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In the Supreme Court of the State of California

SUPREME COURT
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In re
ROY BUTLER (D-94869),
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

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

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, governing statutes assigned the Board of Parole Hearings two tasks with respect to violent offenders sentenced to indeterminate life terms: (i) determining when the individual offender was suitable for parole and (ii) setting a "release date" (or "base term") that was based on characteristics of the commitment offense and functioned in effect as a minimum sentence. In 2005, this Court upheld the Board's practice of not setting base terms until it had already determined that an inmate was otherwise suitable for parole. In 2013, the Board settled a habeas claim brought by Roy Butler by agreeing that it would instead, as a matter of policy, set base terms first, and would promulgate new regulations to that effect. The Court of Appeal embodied that settlement in an injunctive order.

In 2016, the Legislature revised the whole parole system, entirely eliminating the Board's term-setting function. Under current law, minimum terms for indeterminate-life inmates are fixed by statute, not by the Board. In light of that systemic change, the Board moved to modify the Court of Appeal's order to relieve the Board from any ongoing obligation to set base terms or promulgate associated regulations, since those actions would lack any statutory basis or point under current law. The Court of

Appeal declined to modify its order, reasoning in part that base terms had continuing significance under the Constitution.

That decision should be reversed. The authority to modify injunctive orders in light of intervening changes in law or facts exists for just this sort of situation. The 2016 statutory revisions to the State's parole system eliminated the Board's term-setting function and emptied base terms of any meaning or function. And contrary to the Court of Appeal's conclusion, under current law base terms have no constitutional significance. Requiring the Board to continue to set them is a waste of public resources, which the injunctive order should be modified to avoid.

BACKGROUND

The ultimate conclusion in this case should be straightforward: The Legislature has fundamentally changed California's parole system, and the Board should not be required to expend public resources on actions that have no continuing significance under current law. We begin, however, with a relatively detailed treatment of the statutory and procedural history, to provide a full explanation of why the Court of Appeal's order declining to modify the stipulated order rests on fundamental errors and must be reversed.

I. BEFORE 2016, THE BOARD WAS REQUIRED TO SET MINIMUM PAROLE RELEASE DATES FOR LIFE-TERM INMATES AND DETERMINE WHETHER THEY WERE SUITABLE FOR RELEASE INTO THE COMMUNITY.

Before 1977, the State's Indeterminate Sentencing Law provided that nearly all convicted felons were sentenced to indeterminate terms. (See generally *In re Dannenberg* (2005) 34 Cal.4th 1061, 1077.) Under the ISL, trial courts imposed all sentences as a range, often with a short minimum and a life maximum, and the parole authority determined the length of time

within that broad range that any prisoner would remain in custody. (*Id.* at p. 1088; see also former Pen. Code, §§ 3020, 3023.)

In 1976, California adopted the Determinate Sentencing Law, under which most criminal defendants are sentenced to a definite term of years. (E.g., Pen. Code, § 1170; *Dannenberg*, *supra*, 34 Cal.4th at p. 1078.) The DSL, however, provided for a form of indeterminate sentencing for a small class of offenders who commit serious, violent crimes, such as first- and second-degree murder, attempted premeditated murder, and kidnapping for robbery, ransom, or sexual assault. (*Dannenberg*, *supra*, at pp. 1078 & 1097, fn. 17.) These offenders may serve up to life in prison, but are eligible for parole consideration after a minimum period of incarceration. (*Id.* at p. 1078.)

For these life-term inmates, before 2016, the Legislature directed the Board to perform two tasks. First, former Penal Code section 3041, subdivision (a) required the Board to set a "parole release date" for each indeterminately sentenced inmate based on uniform criteria. (Former Pen. Code, § 3041, subd. (a).) This release date was required to "be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates." (*Ibid.*) The statute also provided that the Board 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." (*Ibid.*) This provision was designed to promote term uniformity—other things being equal, inmates who committed similar crimes should serve similar sentences.

Second, the Legislature directed the Board to determine whether a life inmate was safe for release into the community. Former section 3041,

subdivision (b) provided that the Board "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed ...." (Former Pen. Code, § 3041, subd. (b).) This provision promoted the Legislature's goal of protecting public safety. (See, e.g., *Dannenberg*, *supra*, 34 Cal.4th at pp. 1082-1083.)

To implement these two legislative directives, the Board promulgated a series of regulations governing the setting of release dates and the consideration of inmates' suitability for parole. (See Cal. Code Regs., tit. 15, §§ 2280-2292, 2400-2411, 2420-2429.1, 2430-2439.1; *In re Stanworth* (1982) 33 Cal.3d 176, 182.)[1] Under these regulations, the Board first determined whether an inmate was suitable for release on parole—that is, whether the inmate would "pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2402, subd. (a).) In making this determination, the Board considered "[a]ll relevant, reliable information available," including, among other things, the inmate's social history, mental state, criminal history, the circumstances of his offense, his conduct while incarcerated, and conditions of his release.

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[1] The Board's regulations prescribing parole procedures are set forth in distinct articles by category of offense. (See Cal. Code Regs., tit. 15, §§ 2280-2292 [murders committed before November 8, 1978 and aggravated kidnapping], 2400-2411 [murders on or after November 8, 1978], 2420-2429.1 [certain habitual offenders], 2430-2439.1 [certain sex offenders]; see generally *In re Vicks* (2013) 56 Cal.4th 274, 294, fns. 12 & 14.) The substantive provisions of these articles relating to release-date setting and suitability determinations are substantially similar. (See *Vicks*, *supra*, 56 Cal.4th at p. 294, fn. 12; but see Cal. Code Regs., tit. 15, § 2433 [no regulatory matrix used for calculating base terms for sex offenders].)

(*Id.*, § 2402, subd. (b); see also *id.*, § 2402, subds. (c), (d) [enumerating circumstances tending to show unsuitability and suitability].)

