

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re ROY BUTLER,  
on Habeas Corpus.

No. S237014

SUPREME COURT  
**FILED**

JUN 29 2017

Jorge Navarrete Clerk

Deputy

First Appellate District, Division Two, Case No. A139411

Alameda County Superior Court, Case No. 91694B

**FILED WITH PERMISSION**

APPLICATION FOR PERMISSION TO FILE  
AMICUS CURIAE MOTION FOR JUDICIAL NOTICE

AMICUS CURIAE MOTION FOR JUDICIAL NOTICE

California Evidence Code, section 459  
California Rules of Court  
Rule 8.50, 8.54, 8.520(g), and 8.252(a)

William Vogel P88353  
and  
Aubrey Grant B86403  
Correctional Training Facility  
P.O. Box 705  
Soledad, CA 93960

APPLICATION FOR PERMISSION TO FILE  
AMICUS CURIAE MOTION FOR JUDICIAL NOTICE

To the Honorable Chief Justice of California:

Application is hereby made by amici curiae Aubrey Grant and William Vogel in support of Roy Butler for permission to file the attached motion for judicial notice of subdivision (h) as added to Penal Code section 1170.2 by Senate Bill 709 (Stats. 1978, chap. 579).

Subdivision (h) provides the duty and authority for the Board of Parole Hearings to fix a determinate term given an indeterminate sentence for a crime committed on or after January 1, 1979. Neither party nor any court has recognized this crucial element of the determinate sentencing law. But these amici curiae have brought it to the attention of this Court as the only issue that has merit in this review: their brief and supplemental brief show that this is a public law which is jurisdictional and must be enforced.

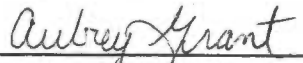
The attached motion is supported by points and authorities allowing amicus curiae to raise jurisdictional questions and bring it to the Court's attention by way of a motion.

Good cause appearing, this application should be granted and the motion for judicial notice filed.

Dated: 6/19/2017

Respectfully submitted,

  
\_\_\_\_\_  
William Vogel P88353

  
\_\_\_\_\_  
Aubrey Grant B86403

AMICUS CURIAE MOTION FOR JUDICIAL NOTICE


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


Pursuant to California Evidence Code, section 459, California  
Rules of Court, Rule 8.520(g) and 8.252(a), and decisional law of  
this State, amici curiae Aubrey Grant and William Vogel hereby move  
the Court for judicial notice of subdivision (h) of Penal Code sec-  
tion 1170.2 as added by Senate Bill 709 (Stats. 1978, chap. 579) in  
In re Roy Butler, No. S237014.

Subdivision (h) is the authority for the Board of Parole Hearings  
to fix a term of imprisonment pursuant to the determinate sentencing  
law. It is jurisdictional and must be enforced being a public statu-  
tory law. The statute underlies the relief sought by Roy Butler whom  
we support but is not recognized or enforced by the parties or the  
settlement order being reviewed. This motion is based upon the attach-  
ed Memorandum of Points and Authorities.

Dated: 6/19/2017

Respectfully submitted,

  
\_\_\_\_\_  
William Vogel P88353

  
\_\_\_\_\_  
Aubrey Grant B86403

and supplemental brief in support of Roy Butler. Subdivision (h) presents a jurisdictional question that may otherwise elude resolution or enforcement. (E.L. White v. Huntington Beach (1978) 21 Cal. 3d 497, 510-511 [amicus curiae may present a new issue if "a question of jurisdictional dimension appears to be involved"].)

Pursuant to Rule 8.252(a)(2)(B) these amici curiae know that subdivision (h) was presented to the trial court in Butler's original habeas corpus petition but have no evidence that judicial notice was taken. (See Pratt v. Coast Trucking, Inc. (1964) 228 Cal.App. 2d 139, 144 [fact that record does not affirmatively show whether trial court took judicial notice in arriving at its decision "does not affect or impair our power to do so"]; Taliaferro v. County of Contra Costa (1960) 182 Cal.App. 2d 587, 592 [same].)

Subdivision (h) was also presented to the Court of Appeal in Butler's in pro per habeas corpus petition (see No. Al37273 docket at 01/30/2013) and in a filed letter requesting that the court take notice of subdivision (h) in another case. (See id. at 02/11/2013.) However, there is no evidence in the appellate court's record, stipulated settlement orders or opinion that subdivision (h) was noticed or enforced. Rather, after several attempts by William Vogel to file a declaration and supplement raising subdivision (h) and to vacate submission in March 2015 (see No. Al39411 docket from 03/05/2015) the court's order vacating submission of the cause cited "the novelty and complexity of the issues presented" and may have been related. (See id. at 04/23/2015.)

