S266867

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JOHN LAPONTE on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE
Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re JOHN LAPONTE On Habeas Corpus.	B309741 (Super. Ct. L.A. County No. KA001795) ORDER

THE COURT*:

The petition for writ of habeas corpus, filed January 4, 2021, has been read and considered.

To the extent petitioner challenges the Board of Parole Hearings' findings at petitioner's 2020 parole hearing, the petition is denied without prejudice to petitioner's filing a new petition in the superior court challenging that hearing and including a transcript of the hearing.

In all other respects, the petition is denied.

*ROTHSCHILD, P. J. CHANEY, J. BENDIX, J.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

JOHN RAFAEL LAPONTE,

on

Habeas Corpus.

B267768

(Los Angeles County
Super. Ct. No. KA001795)

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Steven D. Blades, Judge. Petition granted.

Michael Satris, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Julie A. Malone, Acting Assistant Attorney General and Charles Chung, Deputy Attorney General for Respondent.

John Rafael Laponte[1] petitions for a writ of habeas corpus relating to a 2009 decision of the Board of Parole Hearing denying him parole. Because "some evidence" supported the Board of Parole Hearing's determination to deny Laponte parole, Laponte's petition is denied to the extent it seeks review of that decision. We also decline to address at this point Laponte's contention that his sentence is unconstitutionally disproportionate to his culpability. Upon review of the petition, the return, the traverse, and related exhibits, and solely with respect to the issue of setting his base term and adjusted base term, we agree with Laponte, however, that under the particular circumstances of his case, and in light of *In re Butler* (2015) 236 Cal.App.4th 1222, he is entitled to have his base and adjusted base term set rather than waiting until his next scheduled parole hearing in November 2019. Accordingly, we grant the petition and order the Board of Parole Hearings to provide Laponte with the calculation of his base and adjusted base term or to conduct a new parole hearing at which Laponte's base term and adjusted base term shall be calculated.

BACKGROUND

On November 17, 1989, when he was 27 years old, Laponte kidnapped 20-year-old Zoraida Noriega at gunpoint and took her to a motel, where two codefendants joined him. All three carried firearms. One of the men called Noriega's family and demanded $15,000 ransom for her release. The family contacted the sheriff's department, which traced the call to the motel. Deputies arrived at the motel and observed Laponte leave the motel room and drive away. The deputies subsequently arrested Laponte. Laponte's codefendants were later observed leaving the motel room, using Noriega as a hostage. The deputies pursued the codefendants' vehicle, eventually stopping them, arresting the two men, and releasing Noriega, who was unharmed.

---

[1] The petition was filed under the name John Rafael Aponte. Aponte was committed to the California Department of Corrections and Rehabilitation under the name John Laponte. For purposes of this opinion and order we will use Laponte to refer to the petitioner.

In an information dated December 20, 1989, Laponte was charged with one count of kidnapping for ransom (Pen. Code, § 209, subd. (a))[2], one count of false imprisonment by violence (§ 236), one count of assault with a firearm (§ 245, subd. (a)(2)), and one count of second degree robbery (§ 211). Each count included allegations that Laponte personally used a firearm.

At a hearing on April 13, 1990, Laponte pleaded guilty to kidnapping to commit robbery (§ 209, subd. (b)), for which he was sentenced to life with the possibility of parole. The trial court struck the firearm allegation with respect to count one. With respect to that count, Laponte was informed that he would be eligible for parole at the end of seven years, which would be the minimum sentence, but that the specific sentence would be set by the BPH and that it would vary depending on the facts and how he conducted himself in prison. With respect to count two, the court selected the middle term of two years and added two years for the firearm enhancement, and stayed the sentence pursuant to section 654. With respect to counts three and four, the court selected the middle term of three years, added two years for the firearm enhancement, and ordered counts three and four to be served concurrently with count one. The guilty plea form completed by Laponte stated that the sentence for count one shall be life with the possibility of parole, and that each of counts two, three and four were to run concurrent with the sentence imposed on count one; the abstract of judgment, however, conforms to the trial court's ruling at the sentencing hearing and states that count two was stayed while counts three and four were to run concurrently.[3]

---

[2] Subsequent statutory references are to the Penal Code, unless otherwise specified.

[3] In his traverse, petitioner raises a new claim that each of counts 2, 3 and 4 should have been stayed pursuant to section 654. Because this issue was not raised in the petition, we do not consider it. (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16 ["attempts to introduce additional claims or wholly different factual bases for those claims in a traverse do not expand the scope of the proceeding which is limited to the claims which the court initially determined stated a prima facie case for relief"].)

Prior to this incident, Laponte had no adult or juvenile criminal history, had served in the military, and was self-employed in the auto detailing business. Laponte stated that the actions taken with respect to Noriega were retaliation for an incident in which Noriega allegedly " 'mastermind[ed]' " the robbery of a neighbor's home.

