IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ROY BUTLER,

On Habeas Corpus.

Case No. S237014

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

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PLAINTIFF/RESPONDENT PEOPLE OF THE STATE OF CALIFORNIA

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APPLICATION FOR PERMISSION
TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The California District Attorneys Association (CDAA), as amicus curiae, hereby requests permission to file the enclosed amicus curiae brief in support of the Attorney General.

The California District Attorneys Association (CDAA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. CDAA presents prosecutors' views as amicus curiae in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

This case presents issues of statewide interest, and concern the greatest interest to California prosecutors. As the statewide association of these prosecutors, amicus curiae, CDAA, is familiar and experienced with the issues presented in this proceeding.

The undersigned serves as the Supervising Deputy District Attorney of the San Diego County District Attorney's Lifer Hearing Unit and has filed amicus briefs on behalf of CDAA in all of the recent California Supreme Court lifer/parole cases including *In re Vicks* (2013) 56 Cal.4th 274 (*Vicks*), *In re Shaputis* (2011) 53 Cal.4th 192 (*Shaputis II*), *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis I*), *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), and *In re Dannenberg* (2005) 34 Cal.4th 1061 (*Dannenberg*). In addition, the undersigned has also filed an amicus brief in the Ninth Circuit Court of Appeals decision in *Gilman v. Brown* (9th Cir.

2016) 814 F.3d 1007. The undersigned also serves as the subject matter expert in this area of law for CDAA and is the principal author of the CDAA Lifer Hearings Manual. (Richard Sachs et al., Lifer Hearings (2016).)

The instant case raises matters of grave concern to prosecutors and represents a serious threat to the administration of justice statewide. The order denying the Board of Parole Hearings ("Board") motion to modify the stipulated settlement was wrongly decided, and set out mistaken legal principles regarding parole suitability; it violated the long established principle that public safety is the paramount consideration in any parole release decision. The Court of Appeal's order has the practical effect of *deprioritizing* public safety concerns in life-top parole cases.

Moreover, the order turns on its head the well-established concept that "suitability" is the *predicate fact* which must be found before a parole grant can occur. Left unchecked, this order, and the legal trend it establishes, will require the release of even extremely dangerous inmates without regard to the threat they pose to the public, simply to satisfy a misplaced concept of term proportionality that was never intended to be a yardstick when the Board makes parole decisions. The need for a reversal of the order that requires base terms to be set as a constitutional measure of sentencing proportionality, without regard to the current risk of danger the inmate poses to public safety, is manifest.

Pursuant to Rule 8.520(f)(4), applicant states that no party nor counsel for a party in this appeal authored in whole or in part the proposed amicus brief, nor made any monetary contribution to fund the preparation or submission of the proposed amicus brief. Applicant further states that no person or entity made any monetary contribution to fund the preparation or submission of the proposed amicus brief other than amicus curiae and its members.

The applicant is familiar with the questions involved in this case and the scope of the application. The applicant believes further argument and briefing on these points will be helpful to the Court in its evaluation and resolution of this case. CDAA is able to present additional arguments clarifying the issues and potential ramifications of an eventual holding. CDAA respectfully asks that this Court accept the attached brief and permit CDAA to appear as amicus curiae.

Dated: May 9, 2017

Respectfully Submitted,

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ISSUE PRESENTED

In a parole decision for an indeterminately sentenced inmate, is "suitability" the *predicate fact* which must be determined, for the purpose of assessing whether there is a current risk to public safety, before the issue of the proper length of term is considered?

INTRODUCTION AND SUMMARY OF ARGUMENT

For years, under Penal Code[1] section 3041, "suitability" for parole—defined as no longer representing an unreasonable risk to public safety—has been the predicate fact before a life term inmate could be released upon parole. The issue of term-setting was not reached until a finding of suitability was made.

Section 3041, former subdivision (a), required the Board to set release dates for offenses which were "uniform," but only after a finding of suitability was reached. The Stipulation and Order Regarding Settlement in the lawsuit filed by inmate attorneys in Butler's case in April 2014 provided that base terms and adjusted base terms would be set in all – cases—not just when a finding of suitability was made—to inform inmates what their maximum term of confinement would be once they were found suitable. This was done primarily to fulfill the "uniform term" requirement in section 3041, former subdivision (a); however, suitability still remained the predicate fact before an inmate could be released, regardless of their base and adjusted base term.