Because the lower courts were required to take notice of subdivision (h) which forms the basis of Grant and Vogel's amicus curiae briefs and argument they may now motion for its notice and it may be considered as part of the record. (Pratt v. Coast Trucking, supra, 228 Cal.App. 2d at 143-149; see also In re Frowenfeld (1935) 3 Cal. App. 2d 576, 579 [amicus curiae permitted to file motion as a convenient way to bring issue to court's attention that it could recognize

# EXHIBIT

# A

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1978

PAMPHLET NO. 5

Chapters

482-780

Legislation approved  
and filed  
to September 8, 1978

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Advance  
Legislative  
Service

*Immediate Interest chapters, this issue:*

- Bulk Transfers, ch 490
- Actions in Restraint of Trade, ch 536
- Mortgage Guarantee Insurance, ch 536
- Controlled Escrows, ch 552
- Community Crime Resistance, ch 578
- Imprisonment Sentences, ch 579
- Burglary Prevention, ch 580
- Parole, ch 582
- Reconsideration of Court Orders, ch 631
- Corporate Securities Liability, ch 663
- State Employer-Employee Relations, ch 776

NON-PROFIT CORPORATION LAW  
Chapter 567, Operative  
January 1, 1980  
See also: Amendments by Chapter 1305

For quick review of other 1978 legislation, scan the cumulative index in this issue.

Laws included in this pamphlet, unless enacted as urgency measures will not become effective until January 1, 1979. (Const Art IV s 8) Urgency measures are identified in Table 1 by (\*).

## DEERING'S CALIFORNIA CODES

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the last 10 years has been at a rate of 93 percent (93%) This represents an average increase of almost 10 percent (10%) per year. The types of crime resistance activities to be supported under this act have generally been demonstrated to have a substantial and rapid effect in reducing local crime incidence.

HISTORY: A.B. 2971, approved September 5, 1978, filed September 6, 1978.

An act to amend Sections 182, 190, 193, 204, 208, 211a, 213, 216, 217, 217.1, 219.1, 220, 246, 264, 264.1, 286, 288, 288a, 447a, 448a, 454, 459, 460, 461, 464, 653f, 664, 669, 1170, 1170.2, 3046, 4501, 4501.5, 4502, 4503, 4530, 4532, 4574, 12022.7, 12303.1, 12303.2, 12303.3, 12308, 12309, and 12312 of the Penal Code, relating to imprisonment.

LEGISLATIVE COUNSEL'S DIGEST

SB 709, Presley. Imprisonment: sentences. Existing law specifies for many public offenses that the term of imprisonment imposed by the trial court be selected from 1 of 3 prescribed terms for that offense. Presently, there are 4 such sets of 3 terms: 16 months, 2 or 3 years; 2, 3 or 4 years; 3, 4, or 5 years; and 5, 6, or 7 years. The bill would revise the punishment prescribed for a number of public offenses by substituting additional longer sets of terms. Existing law provides that assault with intent to commit specified felonies, including robbery, is punishable by imprisonment in the state prison for 2, 3, or 4 years and assault with intent to commit other felonies, except murder, is punishable by imprisonment in the state prison for 16 months, 2 or 3 years, or in the county jail not exceeding one year or by a fine not exceeding \$1,000, or by both. This bill would delete robbery from such specified felonies for which assault with the intent to commit is punishable by imprisonment in the state prison for 2, 3, or 4 years. Existing law makes solicitation to commit murder a crime punishable by imprisonment in the state prison for 16 months, or 2 or 3 years, or by imprisonment in the county jail, or by a fine, or both. This bill would make solicitation to commit murder punishable by imprisonment in the state prison for 2, 4, or 6 years. Existing law defines burglary of the first degree to include burglary of an inhabited dwelling house, trailer coach, or building committed in the nighttime.



If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term.

When they conspire to do an act described in subdivision 4 of this section, they shall be punishable by imprisonment in the state prison, or by imprisonment in the county jail for not more than one year, or by a fine not exceeding five thousand dollars (\$5,000), or both.

When they conspire to do any of the other acts described in this section, they shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison, or by a fine not exceeding five thousand dollars (\$5,000) or both.