Once an inmate was found suitable for parole, the regulations directed the Board to set an inmate's release date starting with the calculation of a "base term." (Cal. Code Regs., tit. 15, §§ 2401, 2403, subd. (a); *Dannenberg*, *supra*, 34 Cal.4th at p. 1079.) To compute an inmate's base term, the Board looked to a biaxial matrix for the inmate's crime of conviction. (E.g., Cal. Code Regs., tit. 15, § 2403, subds. (b)-(f).) Each matrix identified a range of possible release dates that varied according to specified offense characteristics, such as the victim's cause of death or the extent of his or her injuries (represented on the horizontal axis) and the relationship between the inmate and the victim (represented on the vertical axis). (E.g., *ibid.*) Each matrix category included three terms: a lower, middle, and upper base term. (*Id.*, § 2403, subds. (a)-(f).) In determining the appropriate base term, the Board selected the matrix category that "most closely related to the circumstances" of the inmate's crime and imposed the middle term unless it found aggravating or mitigating circumstances. (*Id.*, § 2403, subd. (a) [also permitting other term to be selected in certain circumstances].) If aggravating circumstances were present, the Board could select the upper term in the matrix category. (*Id.*, § 2404, subd. (a).) If there were mitigating circumstances, the Board chose the lower term in the matrix category. (*Id.*, §§ 2403, subd. (a), 2405, subd. (a).) This term—whether upper, middle, or lower—was the inmate's "base term."

Under the regulations, the Board could then choose whether to add enhancements to the base term based on prescribed criteria, such as if the inmate used a gun or other weapon, caused great loss, served prior prison terms, or committed multiple offenses. (Cal. Code Regs., tit. 15, §§ 2406-2409.) This final term was what is commonly referred to as the inmate's "adjusted base term."

Once calculated, the base or adjusted base term operated as the inmate's minimum term of confinement. An inmate found suitable for release was required to remain in prison until he had served his base term, reduced for any credits earned while incarcerated. (Cal. Code Regs., tit. 15, §§ 2289, 2411; see also *Vicks*, *supra*, 56 Cal.4th at p. 313; *In re Bush* (2008) 161 Cal.App.4th 133, 142.) If an inmate had already served his base term at the time he was found suitable, he was entitled to release once the Board's decision became effective following prescribed review periods. (See *Bush*, *supra*, 161 Cal.App.4th at p. 142; see also Pen. Code, § 3041, subd. (b)(2) [Board decision final within 120 days of parole hearing]; *id.*, §§ 3041.1, 3041.2 [Governor's review of parole decisions]; Cal. Const. art. V, § 8, subd. (b) [Governor's review of parole decisions for those convicted of murder].)

In *Dannenberg*, *supra*, 34 Cal.4th 1061, this Court approved the Board's deferral of the base-term calculation until an inmate was found suitable for parole. The Court explained that the overriding goal of the parole statute was public safety and that nothing in the statute or in the constitutional prohibition against cruel or unusual punishment required the Board to set an inmate's release date before he was found suitable for release. (*Id.* at pp. 1082-1084, 1096-1098.)

II. THE BOARD AGREES TO ADVANCE THE TIMING OF ITS BASE-TERM CALCULATIONS.

In December 2012, petitioner Roy Butler, who was serving a sentence of 15-years-to-life for second-degree murder, filed an original petition for a writ of habeas corpus in the First District Court of Appeal. Butler's petition alleged that the Board's decision to deny him parole lacked evidentiary support and that the Board's practice of postponing base-term calculations until an inmate was found suitable for parole was inconsistent with due

process and the federal and state constitutional prohibitions against cruel and unusual punishment.

The Court of Appeal bifurcated Butler's claims into two cases: one to address Butler's challenge to the Board's suitability determination (No. A137273) and the second to address his challenge to the timing of the Board's base-term calculations (No. A139411). In the latter case, at the Court of Appeal's suggestion, the parties participated in three settlement conferences before Justice Jim Humes. Although Butler's claims were foreclosed as a legal matter by this Court's decision in *Dannenberg*, the Board ultimately concluded there were sound public policy reasons to set base terms at the time of an initial suitability hearing, including that an inmate's rehabilitation might be fostered if he knew the earliest date on which he could be released if found suitable for parole.

The parties reached a settlement, the terms of which were embodied in a December 2013 injunctive order. That order required the Board to (1) announce and implement a policy of calculating base and adjusted base terms for life inmates at their initial parole consideration hearings or, for those inmates who already had their initial hearings, at the inmate's next scheduled parole hearing (Stipulation & Order Regarding Settlement, No. A139411 (Dec. 16, 2013) at pp. 5-6 (¶¶ 3-4)); and (2) promulgate new regulations codifying the new timing of base-term calculations (*id.* at p. 6 (¶¶ 5-7)). The order did not address or express any agreement between the parties on the merits of Butler's claim that the Board's term-setting practices were unconstitutional. The Court of Appeal retained jurisdiction over the case until the amended regulations required under the order became effective. (*Id.* at p. 7 (¶ 8).)[2]

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[2] In case number A137273, the Court of Appeal granted Butler's habeas petition and remanded for further proceedings. (*In re Butler*, (continued...)

III. THE LEGISLATURE OVERHAULS THE STATE'S PAROLE SYSTEM.

Starting in 2014, the legal structure of the State's parole system shifted in three fundamental ways. First, the Legislature enacted Senate Bills 260 and 261 to reform the parole process for youthful offenders, those who were under age 23 when they committed their offenses. (See Stats. 2013, ch. 312 (SB 260) [offenders under age 18]; Stats. 2015, ch. 471 (SB 261) [extending reforms to offenders who were under age 23].) Under SB 260 and SB 261, youth offenders are entitled to parole consideration after 15, 20, or 25 years of incarceration depending on their commitment offense. (Pen. Code, § 3051, subd. (b).) If the youth offender is found suitable at his parole hearing, he "shall be paroled regardless of the manner in which the board set release dates pursuant to subdivision (a) of Section 3041...." (*Id.*, § 3046, subd. (c); see generally *People v. Franklin* (2016) 63 Cal.4th 261, 276-278 [describing SB 260 and SB 261].) Thus, under these new laws, youth offenders must be immediately released once they are found suitable for parole—without regard to the minimum term that the Board's base-term regulations would otherwise have prescribed.

