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SUPREME COURT
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In the Supreme Court of the State of California

In re

ROY BUTLER (D-94869),

On Habeas Corpus.

Case No. _____

First Appellate District, Division Two, Case No. A139411

Alameda County Superior Court, Case No. 91694B
The Honorable Larry J. Goodman, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

The Board of Parole Hearings respectfully petitions for review of the order of the Court of Appeal, First Appellate District, Division Two, filed on July 27, 2016, in *In re Butler* (A139411), denying the Board's motion to modify an order implementing a stipulated settlement agreement under which the Board agreed to set "base terms" for certain inmates under a now-superseded statutory framework. (Ex. 1, Order.)

ISSUE PRESENTED FOR REVIEW

Must the Board continue to calculate "base terms" for certain inmates under a 2013 settlement agreement, despite statutory changes eliminating the Board's authority and the base term's previous function, under the rationale that base terms might indicate the point at which a sentence becomes constitutionally disproportionate to an inmate's underlying crime?

INTRODUCTION

Before 2016, the Board of Parole Hearings performed two core functions: determining the parole suitability of inmates serving life sentences for certain serious crimes, and setting "base terms" identifying each such inmate's earliest possible release date. The Board's base term-setting function, the issue on which this dispute turns, served the legislative goal of term uniformity—other things being equal, inmates who commit similar crimes should serve similar sentences. In carrying out its two statutory functions, the Board's practice was to set a base term only after determining an inmate was suitable for parole, *i.e.*, that he no longer posed a current unreasonable risk of danger to public safety. This Court upheld this policy in *In re Dannenberg* (2005) 34 Cal.4th 1061. If an inmate found suitable for parole had already served the minimum sentence established by the base term, he was eligible for immediate release. If the inmate was

found suitable but had not yet served the base term, he was not eligible for release until he completed that term.

In 2013, Roy Butler petitioned the Court of Appeal for a writ of habeas corpus, alleging that the Board's policy of not setting his base term until it found him suitable for parole was causing him to serve a constitutionally disproportionate sentence for his participation in a 1988 murder. Although this Court in *Dannenberg* foreclosed that claim, the Board concluded that an inmate's rehabilitation might be fostered if he knew the earliest date he could be released if found suitable for parole. The Board eventually settled the case by agreeing to calculate base terms at inmates' initial parole hearings, or at the next hearing if the initial hearing had already occurred, and to promulgate regulations implementing the settlement's terms. The Court of Appeal approved the settlement's terms and embodied them in an injunctive order.

In 2016, as part of a sweeping overhaul of the State's criminal justice system, the Legislature revised the parole system's structure and eliminated the Board's term-setting authority. Under current law, life inmates are immediately released once they are found suitable for parole, as long as they have served a minimum sentence fixed by statute, not as determined by the Board's regulations. The Legislature's purpose for this new parole regime was twofold: to parole suitable inmates as soon as possible and to eliminate confusion previously caused by the Board's term-setting function.

In light of this systemic legislative reform, the Board moved to modify the Court of Appeal's stipulated settlement order to confirm that the Board no longer had authority, or a need, to calculate "base terms," which have no utility under the new law. In the order at issue here, the Court of Appeal denied that motion, reasoning that base terms set by the Board continued to have *constitutional* significance on the theory they "indicate

the point at which a sentence becomes constitutionally excessive." In the Court of Appeal's view, the Board should continue performing the idle act of setting base terms before it determines parole suitability "so that parole officials know at the time they decide whether to deny parole" whether denial might result in a constitutionally disproportionate term. The court went even further, suggesting that, in its view, a base term computed by the Board in effect defines the *maximum* sentence that a life inmate may constitutionally be required to serve—even if the Board also determines that, as a matter of public safety, the inmate is not suitable for parole.

Under the auspices of enforcing a settlement agreement, the Court of Appeal has radically elevated a base term's significance—from one of statutory sentence uniformity to one of a constitutional dimension. But a rote calculation by the Board under a regulatory matrix cannot supplant the role of the judiciary, which alone can invalidate sentences based on proportionality. The Court of Appeal's order not only reflects a fundamental misunderstanding of the base term's previous function, but also would require the Board to ignore the Legislature's recent revisions to the parole system. Compelling the Board to continue setting now-meaningless "base terms" would waste public resources, sow confusion, and undermine the Board's current parole suitability determination process. The order is also likely to be misused to argue that serving a sentence past one's base term is presumptively unconstitutional, which will set the stage for future litigation based on an unsupportable distortion of this Court's longstanding constitutional disproportionality jurisprudence.

Review should be granted to settle these important questions of law.

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STATEMENT OF THE CASE

I. THE BOARD WAS REQUIRED TO SET TERMS UNDER FORMER PENAL CODE SECTION 3041 AND CALIFORNIA CODE OF REGULATIONS, TITLE 15.

