In the Supreme Court of the State of California

In re

ROY BUTLER (D-94869),

On Habeas Corpus.

Case No. S237014

First Appellate District, Division Two, Case No. A139413
Alameda County Superior Court, Case No. 91694B
The Honorable Larry J. Goodman, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Courts have inherent and statutory authority to modify stipulated injunctive orders in light of intervening changes in law or facts. This authority assures that injunctions can be adapted to changed circumstances and new legal directives or assumptions. In this case, the Legislature's decision to overhaul California's parole system fundamentally altered the legal landscape underlying the Court of Appeal's stipulated order. When the order was entered, the governing parole statutes required the Board of Parole Hearings to set minimum terms of confinement for prisoners receiving indeterminate life sentences. In 2015, the Legislature repealed that requirement and provided instead that minimum terms would be set by statute. These statutory revisions ended the Board's term-setting role and deprived base terms of any meaning or function. These are precisely the sorts of circumstances under which modification of an equitable injunctive order is required.

In his answer brief on the merits, Roy Butler offers no response to many of the authorities and arguments presented by the Board. Most notably, he ignores this Court's conclusion in *In re Dannenberg* (2005) 34 Cal.4th 1061 that, contrary to his central thesis, the Constitution does not require the Board to fix maximum terms for indeterminately sentenced life inmates. Butler likewise fails to address the regulatory provisions and judicial precedents cited by the Board establishing that, at the time the stipulated order was entered, base terms marked the minimum sentence a life inmate was required to serve—not the maximum sentence permitted by state law or the state or federal constitutions. Similarly, he never explains how a rudimentary base-term calculation can supplant the broad, case-specific inquiry courts must undertake to determine if a sentence offends constitutional limits. Finally, Butler does not dispute that continued enforcement of the order, based on a now-superseded statutory scheme, will

cause widespread confusion for prisoners and the public at large. All of these reasons show that the stipulated order should be modified.

The arguments Butler does make have no merit. Butler's objection to the Board's modification request is premised in substantial part on his misunderstanding of the relevant legal standard. In his view, a court may modify an injunctive order only when there has been a change in the law invoked in the plaintiff's complaint and the change renders the order unlawful. To the contrary, the meaning of a stipulated injunction is determined by the order itself—not by the legal theories pressed by one party. Moreover, this Court has made clear that modification of an injunctive order is warranted any time changed circumstances make it no longer equitable to enforce the order's terms. Showing that continued compliance would be pointless and wasteful is enough.

Butler also errs in asserting that the stipulated order is consistent with the legislative revisions to the parole system. When the Legislature adopted Senate Bill 230, it expressly decided to dismantle the base-term system. His strained effort to harmonize the purposes of SB 230 with the stipulated order rests on his unsupported and incorrect claim that base terms reflect a constitutionally proportionate sentence.

The Court of Appeal's decision rejecting the Board's motion to modify should be reversed.

ARGUMENT

I. THE STIPULATED ORDER SHOULD BE MODIFIED.

A. Courts May Modify Injunctions in Light of Changes in Law or Fact.

Starting in 2014, new criminal justice reform measures shifted the legal structure of the State's parole system in fundamental ways. (Opening Brief at pp. 8-11, 14-19.) Butler argues that the Legislature's revisions to

the parole scheme are not relevant and that the Court's modification inquiry turns solely on whether the law on which he based his original habeas claims—the state and federal constitutions—has changed. (Answer Brief at pp. 25-29.) That is incorrect. In interpreting the meaning of a stipulated order, courts look to the agreement reached by the parties, not to the claimant's allegations. A consent judgment is "in the nature of a contract" (*Pardee Construction Co. v. City of Camarillo* (1984) 37 Cal.3d 465, 471), and is interpreted under the rules applicable to other contracts (*Jamieson v. City Council of City of Carpinteria* (2012) 204 Cal.App.4th 755, 761). That means that a stipulated order is "construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation." (*United States v. Armour & Co.* (1971) 402 U.S. 673, 682; see also *United States v. ITT Continental Baking Co.* (1975) 420 U.S. 223, 236-237 [consent decrees construed "without reference to" the law plaintiff sought to enforce but never proved].)