Second, the Board restructured the parole process for certain elderly offenders in compliance with a three-judge federal court order mandating reductions in the State's prison population. (See *Plata v. Brown*, Case No. 01-1351 (N.D.Cal.), Dkt. No. 2766 (Feb. 10, 2014).) Under the court-ordered program, inmates who are at least 60 years old and have served 25

(...continued)
No. A137273 (Mar. 5, 2014).) This Court depublished the Court of Appeal's opinion. (*In re Butler*, No. S217457.) On remand, the Board granted Butler parole, the Governor took no action, and in June 2014, Butler was released from prison onto parole. Although Butler is no longer incarcerated, the case is not moot because the Board remains bound under the stipulated order notwithstanding Butler's release.

continuous years of custody are entitled to parole consideration and immediate release if they are found suitable, irrespective of the minimum base term they would otherwise have been required to serve. (*Id.* at p. 3 (¶ 4(e); see also *id.* at p. 5 (¶ 9) [generally waiving state statutes and regulations that "impede the implementation" of the court's order].)

Third, in 2015, the Legislature enacted Senate Bill 230, which reformed the parole process for all indeterminate life-term inmates. The new law left in place the Board's responsibility under Penal Code section 3041, subdivision (b) to determine whether an inmate was suitable for parole based on his dangerousness, but repealed the requirement in section 3041, subdivision (a) that the Board set uniform release dates according to established criteria. (Stats. 2015, ch. 470, § 1.) In place of these Board-set release dates, the Legislature added new section 3041, subdivision (a)(4), which provides: "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).) Thus, under SB 230, all life inmates are entitled to release once they have reached a minimum eligible parole date prescribed by statute and are found suitable for parole. (*Ibid.*; see also *id.*, § 3046, subd. (a) [minimum sentence for offender convicted of life term is seven years or term set by statute]; *id.*, § 190, subds. (a), (b), (d) [minimum term for first-degree murder is 25 years; minimum terms for various second-degree murder offenses are 15, 20, or 25 years].)[3]

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[3] Minimum eligible parole dates may vary by inmate through the calculation of credits that can shorten a prisoner's minimum term. One year before an inmate's minimum eligible parole date, the Board conducts (continued...)

In eliminating the Board's authority to set release dates, the Legislature identified what it perceived as significant problems with the existing base-term process. According to the Legislature's two Public Safety Committees, the process for calculating base terms was "'confusing,'" "'convoluted,'" "complex," and "inconsistent." (Sen. Com. on Pub. Safety, Rep. on Sen. Bill No. 230 (2015-2016 Reg. Sess.), Hearing Date Apr. 28, 2015, p. 3 [author's statement]; Assem. Com. on Pub. Safety, Rep. on Sen. Bill No. 230 (2015-2016 Reg. Sess.) as amended Mar. 24, 2015, p. 3.) In the Legislature's view, the base-term regulations "creat[ed] a system of back-end sentencing in which a judge's sentence may bear little resemblance to the actual time an individual serves under correctional control." (Assem. Pub. Safety Com. Rep., *supra*, at p. 3 [length of base term "not at all apparent from the sentences issued by trial judges"].) In addition, because base terms set an inmate's minimum sentence and could be increased by a variety of enhancements, the base-term regulations led the Board to keep inmates incarcerated, even after finding them suitable for parole, "at great expense and no added safety to the public." (Assem. Pub. Safety Com. Rep., *supra*, at p. 3; see also Sen. Pub. Safety Com. Rep., *supra*, at pp. 3-4 [criticizing enhancements used to increase base terms].) At the same time, by keeping inmates in custody after a suitability finding,

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(...continued)
an initial parole consideration hearing. (Pen. Code, § 3041, subd. (a)(2).) The minimum eligible parole date is "the earliest date on which ... [a] life prisoner may legally be released on parole." (Cal. Code Regs., tit. 15, §§ 2000, 3000, subd. (b)(67).) It is based on the sentence imposed by the trial court, the credit eligibility associated with the particular life offense, and the inmate's behavior in prison. (See *People v. Buckhalter* (2001) 26 Cal.4th 20, 30-32 [describing credits scheme].) Many indeterminate life crimes are statutorily ineligible to receive prison credits. (*Id.* at pp. 32, 34.) For these offenses, the minimum eligible parole date is the minimum term prescribed by law less any presentence credits awarded by the trial court.

the system did "not encourage rehabilitative behavior by inmates." (Sen. Pub. Safety Com., *supra*, at p. 4.) In light of these findings, the Legislature repealed the Board's authority to set release dates and provided instead that "if an inmate is found suitable he or she shall be released, after the Governor's statutory right of review." (Assem. Pub. Safety Com. Rep., *supra*, at p. 3.) The new law would result in "truth in sentencing" (*ibid.*) and "'create[] steps to minimize bureaucratic delay, remove duplication, and eliminate unfair procedures'" (*ibid.* [author's statement]).

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

In January 2016, when SB 230 became effective, the Board moved to modify the stipulated order in this case to conform its terms to the new parole scheme. In light of the Legislature's repeal of the Board's term-setting authority, the Board asked the Court of Appeal to relieve it of its obligations under the stipulated order to calculate base terms and promulgate new base-term regulations. The Board suggested that the court amend the order and replace those obligations with a requirement that the Board inform inmates of their statutory minimum eligible parole date at their consultation or next scheduled parole consideration hearing.

The Court of Appeal denied the Board's motion. The court held that none of the intervening legal developments involved any material change that warranted the order's modification. With respect to SB 230, the court concluded that the Legislature's revisions to section 3041 did not affect the Board's base-term-setting obligations because "[t]he 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." (Order at p. 6.) According to the court, "[n]othing in SB 230 indicates a legislative intent to interfere in any way with [the stipulated order's] advancement of the time at which the base and adjusted base term is calculated." (*Id.* at p. 7.) The court further reasoned

that SB 230 and the stipulated order were complementary; in its view, both were aimed at expediting inmates' release. (*Id.* at pp. 6-7, 9.) Applying similar reasoning, the court held that SB 260, SB 261, and the federal court order in *Plata* did not warrant modification of the stipulated order. (*Id.* at pp. 10-11 ["Board's authority to set base terms does not arise under any of the statutes amended by SB 260" and amendment did not "create[] a material change in the law justifying modification of the stipulated order"]; *id.* at pp. 11-12 [prompt base-term setting not inconsistent with federal order, "the purpose of which is to reduce the prison population"].)

The court further held that the Board was required to continue setting base terms because they were constitutionally significant. (Order at p. 6.) It reasoned that "[t]he base term has never been considered the minimum term a prisoner must serve," and its purpose was "not to set a release date." (*Id.* at pp. 6, 7.) Rather, its function "is to indicate the point at which a prison term becomes constitutionally excessive." (*Id.* at p. 6; see also *id.* at p. 7 [base term "indicate[s] whether the denial of parole might result in constitutionally excessive punishment"].)

