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In the Supreme Court of the State of California

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

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Court of Appeal's refusal to modify the stipulated settlement order despite substantial post-settlement changes in the relevant law presents an important legal issue with significant ramifications for the operation of the State's parole system. Compelling the Board to promulgate dueling regulatory schemes and continue setting now-meaningless base terms would waste state resources, sow confusion, and undermine the Board's public safety role in determining parole suitability.

Roy Butler's answer does not dispute that the Legislature fundamentally revised the parole system after the settlement order was entered. Nor does he address, much less contest, this Court's holding in *In re Dannenberg* (2005) 34 Cal.4th 1061 that constitutional proportionality does not require the Board to calculate an inmate's base term before determining suitability. In fact, Butler does not contest that the Court of Appeal's July 27, 2016 order—which requires the Board to conduct a rudimentary evaluation of whether life-term inmates' sentences are constitutionally excessive—will alter the Board's suitability process and set the stage for future litigation based on the theory that serving a sentence past a base term is presumptively unconstitutional. These concerns demonstrate that this Court's intervention is warranted.

Butler argues that the Court of Appeal correctly rejected the Board's modification request because the Legislature's recent parole revisions did not expressly forbid the Board to set base terms. This observation ignores the Legislature's decision to eliminate the Board's term-setting function and the real-world incompatibility between the old and new regulatory schemes. It is also irrelevant that the constitutional proscription against excessive punishment has not been amended since the stipulated order was entered, as Butler notes. The Board's authority to set base terms at the time

of the settlement derived from former Penal Code section 3041, not the state or federal Constitution.

Contrary to Butler's view, moreover, nothing about this case's procedural posture poses any barrier to this Court's review. The Board filed its motion to modify four weeks after Senate Bill 230 took effect on January 1, 2016. The Board was not obligated to seek this Court's intervention earlier, when the Court of Appeal entered the stipulated order in 2014 or ruled that Butler's counsel was entitled to collect attorneys' fees in 2015. Both of those orders were issued before SB 230 was enacted, and neither threatened the kind of disruption to the operation of the State's parole system that the Board now faces with the current order. It was only after the Legislature's substantial revision to the parole system that "the law upon which the injunction . . . was granted ha[d] changed, . . . [and] the ends of justice would be served by the modification or dissolution of the injunction[.]" (Code Civ. Proc., § 533.) The Court of Appeal's refusal to modify the stipulated order after SB 230's adoption, based on the unsupported premise that base-term calculations are mandated by the Constitution, warrants this Court's review.

ARGUMENT

I. THE STIPULATED SETTLEMENT ORDER AND CURRENT PENAL SCHEME ARE IRRECONCILABLE.

As explained in the petition for review, the Court of Appeal's rejection of the Board's modification request requires the Board to act in ways that are inconsistent with the legislative overhaul of the State's parole system. By declining to relieve the Board of its obligations under the 2013 settlement to continue setting base terms and promulgate new base-term regulations, the Court of Appeal's order places the Board in the untenable situation of being judicially required to adopt and apply regulations

implementing a system of Board-established base terms that the Legislature has chosen to abandon. (Pet. for Review at 11-13.)

Butler contends that nothing in the revised statutory parole framework or the *Coleman/Plata* federal court order explicitly *prohibits* base-term calculations. (Answer at 7-9.) In essence, Butler argues that once the Legislature imposes a duty on a state agency, the agency's authority to carry out that duty remains despite its repeal unless the Legislature also enacts language that *affirmatively* prohibits what was previously granted and now repealed. There is no support for this in the law. (See, e.g., *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299-300 ["As we have explained, [a]dministrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void."], internal quotation and citation omitted.) And there can be no dispute that SB 230 eliminated the Board's term-setting function when it deleted the requirement that the Board set a "release date . . . in a manner that will provide uniform terms" (former Penal Code, § 3041, subd. (b)), and replaced it with the requirement that "[u]pon a grant of parole, the inmate shall be released" upon reaching his or her minimum eligible parole date. (Pen. Code, § 3041, subd. (a)(4).)

SB 230's legislative history also makes clear that in overhauling the parole system, the Legislature specifically rejected continued reliance on base terms. (See Pet. for Review at 11-13.) The Legislature did so to promote "truth in sentencing" and to avoid situations in which an inmate is found suitable for parole and still not released because of enhancements that can be added to the inmate's term. (Sen. Rules Comm., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 230 (2015-2016 Reg. Sess.) May 13, 2015, p. 3 [because of time added to terms "a person could be found suitable for parole and held in prison two, five, or even 10 or more years beyond that date"].) Yet under the stipulated settlement order, the

Board must continue to set these terms and adopt regulations grounded in this now-superseded parole scheme.