The Legislature, until recently, required the Board to set a provisional "parole release date" for each life inmate, founded on "criteria" that would "provide uniform terms for offenses of similar gravity." (Former Pen. Code, § 3041, subd. (a).) The Board implemented this statutory directive by promulgating regulations requiring the calculation of a "base term," using a matrix that measured the gravity of the offense, adjusting for any aggravating or mitigating circumstances. (See *In re Dannenberg*, *supra*, 34 Cal.4th at p. 1078 [recognizing that Board promulgated base-term matrices "in response" to section 3041's "requirements" and that "base terms" were means to set minimum "confinement terms," which were intended to infuse uniformity into the sentencing scheme consistent with "sentencing rules that the Judicial Council" had issued], citing former Pen. Code, § 3041, subd. (a); see also Cal. Rules of Court, rule 4.405 [defining "base term" in reference to how a sentencing court selects a term of imprisonment for a determinate sentence].)

Dannenberg recognized that the Board adopted its base-term matrices to satisfy its statutory duty under section 3041 to set "uniform terms." (*In re Dannenberg*, *supra*, 34 Cal.4th at p. 1078.) *Dannenberg* also held that despite the desire for term uniformity, the Legislature required the Board to deny parole to any life inmate "who is still dangerous." (*Id.* at pp. 1087-1088.) Thus, a base term established an inmate's *minimum*—not maximum—period of imprisonment, assuming he was suitable for parole. (*Id.* at pp. 1078-1079.) In this way, the base term set by the Board established the inmate's earliest possible release date, but operated as the inmate's actual release date only if the inmate was found suitable for parole

before reaching that date. (*Id.* at pp. 1090-1091; see also *In re Bush* (2008) 161 Cal.App.4th 133, 142 [life inmate not legally entitled to release until he served his base term and been found suitable for parole].)

At the time Roy Butler petitioned the court below in 2013, it was the Board's policy to calculate an inmate's base term once he was found suitable for parole. (Cal. Code Regs., tit. 15, §§ 2282, 2403.) If the inmate was already past his base term, he was entitled to release once the parole grant became effective.[1] (*Id.* at §§ 2289, 2411.) If not, the inmate remained in prison until he satisfied this minimum term, which could be further reduced during periodic progress hearings for good behavior. (*Id.* at § 2269.)

Concluding that section 3041's goal of term uniformity was subordinate to the overriding statutory goal of public safety (*In re Dannenberg, supra*, 34 Cal.4th at p. 1084), this Court upheld the Board's policy of delaying the setting of a base term until after finding the inmate suitable for parole (*id.* at p. 1098). This Court considered and rejected the contention that constitutional principles prohibiting disproportionate sentences mandated a different result. (*Ibid.* ["Implementation of the cruel or unusual punishment clause . . . does not require the Board, under [the prior parole] law to set premature release dates for current life-maximum prisoners who, it believes, present public safety risks."].) The Court's conclusion was consistent with the fact that the range of terms available under the Board's term-setting matrix—for instance, 25 to 33 years for first degree murder—does not plot the contours of the Eighth Amendment or the

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[1] The Board's decision is final within 120 days of the hearing, after which the Governor has 30 days to review the decision. (Pen. Code, § 3041, subd. (b)(1); Cal. Const. art. V, § 8, subd. (b).) If the Governor does not reverse, refer, or modify the Board's decision, the Board's parole grant becomes effective.

California Constitution's cruel-or-unusual punishment clause. (Cal. Code Regs., tit. 15, § 2403, subd. (b); see *In re Dannenberg*, *supra*, 34 Cal.4th at p. 1094, fn. 15 [Board "may amend the matrix" for second degree murder if it "believes the 15-to-21-year terms . . . are too brief to protect public safety"].) Instead, this Court instructed inmates who believed that a Board's parole denial was causing them to serve a sentence disproportionate to their crime to go straight to court—without the need for the Board to calculate a base term. (*In re Dannenberg*, *supra*, 34 Cal.4th at pp. 1096-1098.)

II. BUTLER PETITIONS THE COURT OF APPEAL FOR HABEAS CORPUS RELIEF, AND THE PARTIES REACH A STIPULATED SETTLEMENT.

Roy Butler petitioned the Court of Appeal for a writ of habeas corpus challenging the Board's policy of waiting until he was found suitable before setting his base term—the policy this Court upheld in *Dannenberg*. Butler alleged that the delay in setting his base term caused him to serve a constitutionally disproportionate sentence. Despite *Dannenberg* foreclosing Butler's claim, the Board decided that sound public policy reasons supported changing the timing of its statutory term-setting function—namely, that setting the base term earlier could aid an inmate's rehabilitation by fostering hope for future release and thus encouraging the inmate to behave in a pro-social manner while incarcerated. (Ex. 2, Stipulation and Order Regarding Settlement.) Importantly, the proposed change in no way altered the Board's underlying statutory duty to deny parole to those inmates whose release would pose an unreasonable risk of danger to the public.