Relying on *In re Rodriguez* (1975) 14 Cal.3d 639, in which this Court held that the parole authority was required to set maximum terms under the then-applicable ISL (see *infra* at p. 25), the Court of Appeal held that base-term calculations must continue now to ensure that the Board knows, at the time it makes a suitability determination, whether the denial of parole might result in a constitutionally excessive sentence. (Order at pp. 7-8.) Early base-term setting, the court concluded, "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." (*Id.* at p. 12; see also *id.* at p. 8 ["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"].)[4]

This Court granted the Board's petition for review.

ARGUMENT

I. THE STIPULATED ORDER SHOULD BE MODIFIED TO HARMONIZE IT WITH LEGISLATIVE REFORMS TO THE STATE'S PAROLE SYSTEM.

A. Courts May Modify Stipulated Orders in Light of Changes in the Law or Facts.

Courts have inherent power to modify or dissolve injunctive orders in light of changed circumstances. (*Sontag Chain Stores Co. v. Superior Court* (1941) 18 Cal.2d 92, 94-95.) Because an injunctive decree "is continuing in nature, directed at future events, it must be subject to adaptation as events may shape the need." (*Union Interchange, Inc. v. Savage* (1959) 52 Cal.2d 601, 604.) Under Code of Civil Procedure section 533, a court may "modify or dissolve an injunction ... upon a showing that there has been a material change in the facts upon which the injunction ... was granted, 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 ...." (Code Civ. Proc., § 533.)

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[4] The Court of Appeal's order also noted that the Board was not setting base terms for youthful and elderly offenders in light of changes to the parole system mandated by SB 260, SB 261, and the *Plata* order—changes that preceded the stipulated order's effective date. (Order at pp. 9-11.) After the Court of Appeal denied the Board's motion to modify, the Board began setting base terms for all youth and elderly offenders who did not receive a base-term calculation, but who would have received one under the court's interpretation of the settlement agreement as expressed in its order. Accordingly, the Board is currently setting base terms for all indeterminate life-term inmates. The Court of Appeal stayed the Board's rulemaking obligations under the settlement agreement after the Board filed its petition for review in this Court.

This authority exists even if the court originally imposed the injunction based on an agreement between the parties. (See, e.g., *Sys. Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright* (1961) 364 U.S. 642, 650-652; *Welsch v. Goswick* (1982) 130 Cal.App.3d 398, 404-405.)

A party seeking modification need not show that a change in law has made an injunctive order unlawful. Rather, "sound judicial discretion calls for modification of a stipulated injunctive decree when circumstances of law existing at the time of issuance have changed, making the original decree inequitable." (*Welsch*, *supra*, 130 Cal.App.3d at p. 405; see also *Agnostini v. Felton* (1997) 521 U.S. 203, 215 [similar].) A court has the power to amend an injunction when it is "no longer necessary or desirable" (*Union Interchange*, *supra*, 52 Cal.2d at p. 604) or "when the ends of justice will be thereby served" (*Sontag*, *supra*, 18 Cal.2d at p. 95).

An appellate court reviews a lower court's refusal to modify an injunction for abuse of discretion. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 850.) The lower court's conclusions of law, however, are reviewed de novo. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712; *People ex rel. Feuer v. Progressive Horizon, Inc.* (2016) 248 Cal.App.4th 533, 540.) When the "new circumstances" supporting modification of an injunctive order "involve a change in law rather than facts," the limits of the lower court's discretion "are often far clearer to the reviewing court." (*Wright*, *supra*, 364 U.S. at p. 648.)

B. Material Changes Warrant Modification of the Stipulated Order.

SB 230 changed the legal landscape in ways that compel modification of the stipulated order. As explained above, the stipulated order addressed the manner in which the Board would implement its previous statutory obligation to set parole release dates according to uniform criteria. It required the Board to compute an inmate's base term at the initial parole

consideration hearing, rather than deferring the calculation until the inmate was found suitable for parole. But in enacting SB 230, the Legislature repealed the Board's authority to set release dates altogether, replacing it with a system under which minimum terms are set by statute. (See Pen. Code, § 3041, subd. (a)(4).) The stipulated order cannot be reconciled with this new statutory structure. The Court of Appeal is requiring the Board to maintain a regulatory scheme that purports to set release dates for life-term inmates according to Board-computed base terms, even though the Legislature has stripped the Board of any authority to set such release dates. Modification is necessary to conform the stipulated order to current law. (See *Wright, supra*, 364 U.S. at p. 652 [parties to stipulated injunction "have no power to require of the court continuing enforcement of rights the statute no longer gives"].)

The legislative revisions to the parole system have also emptied base terms of any meaning or function. Contrary to the Court of Appeal's understanding (order at pp. 6, 7), the Board's base-term calculation previously functioned precisely and solely to establish the minimum term of imprisonment that an inmate was required to serve. (See *supra* at p. 6.) Under the new statutory framework, an inmate's minimum sentence is a statutory minimum eligible parole date (Pen. Code, § 3041, subd. (a)(2), (4)), and he is entitled to immediate release once he is found suitable and has served this statutorily prescribed minimum period. Base terms, moreover, lack any constitutional significance. (See *infra* at pp. 21-27.) There is accordingly no reason for the Board to continue calculating base terms that have no function under current law.

It would also be inequitable to continue to bind the Board to the stipulated order. The Board agreed to the stipulated order because it only changed the timing of its then-existing statutory obligation to set parole release dates. Because the Legislature has now relieved the Board of that

responsibility, the Board can no longer be equitably required to implement the order's terms. (See *Welsch*, *supra*, 130 Cal.App.3d at pp. 408-409 [inequitable to deny party benefit of changed law]; cf. *Wright*, *supra*, 364 U.S. at p. 648 [continuing to enforce injunction after statutory amendment "render[s] protection in no way authorized by the needs of safeguarding statutory rights at the expense of a privilege" granted under the new statute].)