In addition, modification of an injunctive order is warranted when "circumstances have so changed that an injunction is no longer necessary or desirable" (*Union Interchange, Inc. v. Savage* (1959) 52 Cal.2d 601, 604), or "when the ends of justice will be thereby served" (*Sontag Chain Stores Co. v. Superior Court* (1941) 18 Cal.2d 92, 95). Code of Civil Procedure section 533, which provides that 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," embodies these same principles. (Code Civ. Proc., § 533; see also Civ. Code, § 3424, subd. (a) [same for final injunctions]; Sen. Com. on Judiciary, Rep. on Sen. Bill No. 45 (1995-1996 Reg. Sess.) as amended Feb. 23, 1995, pp. 4-5 [section 533 "intended to codify several decisions of the Supreme Court

which hold that the courts have inherent powers to modify or dissolve injunctions when that change is warranted by changed circumstances," citing *Savage, supra*, at pp. 604-605]; *Swan Magnetics, Inc. v. Superior Court* (1997) 56 Cal.App.4th 1504, 1509 [similar regarding section 3424].) As one court put it, "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 v. Goswick* (1982) 130 Cal.App.3d 398, 405.) These authorities make clear that amendment of an injunctive order is appropriate when the legal landscape—not just the law alleged in a plaintiff's complaint—changes in ways that make continued enforcement of the order inequitable. (See *id.* at pp. 406-408 [trial court abused discretion in failing to modify settlement agreement in light of later-enacted statute revising state "public policy," even though statute, by its terms, did not apply to conduct addressed in agreement]; *Horne v. Flores* (2009) 557 U.S. 433, 456-465 [proper analysis of request to modify order addressing violations of federal statute required consideration of changes to state law and policy and enactment of new federal statute]; *David B. v. McDonald* (7th Cir. 1997) 116 F.3d 1146, 1148-1150 [modification of consent decree entered to resolve claims under federal Rehabilitation Act required in light of changes to state law].)[1]

These authorities also demonstrate that Butler is wrong in arguing that modification is justified only when a change in law renders a stipulated

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[1] *System Federation No. 91 Railway Employees Department v. Wright* (1961) 364 U.S. 642, on which Butler relies (AB at p. 30), did not view the allegations of the plaintiffs' complaint as defining the scope of its modification inquiry. There, the Court looked to the consent decree itself and concluded that modification was required because the legal assumptions underlying the decree had changed. (*Wright, supra*, 364 U.S. at pp. 651-652.)

injunction unlawful. (AB at pp. 1, 25, 30, 36.) Butler erroneously cites a single case, *Local No. 93, International Association of Firefighters, AFL-CIO C.L.C. v. City of Cleveland* (1986) 478 U.S. 501 in support of his view that a "conflict" is required. (AB at p. 25.) In the language excerpted by Butler (see *ibid.*), the Supreme Court enunciated the different principle that parties cannot "agree to take action that conflicts with or violates the statute upon which the complaint was based." (*Local No. 93*, *supra*, at p. 526.) That observation—that a court cannot enter a consent decree with illegal terms—says nothing about the conditions under which modification of a lawfully entered injunctive order is appropriate. On that point, the high court has made clear that modification is called for when "any change in factual or legal circumstances renders continued enforcement of the original order inequitable." (*Horne*, *supra*, 557 U.S. at p. 457; see also *id.* at p. 447 [modification appropriate when "'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest,'" quoting *Rufo v. Inmates of Suffolk County Jail* (1992) 502 U.S. 367, 384].)