All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done.

SEC. 2. Section 190 of the Penal Code is amended to read:

190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, seven, or 11 years.

SEC. 3. Section 193 of the Penal Code is amended to read:

193. (a) Voluntary manslaughter is punishable by imprisonment in the state prison for two, four, or six years.

(b) Involuntary manslaughter is punishable by imprisonment in the state prison for two, three, or four years.

(c) A violation of subsection 3 of Section 192 of this code is punishable as follows. In the case of a violation of subsection (a) of said subsection 3 the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison, and in such case the

jury may recommend by their verdict that the punishment shall be by imprisonment in the county jail in the case of a violation of subdivision (b) of said subsection 3, the punishment shall be by imprisonment in the county jail for not more than one year. In cases where, as authorized in this section, the jury recommends by their verdict that the punishment shall be by imprisonment in the county jail, the court shall not have authority to sentence the defendant to imprisonment in the state prison, but may nevertheless place the defendant on probation as provided in this code.

SEC. 4. Section 204 of the Penal Code is amended to read:

204. Mayhem is punishable by imprisonment in the state prison for two, four, or six years.

SEC. 5. Section 208 of the Penal Code is amended to read:

208. Kidnapping is punishable by imprisonment in the state prison for three, five, or seven years.

SEC. 6. Section 211a of the Penal Code is amended to read:

211a. The robbery of any person who is performing his duties as operator of any motor vehicle, streetcar, or trackless trolley used for the transportation of persons for hire, is punishable by imprisonment in the state prison for three, four, or six years.

SEC. 7. Section 213 of the Penal Code is amended to read:

213. Except as provided in Section 211a, robbery is punishable by imprisonment in the state prison for two, three, or five years.

Notwithstanding Section 664, attempted robbery is punishable by imprisonment in the state prison.

SEC. 8. Section 216 of the Penal Code is amended to read:

216. Every person who, with intent to kill, administers, or causes or procures to be administered, to another any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the state prison for two, four, or six years.



(2) Any person over the age of 21 years who participates in an act of sodomy with another person who is under 16 years of age shall be guilty of a felony.  
(c) Any person who participates in an act of sodomy with another person who is under 14 years of age and more than 10 years younger than he, or who has compelled the participation of another person in an act of sodomy by force, violence, duress, menace, or threat of great bodily harm, shall be punished by imprisonment in the state prison for three, six, or eight years.

(d) Any person who, while voluntarily acting in concert with another person, either personally or by aiding and abetting such other person, commits an act of sodomy by force or violence and against the will of the victim shall be punished by imprisonment in the state prison for five, seven, or nine years.

(e) Any person who participates in an act of sodomy with any person of any age while confined in any state prison, as defined in Section 4504, or in any local detention facility as defined in Section 6031.4, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.  
(f) Any person who commits an act of sodomy, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

SEC 17. Section 288 of the Penal Code is amended to read:  
288. Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of such person or of such child shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, five, or seven years.

SEC 18. Section 288a of the Penal Code is amended to read:  
288a. (a) Oral copulation is the act of copulating the

mouth of one person with the sexual organ of another person.

(b) (1) Any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(2) Any person over the age of 21 years who participates in an act of oral copulation with another person who is under 16 years of age shall be guilty of a felony.

(c) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he, or who has compelled the participation of another person in an act of oral copulation by force, violence, duress, menace, or threat of great bodily harm, shall be punished by imprisonment in the state prison for three, six, or eight years.

(d) Any person who, while voluntarily acting in concert with another person, either personally or by aiding and abetting such other person, commits an act of oral copulation by force or violence and against the will of the victim shall be punished by imprisonment in the state prison for five, seven, or nine years.

(e) Any person who participates in an act of oral copulation while confined in any state prison, as defined in Section 4504 or in any local detention facility as defined in Section 6031.4, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(f) Any person who commits an act of oral copulation, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act, shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

SEC 19. Section 447a of the Penal Code is amended to read:

447a. Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids,

SEC. 26. Section 653f of the Penal Code is amended to read:

653f. (a) Every person who solicits another to offer or accept or join in the offer, or acceptance of a bribe, or to commit or join in the commission of robbery, burglary, grand theft, receiving stolen property, extortion, rape by force and violence, perjury, subornation of perjury, forgery, kidnapping, arson or assault with a deadly weapon or instrument or by means of force likely to produce great bodily injury, is punishable by imprisonment in the county jail not more than one year or in the state prison, or by fine of not more than five thousand dollars (\$5,000), or the amount which could have been assessed for commission of the offense itself, whichever is greater, or by both such fine and imprisonment.

