# In the Supreme Court of the State of California

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| **In re**<br>**ROY BUTLER (D-94869),**<br>**On Habeas Corpus.** | Case No. S237014 |

First Appellate District, Division Two, Case No. A139411
Alameda County Superior Court, Case No. 91694B
The Honorable Larry J. Goodman, Judge

## ANSWER TO AMICUS BRIEFS



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## INTRODUCTION

In 2013, the Board of Parole Hearings entered into a stipulated settlement, later embodied in an injunctive order, that shifted the timing of when the Board would set base terms—administratively defined terms marking the minimum period of incarceration that an indeterminately sentenced life inmate could be required to serve. In 2015, the Legislature adopted Senate Bill 230 and overhauled the State's parole system, repealing the Board's term-setting function and replacing it with a system under which minimum terms are set by statute. Those legislative reforms fundamentally altered the legal landscape underlying the Stipulated Order and deprived base terms of any function or point under current law.

Amici curiae the USC Gould School of Law Post-Conviction Justice Project and Professor Rebecca Brown (together Post-Conviction Project) and inmates William Vogel and Aubrey Grant present a variety of arguments in support of their view that, as a matter of either California statute or constitutional mandate, the Board is required to fix maximum terms for indeterminately sentenced life offenders. These arguments have little relevance to the central issues in this case, and in any event lack merit.

## ARGUMENT

The Post-Conviction Project broadly criticizes the current parole system and urges the Court to order the Board to fix a "primary term," a maximum term-of-years sentence, for every offender serving an indeterminate life sentence. (Post-Conviction Project Br. at pp. 11-12.) But amicus does not contend that the result sought by Roy Butler in this case—continued enforcement of the Board's obligation under the Stipulated Order to set base terms as defined in current Board regulations—would accomplish that goal. Rather, it acknowledges that, as the Board has explained, a base term as prescribed in the Board's regulations represents a

minimum term—not a constitutional maximum. (*Id.* at p. 22 [base terms "serve[] no constitutional purpose"]; see also *id.* at pp. 11, 15, 21, 38 [base terms reflect minimum terms].) Accordingly, even if the Post-Conviction Project were correct that the Board is required to set a maximum term of years, less than life, for every indeterminate prisoner, that would provide no support for continued enforcement of the Stipulated Order.

In any event, the Post-Conviction Project is wrong in claiming that either the constitutional proscription against excessive sentences or the Determinate Sentencing Law requires the Board to fix an actual maximum term of years for indeterminately sentenced life inmates. As explained in the Board's prior briefing, both this Court's decision in *In re Dannenberg* (2005) 34 Cal.4th 1061 and case law interpreting the state and federal Constitutions definitively reject any notion that the Board is required to fix maximum terms of less than life for the relatively small number of serious offenses for which indeterminate life sentences are provided under current law. (Opening Br. at pp. 26-28; Reply Br. at pp. 14-16.)

The Post-Conviction Project is likewise incorrect in arguing that, in enacting the DSL in 1976, the Legislature intended for the Board to continue fixing maximum terms for inmates who receive indeterminate life sentences—as the Board had been doing under the prior Indeterminate Sentencing Law in accordance with this Court's decision in *In re Rodriguez* (1975) 14 Cal.3d 639. (See Post-Conviction Project Br. at pp. 31-39.) When the Legislature established the determinate-sentencing scheme, it repealed the provision of the ISL (Penal Code section 3020) that authorized the Board to fix inmates' maximum terms. (See former Pen. Code, § 3020, added by Stats. 1941, ch. 106, § 15, p. 1110 and repealed by Stats. 1977, ch. 165, § 43, p. 666, eff. June 29, 1977; *Dannenberg*, *supra*, 34 Cal.4th at p. 1090 [parole authority's prior responsibility under the ISL to fix maximum terms "derived from former section 3020," discussing *Rodriguez*,

*supra*, at pp. 646-653]; see also Post-Conviction Project Br. at p. 23 [recognizing section 3020 as authorizing the Board to fix terms under the ISL].) In place of those provisions, the Legislature provided in section 3041 that the Board was required to deny parole to any inmate who continued to pose an unreasonable risk of danger—even if he had served an administratively set term of incarceration. (See former Pen. Code, § 3041, subd. (b).) As this Court explained in *Dannenberg*, former section 3041 did not require the Board to set a release date for an indeterminate offender if it concluded, based on reliable evidence, that the inmate remained a danger to the public. (*Supra*, 34 Cal.4th at p. 1084.)

Disputing this controlling interpretation, the Post-Conviction Project argues that this Court in *Dannenberg* was misled or misconstrued the parole statutes. (Post-Conviction Project Br. at pp. 39-42.) There is no basis for this claim. The argument rests on fragments from various legislative history documents, while ignoring the wide range of statutory-interpretation sources on which the Court relied. (See *Dannenberg*, *supra*, 34 Cal.4th at pp. 1080-1081 [prior judicial interpretation of statute], 1082-1084, 1087 [statutory text], 1084-1086 [statutory context], 1091-1093 [legislative acquiescence in Board's longstanding interpretation of statute], 1093-1094 [public policy implications].)