B. The Changes Are Material and Warrant Modification.

The legislative revisions to Penal Code section 3041 have changed California's parole system in ways that compel modification of the stipulated order. (OB at pp. 14-19.) At the time the stipulated order was entered, section 3041, subdivision (a) required the Board to set "parole release dates"—a mandate that the Board implemented by calculating base terms that prescribed an inmate's minimum sentence. (OB at pp. 3-6, 17-18.) SB 230 amended section 3041, repealed the requirement that the Board set release dates, and replaced it with a system under which minimum prison terms are established by statute. (OB at p. 9.) These legislative reforms eliminated the Board's term-setting function and rendered Board-set base terms obsolete. They cannot be reconciled with

the stipulated order's requirements that the Board continue setting base terms and promulgate new base-term-setting regulations. (OB at pp. 14-19.) There is no reason (or statutory authority) for the Board to continue setting them, or to maintain two mutually inconsistent regulatory schemes. (OB at pp. 8-11, 14-20.)

Contrary to Butler's view (AB at pp. 30-31), both *Salazar v. Eastin* (1995) 9 Cal.4th 836 and *System Federation No. 91 Railway Employees Department v. Wright* (1961) 364 U.S. 642 support the conclusion that the legislative reforms to the state parole scheme warrant modification of the stipulated order. In both cases, the applicable injunctive order was premised on assumptions about the law in effect at the time. (*Salazar*, *supra*, 9 Cal.4th at p. 850; *Wright*, *supra*, 364 U.S. at p. 651.) In both, those assumptions changed—one by virtue of a statutory amendment (*Wright*) and one through a change in decisional law (*Salazar*). In both, modification or vacatur of the order was appropriate in light of those changed legal assumptions. (See *Salazar*, *supra*, at p. 850; *Wright*, *supra*, at p. 651.)[2] The Legislature's revisions to California's parole system had the same kind of effect here.

Butler sees the stipulated order as consistent with the legislative overhaul of the parole system (AB at pp. 34-41), but his arguments rest on a misunderstanding of the new statutory scheme and the role and purpose of base terms. To begin with, Butler is incorrect in claiming that the new laws

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[2] Butler quibbles with the opening brief's statement that, in *Salazar*, this Court "upheld a trial court's decision to modify an injunction." (OB at p. 17; AB at p. 31, fn. 18.) As the brief described, the modification upheld in that case was the trial court's decision to vacate its earlier injunction. (OB at p. 17.) The Board explained that *Salazar* held the trial court "acted properly" in vacating the injunction in light of changes in the law (see OB at p. 17, discussing *Salazar*, *supra*, 9 Cal.4th at p. 850)—a characterization that Butler does not and cannot dispute.

only "relate to the Board's parole-granting authority" and not its prior term-setting function. (AB at p. 41; see also AB at p. 38.) Just the opposite: SB 230 left intact the Board's prior authority under section 3041, subdivision (b), to determine whether an inmate is suitable for parole based on dangerousness, while expressly repealing the Board's distinct term-setting function, previously set forth in section 3041, subdivision (a). (Stats. 2015, ch. 470, § 1.) The Legislature made this decision specifically to address what it perceived as significant problems with the existing base-term process. (OB at pp. 10-11.)

Penal Code section 1170, subdivision (a)(1) does not reflect the Legislature's intent that the Board nonetheless continue setting base terms to promote the Determinate Sentencing Law's general goal of proportionate sentences. (See AB at p. 37.) Base terms do not serve as the measure or outer limit of a sentence's constitutional proportionality, particularly for the narrow class of serious, violent offenders subject to indeterminate life sentences today. (OB at pp. 6, 15, 21-22.) Moreover, in light of the Legislature's overriding goal of protecting public safety through parole decisions made in each individual case, the DSL's objective of proportionate punishment does not require the Board to set uniform, proportional sentences for life-term inmates. (See *Dannenberg*, *supra*, 34 Cal.4th at pp. 1083-1084; see also *id.* at p. 1083 [Legislature intended to apply some determinate sentencing principles to life-maximum inmates but "analogy is not complete"].) This conclusion is all the more true after SB 230 eliminated the Board's term-setting function altogether.