(b) Every person who solicits another to commit or join in the commission of murder, is punishable by imprisonment in the state prison for two, four, or six years.

(c) An offense charged in violation of subdivision (a) or (b) must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances.

SEC. 27. Section 664 of the Penal Code is amended to read:

664. Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows:

1. If the offense so attempted is punishable by imprisonment in the state prison, the person guilty of such attempt is punishable by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense, so attempted, provided, however, that if the crime attempted is one in which the maximum sentence is life imprisonment or death, the person guilty of such attempt shall be punishable by imprisonment in the state prison for a term of five, seven, or nine years.

2. If the offense so attempted is punishable by

imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in a county jail for a term not exceeding one-half the term of imprisonment prescribed upon a conviction of the offense so attempted.

3. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

SEC. 28. Section 669 of the Penal Code is amended to read:

669. When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently or consecutively; life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another or with any other term of imprisonment for a felony conviction. Whenever a person is committed to prison on a life sentence which is ordered to run consecutive to any determinate term of imprisonment imposed pursuant to Sections 1170, 1170.1, 667.5, 12022, 12022.5, 12022.6, and 12022.7, the determinate term of imprisonment shall be served first and no part thereof shall be credited toward the person's eligibility for parole as calculated pursuant to Section 3046.

In the event that the court at the time of pronouncing the second or other judgment upon such person had no knowledge of a prior existing judgment or judgments, or having knowledge, fails to determine how the terms of imprisonment shall run in relation to each other, then, upon such failure so to determine, or upon such prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of 60 days from, and after, the actual commencement of

The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under Section 667.5, 1170.1, 12022.5, 12022.6, or 12022.7. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(c) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he may be on parole for a period as provided in Section 3000.

(d) When a defendant, subject to this section, or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the Director of Corrections, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Director of Corrections or the Community Release Board, recall the sentence and commitment previously ordered and resent the defendant in the same manner as if he had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The sentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

(e) Any sentence imposed under this article shall be subject to the provisions of Sections 3000 and 3057 and any other applicable provisions of law.

(f) In all cases the Community Release Board shall, not later than one year after the commencement of the term of imprisonment, review the sentence and shall, by motion, recommend that the court recall the sentence and commitment previously ordered and resent the defendant in the same manner as if he had not been previously sentenced, if the board determines the sentence is disparate. The review under this section shall concern the decision to deny probation and the sentencing decisions enumerated in subdivisions (b), (c),

(d), and (e) of Section 1170.3 and apply the sentencing rules of the Judicial Council and the information regarding the sentences in this state of other persons convicted of similar crimes so as to eliminate disparity of sentences and to promote uniformity of sentencing.

SEC. 30. Section 1170.2 of the Penal Code is amended to read:

1170.2. (a) In the case of any inmate who committed a felony prior to July 1, 1977, who would have been sentenced under Section 1170 if he had committed it after July 1, 1977, the Community Release Board shall determine what the length of time of imprisonment would have been under Section 1170 without consideration of good-time credit and utilizing the middle term of the offense bearing the longest term of imprisonment of which the prisoner was convicted increased by any enhancements justified by matters found to be true and which were imposed by the court at the time of sentencing for such felony. Such matters include being armed with a deadly or dangerous weapon as specified in Section 211a, 460, 3024, or 12022 prior to July 1, 1977, which may result in a one-year enhancement pursuant to the provisions of Section 12022, using a firearm as specified in Section 12022.5 prior to July 1, 1977, which may result in a two-year enhancement pursuant to the provisions of Section 12022.5; infliction of great bodily injury as specified in Section 213, 264, or 461 prior to July 1, 1977, which may result in a three-year enhancement pursuant to the provisions of Section 12022.7; any prior felony conviction as specified in any statute prior to July 1, 1977, which prior felony conviction is the equivalent of a prior prison term as defined in Section 667.5, which may result in the appropriate enhancement pursuant to the provisions of Section 667.5; and any consecutive sentence.