Laponte's Minimum Eligible Parole Date (MEPD) was September 15, 1996. Laponte appeared before the BPH for his initial parole consideration hearing on December 6, 1995, and was denied parole. His most recent hearing, his eighth, took place on November 23, 2009, and resulted in a ten-year denial. His next scheduled hearing date is no later than November 23, 2019.

At the 2009 hearing, the BPH concluded that Laponte was unsuitable for parole based on factors including the commitment offense; Laponte's unstable social history and relationships; disciplinary violations that included a previous attempt to escape from prison; Laponte's past and present mental state, including demonstrating anger and defiance; an unfavorable psychological report; and Laponte's attitude towards the crime and lack of insight. Laponte made a brief appearance at the hearing and made a statement, but then elected to leave and did not remain for the remainder of the hearing.

In 2012 and 2014, Laponte requested that the 2019 hearing date be advanced, which request the Board denied. A letter from BPH dated November 24, 2014 informed Laponte that the Board would not consider another request to advance his 2019 hearing any earlier than September 26, 2017.

Laponte argues in his petition that he should be released on parole, that his sentence is so disproportionate to his individual culpability that it violates the constitutional prohibition of cruel and unusual punishment, and that the BPH should be required to set his base and adjusted base term. The superior court denied Laponte's petition on September 22, 2015. We issued an order to show cause on March 9, 2016.

DISCUSSION

A. 2009 Parole Determination

Laponte's most recent parole hearing took place on November 23, 2009. Laponte elected to proceed without counsel at the hearing, disputed the panel's jurisdiction over him, unilaterally declared the he was concluding the hearing, and left the room. BPH, after reviewing the evidence supporting and opposing Laponte's suitability for parole, determined that releasing Laponte would pose an unreasonable risk to public safety. The panel heard evidence that from Laponte's first hearing in 1995 and throughout subsequent hearings he was belligerent and argumentative, failed to conduct himself appropriately in prison, and did not accept responsibility for the life crime or demonstrate insight, believing that he was justified in kidnapping Noriega.

The BPH is the administrative agency authorized to grant parole and set release dates. (§§ 3040, 5075 et seq.) The BPH "'shall normally set a parole release date' one year prior to the inmate's minimum eligible parole release date, and shall set the date 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude [with] respect to their threat to the public . . . .' (§ 3041, subd. (a) . . .) . . . [A] release date must be set 'unless [the Board] determines that . . . *public safety* requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.' " (*In re Lawrence* (2008) 44 Cal.4th 1181, 1202.)

If "'some evidence,' a 'modicum' of evidence, supports the Board's determination that the inmate currently poses an unreasonable risk to public safety," we will affirm that decision. (*In re Swanigan* (2015) 240 Cal.App.4th 1, 14.) The BPH satisfied this standard in making its 2009 determination that Laponte remains an unreasonable risk to public safety and we agree that that "some evidence" supports that decision.

The BPH found that the commitment offense was carried out in a dispassionate and calculated manner, and that the motive was very trivial in relation to the offense. The panel also concluded that Laponte has an unstable social history and lacks insight into the life crime, as reflected by the fact that he lacks empathy and remorse and continues to believe that his actions were justified.

Laponte has had 27 serious disciplinary violations, with five occurring after his parole hearing in 2007. Further, a 2009 report of BPH Forensic Assessment Division Forensic Psychologist James McNairn concluded that Laponte presented a "Moderate" risk of violence. In 1990, he had a 128B disciplinary incident for attempting to escape. Laponte admitted to McNairn that he committed Noriega's kidnapping, saying, "I did it." Laponte has "problems with impulsivity and anger based on his actions in the commitment offense and the many disciplinary infractions he has received while incarcerated." On the instrument used to measure levels of risk to recidivate, Laponte received a score in the "medium" category. McNairn concluded that "[a]fter weighing all data from the available records, the clinical interview and risk assessment data, it is believed that Mr. [Laponte] presents a relatively MODERATE RISK for violence in the free community." (Boldface and underline omitted.) This evidence before the BPH supports the panel's finding that Laponte presents an unreasonable risk of danger and the resulting decision denying parole.

B. Term Setting & *Butler*

Section 3041, subdivision (b) provides that "[t]he panel or the board, sitting en banc, shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual. (§ 3041, subd. (b).) Our Supreme Court has held that this consideration of public safety takes precedence over uniformity in sentencing. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1096.) In *Dannenberg*, the Court concluded that the requirement that inmates were "normally" to receive "uniform" parole dates[4] did not "impose upon the Board a general obligation to fix actual maximum

---

[4] Section 3041, subdivision (a) has since been revised to remove the reference to uniformity. Section 1170 states that "the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. [. . .] the elimination of disparity and the provision

terms, tailored to individual culpability, for indeterminate life inmates. Our prior ruling that the parole authority had such a general duty was influenced by the nature and provisions of the more comprehensive indeterminate sentencing system then in effect." (*Dannenberg, supra*, 34 Cal.4th at 1096.)