Butler is also mistaken in arguing that the Board's proposed modification—requiring the Board to inform inmates of their statutory minimum eligible parole date instead of their base term at their consultation or next scheduled parole consideration hearing—is not properly tailored to the amendments to section 3041. (AB at pp. 33-34.) Contrary to Butler's

view, base terms, like the minimum eligible parole dates now provided under section 3041, subdivision (a)(4), formerly operated as the inmate's minimum term of confinement. (OB at p. 6.) In addition, although the Board generally announces minimum eligible parole dates at inmates' parole hearings as a matter of practice, section 3041 does not compel the Board to do so.

There is likewise no merit to Butler's claim that continued enforcement of the stipulated order would further the purposes of SB 260, SB 261, and SB 230. (AB at pp. 36-37, 38, 40.) As discussed in the opening brief, the Legislature adopted SB 230 to end the Board's term-setting role and remedy what it saw as defects in the base-term system. (OB at pp. 9-11, 18.) That purpose is incompatible with requiring the Board to continue setting base terms and perpetuate its flaws. Butler argues that "[a]t no point did a single lawmaker indicate an intent to eliminate base terms as a measure for proportionality" or "decry base terms as a useful measure of proportionality for inmates who have repeatedly been denied parole." (AB at pp. 38, 39-40.) That is not surprising, because base terms have never served that function. (See OB at p. 6.)[3]

The stipulated order, moreover, did not infuse base terms with such a purpose. According to Butler, the stipulated order promotes SB 230's goal of expediting the release of parole-suitable inmates by vindicating prisoners' constitutional right not to be confined beyond the base term. (See AB at pp. 4, 32, 40.) That is not correct. The parties stipulated to the settlement

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[3] Butler also errs in claiming that the Board lacked support in asserting that the Legislature was aware of the settlement in this case when it enacted SB 230. (AB at p. 39, citing OB at p. 18.) The cited page of the opening brief includes a citation to a legislative history report that specifically mentions the *Butler* settlement. (See OB at p. 18, citing Sen. Com. on Pub. Safety, Rep. on Sen. Bill No. 230 (2015-2016 Reg. Sess.), Hearing Date Apr. 28, 2015, p. 3.)

order without a ruling by the Court of Appeal on the merits of Butler's claims, and the stipulation itself expresses no agreement on his constitutional theories. The stipulated order requires only that the Board change the time at which it calculates base terms and promulgate new regulations reflecting that practice. (Stipulated Order ¶¶ 3-5.) Its operative provisions do not mention the Constitution, state that base terms are measures of proportionality, or suggest that the Board must take them into account when making suitability determinations. Nor would it make sense to construe the stipulated order as reflecting a mutual agreement on these points. (See, e.g., AB at p. 4.) Butler suggests that the Board acceded to his position that the constitutional prohibition against excessive punishment requires that base terms be set early in the parole process and be considered as part of the suitability determination—notwithstanding this Court's prior conclusion that the Constitution contains no such requirement, the Legislature's unequivocal direction (repeatedly affirmed by this Court) that the Board must consider only public safety when evaluating an inmate's suitability for release, and forty years of contrary Board practice. (See OB at pp. 3-6, 21-29; *infra*, section II.) Such a reading of the parties' agreement is, to say the least, implausible.[4]

Finally, Butler's misunderstanding of the legislative reforms leads him to discount the significant burdens and practical difficulties that

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[4] Any such reading would also contradict Butler's own statements describing the Board's position in this case. In proceedings below, Butler acknowledged that the Board had "long refused" to agree with him that "it is constitutionally obligated to determine the point at which an inmate's sentence becomes excessive" and had "always" insisted that its authority to calculate base terms arose only from statute and not the Constitution. (See Butler Opp. to Mot. to Modify, No. A139411 (Mar. 1, 2016) at p. 6, italics and bold omitted.) Butler cannot now suggest that the Board accepted his constitutional theories when it agreed to settle this case.

continued enforcement of the stipulated order would create. (AB at pp. 32-33.) Butler does not dispute that adopting new base-term-setting regulations will consume resources of multiple state agencies or that ongoing enforcement of the stipulated order will cause widespread confusion among inmates, lawyers, and the public at large. (See OB at p. 20.) He instead makes the puzzling argument that all of the Board's concerns existed at the time the Board agreed to settle the case. (AB at p. 33.) SB 230 did not take effect until two years after the stipulated order was entered.