Butler additionally asserts the Board has no grounds to seek modification because his habeas petition "sought to vindicate" inmates' constitutional rights, and "[n]othing in the Federal and California Constitutions has changed since the Board stipulated to the Settlement Order." (Answer at 6-7.) This argument, however, is based on the false premise that, by agreeing to a stipulated settlement order addressing *when* the Board would make base-term calculations required under prior law, the Board also accepted the substantive arguments advanced in Butler's habeas corpus petition, including that the setting of base terms was constitutionally mandated. This is incorrect. The parties stipulated to the settlement order without a ruling by the Court of Appeal on the merits of the underlying habeas corpus petition. (See *Firefighters Local Union No. 1784 v. Stotts* (1984) 467 U.S. 561, 574 ["the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it or by what might have been written had the plaintiff established his factual claims and legal theories in litigation," internal quotations and citation omitted].) This argument also ignores the settlement's terms, which only prescribed the manner in which the Board would administer its statutory duties under Penal Code section 3041. (Pet. for Review, Ex. 2, Stipulated Settlement Order; see *infra*, fn. 1.)

Butler correctly notes that Code of Civil Procedure section 533 prescribes the standard governing a motion to modify a settlement order, but incorrectly describes that standard. (Answer at 1.) Under section 533, a party seeking to modify a settlement order need not show a change in law that "conflicts" with the order (Answer at 1), but rather that "the law upon which the injunction . . . was granted has changed, . . . [or] that the ends of justice would be served by the modification or dissolution of the

injunction[.]" This was the same standard the Board advanced in the court below. (See Resp't's Mot. to Modify Order Regarding Stipulated Settlement, A139411, Jan. 28, 2016, at 10, 15, 18.) As noted above, the settlement solely changed the timing of the Board's base-term calculations—calculations mandated by former Penal Code section 3041 that no longer exist under the current statutory scheme. There has thus been a material change in "the law upon which the injunction . . . was granted." (Code Civ. Proc., § 533.) Moreover, modification is not contingent on the new law being contrary to the settlement's terms. (Answer at 1; see *Union Interchange, Inc. v. Savage* (1959) 52 Cal.2d 601, 604 [modification is proper when "circumstances have so changed that an injunction is no longer necessary or desirable"].)

Nor does Butler cite any legal authority for his contention that when assessing whether modification is appropriate, a court is bound by the legal theory cited in the plaintiff's complaint. (Answer at 6-7.) He points to *System Federation* and *Welfare Rights*, two cases examined by the Board in its motion to modify, but he cites only those portions of the opinions discussing those cases' factual backgrounds. (Answer at 6, citing *System Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright* (1961) 364 U.S. 642, 643; *Welfare Rights v. Frank* (1994) 25 Cal.App.4th 415, 417.) Neither case holds that the parties are presumptively bound by the complaint or petition's allegations when agreeing to a settlement. (*Ibid.*; see also *Valdivia v. Schwarzenegger* (9th Cir. 2010) 599 F.3d 984, 994-995 [holding that because district court never explicitly found State's parole procedures violated prisoners' due process rights, as alleged in plaintiffs' complaint, district court erred in denying State's motion to modify injunction's terms to conform to newly enacted parole statutes], *Stotts, supra*, 467 U.S. at p. 574 [a consent decree is interpreted by its express terms, not by reference to plaintiff's legal theories].) And in any event, the

premise of Butler's underlying constitutional theory—that base terms derive from the Constitution, not the Legislature—is wrong. (*In re Dannenberg*, *supra*, 34 Cal.4th at p. 1078.)

Butler further contests that requiring the Board to continue setting base terms—apparently indefinitely—will waste public resources (Answer at 15), but his argument ignores the significant time and effort required to promulgate regulations, which would compel official actions by no fewer than four additional state agencies, including the Office of Administrative Law, the Department of Finance, the California Department of Corrections and Rehabilitation, and the Secretary of State. (See Pen. Code, § 5076.1, subd. (a); Gov. Code, §§ 11120-11121.1; 11122-11132; 11342.2; 11346, *et seq.*; 11346.8; 11346.9, *et seq.*) Butler claims, moreover, that continued setting of base terms will not lead to confusion among inmates, but represents (without record citation) that hundreds of inmates have contacted counsel inquiring about their base terms. (Answer at 15.) Such communications, if anything, underscore that the dueling regulatory regimes contemplated by the Court of Appeal's order—under which inmates receive a base-term calculation while Board parole decisions are made under a new statutory scheme—will only lead to greater misunderstandings among life inmates and the public.