The Court of Appeal entered an order approving the settlement. Under the order, the Board was required to calculate base terms for life inmates at their initial parole consideration hearing, or at their next

scheduled parole hearing if the initial hearing already occurred. (Ex. 2, at p. 3.) The order also required the Board to promulgate regulations to implement the agreement. (*Ibid.*) Since the settlement order became operative in April 2014, the Board has calculated thousands of inmates' base terms per the settlement's terms. The Court of Appeal retains jurisdiction until the amended regulations become effective.[2] (*Id.* at p. 7.)

III. DEVELOPMENTS IN THE LAW MATERIALLY ALTER THE BOARD'S AUTHORITY TO SET BASE TERMS.

In 2014, the legal landscape underlying the Board's term-setting function changed in three material ways. First, under Senate Bill Nos. 260 and 261, the Legislature eliminated the Board's term-setting function for youthful offenders—those who were 23 or younger when they committed their crimes—by mandating their release once they are found suitable for parole. (See generally Pen. Code, §§ 3041, 3046, subd. (c), 3051, 4801, subd. (c), as amended by Stats. 2013, ch. 312, §§ 2-5; Pen. Code, §§ 3041, 3051, 4801, subd. (c), as amended by Stats. 2015, ch. 471, §§ 1-2.) In light of the legislative changes, base terms are not meaningful to youth offenders because they must be immediately released once they are found suitable for

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[2]After the Court of Appeal entered the stipulated order, the California District Attorneys Association and the San Diego County and Sacramento County District Attorneys filed letters asking this Court to transfer the case to itself to allow them to present challenges to the settlement. (*In re Butler*, S217611, Apr. 7, 2014.) The Board opposed the transfer, arguing that, because the settlement did nothing more than change the timing of the base-term calculation, the underlying cause presented no issue of great public importance requiring this Court's intervention. The Court denied the requested transfer. For the reasons explained above, the circumstances have changed significantly since this transfer request. The Legislature has restructured the State's parole system, and the Court of Appeal's order rejecting modifications to the settlement both extends the settlement's purpose well beyond its original intent and misapprehends the meaning and significance of Board-established base terms.

parole and have served a minimum term as established by the Legislature. (*Ibid.*)

Second, in compliance with a February 10, 2014 federal court order, California implemented a parole measure that provides parole consideration to inmates who are over 60 years old and have served 25 continuous years of custody. (See *Plata v. Brown*, Case No. 01-1351 (N.D.Cal.), Docket No. 2766.) Like youthful offenders, a base term is not meaningful to inmates eligible for elderly parole because they too must be immediately released once they are found suitable for parole.

And third, beginning in January 2016, the Legislature, through Senate Bill No. 230 (SB 230), amended Penal Code section 3041, subdivision (a), to eliminate the Board's term-setting function for *all* life inmates. (Pen. Code, §§ 3041, *et seq.*, as amended by Stats. 2015, ch. 470, §§ 1-13.) Before SB 230, Penal Code section 3041 required the Board to set base terms "in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public[.]" (Former Pen. Code, § 3041.) The Legislature struck this language and added subdivision (a)(4), requiring inmates to be released when found suitable for parole:

> 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.

(Pen. Code, § 3041, subd. (a)(4).) In so doing, the Legislature replaced the Board's term-setting function with a new parole regime in which life inmates are entitled to release once they are found suitable and have

reached their minimum eligible parole dates,[3] which are set by statute based on their sentences.

IV. THE COURT DENIES THE BOARD'S MOTION TO MODIFY THE SETTLEMENT AGREEMENT.

In light of the fundamental changes to the State's parole system, the Board moved to modify the settlement agreement's terms. Because the law undergirding the injunctive order had materially changed, the Board sought modifications to harmonize the order's terms with the new parole scheme. (See Code Civ. Proc., § 533; *Welsch v. Goswick* (1982) 130 Cal.App.3d 398, 404 [court has inherent power to modify or dissolve injunction when law upon which injunction was granted has changed or where circumstances and parties' situation have so changed as to render such action just and equitable].) Where the settlement agreement required the Board to calculate and inform inmates of their base-term calculation, the Board proposed to provide each inmate with his minimum eligible parole date in accordance with Penal Code section 3041, subdivision (a)(4).

The court denied the Board's motion. (Ex. 1.) The court rejected the Board's argument that legislative changes to Penal Code section 3041 and the State's parole system warranted modifications to the settlement agreement.[4] (*Id.* at pp. 5-11.) The court concluded that "the Board's

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[3]An inmate's initial parole consideration hearing is conducted one year before the inmate's minimum eligible parole date. (Pen. Code, §§ 3041, subd. (a)(2), 3046, subd. (a).) The minimum eligible parole date, set under Penal Code section 3046, establishes the earliest date an inmate can be released from prison, unless he qualifies for earlier release as a youthful or elderly offender. (Pen. Code, §§ 3041, subd. (a)(4); 3046, subd. (c); *Plata v. Brown*, Case No. 01-1351 (N.D.Cal.), Docket No. 2766.)