After SB 230's enactment, base terms ceased to have any statutory basis or purpose. Requiring the Board to continue setting them is a waste of public resources that the order should be modified to avoid.

C. No Procedural Obstacle Bars the Board's Requested Relief.

Beyond his challenge to the basis for the Board's modification request, Butler claims that the disentitlement and law-of-the case doctrines preclude the Court from granting the Board's requested relief. (AB at pp. 41-48.) These arguments are waived and have no merit.

Butler did not raise either argument in his opposition to the Board's motion to modify in the Court of Appeal. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1245, fn. 15 [argument forfeited if not raised below].)[5] In addition, Butler did not ask this Court to consider either issue at the petition-for-review stage. (See Cal. Rules of Court, rule 8.500, subd. (a)(2) [answer may ask Court to address additional issues if it grants review].)

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[5] At oral argument before the Court of Appeal, Butler argued for the first time that the Board's motion to modify sought to relitigate the constitutional issues he claimed were resolved in the court's earlier attorneys' fee order. (See Oral Argument Tr. 34-36.) Even there, he did not invoke the law-of-the-case doctrine.

Although Butler asserted both as purported reasons for the Court to deny review, he did not request that the Court consider either issue in the event the Board's petition was granted. (See *id.*, rule 8.504, subd. (c) [answer raising additional issues for review must contain statement of those issues]; *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654, fn. 2 [answer failed to preserve issue for Court's consideration by mentioning it as reason to decline review but not asking Court to consider it if the petition were granted].) Butler's arguments based on the disentitlement and law-of-the-case doctrines are thus twice waived and should not be considered.

In any event, both arguments fail. As set forth in the cases on which Butler relies (AB at pp. 41-42), a court may dismiss an appeal under the disentitlement doctrine when an appellant "stands in an attitude of contempt to the legal orders and processes of the courts," such as by fleeing the jurisdiction with a child during a custody proceeding or deliberately flouting court orders. (*Knoob v. Knoob* (1923) 192 Cal. 95, 96 [parent removing child from country in violation of court order not entitled to pursue appeal where she did "not intend to obey" court's commands]; see also *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277 [by "secluding the children in a foreign country," appellant violated court decrees and "willfully and purposely evaded legal processes and contumaciously defied and nullified every attempt to enforce" court orders, including order at issue in appeal]; *Gwartz v. Weilert* (2014) 231 Cal.App.4th 750, 761 [appellant "willfully disobey[ed] trial court's" order by transferring funds to "frustrat[e] defendants' legitimate efforts to enforce the judgment" and in violation of court's order freezing such transactions].)

Here, the premise for Butler's invocation of the disentitlement doctrine is an unproven and erroneous allegation that the Board previously acted in contempt of the settlement agreement. (AB at pp. 42-43, relying on counsel's declaration.) No such finding of contempt has been or could

be made. As the Board previously informed the Court (see Reply to Answer to Pet. for Review at p. 11, fn. 2), the Board concluded that youthful and elderly offenders were not encompassed within the stipulated order in light of SB 260, SB 261, and the order in *Plata v. Brown*, No. 01-1351 (N.D. Cal.), Dkt. No. 2766 (Feb. 10, 2014). Those authorities require youthful and elderly offenders to be released upon a grant of parole, without regard to their base terms. (OB at pp. 8-9.) After the Court of Appeal ruled that youth and elderly offenders were nevertheless included within the terms of the stipulated order (see Order at pp. 9-12), the Board began calculating base terms for these inmates and will soon complete the process of retroactively setting base terms for those who did not receive one at a prior parole consideration hearing. The Board is currently setting base terms for all indeterminate life inmates, and its obligation under the stipulated order to promulgate new base-term-setting regulations has been stayed by the Court of Appeal. Butler's reliance on the disentitlement doctrine is meritless.