This conclusion, however, addressed uniformity rather than the issue of proportionality with respect to any requirement for calculating an inmate's base term and adjusted base term. The *Dannenberg* Court also held that "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 (art. I, § 17) of the California Constitution. [Citations] Thus, we acknowledge, 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, supra*, 34 Cal.4th at p. 1096.) Laponte contends that his confinement exceeds that limit.

The issue of calculating a base and adjusted base term in the context of an argument that a sentence was constitutionally disproportionate to the individual's culpability was raised in *Butler*, which resulted in a settlement agreement pursuant to which the BPH changed the way it calculates base and adjusted base terms for every life inmate. (*In re Butler, supra*, 236 Cal.App.4th at p. 1229).

Prior to the settlement, a life inmate's term was not calculated until the inmate was found suitable for parole. As a result of the settlement in *Butler*, however, BPH agreed to begin setting base terms and adjusted base terms at an inmate's initial parole hearing rather than waiting until the date on which an inmate receives a determination that he is suitable for parole. The People argue that as a result of the *Butler* settlement, Laponte's petition is moot because his base and adjusted base term will be calculated at his next scheduled parole hearing after the effective date of *Butler*. Under most circumstances,

---

of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion." (Pen. Code, § 1170, subd. (a)(1).)

we agree that the relief provided in *Butler* renders moot challenges to the BPH policy. In this case, however, by the time Laponte receives his next hearing he will have been incarcerated for almost 30 years without having had his base and adjusted base term set. We are concerned by this delay in light of the potential that the base term and adjusted base term applicable to Laponte may be less the 25 years he has already served.[5] Without this information, Laponte is unable to utilize that information in order to challenge the proportionality of his confinement. "That the base term and adjusted base term relate to proportionality, and can serve as useful indicators of whether denial of parole will result in constitutionally excessive punishment, is evident in the fact that the matters considered by the Board when it sets the base term relate almost entirely to a prisoner's individual culpability for the base offense. It is also clear from the genesis of these concepts and the guidelines that define them, which were adopted by a former parole board precisely in order to measure constitutional proportionality during the parole granting process. (*Butler*, *supra*, 236 Cal.App.4th at p. 1237.)

Laponte attempted to obtain his base term from BPH prior to filing the instant petition. On May 13, 2014, Laponte wrote the BPH and requested a term calculation based on the *Butler* decision.[6] On June 11, 2014 the BPH responded, in relevant part: "The *Butler* decision requires the Board to set base terms and adjusted base terms for all life-term inmates at their initial parole consideration hearing, or at their 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. [¶] The base term will be established pursuant to the matrices and directives found in Title 15 of the *California Code of Regulations*. The adjusted base term refers to the base term after it has been adjusted for enhancement

---

[5] Laponte's appointed counsel asserts that the matrix applicable to Laponte's offense "suggests a term somewhere in the range of 9-13 years, depending on the Board's discretionary determination." Laponte alleges that the base term set for one of his codefendants was 14 years.

[6] This letter was provided to this Court in a prior petition for writ of habeas corpus filed by Laponte. We may take judicial notice of Laponte's prior petition. (Evid. Code, § 452, subd. (d).)

purposes pursuant to Title 15 of the *California Code of Regulations*. [¶] . . . [¶] Your next hearing is scheduled no later than November 23, 2019, at which time you will receive a term calculation as described above."

In determining that the *Butler* settlement provided a "substantial benefit" to life prisoners justifying an award of attorneys fees, the *Butler* court concluded that "[t]he settlement and stipulated order will *rectify or at least diminish* this and other problems attributable to the Board's former policy and practice." (*Butler, supra,* 236 Cal.App.4th at p. 1242, italics added.) Because BPH will not calculate Laponte's base term and adjusted base term until 2019, this potential constitutional violation cannot be said to be rectified or sufficiently diminished. Given that "the base term and adjusted base term relate to proportionality, and can serve as useful indicators of whether denial of parole will result in constitutionally excessive punishment," (*Butler, supra,* 236 Cal.App.4th at p. 1237), facilitating judicial review, Laponte is entitled to have his term set. "A reviewing court can most usefully analyze a life prisoner's claim that the denial of parole results in a cruel and/or unusual punishment after the parole authority has established a term that can be subjected to judicial review. . . . Once the primary term is fixed by the [parole authority], however, all of the relevant data regarding the particular inmate, the circumstances of his offense, and the criteria upon which the term is based will have been marshaled by the [parole authority], thus enabling petitioner to set out the basis or bases for his complaint, while at the same time providing the court with a record adequate to permit meaningful review." (*Id.* at p. 1243.)

Because Laponte's situation results in such a lengthy delay in calculating his base and adjusted base term, it does not sufficiently resolve, under these circumstances, the constitutional concerns identified in *Butler*. Accordingly, we grant the petition solely to the extent that it requests the BPH to calculate Laponte's base term and adjusted base term.

DISPOSITION

Within 90 days, the Board is directed to provide Laponte with either a written calculation of Laponte's base and adjusted base term or a date for a new hearing at which time the Board shall provide Laponte with his base term and adjusted base term. In all other respects, the petition is denied.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.

Additional material from this filing is available in the Clerk's Office.