[4]The Court of Appeal's order also noted that the Board stopped setting base terms for youthful and elderly offenders, in light of changes to the parole system mandated by Senate Bill Nos. 260 and 261, and a federal court order—changes in the law that predated the effective date of the

(continued...)

authority to set base terms does not derive from section 3041" (*id.* at p. 6), but rather from the stipulated order itself, which, in the court's view, facilitated enforcement of the constitutional safeguard against excessive sentences (*id.* at p. 10). According to the court, a base term has "never been considered the minimum term" an inmate must serve, but instead functions "to indicate the point at which a prison term becomes constitutionally excessive." (*Id.* at p. 6; see also *id.* at p. 7 [base term does not set a release date but "indicate[s] whether the denial of parole might result in constitutionally excessive punishment"].) Thus, the court concluded that base-term calculations must continue both to facilitate judicial review of constitutional disproportionality challenges (*id.* at pp. 8-9; see also *In re Butler* (2015) 236 Cal.App.4th 1222, 1242-1243), and to ensure the Board knows "whether the denial of parole might result in constitutionally excessive punishment." (Ex. 1, at p. 7; see also *id.* at p. 8 ["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 . . . .].)[5]

REASONS FOR GRANTING REVIEW

Review should be granted for three reasons. First, in light of the material changes in the law, the order will create dueling regulatory schemes, one that is relevant to the inmate's actual release date and one that is not. It will also waste resources by requiring the Board to set "base

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order. (Ex. 1, at pp. 9-11.) Since then, Butler's counsel filed a declaration charging the Board with contempt of the stipulated order. The Court of Appeal has set a status conference for September 21, 2016, to discuss with the parties matters regarding the stipulated order.

[5]No petition for rehearing was filed in the Court of Appeal. (Cal. Rules of Court, rule 8.504(b)(3).)

terms" that have no legal significance, and create unnecessary confusion. Second, the order undermines public safety by injecting uncertainty into the parole suitability process by requiring the Board to consider whether a parole denial might violate the constitution's ban on disproportionate sentences. And third, the order misinterprets this Court's disproportionality jurisprudence by converting base terms into constitutional precepts. Review should be granted to settle these important questions of law.

I. BY FAILING TO HARMONIZE THE SETTLEMENT'S TERMS WITH THE LEGISLATURE'S NEW PAROLE SCHEME, THE COURT'S ORDER PLACES THE BOARD IN AN UNTENABLE POSITION AND UNNECESSARILY INTRODUCES CONFUSION INTO THE PAROLE PROCESS.

The Court of Appeal's refusal to modify the stipulated order in light of the Legislature's recent overhaul of California's parole system warrants review by this Court because it would require the Board to act in ways inconsistent with the new statutory framework, waste resources by requiring the continued setting of "base terms" that have no legal significance, and create unnecessary confusion.

As explained above, SB 230 eliminated the Board's statutory authority to establish term-setting regulations, including the regulatory matrices Board staff use to calculate terms. SB 230, a criminal justice reform measure, was aimed, in part, at "truth in sentencing," because under prior law, "a person [could] be found suitable for parole . . . and still not be released because of the various enhancements that [could] be added to the person's term." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 230 (2015-2016 Reg. Sess.) May 13, 2015, p. 3.) The prior scheme of Board-established base terms did "not encourage rehabilitative behavior" in prisoners because they could be "found suitable [for parole] by the Board and then kept longer" in prison based on factors of the "original crime that were already considered by the Board." (*Ibid.*)

SB 230 thus nullified the Board's term-setting regulations, and, along with SB 260 and 261, requires the Board to implement the Legislature's revised parole system. The Board intends to promulgate new regulations consistent with the new laws. (See Pen. Code, § 3052 [authorizing the Board to promulgate regulations].) The settlement order, in contrast, requires the Board to adopt regulations grounded in the *prior* parole regime, under which the Board, not the Legislature, set minimum terms, and to communicate those terms to inmates at their initial parole hearings. (Ex. 2, at p. 6; but see *California School Bds. Assn. v. State Bd. of Education* (2010) 191 Cal.App.4th 530, 544 ["an agency does not have discretion to promulgate regulations that are inconsistent with the governing statute, alter or amend the statute, or enlarge its scope"].) And notwithstanding the absence of legal authority, the court expects the Board to codify these regulations immediately. (Ex. 3, Order Regarding Enforcement.) In so doing, the Court of Appeal's order places the Board in the untenable situation of being required to develop and apply regulations implementing a system of Board-set base terms that the Legislature has chosen to abandon.

