IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re ROY BUTLER,
on Habeas Corpus.

No. S237014

First Appellate District, Division Two, Case No. A139411

Alameda County Superior Court, Case No. 91694B

APPLICATION FOR PERMISSION TO FILE SUPPLEMENTAL AMICUS CURIAE BRIEF IN SUPPORT OF ROY BUTLER

SUPPLEMENTAL AMICUS CURIAE BRIEF IN SUPPORT OF ROY BUTLER

California Rules of Court

Rule 8.50 and 8.520(d)

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APPLICATION FOR PERMISSION TO FILE SUPPLEMENTAL
AMICUS CURIAE BRIEF IN SUPPORT OF ROY BUTLER

To the Honorable Chief Justice of California:

Application is hereby made for permission to file a supplemental brief in support of Roy Butler by inmates Aubrey Grant and William Vogel who obtained copies of the parties' answer and reply briefs on the merits and the November 16, 2016 order granting review after submitting their orginal application and brief on April 3, 2017 in No. S237014. That brief was filed May 10, 2017.

The previously unavailable briefs and recent matters are addressed in this supplement with new authorities and support for the merits of enforcing Penal Code section 1170.2, subdivision (h) under the DSL which is jurisdictional and a pure question of law.

The attached supplemental brief meets the requirements of Rule 8.520(d) except we are not "a party" due to the denial of our intervention application. Nonetheless, our briefs raise an important issue not presented by the parties.

Good cause appearing this application should be granted and the supplemental brief filed.

Dated: 6/12/2017

Respectfully submitted,

William Vogel P88353

Aubrey Grant B86403

SUPPLEMENTAL AMICUS CURIAE BRIEF IN SUPPORT OF ROY BUTLER

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

INTRODUCTION

Amici curiae Aubrey Grant and William Vogel have obtained the parties' answer and reply briefs on the merits and the November 16, 2016 order granting review. They hereby supplement their brief in support of Roy Butler filed May 10, 2017 in No. S237014 and assail the stipulated settlement and order of December 16, 2013 as failing to enforce the public statute providing the relief sought by Butler. The parties agree that the Court of Appeal's settlement order (or consent decree) may be modified but disagree as to why or why not given the parole amendments under Senate Bill 230 and the role of the Board's matrices of "base terms" in administering the Uniform Determinate Sentencing Act of 1976 (DSL). Yet neither the court nor the parties recognize Penal Code[1] section 1170.2, subdivision (h) term-fixing authority and duty added by Senate Bill 709 effective January 1, 1979. This law is intrinsic to the DSL, is jurisdictional, and underlies Butler's original claim that indeterminate sentences are not being promptly fixed to represent a proportionate and uniform DSL term of imprisonment: it is the only meritorious issue in this case for the Court to resolve.

To wit, the present settlement only "calculates" base terms which conflicts with and does not enforce subdivision (h) term "fixing." Although we agree with opinions of this Court, the Court of Appeal and Butler that the Board's matrices of base terms and adjustments are "maximum" terms, the Board continues to argue without merit that base terms are "minimum" periods of confinement and were made obsolete by SB 230. But SB 230 requires the Board to calculate "minimum"

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1. Subsequent statutory references are to the Penal Code unless otherwise indicated.

terms pursuant to section 3046 while subdivision (h) requires the Board to fix a "maximum" term by utilizing the matrices of base terms and adjustments. Due process and the merits require the settlement order be dissolved or modified to the extent that subdivision (h) is enforced.

DISCUSSION

I. The settlement order must be dissolved or modified to enforce the underlying statute

"[T]he fact that the parties have consented to the relief contained in a consent decree does not render their action immune from attack on the ground that it violates [the underlying statute] or the Fourteenth Amendment." (Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland (1986) 478 U.S. 501, 526 (Firefighters); see McAllister v. Drapeau (1939) 14 Cal. 2d 102, 113 [recognizing amicus curiae who "vigorously assails the legality of the transaction"].) Here, the stipulated settlement and order of December 16, 2013 fail to enforce section 1170.2, subdivision (h) term fixing for crimes committed on or after January 1, 1979. This violates due process and denies the relief originally sought by Butler. Although courts generally only consider issues properly raised by the parties on appeal, this Court has recognized that an "amicus curiae may assert jurisdictional questions which cannot be waived even if not raised by the parties." (See Sacramento County Empl's Ret. Sys. v. Superior Court (2011) 195 Cal.App. 4th 440, 473; cf. Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 654-655 and n.3 [consideration of new issue raised by an amicus is justified "when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy"].) Because subdivision (h) is an integral part of the DSL and wholly related to this case, failure to dissolve or modify the decree to enforce it will run afoul "the rule that an injunction cannot be issued to prevent the enforcement of a public statute." (Moore v. Superior Court (1936) 6 Cal. 2d 421, 424 citing Civ. Code, sec. 3423 (d) and

Code Civ. Proc., sec. 526 (b)(4).)