(b) If the calculation required under subdivision (a) is less than the time to be served prior to a release date set prior to July 1, 1977, or if a release date had not been set, the Community Release Board shall establish the prisoner's parole date, subject to subdivision (d), on the date calculated under subdivision (a) unless at least two of the members of the Community Release Board after



July 1, 1977, the Community Release Board shall determine what the length of time of imprisonment would have been under Section 1170 without consideration of good-time credit and utilizing the middle term of the offense, bearing the longest term of imprisonment of which the prisoner was convicted increased by any enhancements justified by matters found to be true and which were imposed by the court at the time of sentencing for such felony. Such matters include: being armed with a deadly or dangerous weapon as specified in Section 211a, 460, 3024, or 12022 prior to July 1, 1977, which may result in a one-year enhancement pursuant to the provisions of Section 12022; using a firearm as specified in Section 12022.5 prior to July 1, 1977, which may result in a two-year enhancement pursuant to the provisions of Section 12022.5; infliction of great bodily injury as specified in Section 213, 264, or 461 prior to July 1, 1977, which may result in a three-year enhancement pursuant to the provisions of Section 12022.7; any prior felony conviction as specified in any statute prior to July 1, 1977, which prior felony conviction is the equivalent of a prior prison term as defined in Section 667.5, which may result in the appropriate enhancement pursuant to the provisions of Section 667.5; and any consecutive sentence.

(b) If the calculation required under subdivision (a) is less than the time to be served prior to a release date set prior to July 1, 1977, or if a release date had not been set, the Community Release Board shall establish the prisoner's parole date, subject to subdivision (d), on the date calculated under subdivision (a) unless at least two of the members of the Community Release Board after reviewing the prisoner's file, determine that due to the number of crimes of which the prisoner was convicted, or due to the number of prior convictions suffered by the prisoner, or due to the fact that the prisoner was armed with a deadly weapon when the crime was committed or used a deadly weapon during the commission of the crime, or inflicted or attempted to inflict great bodily injury on the victim of the crime, the prisoner should serve a term longer than that calculated in subdivision (a); in which event, the prisoner shall be entitled to a

hearing before a panel consisting of at least two members of the Community Release Board as provided for in Section 3041.5. The Community Release Board shall notify each prisoner who is scheduled for such a hearing within 90 days of July 1, 1977, or within 90 days of the date the prisoner is received by or returned to the custody of the Department of Corrections, whichever is later. The hearing shall be held before October 1, 1978, or within 120 days of receipt of the prisoner, whichever is later. It is the intent of the Legislature that the hearings provided for in this subdivision shall be accomplished in the most expeditious manner possible. At such hearing the prisoner shall be entitled to be represented by legal counsel, a release date shall be set, and the prisoner shall be informed in writing of the extraordinary factors specifically considered determinative and on what basis the release date has been calculated. In fixing a term under this section the board shall be guided by, but not limited to, the term which reasonably could be imposed on a person who committed a similar offense under similar circumstances on or after July 1, 1977, and further, the board shall be guided by the following finding and declaration hereby made by the Legislature: that the necessity to protect the public from repetition of extraordinary crimes of violence against the person is the paramount consideration.

(c) Nothing in this section shall be deemed to keep an inmate in the custody of the Department of Corrections for a period of time longer than he would have been kept in its custody under the provisions of law applicable to him prior to July 1, 1977. Nothing in this section shall be deemed to require the release of an inmate sentenced to consecutive sentences under the provisions of law applicable to him prior to July 1, 1977, earlier than if he had been sentenced to concurrent sentences.

(d) In the case of any prisoner who committed a felony prior to July 1, 1977, who would have been sentenced under Section 1170 if the felony was committed on or after July 1, 1977, the good behavior and participation provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply

be imprisoned in the state prison for three, five, or seven years to be served consecutively.

SEC. 37. Section 4530 of the Penal Code is amended to read:

4530. (a) Every prisoner confined in a state prison who, by force or violence, escapes or attempts to escape therefrom and every prisoner committed to a state prison who, by force or violence, escapes or attempts to escape while being conveyed to or from such prison or any other state prison, or any prison road camp, prison forestry camp, or other prison camp or prison farm or any other place while under the custody of prison officials, officers or employees; or who, by force or violence, escapes or attempts to escape from any prison road camp, prison forestry camp, or other prison camp or prison farm or other place while under the custody of prison officials, officers or employees; or who, by force or violence, escapes or attempts to escape while at work outside or away from prison under custody of prison officials, officers, or employees; is punishable by imprisonment in a state prison for a term of two, four, or six years. The second term of imprisonment of a person convicted under this subdivision shall commence from the time he would otherwise have been discharged from said prison. No additional probation report shall be required with respect to such offense.