Decisions from the United States Supreme Court and this Court confirm that modification is appropriate under circumstances such as these. For example, in *Wright*, the high court held that a consent decree had to be modified after Congress changed the law on which it was based. (*Supra*, 364 U.S. at p. 651.) The initial consent decree enjoined a railroad company and its union from discriminating against non-union employees. (*Id.* at p. 644.) That agreement was consistent with federal law then in effect, which prohibited railroad companies from preferring union members under "union shop" agreements. (*Id.* at p. 646.) Congress subsequently changed the law to allow railroads and unions to enter into union shop agreements. (*Id.* at p. 644.) The union then asked the district court to modify the decree in light of the changed statute. (*Id.* at pp. 644-645.) The district court refused, concluding that the new law neither nullified the parties' agreement nor required union shops. (*Id.* at pp. 645-646.)

The high court reversed. Explaining that a "court must be free to continue to further the objectives of [the underlying statute] when its provisions are amended," the Court held that the district court had abused its discretion in declining to modify the consent decree to align it with the purposes of the new law. (*Id.* at p. 651; see also *Welfare Rights v. Frank* (1994) 25 Cal.App.4th 415, 424-425 [consent decree requiring county to pay specified welfare benefits no longer enforceable once underlying statutory obligation to pay benefits changed].)

In *Salazar v. Eastin*, *supra*, 9 Cal.4th 836, this Court upheld a trial court's decision to modify an injunction under similar circumstances. There, a superior court had entered an injunction prohibiting public school districts from charging fees for transportation to or from school, based on a Court of Appeal's conclusion that such a charge violated the California Constitution. (*Id.* at pp. 844-845.) This Court later reached a contrary conclusion on the constitutional question. (*Id.* at pp. 845-847.) The trial court then vacated the injunction, and on appeal, this Court concluded the trial court acted properly in doing so because the intervening decision "changed the assumptions about the law upon which the injunction was based." (*Id.* at p. 850.)

As in *Wright* and *Salazar*, although the stipulated order in this case was consistent with the statutory parole scheme in effect at the time it was entered, the law underlying the order has changed. The order's modification is warranted to conform its requirements with the now-applicable law. (See *Wright*, *supra*, 364 U.S. at p. 651; *Salazar*, *supra*, 9 Cal.4th at p. 850.)

The Court of Appeal did not see SB 230 as materially changing the law underlying the stipulated order, but its reasons rest on a mistaken understanding of base terms and the legislative revisions to the parole system. In the court's view, SB 230's amendments to section 3041 did not alter the Board's authority to set base terms because the Board's authority did not derive from that statutory provision. (Order at p. 6.) That is incorrect. The Board's base-term regulations were promulgated specifically to implement section 3041. (See Cal. Code Regs., tit. 15, § 2400 [article "implements Penal Code section 3041"]; *id.*, § 2280 Note [listing section 3041 as statutory "[r]eference" for Board's regulations]; *id.*,

§ 2403 Note [section 3041, among others, is statutory "[r]eference"].)[5] This Court has also observed that the Board's parole regulations "are not mere administrative responses to the Board's internal shifting discretion but rather reflect basic legislative alterations in the underlying parole scheme" when the Legislature enacted the Determinate Sentencing Law in 1976. (*Stanworth*, *supra*, 33 Cal.3d at p. 182 [Board's "parole guidelines were promulgated pursuant to" the Determinate Sentencing Law, including section 3041]; see also *Dannenberg*, *supra*, 34 Cal.4th at pp. 1078-1079 [Board promulgated parole-consideration regulations, including base-term regulations, "[i]n response to" section 3041(a)'s "requirements"].) Accordingly, when the Legislature repealed former section 3041, subdivision (a), it eliminated the statute upon which the Board's base-term regulations were grounded.

The Court of Appeal also erred in viewing the stipulated order's requirement that the Board continue calculating base terms as complementary to SB 230. (Order at pp. 7-9.) In enacting SB 230, the Legislature expressly chose to abandon the base-term system in light of what it saw as serious defects in the base-term structure—among other things, that it was convoluted, opaque, and resulted in "a system of back-end sentencing" in which inmates served terms quite different from those imposed by sentencing courts. (Assem. Pub. Safety Com. Rep., *supra*, at p. 3; see also *supra* at p. 10.) Moreover, the legislative history of SB 230 demonstrates that the Legislature was aware of the settlement in this case when it decided to dismantle the base-term system. (See Sen. Pub. Safety Com. Rep., *supra*, at p. 3.)

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[5] A "reference" in this context means "the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation." (See Gov. Code, § 11349, subd. (e).)

Finally, it does not matter that SB 230 did not affirmatively prohibit the Board from calculating base terms, as the Court of Appeal and Butler both have suggested. (See Order at p. 4.) As explained above, a party need not show that a change in law has made provisions of an injunctive order unlawful. A court should modify an injunctive order "when circumstances of law existing at the time of issuance have changed, making the original decree inequitable" or undercutting its original purpose. (See *Welsch*, *supra*, 130 Cal.App.3d at p. 405.) That is the situation here.

C. Continued Enforcement of the Stipulated Order Imposes Significant Burdens on the Board, the Public, and Inmates.

Continued enforcement of the Court of Appeal's order will also create unnecessary and unjustified practical difficulties, public expense, and confusion. (See Code Civ. Proc., § 533 [injunctive order may be modified or dissolved where "the ends of justice would be served"].)

To begin with, it will waste public resources. Under the stipulated order, the Board is required to perform the idle act of setting base terms at thousands of parole hearings on an ongoing basis. The stipulated order also imposes on the Board the obligation to promulgate new base-term-setting regulations. Implementing that requirement will consume not only a substantial commitment of Board resources, but also those of at least four other state agencies that must approve the regulations—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.*; 11345.8; 11345.9, *et seq.*) In addition, to maintain the base-term system, seemingly in perpetuity, the Board would be required to create new base-term matrices each time the Legislature (or the voters) alters minimum eligible parole dates for any indeterminate-life crime or

adds new crimes to that list. These burdens cannot be justified in light of the Legislature's decision to discard the entire system of base terms.

Requiring the Board to continue setting base terms will also make the current parole system more confusing for inmates and the public at large. Although inmates are now entitled to release when they are found suitable for parole and have served their statutorily prescribed minimum term, the stipulated order requires the Board to continue communicating a now-meaningless base term to each inmate at his parole-consideration hearing. This can only sow confusion among inmates. And that result undermines one of the Legislature's purposes in adopting SB 230—to simplify what it saw as a confusing base-term system. (See *supra* at pp. 10-11.)