Finally, Butler discounts the effect of the Court of Appeal's order, yet his answer contains several notable omissions. Butler does not discuss *In re Dannenberg*, *supra*, 34 Cal.4th 1061, or dispute that it is contrary to the Court of Appeal's order. (Answer at 5.) Butler does not attempt to explain, for example, how the Court of Appeal's assertion that *Dannenberg* "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," can be reconciled with this Court's explicit holding that the Board need not calculate a base term before

determining an inmate's parole suitability. (Pet. for Review, Ex. 1, Order at p. 8, citing *In re Dannenberg*, *supra*, 34 Cal.4th at pp. 1070, 1086, 1098; see Pet. for Review at 14.) Nor does Butler contest that the Court of Appeal's theory—that base terms indicate "the point at which a prison term becomes constitutionally excessive"—misinterprets decades of law establishing that courts, not administrative agencies, 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.) Nowhere does his answer dispute that the Court of Appeal's order, based on this theory, is likely to be misused to argue that serving a sentence past one's base term is presumptively unconstitutional, setting the stage for future litigation based on an unsupportable distortion of this Court's longstanding constitutional disproportionality jurisprudence. And Butler never explains how a rote calculation—that Butler argues takes fewer than five minutes (Answer at 15)—is expected to signal the presumptively constitutional maximum term.

As explained in the Board's petition, a base term has 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.) The Court of Appeal's radical elevation of a base term's significance—from a statutory guidepost for enforcing sentencing uniformity to the indicator of when a sentence becomes constitutionally excessive—distorts this Court's longstanding constitutional disproportionality jurisprudence and will lead to unnecessary confusion and disruption in parole litigation.

II. BUTLER'S PROCEDURAL OBJECTIONS TO THIS COURT'S REVIEW HAVE NO MERIT.

The Board's petition for review properly presents the legal issue it seeks to have determined, and nothing about the procedural posture of this case would interfere with this Court's consideration of the issues presented. Code of Civil Procedure section 533 "codifies a long-settled judicial recognition of the inherent power to amend an injunction" based on a change in the facts, a change in the law, or where the ends of justice would be served by modification. (*Swan Magnetics, Inc. v. Superior Court* (1997) 56 Cal.App.4th 1504, 1509, citing *Sontag Chain Stores Co. v. Superior Court* (1941) 18 Cal.2d 92, 95.) A court's power "in this respect is an inherent one . . . not dependent upon statute" and includes the authority to act when "circumstances have so changed that an injunction is no longer necessary or desirable[.]" (*Savage, supra*, 52 Cal.2d at p. 604.) Additionally, an order refusing to dissolve or modify a stipulated settlement based on a change in the law is an appealable order. (*People v. Brewer* (2015) 235 Cal.App.4th 122, 135-136, citing Code Civ. Proc., § 904.1, subd. (a)(6).) Accordingly, the Board may now seek relief based on the Court of Appeal's refusal to harmonize the stipulated settlement order's terms with SB 230—a statutory change that, as explained above, repealed the legal significance of Board-established base terms and removed the Board's duty to set them.

Butler is wrong in claiming that various procedural hurdles impede this Court's review of the Board's petition. (Answer at 9-14.) First, contrary to Butler's claims, the Board is not estopped from seeking review of the July 27, 2016 order denying its motion to modify, either because it initially opposed transfer to this Court in 2014 or because it declined to seek review of the Court of Appeal's May 2015 order holding that Butler's counsel was entitled to a fee award. (*Id.* at 9-10.) The stipulated settlement

order did nothing more than change the timing of the base-term calculations—calculations the Board was required to provide under the Penal Code at that time. (See Pet. for Review, Ex. 2 [settlement's terms adjusted timing of base-term calculations].) The court's fee order, which held that Butler's counsel was entitled to a fee award but rejected the amount requested as unreasonable and excessive, directed no changes to the Board's term-setting practices or regulations. The Court of Appeal's July 27, 2016 order, by contrast, requires the Board to adopt regulations that are inconsistent with the new statutory scheme, and alter its parole-suitability process in ways that will disrupt the parole system and undermine public safety. (Pet. for Review at 11-15.) Review at this time is therefore warranted.

Second, the law-of-the-case doctrine is inapplicable. (Answer at 11.) The issue presented by the petition for review is whether the Board should be relieved of the prior settlement obligations to continue setting base terms and promulgate base-term-setting regulations in light of the Legislature's later reforms to the parole system. Nothing in the Court of Appeal's prior fee decision addresses that issue. Indeed, SB 230, which eliminated the Board's term-setting function for all life inmates, did not become law until *after* the Court of Appeal's fees order.[1]

Nor does the law of the case preclude this Court from considering the Court of Appeal's theory that base terms prescribe the outermost limits of

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[1] Contrary to the contention that the Board accepted the legitimacy of Butler's constitutional allegations by failing to seek review of the Court of Appeal's fees order, the Board has always been consistent about its reasons for settling *Butler*. The Board previously sought depublication of *In re Riley*, No. A1450411, on the basis that the opinion misconstrued the Board's obligations and intentions under the *Butler* stipulated settlement order. This Court granted that depublication request. (*In re Riley*, S220036, Aug. 20, 2014.)