(b) Every prisoner who commits an escape or attempts an escape as described in subdivision (a), without force or violence, is punishable by imprisonment in the state prison for 16 months or two or three years to be served consecutively. No additional probation report shall be required with respect to such offense.

(c) The willful failure of a prisoner who is employed or continuing his education, or who is authorized to secure employment or education, or who is temporarily released pursuant to the provisions of Section 2690, 2910, or 6254 of this code, or Section 3306 of the Welfare and Institutions Code, to return to the place of confinement not later than the expiration of a period during which he is authorized to be away from such place of confinement, is an escape from such place of confinement punishable

as provided in this section. A conviction of violation of this subdivision, not involving force or violence, shall not be charged as a prior felony conviction in any subsequent prosecution for a public offense.

SEC. 38. Section 4532 of the Penal Code is amended to read:

4532. (a) Every prisoner arrested and booked for, charged with, or convicted of a misdemeanor, and every person committed under the terms of Section 5654, 5656, or 5677 of the Welfare and Institutions Code as an inebriate, who is confined in any county or city jail or prison or industrial farm or industrial road camp or who is engaged on any county road or other county work or who is in the lawful custody of any officer or person, or who is employed or continuing in his regular educational program or authorized to secure employment, or education away from the place of confinement, pursuant to the Work-Furlough Rehabilitation Law (Section 1208), or who is authorized for temporary release for family emergencies or for purposes preparatory to his return to the community pursuant to Section 4018.6, and who thereafter, escapes or attempts to escape from such county or city jail, prison, industrial farm or industrial road camp or from the custody of the officer or person in charge of him while engaged in or going to or returning from such county work or from the custody of any officer or person, in whose lawful custody he is, is guilty of a felony and, if such escape or attempt to escape was not by force or violence, is punishable by imprisonment in the state prison for not exceeding one year and one day to be served consecutively, regardless of any prior convictions, or in the county jail not exceeding one year; provided, however, that if such escape or attempt to escape is by force or violence, such person is guilty of a felony and is punishable by imprisonment in the state prison for two, four, or six years to be served consecutively, or in the county jail not exceeding one year; provided, that when said second term of imprisonment is to be served in the county jail it shall commence from the time such prisoner would otherwise have been discharged from said jail.

SEC. 45. Section 12309 of the Penal Code is amended to read:

12309. Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes bodily injury to any person is guilty of a felony, and shall be punished by imprisonment in the state prison for a period of five, seven, or nine years.

SEC. 46. Section 12312 of the Penal Code is amended to read:

12312. Every person who possesses any substance, material, or any combination of substances or materials, with the intent to make any destructive device or any explosive without first obtaining a valid permit to make such destructive device or explosive, is guilty of a felony, and is punishable by imprisonment in the state prison for two, three, or four years.

SEC. 47. It is the intent of the Legislature, if this bill and Assembly Bill No. 2632 are both chaptered and become effective on or before January 1, 1979, both bills amend Section 1170.2 of the Penal Code, and this bill is chaptered after Assembly Bill No. 2632, that Section 1170.2 of the Penal Code, as amended by Section 1 of Assembly Bill No. 2632, be further amended on the effective date of this act in the form set forth in Section 31 of this act to incorporate the changes in Section 1170.2 proposed by this bill. Therefore, if this bill and Assembly Bill No. 2632 are both chaptered and become effective on or before January 1, 1979, and Assembly Bill No. 2632 is chaptered before this bill and amends Section 1170.2, Section 31 of this act shall become operative on the effective date of this act and Section 30 of this act shall not become operative.

SEC. 48. This act shall apply prospectively only for crimes committed on or after January 1, 1979.

SEC. 49. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

12303.1. Every person who willfully does any of the following is guilty of a felony and is punishable by imprisonment in the state prison for two, four, or six years:

- (a) Carries any explosive or destructive device on any vessel, aircraft, car, or other vehicle that transports passengers for hire;
- (b) Places or carries any explosive or destructive device, while on board any such vessel, aircraft, car or other vehicle, in any hand baggage, toll, or other container;
- (c) Places any explosive or destructive device in any baggage which is later checked with any common carrier.

SEC. 42. Section 12303.2 of the Penal Code is amended to read:

12303.2. Every person who recklessly or maliciously has in his possession any destructive device or any explosive on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in or near any aircraft, railway passenger train, car, cable road or cable car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings is guilty of a felony, and shall be punishable by imprisonment in the state prison for a period of two, four or six years.