Butler and the Board agree that parties may not consent to an action that "conflicts with or violates the statute upon which the complaint was based." (Ans. Brf. at 25, Reply at 5 citing Firefighters, supra, 478 U.S. at 526.) They also agree that a consent decree may be modified or dissolved when there is a change in or conflict with the underlying law or when "the ends of justice would be served." (See Ans. Brf. at 26, Reply at 3-4 citing, inter alia, Code Civ. Proc., sec. 533.) In line with the Court of Appeal, Butler argues that no modification is required because SB 230 is a parole amendment that does not affect the determination of a maximum proportionate term or preclude "base terms as a useful measure" of it. (Ans. Brf. at 39-40.) The Board, however, continues to argue that modification is required because "the base-term system" which had "formerly operated as the inmate's minimum term of confinement" was "dismantle[d]" by SB 230 and is no longer required by the settlement. (Reply at 2, 7-8.) Neither position is correct.

A. Penal Code section 1170.2, subdivision (h) is the statute underlying both the original and supplemental habeas corpus petitions

No party or lower court has recognized the section 1170.2, subdivision (h) provision to fix terms as presented by Roy Butler and these amici: it is the only meritorious, just, and relevant legal standard that must be recognized and enforced to complete California's "determinate" sentencing law and the "analogy" sought in Dannenberg. (See Reply at 7.) The Board maintains "There is no reason (or statutory authority) for the Board to continue setting [base terms]" (Reply at 6) or for making "base-term calculations that have no statutory basis or point under current law." (Reply at 19; Opn. Brf. at 1 [same].) Even Butler's appointed counsel, who filed a supplemental petition for a writ of habeas corpus, overlooked Butler's original pro per petition stating "Mr. Butler never presented a statutory claim against the Board." (Ans. Brf. at 29.) But the record will show that subdivision (h) was presented and

underlies every claim in the original petition and issue (2) of counsel's supplemental petition. (See No. A137273 docket entry at 08/07/2013; cf. Ans. Brf. at 30 [a court determines the law upon which a consent decree is based "by looking at the complaint"].)

As raised by Butler, subdivision (h) provides the DSL "term fixing power" that safeguards the Rodriguez proportionality argued for by Butler's counsel. (See No. A139411 docket at 12/01/2014, item 3.) Once raised, subdivision (h) should have come to light since habeas courts consider "only those grounds of illegality alleged in the petition for issuance of the writ...or in any supplemental petition." (People v. Green (1980) 27 Cal. 3d 1, 43, n. 28 citing In re Haygood (1975) 14 Cal. 3d 802, 805 where the original and supplemental petitions were considered as one.) We urge the Court in this review to examine and enforce subdivision (h). (See Eye Dog Foundation v. State Board (1967) 67 Cal. 2d 536, 541 ["the court must do complete justice once jurisdiction has been assumed"].)

B. The Board must enforce subdivision (h) term fixing regardless of the settlement order's disposition

The Board argues that the parties "stipulated to the settlement order without a ruling by the Court of Appeals on the merits of Butler's claims, and the stipulation itself expresses no agreement on his constitutional theories." (Reply at 8-9.) But the sobering reality is that the Board has had a continuing duty to enforce the proportionality principles in Article I, section 17 of the California Constitution, made clear in In re Rodriguez (1975) 14 Cal. 3d 639 and required by subdivision (h) term fixing, which was the process due inmates under the Fourteenth Amendment since January 1, 1979. (See Government Code, sec. 12838.4 ["The Board of Parole Hearings...is vested with, all the powers, duties, responsibilities, obligations, liabilities, and jurisdiction" of its predecessor entities]; see also Penal Code, secs. 5075 and 5078 [Board "shall exercise and perform all powers and duties granted to and imposed upon"

its predecessors] and sec. 5075.1 ["The Board of Parole Hearings shall do all of the following:...(i) Exercise other powers and duties as prescribed by law."].)