The dueling regulatory schemes resulting from the Court of Appeal's order would create confusion for inmates as well as the public because a base term no longer reflects when an inmate can expect to be released should he be found suitable for parole. Under the revised Penal Code, an inmate's potential release date is instead determined by his minimum eligible parole date, which is set by statute. (Pen. Code, §§ 3041, subd. (a)(4); 3046; *Plata v. Brown*, Case No. 01-1351 (N.D.Cal.), Docket No. 2766.) Now every inmate under the new law 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. Yet the court's order demands every inmate be provided with a base-term calculation—an obsolete number that

has no bearing on an inmate's actual or potential release date. This irrelevant data will befuddle many inmates and victims. And by sowing uncertainty among the inmate population, the order interferes with the Legislature's intent in passing the law, which was, in part, to "simplif[y]" the "convoluted" administrative scheme of base terms "in a basic and commonsense way." (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 230 (2015-2016 Reg. Sess.) April 27, 2015, pp. 4-5.) This Court's review is warranted to bring the stipulated order in line with current law and to prevent confusion in the parole process.

II. THE ORDER UNDERMINES THE BOARD'S PUBLIC SAFETY ROLE BY CONFUSING STATUTORY SENTENCING PROVISIONS WITH CONSTITUTIONAL PROPORTIONALITY.

Review is warranted for the additional reason that the Court of Appeal's order undermines the Board's parole suitability process and its paramount focus on public safety. California has approximately 30,000 life inmates, most convicted of murder. For 39 years, since the adoption of the Determinate Sentencing Law, judicial and statutory authority has prohibited the Board from predetermining a maximum confinement period for these inmates. (*In re Dannenberg*, *supra*, 34 Cal.4th at pp. 1078, 1090-1091, citing former Pen. Code, § 3041, subd. (b).) To do so would, in this Court's words, "force the Board to schedule the release of inmates serving statutory life-maximum sentences—penalties now reserved for serious offenders, including murderers—despite the Board's reasonable belief that the particular circumstances of their commitment offenses indicated a continuing risk to the community at large." (*In re Dannenberg*, *supra*, 34 Cal.4th at p. 1094.) And forcing the release of such inmates would be incompatible with the Board's statutory duty to protect the public by denying parole to those inmates deemed an unreasonable risk of danger to society. (Pen. Code, § 3041, subd. (b)(1); see, e.g., *In re Lawrence* (2008)

44 Cal.4th 1181, 1205 ["the primary, overriding consideration for the Board is public safety"].)

The 2013 settlement agreement in no way affected how the Board considers inmates' parole suitability or "the overriding statutory concern for public safety." (*In re Dannenberg*, *supra*, 34 Cal.4th at p. 1084; see Ex. 2 [settlement's terms merely adjusted timing of base-term calculation].) The court's order reads a new purpose into the parties' agreement and alters the Board's parole suitability determinations by requiring the Board to consult the base term as a guide for whether it must grant parole because the inmate has exceeded the base term and thus his "prison term [has] become[] constitutionally excessive." (Ex. 1, at pp. 6-7.) In reaching this conclusion, the Court of Appeal invoked *Dannenberg* and asserted that it "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[.]" (*Id.* at p. 8.)

This strained reading of *Dannenberg* is contrary to the Court's explicit holding in that case: the Board need not calculate an inmate's base term before determining an inmate's suitability. (*In re Dannenberg*, *supra*, 34 Cal.4th at pp. 1070, 1086, 1098.) According to the Court of Appeal, the Board must consider whether denying parole might violate an inmate's constitutional rights even though, in its opinion, the inmate poses a current risk of danger. (Ex. 1, at p. 8.) But the court's order does not speak to how the Board is to make such a determination, what role the base term plays in this analysis, or why this responsibility should be imposed on an administrative agency that the Legislature has neither directed nor authorized to make any such constitutional assessment. This is not surprising given that the parties' settlement never contemplated such an objective. In any case, the Board is already aware of the inmate's sentence

length and how long he has been in prison at the time it decides parole suitability.

Under this rationale, must the Board then discard its public-safety function and direct the release of inmates as soon as they have served their base terms? The opinion surely will be interpreted by the criminal defense bar to mean that failing to do so is at least presumptively unconstitutional. Moreover, the court's theory would contravene decades of law establishing that courts, not administrative agencies, are the appropriate fora to assess constitutional disproportionality claims. (*In re Dannenberg*, *supra*, 34 Cal.4th at pp. 1071, 1098; *In re Finley* (1905) 1 Cal.App. 198, 201-202.)

Finally, the Court of Appeal's ruling is likely to affect inmates' rehabilitative efforts. If the Court of Appeal's order were interpreted to require the Board to release an inmate once he served his base term, despite evidence of unsuitability, an inmate would have little incentive to rehabilitate himself once he neared his base term date. The order thus endangers public safety by undermining the Board's current parole suitability determination process as well as inmates' rehabilitative incentives.

III. BY CONVERTING BASE TERMS INTO CONSTITUTIONAL PRECEPTS, THE ORDER MISINTERPRETS THIS COURT'S DISPROPORTIONALITY JURISPRUDENCE.

