and what function was served by its deferral in setting those terms until after the grant of parole.

served 25 continuous years of custody, almost two years ago, despite the fact that the stipulated order and applies to "all life prisoners" and contemplates no exceptions.

The Board justifies the exception of youthful offenders on the ground of changes to the DSL mandated by SB 260, which expedited parole hearings for life prisoners who committed their offenses as minors and have served at least 15 years of incarceration. [4] The change in the law made by SB 260 that the Board relies on includes the statement in subdivision (c) of section 3046 that "an inmate found suitable for parole pursuant to a youth offender parole hearing as described in section 3051 shall be paroled regardless of the manner in which the board set release dates" pursuant to other specified provisions of the DSL. The Board claims it cannot comply with the stipulated order with respect to youth offenders, because under the amendment it "has no authority to set base terms for youth offenders who are granted parole because the law requires their immediate release from prison once their parole grant becomes effective."

This claim is identical to the one we have just rejected. The Board's authority to set base terms does not arise under any of the statutes amended by SB 260 but under our order, to which it stipulated, which facilitates enforcement of the cruel and/or unusual punishment provisions of the federal and state Constitutions that protect all life prisoners. Section 3051, which was added by enactment of SB 260, simply expedites parole eligibility for youthful offenders and requires the Board to give weight to "the diminished culpability of juveniles as compared to adults." (§ 3051, subd. (f)(1).) The Board acknowledges that SB 260 does not prevent the Board from denying a youthful offender parole upon a finding he or she remains dangerous and is therefore not "suitable" for release. Thus, as in the case of all life prisoners, the only limitation on the Board's discretion to deny parole is the cruel and/or unusual punishment provisions of the federal and state Constitutions, the application of which to the parole process is assisted by the term-fixing requirements specified in the settlement and stipulated order. Youth

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[4] SB 261, which became effective January 1, 2016, expanded the scope of SB 260 to life prisoners who were convicted of a controlling offense before he or she had attained 23 years of age. (§ 3051, subd. (b)(3).)

offenders are no less in need of those protections than other life prisoners. Neither section 3046 nor any other statute amended by SB 260 creates a material change in the law justifying modification of the stipulated order.

C.

The Coleman Order Does Not Make a Material Change in the Law or Controlling Facts Warranting Modification of the Stipulated Order

The Board justifies its previously undisclosed cessation of term-fixing for inmates over 60 years of age who have served 25 continuous years of custody, on the ground of an order of the three-judge federal court in *Plata* and the companion case *Coleman*, directing the state to reduce the overall prison population in order to eliminate overcrowding found to have resulted in cruel and unusual punishment of prison inmates. After reciting that the Governor and other state defendants "have represented that, in conformance with the terms of this order, they will develop comprehensive and sustainable prison population reduction reforms," the *Coleman* Order granted the defendants' request for an extension of time to February 28, 2016, to comply with the three-judge court's June 30, 2011, order to reduce California's prison population to 137.5 percent of design capacity. In reliance on the defendants' representations that they would develop comprehensive and sustainable prison population-reduction reforms, the *Coleman* Order directed the state defendants to "immediately implement" eight specified measures, one of which was to "[f]inalize and implement a new parole process whereby inmates who are 60 years of age or older and have served a minimum of twenty-five years of their sentence will be referred to the Board of Parole Hearings to determine suitability for parole."

The Board claims compliance with this requirement obliges it to exclude "inmates eligible for elderly parole" from the life prisoners to whom the stipulated order applies "because they too must be immediately released from prison once their parole grant becomes effective." This argument is as baffling as the Board's arguments we have just rejected. As we hope to have made clear, the sole purpose of the settlement and

stipulated order is to promote consideration of a life prisoner's individual culpability for the base offense *before* the Board determines whether to grant or deny parole, because that is an effective way of introducing the constitutional concept of proportionality of sentencing into the parole process before the Board decides whether to deny a request for parole. Prompt fixing of the base and adjusted base term is hardly inconsistent with the *Coleman* Order, the purpose of which is to reduce the prison population. The life prisoners most likely to have suffered punishment disproportionate to their individual culpability, as measured by the Board's own base term matrices, are the elderly prisoners who have been imprisoned longest.

D.

The Cases the Board Relies Upon are all Distinguishable

The cases most heavily relied upon by the Board—*System Federation v. Wright* (1961) 364 U.S. 642; *Welfare Rights v. Frank* (19944) 25 Cal.App.4th 415; and *Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193—are easily distinguished. In all of them the law enforced by the challenged injunctive order was subsequently repudiated by the Legislature, rendering that which the challenged orders permitted clearly impermissible. That cannot be said of the amendments to the Penal Code made by SB 230 and SB 260, nor can it be said of the *Coleman* Order.

For the foregoing reasons, the Board's Motion to Modify the Stipulation and Order Regarding Settlement filed with the court on December 16, 2013, is hereby DENIED.

Dated: JUL 27 2016

KLINE, P.J.

Kline, P.J.