Butler's counsel correctly states that the "Settlement Order... simply requires the Board to **calculate** base terms." (Ans. Brf. at 41, original emphasis.) But once calculated, the Board has a duty to **fix** those terms which vindicates the constitutional rights of proportionality and due process. Therefore, regardless of "modification or dissolution" of the settlement order "the ends of justice would be served" by the enforcement of subdivision (h) which is the only action required in this case. (See Ans. Brf. at 26, Reply at 3 citing Code Civ. Proc., sec. 533; see also Firefighters, supra, 478 U.S. 501, 528 [a modified order "must also be consistent with the underlying statute"].)

II. Additional points and authorities in support of subdivision (h)

A court "may reject a stipulation that is contrary to public policy...or one that incorporates an erroneous rule of law." (California State Automobile Ass'n Inter-Insurance Bureau v. Superior Court (1990) 50 Cal. 3d 658, 664 (citations omitted)(CSAA).) As we explain, the existing settlement order has both infirmities and should be rejected now or future term-fixing claims could be exposed to the difficulties of collateral estoppel. (See id. at 664, n.2 ["a stipulated judgment may properly be given collateral estoppel effect, at least when the parties manifest an intent to be collaterally bound by its terms"].) Given the stakeholders' interests, the Court is urged to consider these additional points and authorities in deciding the merits of enforcing subdivision (h).

A. This Court previously recognized the effective date of SB 709 which added subdivision (h) to the DSL

We earlier stated that "the most misunderstood aspect of section 1170.2, subdivision (h) is...the SB 709 enactment clause." (Amic.

Brf. at 12.) But this Court recognized the effective date of SB 709 which also amended section 669:

> The 1978 Legislature amended section 669 to grant the trial court discretion to impose consecutive sentences. (Stats. 1978, chap. 579, §28....) The amending [SB 709] statute expressly provided it would apply only to crimes committed on or after January 1, 1979. (Stats. 1978, chap. 579, §48....) (People v. Fain (1983) 34 Cal. 3d 350, 354, n.3; see Amic. Brf. at 10 (where the Board recognizes eff. date of sec. 669) and Exh. A, SB 709 excerpt.)

This confirms that subdivision (h) prompt term-fixing also applies to "crimes committed on or after January 1, 1979" as added by SB 709.

B. This Court recognized "base terms" as "maximum" terms yet eschewed them for public safety which is resolved by subdivision (h) term fixing

As generally argued in its motion to modify, review petition, and review briefs, the Board maintains that (after repeal of the ISL) "base terms under the new regulations defined the minimum period of time an inmate could remain in prison." (Reply at 18; see also 5 ["At the time the [December 2013] stipulated order was entered" the Board had been "calculating base terms that prescribed an inmate's minimum sentence"].) But neither the "gravity and magnitude" attributes of a "term" established under former section 3041, subdivision (a)(the "matrices") nor the Judicial Council's definition of a "base term" support the Board's position that base terms are, or were, "minimum" terms. Instead, present section 3041 (as amended by SB 230) reiterates that the "minimum" term is determined by long-standing section 3046, a point made by this Court in 1999. (See People v. Jefferson, 21 Cal. 4th 86, 96 discussing second-strike sentencing ["section 3046...sets forth a 'minimum term' "].) What remains to be settled is the significance of base terms and their relation to subdivision (h) term fixing.

As we noted earlier, " 'the original purpose of the base term concept was to establish the constitutional limit of punishment by reference to proportionality.' " (See Amic. Brf. at 14 quoting In re Butler (2015) 236 Cal.App. 4th 1222, 1241.) Butler also explained that under the December 2013 settlement order "The base term will be established

pursuant to the matrices and directives" in the Board's regulations. (Id. at 1229, n.3.) But the court observed that "base term" in its order was "not entirely consistent with" that in the regulations and hoped new regulations would "reduce the confusion that may result from the varying terminology." (Id.) Unfortunately, confusion also exists in case law that recognized base terms as a "maximum" DSL term yet allowed them to default to a "minimum" term by upholding parole denial for public safety under the "hybrid" nature of former section 3041. (See Amic. Brf. at 7-8.)