This Court's intervention is also warranted to address an important question of constitutional law. The Court of Appeal's conclusion that a base term functions "to indicate the point at which a prison term becomes constitutionally excessive" (Ex. 1, at p. 6) misinterprets this Court's longstanding constitutional proportionality jurisprudence and sets the stage for future litigation based on an unsupportable theory of constitutional proportionality.

As noted above, the base term established an inmate's minimum prison term. (*In re Dannenberg, supra*, 34 Cal.4th at pp. 1078-1079.) If the inmate remained unsuitable beyond his base term, he continued serving his life-maximum term.[6] (*In re Bush, supra*, 161 Cal.App.4th at p. 142; *In re Coleman* (2015) 236 Cal.App.4th 1013, 1020.) And contrary to the unsupported assertion in the court's order, base terms were never intended to serve as constitutionally *maximum* yardsticks. The range for first degree murder under the matrix—25 to 33 years—for example, does not delineate the constitutionally permitted ceiling under the state and federal constitutions. (See *In re Dannenberg, supra*, 34 Cal.4th at p. 1094, fn. 15 [Board "may amend the matrix" for second degree murder if it "believes the 15-to-21-year terms . . . are too brief to protect public safety"]; *In re Coley* (2015) 55 Cal.4th 524, 531 [holding 25-year-to-life sentence for third strike for failing to register as sex offender in light of defendant's other conduct not unconstitutional and reviewing prior disproportionality case law]; *People v. EM* (2009) 171 Cal.App.4th 964, 972-974 [holding 50-year-to-life sentence not disproportionate to defendant's culpability even though he was not shooter and did not intend to kill victim during robbery]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 73 [only in "exceedingly rare" and "extreme" cases does an indeterminate sentence violate the Eighth Amendment].)

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[6] The Court of Appeal expressed confusion about the purpose of base terms before the settlement agreement. (Ex. 1, at pp. 8-9, fn. 3.) *Dannenberg* and Penal Code section 3041 make clear that base terms served the legislative goal of term uniformity, considered separately from inmate-specific questions about suitability for release and the need to protect public safety. They required an inmate to serve a relatively uniform "minimum" (not maximum) base term, even when otherwise found suitable for parole. (*In re Dannenberg, supra*, 34 Cal.4th at pp. 1078-1079.)

"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." (*In re Dannenberg*, *supra*, 34 Cal.4th at p. 1096.) "But that limitation will rarely apply to those serious offenses and offenders currently subject by statute to life-maximum punishment." (*Id.* at p. 1071.) And any life inmate can bring his claim "directly to court" if he believes his confinement has "become constitutionally excessive as a result" of the Board's failure to grant parole. (*Id.* at pp. 1071, 1098.)

An inmate's base term does not play any part in the constitutional disproportionality analysis. (See, e.g., *In re Busch* (2016) 246 Cal.App.4th 953, 971-972 [denying life prisoner's disproportionality claim stemming from parole denial].) This is because the base term is of no value in the context of deciding whether an inmate's punishment has become "grossly disproportionate" in relation to his culpability for committing a life-maximum offense—a claim that "rarely" has merit. (*In re Dannenberg*, *supra*, 34 Cal.4th at p. 1071.) And resorting to the inmate's base-term computation is a mechanical approach that is antithetical to this Court's longstanding disproportionality jurisprudence. (Ex. 1, at p. 9; compare *In re Coley*, *supra*, 55 Cal.4th at p. 540; with *In re Butler*, *supra*, 236 Cal.App.4th at p. 1243 [base-term calculations "will greatly strengthen" disproportionality claims and allow courts to "usefully analyze" the data].)

Instead, a disproportionality claim involves a fact-specific inquiry where a reviewing court "must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts," as well as the defendant's "personal characteristics," including his "age, prior criminality, and mental capabilities." (*People v. Hines* (1997) 15 Cal.4th 997, 1078; see *In re Coley*, *supra*, 55 Cal.4th at p.

540 [court examines maximum sentence and considers harshness of the penalty, sentences imposed on other criminals in same jurisdiction, and sentences imposed on criminals in other jurisdictions]; *In re Lynch* (1972) 8 Cal.3d 410, 417-418 [life sentence must be measured against cruel and unusual punishment test, not lesser sentence potentially ameliorated by the parole board].) Base terms are unrelated to these factors. And in light of the Court of Appeal's conclusion that a base term indicates "the point at which a prison term becomes constitutionally excessive," more courts are likely to erroneously rely on the Board's base-term computation as some sort of talismanic number in their disproportionality review. (Ex. 1, at p. 6.) Such a result would distort this Court's longstanding disproportionality jurisprudence. Review is necessary to prevent the Board's base-term matrices—administrative regulations drafted without regard to constitutional proportionality—from becoming a de facto yardstick for adjudicating disproportionality challenges.

CONCLUSION

The petition for review should be granted.

Dated: September 2, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains **5,863** words.

Dated: September 2, 2016

KAMALA D. HARRIS
Attorney General of California

BRIAN C. KINNEY
Deputy Attorney General
Attorneys for Board of Parole Hearings

EXHIBIT 1

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.