Effective January 1, 2016, Senate Bill No. 230 took effect, and it deleted section 3041, former subdivision (a), and the requirement to set uniform terms. (Sen. Bill No. 230 (2015-2016 Reg. Sess.).) The measure provided that upon a grant of parole, the inmate shall effectively be released

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[1] Unless otherwise specified, all statutory references are to the Penal Code.

upon reaching their minimum eligible parole date (or put another way – immediate release): "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. . . ." (§ 3041, subd. (a)(4).) The measure left intact the public safety exception found in subdivision (b):

> The panel or the board, sitting en banc, shall grant parole to an inmate 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.

(§ 3041, subd. (b)(1).)

The Board made a motion to modify the *Butler* settlement stating that the setting of base and adjusted base terms was now unnecessary as no inmate will be retained in prison beyond his minimum eligible parole date once he is found suitable for parole. The Court of Appeal denied the motion, and the implications deriving from the decision, as made clear by the Attorney General's Opening Brief on the Merits, provide that even an inmate too dangerous for release under the public safety exception found in subdivision (b) must still be released if his sentence is somehow deemed disproportionate. The Court of Appeal relied upon a passage from *Dannenberg*, concerning the prohibition against disproportionate sentences, but unfortunately it read this passage in isolation and ignored the ensuing paragraphs which clarified that this concern is outdated because it was based upon the older, pre-1976 indeterminate sentencing scheme, which had a much larger risk of exposing inmates to disproportionate sentences. (*Id.* at pp. 1096-1098.)

This ruling contravenes over 30 years of case law, and recent precedents from this Court. (See *In re Duarte* (1983) 143 Cal.App.3d 943,

948 [suitability is decided first and public safety is the "fundamental criterion" in making this decision].) The decision by the Court of Appeal suggests that inmates incarcerated past their base and adjusted base terms are presumptively serving disproportionate sentences, and should be released, notwithstanding their unsuitability for parole.

Load testing this concept would require an inmate who states he plans to get out and commit further acts of violence or revenge to be released without regard to his current risk to public safety if his sentence is found to be disproportionate. As will become clear, the Indeterminate Sentencing Law (hereafter "ISL") and parole scheme were never intended to operate this way. As put by the Attorney General, this is an attempt to classify a lawful life-top sentence as unconstitutional based on new invited ad hoc challenges.

ARGUMENT

I.

SENATE BILL NO. 230 ELIMINATED TERMSETTING FOR ALL PURPOSES

Section 3041 was amended by Senate Bill No. 230 effective January 1, 2016. Section 3041, subdivision (a), formerly provided that the Board shall "normally set a parole release date" one year before an indeterminately sentenced inmate's minimum eligible parole date (hereafter "MEPD"). (§ 3041, former subd. (a), repealed by Stats. 2015, ch. 470, § 1.) That section further provided that the parole release date "shall 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. . . ." (*Ibid.*, emphasis added.) Former subdivision (b) provided that the Board set the release date unless it determined that public safety required a more lengthy term of incarceration. (§ 3041, subd. (b), repealed by Stats. 2015, ch. 470, § 1.)

Senate Bill No. 230 deleted the entire concept of parole release "dates" and "uniform terms" and replaced it with a simple construct that requires the Board to meet and "normally *grant parole*." (§ 3041, subd. (a)(2), emphasis added.) The statute further provides that upon a grant of parole, "the inmate shall be released subject to all applicable review periods," once they reach their MEPD. (§ 3041, subd. (a)(4).) Thus, the changes made by Senate Bill No. 230 deleted the requirement that uniform terms for offenses of similar gravity and magnitude be set, and replaced it with the MEPD as the default term once a finding of suitability is made.

Senate Bill No. 230 retained the public safety exception found in subdivision (b) in ISL parole release decisions. The change made by Senate Bill No. 230 to the public safety exception was minor and did not alter the ability of the Board to deny parole to an inmate it determined was too dangerous to release. The statute was amended to delete "release date" and substitute it with "[t]he panel . . . shall *grant parole* [instead of set a release date] unless it determines that the timing or gravity of the . . . offenses . . . is such that consideration of the public safety requires a more lengthy period of incarceration for this individual." (§ 3041, subd. (b)(1), emphasis added.)