For example, in 1999 People v. Jefferson spoke of "terms of imprisonment (the lower, middle, and upper terms)" in the manner of "base terms" defined by the Judicial Council.[2] (Id., supra, 21 Cal. 4th at 95.) The Court described the pre-SB 230 term not as a "minimum" term but "the actual time served in prison **before** release on parole, and the day of release on parole marks the **end** of the prison term." (Id., all Jefferson emphasis in original.) " 'Under the [DSL], the prisoner must be released upon **expiration** of his "term" less good-time credits, with parole acting simply as a variable period of supervision after the end of the term. [ ] **"Term" now means the period of actual confinement prior to release on parole.** ' "[3] (Jefferson at 95 quoting Cassou & Taugher, Determinate Sentencing in California: The New Numbers Game (1978) 9 Pacific L.J. 5, 28.) "This applies to **determinate** sentences as well as **indeterminate** sentences of life imprisonment with the possibility of parole for crimes committed after enactment of the [DSL], which as we noted earlier treats a prisoner who is serving a life sentence and is released on parole as having **completed** the prison term." (Id. at 96 citing Cassou & Taugher, supra, at 28 and quoting in part former sec. 3041, subd. (a) [requirement that the release date "shall be set in a manner that will provide uniform **terms** for offenses

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2. Judicial Council Rules of Court, Rule 4.405: "Base term" is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed.

3. Post-term parole supervision is pursuant to section 3000 et seq. as added by the DSL under Stats. 1976, chap. 1139, sec. 278 and operative July 1, 1977.

of similar gravity and magnitude with respect to their threat to the public," and that will comply with the sentencing rules that the Judicial Council may issue]; cf. In re Dannenberg (2002) 125 Cal. Rptr. 2d 458, 470 (previously published at 102 Cal.App. 4th 95) citing Jefferson at 95-96 with Corrigan, Acting P.J., concurring ["Our Superme Court has made it clear that the 'uniform terms' called for by section 3041, subdivision (a) are analytically equivalent to determinate sentences imposed under section 1170 et seq."].) Thus Jefferson shows that the DSL term and base term are synonymous and represent the "maximum" period of imprisonment (after adjustments).

Again in March 2013, just before the Butler settlement, this Court repeated that the "minimum" release date is addressed in section 3046." (In re Vicks, 56 Cal. 4th 274, 294.) It also cited former section 3041, subdivision (a) as the basis for establishing "criteria for setting parole release dates, including regulations that establish a life prisoner's 'total life term' " (i.e., the "maximum" term). (Id. at 296.) Vicks explained that the "Board's regulations require the panel to set a 'base term' " from "matrices of factors that determine the lower, middle, and upper base terms for particular crimes. [ ] After the panel determines the base term through consideration of the matrices and any aggravating or mitigating circumstances" the result is "a total life term." (Id. at 296, footnotes and citations omitted.) "If the prisoner has already served more time than the total life term calculated pursuant to the regulations, the prisoner is to be transferred from prison to parole supervision in the community." (Vicks at 297.)

The obvious point in Jefferson and Vicks is that a "minimum" term is derived from section 3046 and distinguished from a base term derived from the matrices and directives which is a "maximum" DSL term of imprisonment. This stands in stark contrast to the Board's arguments...and its unwillingness to release inmates at the expiration of their "determinate" term. More disconcerting is that the Board cites and follows In re Dannenberg (2005) 34 Cal. 4th 1061 which was decided between Jefferson and Vicks yet arrived at very different

results by denying parole release at the end of the term. When applying former section 3041 Dannenberg revealed its hybrid nature of "conflicting mandates" whereby term "uniformity is destroyed by consideration of post-conviction factors." (Cassou & Taugher, supra, 9 Pacific L.J. at 86-87; see Amic. Brf. at 6-8; cf. Dannenberg at 1070 ["Nothing in the statute states or suggests that the Board must evaluate the case under standards of term uniformity before exercising its authority to deny a parole date" on the grounds of continuing public danger].) But viewing the DSL as a whole, this disparity is cured by subdivision (h) term fixing which locks-in the "total life term" and was in effect January 1, 1979, at the time of Dannenberg, and at the time of the December 2013 Butler stipulated settlement and order.

The Court can conclude that a base term derived from the matrices is the term of imprisonment to be utilized and fixed by the Board under subdivision (h) to identify the "maximum" total life term and associated release date. (Cf. Dannenberg, 34 Cal. 4th at 1096 ["we acknowledge, section 3041, subdivision (b) cannot authorize such an inmate's [excessive] retention, even for reasons of public safety, beyond this constitutional maximum period of confinement"].)