EXHIBIT 2

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 2

In re ROY BUTLER On *Habeas Corpus*.	Case Nos. A139411 & A137273 Alameda County Case No. 91694B

STIPULATION AND [~~PROPOSED~~] ORDER REGARDING SETTLEMENT

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Attorneys for Petitioner
ROY BUTLER
By Appointment of the Court of Appeal
of the First Appellate District

WHEREAS petitioner Roy Butler filed a supplemental petition for writ of habeas corpus on May 28, 2013, that raised two issues: (1) that the Board of Parole Hearings' ("Board") denial of parole was unsupported by some evidence of current dangerousness, and (2) that the Board's practice of deferring calculation of the base term for life inmates until after a finding of suitability of parole was unconstitutional;

WHEREAS petitioner filed a motion for discovery on May 28, 2013, in support of the latter claim;

WHEREAS the Court, on its own motion, bifurcated the petition into two separate cases, where petitioner's challenge to the denial of his parole became the subject of Case No. A137273 and petitioner's systemic, constitutional challenge to the Board's base term setting practices became the subject of Case No. A139411;

WHEREAS the Court held a discovery conference on petitioner's motion for discovery on October 23, 2013;

WHEREAS, per the Court's suggestion, the parties participated in a settlement conference before Justice Jim Humes on November 20, 2013, December 6, 2013, and December 13, 2013;

WHEREAS, the Board, through its executive officer and chief counsel, participated in the discovery conference before the Court and each of the settlement conferences before Justice Humes;

WHEREAS, in order to expedite the resolution of these matters, the

parties agreed to waive oral argument in Case No. A137273, and agreed that the decision in that case shall be final upon issuance of the Court's opinion;

WHEREAS the parties agreed that upon issuance of a decision in Case No. A137273, the terms described in the Court's [proposed] order will become effective in Case No. A139411;

WHEREAS the parties agree and stipulate as follows:

A. With respect to Case No. A137273, challenging the Board's decision to deny petitioner parole, the parties stipulate that:

1. in a comprehensive risk assessment of petitioner, dated September 26, 2011, Dr. S. Thacker concluded that "Mr. Butler presented with good insight into his past criminal/violent behavior;"

2. petitioner presented the Board with a 2005 letter from his grandmother, Eloise Clayton, that contained an offer of housing, as well as an October 20, 2011 letter of support from the Maranatha Christian Center;

3. if paroled, petitioner plans to reside with his mother, Camille Gilmore, at 2125 Main Street #2, Santa Clara, California, 95050; or with his grandmother, Eloise Clayton, at 463 Wooster Street, #12-J, San Jose, California, 95116.

B. With respect to Case No. A139411, challenging the Board's base term setting practices, the parties stipulate to entry of an order directing that:

1. as soon as is practicable, the Board shall begin implementation of new policies and procedures that will result in the setting of base terms and adjusted base terms for life term inmates at their initial parole consideration hearing, or at the 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;

2. the Board will commence rulemaking proceedings designed to memorialize and embody said new policies and procedures.

THEREFORE, subject to the Court's approval, petitioner Roy Butler and respondent Warden Marion Spearman, by and through their counsel, agree and stipulate that the Court should enter the following proposed order.

IT IS SO STIPULATED.

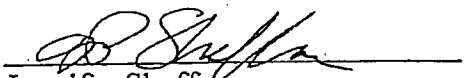
Dated: December 13, 2013 Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
JENNIFER A. NEILL
Senior Assistant Attorney General
CLAUDIA H. AMARAL
Supervising Deputy Attorney General

AMBER N. WIPFLER
Deputy Attorney General
Attorneys for Respondent

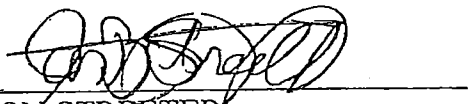
Dated: December 13, 2013 Respectfully submitted,

BOARD OF PAROLE HEARINGS

By: 
Jennifer Shaffer
Executive Officer for the Board of
Parole Hearings

Respectfully submitted,

Dated: December 13, 2013 KEKER & VAN NEST LLP

By: 
JON STREETER
Attorneys for Petitioner
ROY BUTLER
By Appointment of the Court of Appeal
of the First Appellate District

[~~PROPOSED~~] ORDER

Pursuant to the foregoing stipulation, and good cause appearing, IT IS HEREBY ORDERED that:

1. If petitioner prevails on his challenge to the Board's finding that he was not suitable for parole in Case No. A137273, the Board shall:

a) Conduct an expedited parole suitability hearing for petitioner, which conforms with due process requirements, within 60 days of the issuance of the Court's opinion;

b) Calculate petitioner's base term and adjusted base term at the commencement of his hearing;

c) Order an expedited transcription of the hearing;

d) Shorten its internal period of decision review from 120 days to 30 calendar days.