Butler's law-of-the-case theory is also misguided. The question before the Court in this case is whether the Board should be relieved of its prior settlement obligations to continue setting base terms and to promulgate base-term-setting regulations in light of the Legislature's later reforms to the parole system. Nothing in the Court of Appeal's earlier orders entering the parties' stipulation or resolving Butler's motion for attorneys' fees (see AB at pp. 46-47) addressed that issue. Indeed, SB 230, which provided the basis for the Board's motion to modify, did not take effect until two years after entry of the stipulated order and seven months after issuance of the fees order.

The law of the case also does not prevent this Court from considering the Court of Appeal's theory that the Board's obligation to set base terms enforces the constitutional proscription against excessive sentences. The

law-of-the-case doctrine applies when the point of law involved was necessary to the prior decision and was actually determined by the court. (See *Nally v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278, 301-302.) In its fees decision, the Court of Appeal addressed the different question of whether the settlement order conferred a "significant benefit" within the meaning of California Code of Civil Procedure section 1021.5. (*In re Butler* (2015) 236 Cal.App.4th 1222, 1230-1244.) In considering that issue, the court stated, as one of two alternative grounds, that base terms relate to proportionality. (*Id.* at pp. 1236-1240.) The court did not rule, as it did in the current order under review, that base terms mark the point at which a sentence becomes constitutionally excessive. In fact, the fees order concluded that, while base terms "relate to proportionality ... we agree with the Board that the adjusted base term does not necessarily represent the maximum punishment that may constitutionally be imposed on a prisoner." (*Id.* at p. 1235; see also *id.* at p. 1243 [current base-term regulations "do *not* indicate that the base and adjusted base terms the Board promptly fixes for a particular prisoner constitute the Board's estimate of the maximum prison term constitutionally proportionate to" the particular prisoner's offense].)

In any event, the law of the case will not bar further review of an issue "where there has been a manifest misapplication of existing principles resulting in substantial injustice," or where the controlling legal rules have changed or been clarified. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491-492.) For the reasons explained below (see *infra*, section II), any conclusion that base terms are constitutionally significant is wrong and should not remain uncorrected by this Court. In that regard, declining to consider the Court of Appeal's constitutional reasoning would not promote judicial economy, which is the "primary purpose served by the law-of-the-case rule." (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 435.)

Rather, judicial economy would be served by clarifying for this and future cases that base terms do not indicate the maximum period of confinement that the Constitution allows.

Finally, Butler's observation that the Board did not support this Court's review of the stipulated order at the time it was entered is irrelevant. (AB at p. 46.) Only orders actually deciding an issue of law can operate as law of the case, and the Court of Appeal's order entering the parties' settlement agreement did not discuss or rest on Butler's constitutional theories. In addition, Butler is mistaken in arguing that the third-party request to transfer the case to this Court following the effective date of the stipulated order presented the same statutory arguments that are at issue now. (AB at p. 46.) SB 230 did not take effect until more than eighteen months after that request.

No procedural hurdle prevents the Court from modifying the stipulated injunction to harmonize it with the Legislature's revisions to the statutory parole scheme.

II. BASE-TERM SETTING IS NOT REQUIRED BY THE CONSTITUTION.

The constitutional proscription against grossly disproportionate confinement also does not preclude this Court from granting the Board's modification request. Butler urges that, even if the Legislature directed base-term setting to end, the Board must nevertheless continue to set such terms in order to maintain the parole system within constitutional bounds. (AB at pp. 48-56.) This novel and far-reaching claim is foreclosed by *Dannenberg* and untethered from the law interpreting the constitutional protection against excessive sentences.