As to the independent function of parole, SB 230 did not repeal the post-custody parole supervision period pursuant to section 3000 et seq. (See Amic. Brf. at 18, n.3 pointing to the open question of whether post-custody (i.e., post-"term") parole supervision is to be weighed in proportionality analysis.) Rather, SB 230 also permits release on parole from the section 3046 "minimum" term up to the "maximum" term that is fixed and safeguarded by subdivision (h) in the event parole is never granted. (See present section 3041(a)(4) ["an inmate shall not be released before reaching his or her minimum eligible parole date as set pursuant to Section 3046" unless a youth offender].)

C. Enforcement of subdivision (h) supports public policy goals

As stated above, a court "may reject a stipulation that is contrary

to public policy." (CSAA, supra, 50 Cal. 3d 658, 664.) In addition to not enforcing a public law as stated above the existing December 2013 settlement order is contrary to Proposition 57 (The Public Safety and Rehabilitation Act of 2016) passed in November 2016 which added section 32 to Article I of the California Constitution. (See Exh. A, Prop. 57 excerpt, Sec. 3.) The stated "purpose and intent of the people" in passing this initiative includes "1. Protect and enhance public safety," "2. Save money by reducing wasteful spending on prisons," and "3. Prevent federal courts from indiscriminately releasing prisoners." (Id., Sec. 2 [alluding to the standing Coleman/Plata federal Three-Judge Court prison-population reduction order].)

In line with these goals, we stated earlier that by enforcing subdivision (h) term fixing "The resulting prevention of over-incarceration will be a durable remedy to prison crowding which comes at great expense to taxpayers with no added safety to the public." (Amic. Brf. at 19, internal quotation marks and citations omitted.) Although to date Butler's counsel have not recognized subdivision (h) and argue against modifying the settlement order (see, e.g., Ans. Brf. at 2, 57), his attorneys Sharif E. Jacob and Andrea Nill Sanchez recently authored an article that supports both. In "Prop 57 fails to address set of inmates" (San Francisco Daily Journal, May 1, 2017 at p. 7, Exh. B.) they explain that inmates who remain indeterminately sentenced can only advance their initial parole hearing date rather than have an actual reduction to their sentence or determinate term upon earning various credits. (See id., citing to Proposed Calif. Code Regs., Title 15, sec. 3043(a).) According to The Anti-Recidivism Coalition's April 2017 newsletter there are four Prop. 57 credit-earning categories: (1) Good Time; (2) Milestones (vocational and rehabilitation programs); (3) Enhanced Milestones (educational degrees and certifications); and (4) Achievement (group and activity participation).

Although the Prop. 57 particulars are presently operating under emergency regulations, enforcing subdivision (h) term fixing will support the public policy goals of reduced prison crowding and

spending, increased rehabilitation opportunities, and early release incentives since all inmates will become "determinately" sentenced and eligible for the Prop. 57 benefits. The aim of Prop. 57 is also in harmony with the amended "purpose" of determinate sentencing under section 1170(a)(1) which is "public safety achieved through punishment, rehabilitation, and restorative justice." None of these collective goals suggest they would be better served by the endless incarceration now possible under the Board's "parole-only release" practice. (See Amic. Brf. at 19-20; but cf. Pet. Rev. at 12 ["Now every inmate under [SB 230] can potentially secure his release upon his minimum eligible parole date by convincing the Board he is not a current threat to public safety. Such knowledge tends to encourage self-improvement and rehabilitation."].)

Enforcing subdivision (h) prompt term-fixing will also satisfy the "public interest" by vindicating constitutional proportionality and due process for a large class of inmates. (See Ans. Brf. at 47 citing Press v. Lucky Stores, Inc. (1983) 34 Cal. 3d 311, 318 ["litigation that vindicates rights of 'constitutional stature' satisfy the public interest element of" Code Civ. Proc., sec. 1021.5].) Modifying the settlement order to enforce subdivision (h) would be "suitably tailored" to fulfilling the DSL while providing relief to the "constitutional violation" of disproportionate punishment. (See Ans. Brf. at 28 citing Rufo v. Inmates of Suffolk Co. Jail (1992) 502 U.S. 367, 391.)

Finally, amici curiae Grant and Vogel request to participate in oral arguments either in person or telephonically per Rule of Court, Rule 8.254.