2. Upon issuance of a decision from this Court in Case No. A137273, whether favorable or unfavorable to petitioner, the terms of settlement for Case No. A139411, as described below, will become effective immediately.

3. The Board shall, at the next publicly noticed Board meeting, announce a policy of calculating the base term and the adjusted base term for all life term inmates at the initial parole consideration hearing. The Board will implement this policy on the first day of the calendar month following the aforementioned meeting.

- The base term will be established pursuant to the matrices and directives found in California Code of Regulations, title 15, sections 2282-2284, 2320-2321, 2329, 2403-2405, 2423-2425, and 2433-2435.

- The adjusted base term refers to the base term after it has been adjusted for enhancements pursuant to California Code of Regulations, title 15, sections 2285-2288, 2322-2326, 2406-2409, 2426-2428, and 2436-2438.

4. For any life term inmate who has already had his or her initial parole consideration hearing without a calculation of the base term and adjusted base term, the Board shall calculate the base term and adjusted base term at the inmate's 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.

5. The Board shall, within 90 days of this order going into effect, initiate the process to amend its regulations to reflect the base term setting practices described in this order, in accordance with Government Code, section 11340 et. seq.

6. The Board shall cite this order and submit it as supporting documentation in its initial statement of reasons, as required by Government Code, section 11346.2, subdivision (b).

7. The Board shall in good faith seek to complete the rule-making process as soon as reasonably practicable.

8. 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.

IT IS SO ORDERED.

Dated: DEC 16 2013, 2013

KLINE, P.J.

J. Anthony Kline
Presiding Justice

EXHIBIT 3

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re ROY BUTLER,
on Habeas Corpus.

A139411

(Alameda County
Super. Ct. No. 91649B)

ORDER REGARDING ENFORCEMENT OF THE DECEMBER 16, 2013 STIPULATED ORDER IMPLEMENTING SETTLEMENT

BY THE COURT:*

In light of the court's order filed on July 27, 2016, denying respondent's motion to modify the stipulated settlement order filed on December 16, 2013 (the stipulated order), the court believes it would be useful for members of the assigned panel to meet with counsel for the parties, including the Executive Officer of the Board of Parole Hearings and/or the Board's General Counsel (both of whom attended the last status conference held in this matter), should they wish to attend, to discuss future enforcement of the terms of the stipulated order. The court has the following directives and comment.

1. The court will conduct a status conference with the parties at 10:30 a.m. on August 17, 2016. Counsel should appear at the Office of the Clerk of the First District Court of Appeal at 10:15 that day. The conference will be informal and will not be recorded. If appropriate, a formal order will be issued after the conference.

2. The issues the court wishes to discuss at the conference arise from the disclosure by the Attorney General, in her letter to the court dated June 7, 2016, that the Board of Parole Hearings has not been calculating base and adjusted base terms for life

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

prisoners "who qualified for youth-offender or elderly-parole hearings" because "the youth offender law and the federal court order in the Three Judge Panel proceedings mandate the immediate release of these inmates once their parole grants become effective." As explained in the order denying the Board's motion to modify the stipulated order, that order applies by its own terms to "all life prisoners" and the Board's exception of youth offenders and certain elderly life prisoners is unjustified by the reasons given by the Board. The court's present concerns are whether (a) counsel for Butler was provided advance notice of those exceptions, (b) it is necessary for the court to order that any future proposed exceptions to the requirements of the stipulated order, or other matter related to the stipulated order, be disclosed in advance to the court and counsel for Butler, and (c) it would be useful for the parties and counsel or, if they are unable to agree, the court, to prescribe the manner in which the court and counsel for Butler will be kept informed of the Board's acts in furtherance of the "implementation of new policies and procedures that will result in the setting of base terms and adjusted base terms for life term inmates at their initial parole consideration hearing," that is required by the stipulated order.

3. Counsel may raise additional issues and should be prepared to respond to additional questions pertaining to the rulemaking proceedings that are presumably now underway regarding implementation of the new policies and procedures called for by the parties' settlement and the stipulated order.

Dated: JUL 27 2016

KLINE, P.J.

Kline, P.J.

DECLARATION OF SERVICE

Case Name: **In re Roy Butler**
Supreme Court No.: _____
(Court of Appeals Case No. **A139411)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 2, 2016, I served the attached:

PETITION FOR REVIEW with EXHIBITS 1 TO 3;

by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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Superior Court of California
1225 Fallon Street, Room 107
Oakland, CA 94612-4293
(Case No. 91694B)

California Court of Appeals
First Appellate District, Div. 2
355 McAllister Street
San Francisco, CA 94102
(Case No. A139411)
Via Hand Delivery

DECLARATION OF SERVICE
(Continued)

On September 2, 2016, I caused one electronic copy of the above stated document(s) in this case to be served on the California Supreme Court by sending the copy to the Supreme Court's electronic service address pursuant to Rule 8.212(c).

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 2, 2016, at San Francisco, California.

C. Look
Declarant

Signature

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