The legislative history documents on which the Post-Conviction Project relies, moreover, do not support its contention that the Legislature intended for "primary term" fixing, as previously required under *Rodriguez*, to continue for inmates who would receive indeterminate life terms after the DSL's passage. To begin with, the Enrolled Bill Report cited by amicus recognized that under the DSL the "[p]resent term fixing and parole boards [were] abolished and a new board created." (Amicus Appendix, Ex. C at p. 1.) The references to *Rodriguez* that amicus cites (Post-Conviction Project Br. at p. 32) discuss the retroactive application of the DSL to

inmates who would have received determinate sentences had the DSL been in effect at the time of their commitment offenses. (See Amicus Appendix, Ex D at pp. 8-9; Ex. F at p. 2; Ex. G at 2.) And the cited excerpt of an August 1976 letter from Senator Nejedly to which amicus refers stresses that the DSL was "*not* directed at providing an 'early parole' for 'convicted murderers serving a life term.'" (Amicus Appendix, Ex. D at p. 7 [discussing parole release dates and not "primary terms," and citing "recent court decisions and Adult Authority policy" but not specifying which decisions or policy].)

Further, even if the Post-Conviction Project were correct that the DSL as originally adopted in 1976 required the Board to set maximum terms, that would not affect the Board's entitlement to modification of the Stipulated Order. Amicus does not dispute that the enactment of SB 230 fundamentally revised the state parole system. As the Board has previously explained, SB 230 repealed the Board's term-setting function and replaced it with a system in which indeterminately sentenced life inmates are released once they are found suitable and have served a statutorily determined minimum term. (See Opening Br. at p. 9.) Accordingly, modification of the Stipulated Order is warranted whether or not the Board was required to set maximum terms for life inmates between 1977 and 2016.

Amici Vogel and Grant invoke a different statutory source for a claimed duty of the Board to set maximum terms—Penal Code section 1170.2, subdivision (h)—but that provision too is inapplicable. (See Vogel & Grant Br. at pp. 5-6, 21.) Section 1170.2 required the parole authority, as a transitional measure, to set terms for inmates who committed felonies before the DSL became effective, and who would have been sentenced to a determinate term under the DSL had they committed their offenses after the DSL's effective date. (Pen. Code, § 1170.2, subds. (a),

(b).) By its terms, section 1170.2, including its subdivision (h), does not apply to inmates sentenced to indeterminate life terms under the DSL. (Pen. Code, § 1170.2, subd. (h) ["[i]n fixing a term *under this section*," italics added].)[1]

Finally, the Post-Conviction Project's general attacks on the Board's implementation of the parole system (Post-Conviction Project Br. at pp. 14-18) are not well taken. Under the current parole scheme, applicable statutes (not Board practice, as amicus wrongly suggests) prescribe life as the maximum term for a defined set of serious and violent offenses. (See Opening Br. at p. 3.) Following SB 230, a significant reform of the State's criminal justice system, each life inmate has an expectation that he will be granted parole after serving a statutorily defined minimum sentence unless it is determined, based on relevant and reliable evidence and subject to judicial review, that he continues to pose an unreasonable risk of danger to the public. At the same time, contrary to amicus's claim, the system accounts for distinctions among inmates based on the seriousness of their commitment offenses by, among other things, making inmates sentenced for crimes with shorter minimum sentences eligible for possible release earlier than those with longer minimum sentences. (Pen. Code, § 3041, subd. (a)(2); see also Pen. Code, §§ 3046, subd. (c), 3051, subd. (b)(2)-(3) [authorizing shorter minimum sentences for some offenders who committed their crimes as youth offenders].) And as this Court recognized in

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[1] Vogel and Grant also seek relief different than that at issue in the Board's petition. They agree with the Board that the Court of Appeal's order should be reversed, but then request that the Stipulated Order be modified to enforce section 1170.2, subdivision (h). (Vogel & Grant Br. at p. 21.) In granting permission for Vogel and Grant to file their amicus brief, the Court clarified that doing so did not expand the scope of issues under review. (Order Granting Leave to File Amicus Brief, *In re Butler*, No. S237014 (May 10, 2017).)

*Dannenberg*, any inmate who believes that his continued confinement is unconstitutional may file a habeas petition seeking release. (*Supra*, 34 Cal.4th at pp. 1098-1099.)

## CONCLUSION

The Court of Appeal's refusal to modify the Stipulated Order should be reversed.

Dated: June 15, 2017

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO AMICUS BRIEFS uses a 13-point Times New Roman font and contains 1,615 words, as counted b the Microsoft Word word-processing program, excluding the parts of the brief excluded by California Rule of Court, rule 8.520(c)(3).

Dated: June 15, 2017

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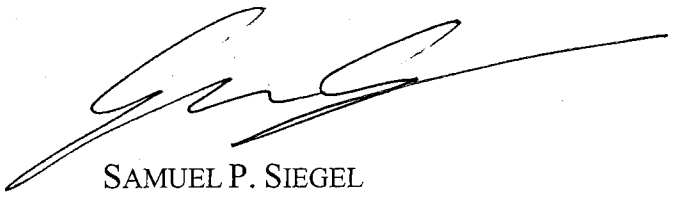

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## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Butler**
No.: **S237014**

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 June 15, 2017, I served the attached **ANSWER TO AMICUS BRIEFS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at 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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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 June 15, 2017, at San Francisco, California.

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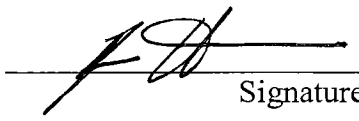

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