CONCLUSION

For the reasons stated above the 2013 settlement order may and should be modified to enforce Penal Code section 1170.2, subdivision (h) for crimes committed on or after January 1, 1979.

Dated: 6/12/2017

Respectfully submitted,

William Vogel P88353

Aubrey Grant B86403

Exhibits

A + B

THE PUBLIC SAFETY AND REHABILITATION ACT OF 2016

SECTION 1. Title.

This measure shall be known and may be cited as "The Public Safety and Rehabilitation Act of 2016."

SEC. 2. Purpose and Intent.

In enacting this Act, it is the purpose and intent of the people of the State of California to:

1. Protect and enhance public safety.
2. Save money by reducing wasteful spending on prisons.
3. Prevent federal courts from indiscriminately releasing prisoners.
4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.
5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court.

SEC. 3. Section 32 is added to Article I of the California Constitution, to read:

SEC. 32. (a) The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law:

(1) Parole consideration. Any person convicted of a non-violent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.

(A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.

(2) Credit Earning: The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements.

(b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.

SEC. 4. Judicial Transfer Process.

Sections 602 and 707 of the Welfare and Institutions Code are hereby amended.

Section 602 of the Welfare and Institutions Code is amended to read:

602. ~~(a)~~ Except as provided in ~~subdivision (b)~~ Section 707, any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based

San Francisco Daily Journal
Monday, May 1, 2017 Page 7

Prop 57 fails to address set of inmates

By Sharif E. Jacob
and Andrea Nill Sanchez

This past November, California voters approved Proposition 57, a ballot initiative instituting a series of measures aimed at reducing the state's prison population. The California Department of Corrections and Rehabilitation (CDCR) issued new, emergency regulations implementing Prop. 57 on March 24, which the Office of Administrative Law approved on April 13.

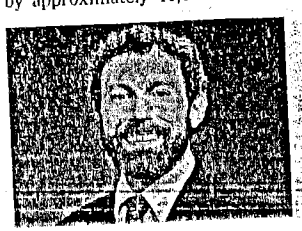
While Prop. 57 and the CDCR's emergency regulations have received widespread attention for the overall effects they will have on the prison population, most reports have overlooked the consequences for a particular subset of prisoners — parole eligible life-term inmates. Unfortunately, as written, Prop. 57 does little or nothing to address overcrowding for this category of inmates.

Prison Population Reduction Obligations and Proposition 57

On Aug. 4, 2009, a three-judge federal court observed that "California's prisons are bursting at the seams and are impossible to manage." *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 888 (E.D. Cal. 2009). Finding that overcrowded prisons were leading to violations of inmates' constitutional rights, the *Coleman* court ordered the governor of California and various state officials to submit a plan for reducing its prison population by approximately 40,000 inmates within two years. The court cited "numerous means" to achieve this goal, including parole reform, sentencing reform and the expansion of good time credits. Eight years later, the state is still grappling with how to comply with the *Coleman* order. It is also now facing public demands to reduce the amount of taxpayer dollars spent on prison costs.

The passage of Prop. 57 this past November is a manifestation of both of these related, but independent, forces. The ballot initiative's stated purpose is to save "money by reducing wasteful spending on prisons" and prevent "federal courts from indiscriminately releasing prisoners." To achieve these goals, it requires the implementation of three reforms. First, it creates a special parole consideration process for inmates who qualify as nonviolent offenders. Second, it gives CDCR the authority to award sentence credits for rehabilitation, good behavior or educational achievements. Third, it grants judges the exclusive authority to decide whether a juvenile should be prosecuted as an adult.

The proposed regulations CDCR released in March are aimed at effectuating the requirements of Prop. 57. The regulations increase the award of existing good time credits and offer additional credits for completing educational, rehabilitative and vocational programs in prison. *See* Proposed Cal. Code Regs. Title 15, Sections 3043-3043.6. The regulations also detail the new parole consideration process for non-violent offenders.



JACOB

SANCHEZ

New York Times News Service

Inmates are housed in a makeshift dormitory in the gym at the California Institution for Men, in Chino, July 12, 2007.

Id. Sections 2449.1-2449.5. Since the Office of Administrative Law initially approved the emergency regulations, they are temporarily in effect until Sept. 20 while the CDCR undertakes the public comment process, according to Steven J. Escobar in the Office of Administrative Law.