Continued enforcement of the stipulated order will create further confusion by leading to dueling regulatory schemes. Under the stipulated order, the Board is required to promulgate new base-term-setting regulations. The Board also intends to develop new regulations to implement SB 230, and is in the process of developing regulations implementing SB 260 and SB 261. These new statutes provide for release protocols to be made without reliance on the Board's prior base terms. Inmates, lawyers, and members of the public who seek to understand the parole process will thus be confronted with two different sets of regulations, both seeming to describe the Board's parole procedures but in fundamentally incompatible ways. The stipulated order should be modified to avoid this result.

II. THE BOARD'S OBLIGATIONS UNDER THE STIPULATED ORDER ARE NOT GROUNDED IN THE CONSTITUTION.

The Court of Appeal refused to modify the stipulated order based on its belief that the Board's obligation to set base terms enforces the constitutional prohibition against excessive sentences. The court reasoned that Board-calculated base terms mark the point at which a sentence becomes constitutionally excessive, and that the Board must therefore consult the base term when it considers whether to grant or deny parole in order to ensure that an inmate's sentence does not surpass constitutional limits. That reasoning is unsustainable because base terms have no constitutional significance.

A. Base Terms Do Not Reflect the Maximum Sentence Permitted by the Constitution.

Contrary to the Court of Appeal's view, the Board's administrative base-term calculations do not reflect "the point at which a prison term becomes constitutionally excessive." (Order at p. 6.) Base terms were never intended as a measure of constitutional proportionality. As explained above, the Board promulgated its base-term regulations following the Determinate Sentencing Law's passage to implement the Legislature's directive to establish "criteria" that would promote uniformity in sentences for life-term inmates, which was considered separately from inmate-specific questions about parole suitability and the need to protect public safety. (See Former Pen. Code, § 3041, subd. (a); *Dannenberg, supra*, 34 Cal.4th at pp. 1078-1079.) Base terms, moreover, marked an inmate's *minimum* sentence. The Board was not permitted to release an inmate unless he no longer posed an unreasonable risk of danger to the public, even if he had reached his base term. (*Dannenberg, supra*, 34 Cal.4th at pp. 1083-1084 [Board required to "eschew term uniformity, based simply

on similar punishment for similar crimes, in the interest of public safety in the particular case," italics omitted; *Bush*, *supra*, 161 Cal.App.4th at p. 142; Cal. Code Regs., tit. 15, § 2402, subd. (a).) The base term therefore was not intended to reflect the Board's judgment that an inmate had reached the outer limit of a constitutionally proportionate sentence. Indeed, under the prior statutory and regulatory scheme, the Board was free to increase the length of terms set forth in the matrices based on policy considerations unrelated to constitutional concerns. (*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"].)

The terms of years prescribed under the Board's base-term matrices also do not come close to approximating any constitutional limit. For example, under the Board's matrices for first-degree murder, the upper base term for killing a police officer in circumstances in which the victim was subjected to prolonged physical pain before death is 33 years. (See Cal. Code Regs., tit. 15, § 2403, subd. (b).) The Constitution tolerates a substantially more severe sentence for such a crime. (See *People v. Brown* (1988) 46 Cal.3d 432, 461-462 [death penalty not disproportionate for intentionally killing peace officer engaged in performance of his duties]; *Solem v. Helm* (1983) 463 U.S. 277, 290, fn. 15 [life in prison "clearly" not disproportionate for defendant who aids and abets felony during which murder is committed by others]; *Hutto v. Davis* (1982) 454 U.S. 370, 374-375 (*per curiam*) [40-year sentence for possession and distribution of marijuana constitutional]; *Harmelin v. Michigan* (1991) 501 U.S. 957 [life without possibility of parole for possession of large quantity of cocaine does not violate Eighth Amendment].)

As this Court has recognized, the Eighth Amendment's proportionality principle has an "extremely narrow scope." (*In re Coley*

(2012) 55 Cal.4th 524, 558.) In non-capital cases, "successful challenges to the proportionality of particular sentences will be exceedingly rare." (*Solem*, *supra*, 463 U.S. at pp. 289-290, italics, alterations, and internal quotation marks omitted.) This is particularly true with respect to the inmates covered by the stipulated order, because only serious offenses and offenders are currently subject to indeterminate life sentences. (*Dannenberg*, *supra*, 34 Cal.4th at p. 1071 [constitutional constraint on excessive punishment "will rarely apply" to offenders sentenced to life-maximum terms]; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 73 [Eighth Amendment challenge will prevail only in "'extreme'" case].) The Court of Appeal's theory that a sentence served beyond the base term is constitutionally suspect cannot be reconciled with these principles.

The rudimentary method of calculating base terms also does not resemble the broad inquiry used by courts to evaluate whether a sentence violates the state or federal Constitution. As explained above, under the Board's regulations, a parole official determines a base term or adjusted base term by selecting the box in a regulatory matrix that most closely matches a handful of particular offense characteristics; picking the upper, middle, or lower term based on the presence or absence of prescribed aggravating or mitigating circumstances; and adding numeric increments for enhancements set forth in the regulations. (E.g., Cal. Code Regs., tit. 15, §§ 2403-2409.) The matrices, moreover, do not take into account an offender's personal characteristics, such as his age or upbringing. (See *id.*, § 2403.)

By contrast, when evaluating a sentence's constitutionality, courts engage in a broad, case-specific factual inquiry. A sentence offends the Constitution only if it "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity" (*In re Lynch* (1972) 8 Cal.3d 410, 424 [state constitution]),

or if it is "gross[ly] disproportionat[e]" to the crime (*Lockyer*, *supra*, 538 U.S. at p. 73 [federal constitution]; see also *Coley*, *supra*, 55 Cal.4th at p. 542 [same].) To determine whether a sentence meets this standard under the state Constitution, courts consider "the totality of the circumstances surrounding the commission of the offense..., including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts"; particular characteristics of the "person before the court," such as his "age, prior criminality, personal characteristics, and state of mind"; and how the offender's sentence compares with other sentences both within and outside the State. (*People v. Dillon* (1983) 34 Cal.3d 441, 479; see also *Lynch*, *supra*, 8 Cal.3d at pp. 425-429.) Similarly, cruel and unusual punishment claims under the Eighth Amendment "take into consideration all of the relevant specific circumstances under which the offense actually was committed," in addition to the length of sentences imposed for other crimes within the same jurisdiction and for the same crime in other jurisdictions. (*Coley*, *supra*, 55 Cal.4th at pp. 540, 553; see also *Graham v. Florida* (2010) 560 U.S. 48, 59 [court "considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive"].) In addition, in conducting a constitutional inquiry, courts review the entire trial record, and examine the facts and circumstances of the offense in depth. (See *Coley*, *supra*, 55 Cal.4th at pp. 554-562 [examining, *inter alia*, trial testimony in measuring gravity of defendant's offense]; *Dillon*, *supra*, 34 Cal.3d at pp. 482-489 [same].) This intensive and highly case-specific inquiry is not a rudimentary categorization exercise.