SEC. 43. Section 12303.3 of the Penal Code is amended to read:

12303.3. Every person who possesses, explodes, ignites, or attempts to explode or ignite any destructive device or any explosive with intent to injure, intimidate or terrify any person, or with intent to wrongfully injure or destroy any property, is guilty of a felony, and shall be punished by imprisonment in the state prison for a period of three, five, or seven years.

SEC. 44. Section 12308 of the Penal Code is amended to read:

12308. Every person who explodes, ignites, or attempts to explode or ignite any destructive device or any explosive with intent to commit murder is guilty of a felony, and shall be punished by imprisonment in the state prison for a period of five, seven, or nine years.



Pen C § 1170. Substituted (1) "two, three, or four years; two, three, or five years; three, four, or five years; two, four, or six years; three, four, or six years; three, five, or seven years; three, six, or eight years; five, seven, or nine years; five, seven, or eleven years" for "two, three or four years; three, four or five years; five, six or seven years" in the first sentence of subd (a) (2); and (2) "fact of any enhancement upon which sentence is imposed" for "same fact used to enhance the sentence" in the fourth sentence of subd (b).

Pen C § 1170.2. (1) Deleted the former sixth sentence of subd (b) which read: "The Attorney General or the district attorney of the county from which the prisoner was committed shall be entitled to be present at and to participate in such hearings." and (2) added subd (h).

Pen C § 3046. Added the second sentence.

Pen C § 4501. Substituted "four, or six years" for "three or four years".

Pen C § 4501.5. Substituted "two, three, or four years" for "16 months, or two or three years".

Pen C § 4502. Substituted "two, three, or four years" for "16 months, or two or three years".

Pen C § 4503. Substituted "five, or seven years" for "four or five years".

Pen C § 4530. Substituted "four, or six years" for "three or four years" at the end of the first sentence of subd (a).

Pen C § 454. (1) Substituted "or a state of emergency" for "a state of disaster" or "a state of extreme emergency" after "insurrection"; (2) deleted "1575 or 1580, respectively," after "Section 143"; (3) added "or pursuant to Section 8625 of the Government Code"; and (4) substituted "five, or seven years" for "four or five years" at the end of the section.

Pen C § 459. Substituted "chapter" for "section" in the last sentence.

Pen C § 460. Amended subd 1 by (1) substituting "or" for a comma after "dwelling house"; and (2) adding "the inhabited portion of any other".

Pen C § 461. Substituted "four, or six years" for "three, or four years".

Pen C § 464. Substituted "five, or seven years" for "four or five years" at the end of the section.

Pen C § 653f. (1) Designated the former first sentence to be subd (a); (2) deleted "murder;" before "robbery, burglary" in subd (a); (3) added subd (b); (4) designated the former second sentence to be subd (c); and (5) substituted "An offense charged in violation of subdivision (a) or (b) for "Such offense" at the beginning of subd (c).

Pen C § 664. Substituted "seven, or nine years" for "six or seven years" at the end of subd 1.

Pen C § 669. (1) Substituted the first sentence for the former first sentence; (2) designated the former second and third sentences to be the second paragraph; and (3) substituted "Department of Corrections" for "State Board of Prison Directors" in the last paragraph.

PROOF OF SERVICE

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

APPLICATION FOR PERMISSION TO FILE  
AMICUS CURIAE MOTION FOR JUDICIAL NOTICE  
and  
AMICUS CURIAE MOTION FOR JUDICIAL NOTICE

in No. S237014 to the parties listed below on 6/19/2017, 2017 by placing said documents in a postage-paid envelope and handing it to a Correctional Officer to be sent via United States mail.


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

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

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

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

Date: 6/19/2017

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

Chief Justice of California  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102

June 19, 2017

Notice of Amicus Curiae Request for Oral Argument  
In re Roy Butler, No. S237014

To the Honorable Chief Justice:

Amici curiae Aubrey Grant and William Vogel notify the Court of their attempt to participate in oral argument in the above case by making request to Butler's counsel per Rule 8.524(g). We can only speculate as to their assent.

This would be a momentous occasion for us whether by telephone or in person, even as the logistics of our in-custody status is not lost on us and would require this Court's order to facilitate.

We therefore thank the Court in advance for any accommodation it may find suitable for this request.

Respectfully submitted,



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