II.

SUITABILITY IS THE PREDICATE FACT WHICH MUST BE FOUND BEFORE GRANTING PAROLE

This Court has never wavered from the fundamental concept that before a life-top inmate can be granted parole he or she must first be found suitable for parole. Prosecutors and inmate attorneys would likely agree that the most significant case this Court has ever decided concerning parole in ISL cases is *Lawrence*. There, this Court stated that "the core statutory determination entrusted to the Board . . . is whether the inmate poses a current threat to public safety." (*Id.* at p. 1191.) Noting that section 3041,

subdivision (a), provided parole applicants with an expectation of parole ("normally set a parole release date"), this Court still recognized that this rule is always subject to the public safety exception found in subdivision (b), when the Board finds "in the exercise of its discretion, that [the inmate is] unsuitable for parole in light of the circumstances specified by statute and by regulation." (*Id.* at p. 1204.) Any doubt about this concept was laid to rest by this Court:

> The relevant determination for the Board . . . *is, and always has been*, an individualized assessment of the continuing danger and risk to public safety posed by the inmate. 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.

(*Id.* at p. 1227, emphasis added.)

Section 2281, subdivision (a), of Title 15 of the California Code of Regulations derives from this well established principle and prominently states: "Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2281, subd. (a).)

III.

COURTS MANDATE A DENIAL OF PAROLE IF AN INMATE IS STILL A PUBLIC SAFETY RISK

The *Lawrence* case reaffirmed the principle that suitability is the predicate fact which must be found before an inmate sentenced to life in prison can receive a grant of parole. The seminal case which focused directly on this issue is *Dannenberg*. "The statutory scheme, viewed as a whole . . . clearly elevates a life prisoner's individual suitability for parole *above* the inmate's expectancy in early setting of a fixed and 'uniform' parole date." (*Id.* at pp. 1070-1071, emphasis added.) Noting that suitability is the predicate issue that must be resolved before a parole release date can

be set, this Court stated "the suitability determination *precedes* any effort to calculate a parole release date, [and] has long been noted in the case law." (*Id.* at p. 1080, emphasis added.)

This Court considered the argument that the measure of term length has significance in the lifer arena and the threat posed by the inmate to public safety should not be the predicate fact in a parole release decision. *(Dannenberg, supra,* 34 Cal.4th at p. 1081.) This Court summarized the countervailing argument as follows: "Thus, it is asserted, the Legislature has imported into the realm of indeterminate life sentences the philosophy of a fixed and uniform period of incarceration, intended simply as punishment *proportionate* to the commitment offense, and the Board has a presumptive obligation to set life inmates' parole release dates accordingly." (*Id.* at p. 1083, emphasis added.) This Court flatly rejected this argument and found the lower court "misperceived the priorities reflected in section 3041 and other statutes governing parole," especially as they relate to serious offenders. (*Id.* at p. 1081; see also p. 1087 rejecting that this approach would destroy "*proportionality*" contemplated by subdivision (a) ["In our view, this interpretation far overstates the meaning of the statute's words."].)

In examining the presumption of parole found in former subdivision (a), and the public safety exception in subdivision (b), this Court stated:

> [T]he overriding statutory concern for public safety in the individual case trumps any expectancy the indeterminate life inmate may have in a term of comparative equality with those served by other similar offenders. Section 3041 does not require the Board to schedule such an inmate's release when it reasonably believes the gravity of the commitment offense indicates a continuing danger to the public, simply to ensure that the length of the inmate's confinement will not exceed that of others who committed similar crimes.

(*Dannenberg*, *supra*, 34 Cal.4th at p. 1084.) In reaching this conclusion, this Court reaffirmed the long-standing principle:

> [T]he indeterminate sentence is in legal effect a sentence for the maximum term, subject only to the ameliorative power of the [parole authority] to set a lesser term. Indeed, [i]t is fundamental to[an] indeterminate sentence law that every such sentence is for the [statutory] maximum unless the [parole] [a]uthority acts to fix a shorter term. The [a]uthority may act just as validly by considering the case and then declining to reduce the term as by entering an order reducing it. . . .