constitutional proportionality, a legal conclusion the Court of Appeal's fees order did not make. The law-of-the-case doctrine applies "where the point of law involved was *necessary* to the prior decision and was *actually presented* and *determined* by the court." (*People v. Gray* (2005) 37 Cal.4th 168, 197, emphases added, internal quotations and citation omitted; *Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498 [law-of-the-case doctrine does not apply to a "determination of a point [of law] not necessary to the disposition"].) Here, the court's order denying modification goes beyond the fees order in regard to the court's proportionality theories. (Pet. for Review, Ex. 1, at 7-8.) In fact, the fees order provides that "the Board's regulations specified in the settlement and stipulated order . . . do *not* indicate that [the base and adjusted base terms] constitute the Board's estimate of the maximum prison term constitutionally proportionate to that prisoner's culpability for his or her base crime." (*In re Butler* (2015) 236 Cal.App.4th 1222, 1243.) In the current order, on the other hand, the Court of Appeal suggests that base terms function to indicate the point at which a sentence becomes constitutionally excessive. (Pet. for Review, Ex. 1, at 7-8.) In addition, although the fees order highlights the Court of Appeal's theory that base terms facilitate judicial review (*In re Butler*, *supra*, 236 Cal.App.4th at pp. 1243-1244), the current order indicates the *Board* should evaluate constitutional proportionality during the suitability-determination process. (Pet. for Review, Ex. 1, at 7-8.) Thus, because the findings in the fees order were not presented, determined, or necessary, they do not bind this Court as law of the case.

In any event, the law-of-the-case doctrine's primary purpose is judicial economy. It "is not inflexible," and it may be disregarded to avoid "a manifest misapplication of existing principles resulting in substantial injustice." (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434-435,

internal quotation marks and citation omitted.) The Board was not required to petition for review on the fees issue in 2015, nor is it now precluded from seeking review of the Court of Appeal's failure to modify the settlement order. And nothing in the Court of Appeal's prior fees ruling precludes this Court from reviewing the novel and unsupported constitutional theories in the current order.

Third, Butler's invocation of the "disentitlement doctrine," which ordinarily applies when a party flees the jurisdiction or acts to frustrate an adverse judgment's enforcement, is also meritless. (See Answer at 12-14; see also *In re L.J.* (2013) 216 Cal.App.4th 1125, 1136-1137 [discussing when disentitlement doctrine is warranted]; *Polansky v. Superior Court* (2009) 180 Cal.App.4th 507, 532-533 [same].) Butler's argument rests solely on an unproven and false allegation that the Board acted in contempt of the settlement agreement. (See Decl. of Andrea Nil Sanchez Charging Board with Contempt of Stipulated Order, A139411, Aug. 24, 2016.) No court has made such a finding.[2]

Finally, Butler's protest that relieving the Board of the obligation to set base terms would mark a significant departure from past practice confirms that review is warranted. (Answer at 16-17.) In adopting SB 260,

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[2] Nor should a court make such a finding. It is the Board's position that youthful and elderly offenders were not encompassed within the stipulated settlement order. But because the Court of Appeal has now ruled otherwise in its July 27, 2016 order denying the Board's motion to modify, the Board is calculating base terms for these inmates. The Board has also started to implement a process to calculate base terms for those youthful and elderly offenders who did not receive such terms previously, but had a parole hearing after April 4, 2014, the stipulated settlement order's effective date. (See Mot. to Stay Rulemaking Portion of Stipulated Settlement Order Pending Disposition of Resp't's Pet. for Review in the Cal. Supreme Ct., A139411, Sept. 14, 2016, at 6-7.)

SB 261 (which eliminated the Board's base-term-setting function for youthful offenders by mandating their release once they are found suitable for parole), and SB 230, the Legislature fundamentally shifted the parole system from one in which the Board sets base terms to one in which the Legislature sets a life inmate's minimum sentence. The Court of Appeal's refusal to modify the stipulated settlement order to harmonize the Board's practices with these important legislative changes is a matter that merits this Court's intervention.

CONCLUSION

The petition for review should be granted.

Dated: October 11, 2016

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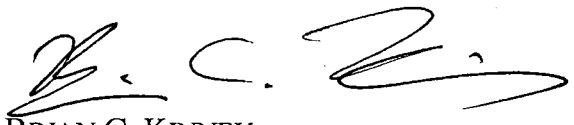
CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY TO ANSWER TO PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 3,716 words.

Dated: October 11, 2016

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE

Case Name: **In re Roy Butler**
Supreme Court No. **S237014**
(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 October 11, 2016, I served the attached:

REPLY TO ANSWER TO PETITION FOR REVIEW;

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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DECLARATION OF SERVICE
(Continued)

On October 11, 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 October 11, 2016, at San Francisco, California.

C. Look
Declarant

Signature

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