In *Dannenberg*, this Court squarely rejected the argument that the Board is constitutionally required to fix maximum terms for indeterminate life inmates sentenced under the Determinate Sentencing Law. (See OB at

pp. 26-27; *Dannenberg*, *supra*, 34 Cal.4th at pp. 1071, 1096-1098.) As Butler notes (AB at p. 51), *Dannenberg* recognized that the Constitution does not permit an indeterminately sentenced offender to be confined for a period grossly disproportionate to his or her culpability for the commitment offense. (*Supra*, 34 Cal.4th at p. 1096.) But the Court specifically held that "such constitutional considerations" do not impose on the Board "a general obligation to fix actual maximum terms, tailored to individual culpability, for indeterminate life inmates." (*Ibid.*) The Court explained that the constitutional concerns addressed in its prior decisions in *In re Rodriguez* (1975) 14 Cal.3d 639 and *People v. Wingo* (1975) 14 Cal.3d 169—which form the basis of Butler's arguments here (AB at pp. 48-51)—do not apply to inmates subject to indeterminate life sentences after the Legislature replaced the Indeterminate Sentencing Law with the Determinate Sentencing Law. (*Dannenberg*, *supra*, at pp. 1096-1097; see also OB at pp. 26-27.) Because the constitutional prohibition against excessive sentences "will rarely apply" to the serious offenders still sentenced to life-maximum terms after adoption of the DSL, the Constitution's "potential application in occasional individual cases does not require [the Board], under the current statutory scheme, to set fixed release dates for all life prisoners ...." (*Dannenberg*, *supra*, at p. 1071.) Butler's argument that *Rodriguez*'s term-fixing mandate "continues to be good law" and that "nothing in subsequent case law ... suggests that [*Rodriguez*] does not still apply" to prisoners currently receiving indeterminate life sentences (AB at p. 51) simply ignores *Dannenberg*.[6]

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[6] Butler's description of the Board's prior practice of setting base terms after determining that an inmate was suitable for parole as the "wrong way" of doing things (AB at pp. 3-4) is perplexing. This Court's decision in *Dannenberg* specifically upheld the practice. (*Supra*, 34 Cal.4th at p. 1084.)

Butler's suggestion that SB 230 has rendered "[m]uch of *Dannenberg*'s reasoning ... obsolete" (AB at pp. 51-52) likewise has no merit. Although, as Butler notes, *Dannenberg* interpreted the "'uniform terms' provision" of section 3041, which SB 230 has now repealed, the Court also considered and rejected the distinct argument that the Constitution requires the Board to fix maximum terms for indeterminate life inmates—the precise claim that Butler urges here. Moreover, *Dannenberg*'s interpretation of former section 3041 as favoring public safety over term uniformity is, if anything, more salient now that the Legislature has rescinded the Board's term-setting responsibilities while maintaining its obligation to not release inmates who continue to pose an unreasonable risk of danger to the public.

Even beyond *Dannenberg*, Butler's constitutional theories are inconsistent with first principles. The rudimentary method of computing base terms does not approximate the broad, fact-specific inquiry that courts use to judge whether a sentence violates the state or federal constitution. (OB at pp. 22-23.) Moreover, this Court and the high court have made clear that only in the rare, extreme case will a term-of-years sentence offend the constitutional prohibition against excessive sentences. (OB at pp. 22-23.) Butler does not discuss or distinguish these authorities, yet insists that the Board is nevertheless required, in every case, to fix a term of imprisonment at substantially less than the life maximum in order to ensure that no inmate is confined for an unconstitutional period. (AB at pp. 48-56.) This understanding of the reach of the cruel and unusual punishment clause—that every sentence beyond an administratively set base term is presumptively suspect—has the law exactly backward.[7]

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[7] Butler contends that those convicted of first-degree murder deserve harsher punishment than those convicted of kidnapping or train-wrecking. (continued...)

Butler's further argument that the Board must consider proportionality as part of the suitability process (AB at p. 53) is also contrary to this Court's precedents. (OB at pp. 28-30.) In *Dannenberg*, the Court held "that the Board proceeded lawfully" by finding an inmate unsuitable and thus not eligible for a release date "without comparing [the inmate's] crime ... to its base term matrices[] or to the minimum statutory prison term for that offense." (*Supra*, 34 Cal.4th at p. 1098.) That conclusion is consistent with the statutory standards governing the Board's suitability determinations, the Board's regulations, and other decisions of this Court—all of which establish that the Board has the power and duty to decline to fix a firm release date if it finds that the inmate remains a danger to the public. (See OB at pp. 28-29, discussing *In re Lawrence* (2008) 44 Cal.4th 1181; *In re Bush* (2008) 161 Cal.App.4th 133, 142.) Again, Butler offers no response to these authorities.