In proceedings before the Court of Appeal, Butler acknowledged that base terms do not necessarily reflect the maximum sentence permitted by the Constitution. (E.g., Supp. Pet. for Writ of Habeas Corpus at p. 72.) He nevertheless opposed the Board's requested modification on the ground that

base-term setting was constitutionally compelled under the reasoning of this Court's decisions in *Rodriguez*, *supra*, 14 Cal.3d 639 and *People v. Wingo* (1975) 14 Cal.3d 169, two cases involving the Indeterminate Sentencing Law that governed sentencing in California before the adoption of the Determinate Sentencing Law in 1976. Under the ISL, "almost all convicted felons received indeterminate terms, often with short minimums and life maximums" (*Dannenberg*, *supra*, 34 Cal.4th at p. 1088), so that a defendant's ultimate period of incarceration "was under the exclusive control of the parole authority" (*id.* at p. 1077). Although the parole authority was authorized to fix an inmate's maximum term, it declined to do so until the inmate was ready for release. (See *id.* at pp. 1096-1097.) That policy created a possibility that a "large number of California prisoners were being exposed to excessive punishment for their individual crimes." (*Id.* at p. 1097.)

Wingo held that constitutional challenges to indeterminate sentences under this system should wait until after the parole authority fixed an inmate's maximum term. (*Supra*, 14 Cal.3d at p. 183.) In *Rodriguez*, this Court further construed the ISL to require the Board to set a maximum term for all indeterminate inmates that was "not disproportionate to the culpability of the individual offender." (*Supra*, 14 Cal.3d at p. 652.) Those maximum terms operated as automatic discharge dates: even if the inmate never became suitable for parole, he would be discharged from custody after serving the specified term. (*Dannenberg*, *supra*, 34 Cal.4th at p. 1097; see former 15 Cal. Admin. Code, § 2100 [Register 76, No. 21, May 22, 1976 (Prior Board Rules)] [describing term fixing].)[6]

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[6] To implement *Rodriguez*'s term-fixing requirement, the Adult Authority (the Board's predecessor) promulgated regulations that required the calculation of a "primary term," which was the Board's estimate of "the

(continued...)

In *Dannenberg*, this Court squarely rejected the argument that the constitutional concerns addressed in *Rodriguez* and *Wingo* required the Board to fix actual maximum terms "tailored to individual culpability" for the relatively small number of serious offenders who remained subject to indeterminate life sentences after the Legislature replaced the ISL with the Determinate Sentencing Law. (*Dannenberg*, *supra*, 34 Cal.4th at p. 1096.) The Court explained that *Rodriguez*'s holding "was influenced by the nature and provisions of the more comprehensive indeterminate sentencing system then in effect." (*Ibid.*) Unlike the ISL, under which a large number of felons, including non-serious offenders, were subject to life-maximum sentences, the DSL reserves indeterminate life sentences "for a much narrower category of serious crimes and offenders." (*Id.* at p. 1097.) And for these offenders, the constitutional proscription against excessive sentences "will rarely apply." (*Id.* at p. 1071; see also *supra* at pp. 22-23.) In addition, for life inmates sentenced under the DSL, unlike under the ISL, the Board is required to release any inmate who has reached his minimum eligible parole date unless it determines, based on reliable evidence, that the inmate continues to pose an unreasonable risk of danger to the public. (Pen. Code, § 3041, subds. (a)(4), (b).) These fundamental statutory changes—under which only the most serious offenders receive

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(...continued)
maximum period of time which [was] constitutionally proportionate to the individual's culpability for the crime." (Prior Board Rules, § 2100, subd. (a).) An inmate's "primary term" consisted of a "base term" that could be adjusted according to the individual's criminal history. (*Id.*, § 2150.) Under those regulations, a "base term" was the starting point for determining an inmate's "primary term," and was determined by consulting ranges of terms set forth elsewhere in the regulations. (*Id.*, § 2152; see also *id.*, §§ 2225, 2227.) Under its prior regulations, the Board's term-fixing function was in addition to its obligation to set parole release dates. (*Id.*, §§ 2250, 2350.)

indeterminate-life sentences, and life inmates have the expectation they will be granted parole unless they remain a danger to the public—have "diminish[ed] the possibility" that the current system will lead to "de facto imposition of constitutionally excessive punishment." (*Dannenberg*, *supra*, 34 Cal.4th at p. 1097.)

Base-term setting is also not necessary for judicial review of inmates' claims that their continued confinement is unconstitutionally excessive. In *Rodriguez*, the Court observed that the parole authority's practice of deferring the fixing of maximum terms under the ISL undermined inmates' ability to seek judicial review of their sentences before the length of their confinement surpassed constitutional limits. (*Supra*, 14 Cal.3d at pp. 650, 654, fn. 18.) The Court of Appeal echoed that reasoning here in denying the Board's motion to modify the stipulated order. (Order at p. 9; see also *In re Butler* (2015) 236 Cal.App.4th 1222, 1242-1243.) But as this Court explained in *Dannenberg*, such considerations do not require base-term setting under the DSL. Under that system, "[c]onstitutional rights are ... adequately protected" by holding that inmates who believe their continued confinement violates the Constitution "may bring their claims directly to court by petitions for habeas corpus." (*Dannenberg*, *supra*, 34 Cal.4th at p. 1098; see also *id.* at p. 1071.) Implementing the constitutional proscription against excessive punishment, the Court concluded, does not require the Board "to set premature release dates for current life-maximum prisoners who, it believes, present public safety risks." (*Id.* at p. 1098.)