How Indeterminate Sentencing Policies Affect Prison Overcrowding

Unlike most inmates — who receive fixed (determinate) sentences — indeterminately sentenced inmates are sentenced to an unspecified amount of time that can range anywhere from seven years to life, with the possibility of parole. "Lifers," or "life-term" inmates, as they are commonly referred to, constitute approximately 20 percent of the California prison population. As of 2013, the lifer population totaled 26,775. Prison Census Data Tbl.10 (Dec. 31, 2013).

According to recidivism studies completed by the CDCR, lifers pose the lowest risk to public safety. Despite these facts, lifers have traditionally stood only an 18-20 percent chance of being granted parole. *See* Weisberg, et al., "An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California," September 2011 at 4. In 2013, there were approximately 9,315 life-term prisoners who were past their minimum eligible parole date — even though virtually all of them were designated low risk. *In re Butler*.

This problem did not go unnoticed by the *Coleman* court. In identifying the various causes of California's increasing prison population, it identified "the actions of the parole board and the Governor in declining to release prisoners serving terms of 15 or 25 years to life who have served their minimum sentence or more with unblemished records and are determined by prison officials not to constitute a risk to society."

Proposition 57 Impact on Life-Term Prison Population

Despite the undeniable impact that Prop. 57 and the associated regulations will have on the prison population as a whole, it is less clear that the reforms will have any consequences on the lifer population.

In order to grasp the effect of Prop. 57 on lifers, it is important to understand a few basic rules that apply to indeterminately sentenced inmates. Most indeterminately-sentenced inmates cannot be released before their minimum eligible parole date (MEPD). Cal. Code Regs. Title 15, Section 3000 (2016). Some lifers may qualify as either (or both) youth and elderly offenders, depending on whether they committed the offense they are serving time for before age 23 and/or are currently over 60 years old. Calif. Penal Code Section 3051(a)(1). Unlike other indeterminately sentenced inmates, youth and elderly offenders must be released once the Board of Parole Hearings finds them suitable for parole, regardless of their MEPD. *Id.* Section 3046(c).

The board's proposed regulations, however, will not advance the release date of any parole eligible life-term inmates. As to the earning of credits, the new regulations provide that they will advance a *determinately* sentenced inmate's *release*. But they only propose to advance an *indeterminately* sentenced inmate's initial *parole hearing*. *See* Proposed Calif. Code Regs. Title 15, Section 3043(a). An initial parole hearing in and of itself is no guarantee of release. Unless the board plans on implementing the new regulations in such a way that also advances the actual release date of a lifer found suitable for parole, the new credit-earning regulations will have no impact on the release date of indeterminately sentenced inmates.

More significantly, most life-term inmates will not benefit from the new regulations because they are not even eligible to receive the credits the new regulations provide for. The majority of lifers are serving time for first- or second-degree murder. *See* Weisberg at 4. And any inmate who committed either offense after June 3, 1998, is ineligible to receive any conduct credit reduction altogether. *See* Calif. Penal Code Sections 190(c), 2933.2(a).

Ultimately, it is certainly possible — if not likely — that Prop. 57 and the new regulations will reduce prison overcrowding overall. However, it should not go unnoticed by either side of the debate over the merits of the reforms that the proposed regulations as currently written do little (if anything at all) to reduce overcrowding caused by the lifer population.

Sharif E. Jacob, *a partner in the San Francisco office of Keker & Van Nest, focuses on intellectual property litigation, complex business disputes and representing individuals.* Andrea Nill Sanchez *is an associate in the San Francisco office.*

PROOF OF SERVICE

I, William Vogel, applicant, hereby declare under penalty of perjury that I mailed a true copy of:

APPLICATION FOR PERMISSION TO FILE
SUPPLEMENTAL AMICUS CURIAE BRIEF
IN SUPPORT OF ROY BUTLER

SUPPLEMENTAL AMICUS CURIAE BRIEF
IN SUPPORT OF ROY BUTLER

in No. S237014 to the parties listed below on June 12, 2017 by placing said documents in a postage-paid envelope and handing it to a Correctional Officer to be sent via United States mail.

First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102-4712

California Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004

Keker, Van Nest & Peters LLP
633 Battery Street
San Francisco, CA 94111-1809
(Counsel for Roy Butler)

I declare under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Soledad, California.

Date: 6/12/2017

William Vogel P88353
Correctional Training Facility
P.O. Box 705
Soledad, CA 93960