Butler additionally claims that base terms are constitutionally significant based on his observation that the phrase "base term" was used in now-superseded regulations that the Board adopted to implement this Court's decision in *Rodriguez*. (AB at pp. 5-9, 11, fn. 5, 50-51.) Today's "base term" has an entirely different purpose and meaning than it did prior to the adoption of the DSL.

As Butler notes, state parole officials implemented *Rodriguez*'s term-fixing requirement first by adopting general guidance and then promulgating formal regulations requiring the calculation of a "primary

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(...continued)
(AB at p. 54.) The question of what sentence may be appropriate as a matter of policy, however, is not the same as what sentence would transgress the constitutional limit. Only in the rare or extraordinary case will a term-of-years sentence—including one for a non-murder offense—violate the state or federal constitution. (OB at pp. 22-23.)

term." (Cal. Code Regs., tit. 15, § 2100, subd. (a) (1976) [Register 76, No. 21-B, May 22, 1976]; see also RJN, Ex. A, Chairman's Directive No. 75/30 (Sept. 2, 1975) [guidance preceding adoption of formal regulations].) A "primary term" consisted of a "base term" and adjustments for prior offenses, and reflected the parole authority's estimate of "the maximum period of time which [was] constitutionally proportionate to the individual's culpability for the crime." (Cal. Code Regs., tit. 15, § 2100, subd. (a) (1976); *id.* § 2150.)

After the repeal of the ISL, the Board implemented section 3041's new directive to set "parole release dates" based on uniform criteria by, among other things, developing base-term matrices used to calculate an inmate's potential release date. (OB at pp. 3-6.) Although the Board's new regulations again used the phrase "base term," it meant something wholly different. Whereas base terms under the prior regulations were the starting point for calculating a "primary term"—which represented parole officials' estimate of the maximum constitutionally permissible sentence—base terms under the new regulations defined the minimum period of time an inmate could remain in prison. (OB at p. 6, citing Cal. Code Regs., tit. 15, §§ 2289, 2411; *In re Vicks* (2013) 56 Cal.4th 274, 313; *Bush*, *supra*, 161 Cal.App.4th at p. 142.) Butler never explains how equating today's base terms with former "primary terms" can be reconciled with these authorities. (See AB at pp. 11, fn. 5, 50, fn. 26.)

Finally, Butler's hyperbolic claim that granting the Board's modification request will "foment a constitutional crisis" and set the parole system on a "collision course with the federal and state constitutions" does not correspond to the realities of the current parole scheme. (AB at pp. 53, 56.) Since the DSL's enactment, base terms have never served the role Butler claims in safeguarding inmates' constitutional right to avoid a grossly disproportionate sentence. Under current law, only the most serious

offenders are subject to indeterminate life sentences. Following SB 230, a significant criminal justice reform measure, each of those life inmates is entitled to release after serving his statutorily prescribed minimum sentence unless the Board determines, based on relevant and reliable evidence, that he continues to pose an unreasonable risk of danger to the public. And any prisoner who believes that his continued confinement is unconstitutional may file a habeas petition seeking release. Nothing in the Constitution requires the Board to add to this system base-term calculations that have no statutory basis or point under current law.

CONCLUSION

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

Dated: April 10, 2017

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 5,803 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: April 10, 2017

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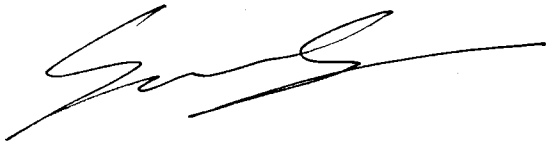

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DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

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

On April 10, 2017, I served the attached **REPLY 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 April 10, 2017, at San Francisco, California.

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