Moreover, for many of the reasons explained above, a base-term calculation would not assist the judiciary in discharging its independent responsibility to determine whether a term of confinement is consistent with the Constitution. (See *Lynch*, *supra*, 8 Cal.3d at p. 414 ["final judgment" whether punishment exceeds constitutional limits "is a judicial function," citations and internal quotation marks omitted].) A Board-

provided base term is a numeric calculation designed to be a statutory guidepost of uniformity; it does not detail facts relevant to a court's constitutional inquiry, such as the circumstances of the offense, the evidence presented at trial, or the inmate's personal characteristics. And unlike primary terms fixed under the ISL, base terms do not represent the Board's judgment of the constitutionally proportionate sentence. Because base terms lack constitutional significance, the basis on which the Court of Appeal rejected the Board's modification request is unsustainable.

B. The Court of Appeal Also Erred in Concluding That the Board Must Consider Base Terms and Constitutional Proportionality as Part of Its Suitability Determination.

The Court of Appeal also reasoned that base-term setting must continue so that the Board can consult the base-term calculation as part of the suitability-review process. (Order at pp. 7-8.) This conclusion too is contrary to this Court's precedents. In *Dannenberg*, *supra*, 34 Cal.4th at pp. 1070-1071, this Court expressly held that the Board need not calculate an inmate's base term before making a suitability determination—a conclusion reaffirmed three years later in *In re Lawrence* (2008) 44 Cal.4th 1181. (*Id.* at pp. 1227-1228 ["reiterat[ing]" recognition that Board "has the express power and duty, in an individual case, to decline to fix a firm release date, and thus to continue the inmate's indeterminate status within his or her life maximum sentence," if it finds that the inmate presents a current risk to public safety].) As this Court has repeatedly recognized, the Board's overriding responsibility in determining parole suitability is protection of public safety. (*Id.* at p. 1213; see also Pen. Code, § 3041, subd. (b).) Indeed, if the Board determines, "based upon an evaluation of each of the statutory factors as required by statute, that an inmate remains a danger, it can, *and must*, decline to set a parole date." (*Lawrence*, *supra*, at p. 1227, italics added; see also *Bush*, *supra*, 161 Cal.App.4th at p. 142

[Board cannot legally release inmate absent determination he is suitable for parole].) Discharging this responsibility "is incompatible with the premise that the Board must look primarily to comparative term length, to the Board's own term matrices, or to the minimum statutory term for the inmate's offense." (*Dannenberg*, *supra*, at p. 1086.)

Requiring the Board to consider base terms as part of the suitability process, moreover, would raise significant separation-of-powers concerns. "The Board's discretion in parole matters has been described as 'great' and 'almost unlimited.'" (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655, citations, internal quotation marks, and brackets omitted.) Under the statutory and regulatory scheme, the decision to grant or deny parole "is committed entirely to the judgment and discretion of the Board, with a constitutionally based veto power over the Board's decision vested in the Governor." (*In re Prather* (2010) 50 Cal.4th 238, 251.) That is because, in determining parole suitability, the Board "deliberate[ly] assess[es] ... a wide variety of individualized factors on a case-by-case basis," and strikes the proper balance "between the interests of the inmate and of the public." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 655, citation and internal quotation marks omitted.) Accordingly, judicially imposed remedies that interfere with the Board's discretion to determine parole suitability, or with the Legislature's judgment that the suitability determination should focus on public safety, violate the separation of powers. (See *Prather*, *supra*, 50 Cal.4th at pp. 255-256 [court-ordered restrictions on evidence Board could consider or judicial requirement that inmate be released "impermissibly impair[ed] the Board's exercise of its inherent discretion to decide parole matters" and "improperly circumscribe[d] the Board's statutory directive" to consider "'all relevant statutory factors'" when deciding parole]; *In re Lira* (2014) 58 Cal.4th 573, 584 [court may not require Board to award custody credits against parole term because doing so would impermissibly

interfere with Board's statutorily conferred discretion to decide "whether a period of parole is to be required and, if so, its duration and conditions"].)

Here, the Court of Appeal's reasoning that the Board must calculate base terms and then must take them into account in deciding parole intrudes directly and impermissibly on the Board's discretion in determining parole suitability and on the Legislature's judgment about the scope of the suitability determination. Whereas the Legislature directed the Board to consider "current dangerousness [as] the fundamental and overriding question" in making that determination (*Lawrence*, *supra*, 44 Cal.4th at p. 1213), the Court of Appeal's decision declining to modify the stipulated order would have the Board look to *different* considerations—whether "the denial of parole might result in a constitutionally excessive sentence" (order at p. 8)—and presumably give some weight to that consideration when deciding whether to grant parole. This impermissibly distorts the parole-suitability process and undermines the Board's public-safety mandate.[7]

The Court of Appeal's understanding of the base term's function and its role in the suitability-determination process is inconsistent with the statutory and regulatory structure, the parole statutes' overriding goal of public safety, and the branches' respective roles in the parole process. It cannot serve as a basis for declining to modify the stipulated order.

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[7] This Court has held that the Constitution imposes procedural requirements to guide the Board's exercise of discretion when necessary to safeguard inmates' constitutional rights. For instance, the due process clause does not permit the Board to deny parole unless there is a written statement of reasons (*In re Sturm* (1974) 11 Cal.3d 258, 268, 273) supported by some evidence (*Rosenkrantz*, *supra*, 29 Cal.4th at pp. 664-665) probative of current dangerousness (*Lawrence*, *supra*, 44 Cal.4th at p. 1221). Here, however, setting or referring to "base terms" previously called for under a now-repealed statutory structure is not even germane to any constitutional inquiry.

CONCLUSION

This Court should reverse the order of the Court of Appeal and order that the stipulated order be modified.

Dated: January 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 9,298 words as counted by the Microsoft Word word-processing program, excluding the parts of the brief excluded by California Rule of Court, rule 8.520(c)(3).

Dated: January 17, 2017

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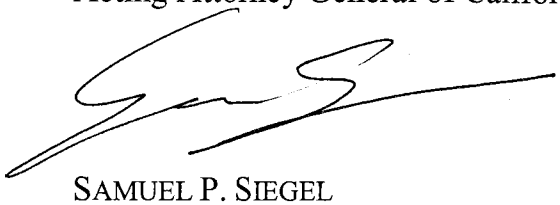

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Roy Butler**
Case 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 January 17, 2017, I served the attached **OPENING BRIEF ON THE MERITS** 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 January 17, 2017, at San Francisco, California.

Magdalena Campos
Declarant

Magdalena Campos
Signature

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