(*Ibid.*, quoting *People v. Wingo* (1975) 14 Cal.3d 169, 182-183 (*Wingo*), internal citations and quotation marks omitted.)

Resolving the conflict between the two competing subdivisions, this Court stated:

> The most natural and reasonable way to read either version is that subdivision (a) applies only if subdivision (b) does not apply, and that the Board, before finding a life-maximum prisoner unsuitable under subdivision (b), need not determine if subdivision (a) might otherwise apply.

(*Dannenberg*, *supra*, 34 Cal.4th at p. 1087.) This Court also stated, "The language and structure of section 3041 thus most logically convey that the Board need engage in comparative term analysis only if it first determines, applying the pertinent criteria, that the inmate presents no public safety danger, and is thus suitable for parole." (*Id.* at p. 1083.)

IV.

THE LAW CONCERNING "SUITABILITY FIRST" HAS NEVER CHANGED

The guiding principle this Court laid out in *Dannenberg* and the importance of public safety as the predicate fact in parole cases has never been eroded and has been reaffirmed many times.[2] In *Lawrence*, this Court

[2] The principle of "legislative acquiescence" is applicable here: "In more than 25 years, despite numerous amendments to California's

stated, "[T]he statute does not require the Board to compare the inmate's actual period of confinement with that of other individuals serving life terms for similar crimes. [Citation] Rather, the statutory suitability determination is individualized, and focuses upon the public safety risk posed by the particular offender." (*Id.* at p. 1217.) Moreover, the *Lawrence* court stated, "[W]e considered it 'obvious' [in *Dannenberg*] that the public-safety provision of subdivision (b) takes precedence over the 'uniform terms' principle of subdivision (a)." (*Id.* at p. 1205.)

While *Lawrence* was primarily concerned with the role of the commitment offense in determining whether the inmate represents a "current threat" to public safety, it did not change the long standing rule that suitability is the predicate fact before parole. (*Id.* at p. 1221.) This Court provided that the paramount consideration is whether "the inmate currently poses a threat to public safety and thus may not be released on parole." (*Id.* at p. 1210.) This Court stated with clarity:

> [D]espite the conclusion we reach in the present case, we reiterate our recognition in *Dannenberg* that pursuant to section 3041, subdivision (b), the 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 circumstances of the inmate's crime or criminal history continue to reflect that the prisoner presents a risk to public safety.

(*Id.* at pp. 1227-1228.)

Three years later, this Court reiterated the concept that suitability is the predicate fact when it stated that the "Board is given the *initial*

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sentencing and parole laws, the Legislature has not disturbed the Board's interpretation of section 3041 in this fundamental regard. Under the particular circumstances, we find persuasive evidence that the Legislature has thus acquiesced in the Board's construction." (*Dannenberg*, *supra*, 34 Cal.4th at p. 1091.)

responsibility to determine whether a life prisoner may *safely* be paroled." (*Shaputis II*, *supra*, 53 Cal.4th at p. 215, emphasis added.) This Court also stated, "[I]t has long been recognized that a parole suitability decision is an 'attempt to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts.' " (*Id.* at p. 219, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 655; see also *Shaputis II*, *supra*, 53 Cal.4th at pp. 220-221 [suitability is the essential inquiry, based upon the threat to public safety, and posed first to the Board].) Also, when this Court considered whether the longer denial times in Marsy's Law were constitutional, it similarly reiterated the concept that suitability is the predicate fact. (*Vicks*, *supra*, 56 Cal.4th at pp. 295-296.)

All of these cases point to the clear conclusion that no inmate is entitled to a parole date unless he is first found suitable for parole and is no longer a current threat to public safety. Moreover, the Board of Parole Hearings has always interpreted the statute to provide that suitability is the predicate fact before a parole grant can occur, and, as previously stated, this interpretation has legal significance. While a court takes "ultimate responsibility for the interpretation of a statute, [it] accord[s] significant weight and respect to the longstanding construction of a law by the agency charged with its enforcement." (*Dannenberg*, *supra*, 34 Cal.4th at p. 1082.)

V.

THE COURT OF APPEAL MISINTERPRETED A PASSAGE FROM *DANNENBERG* BY READING IT IN ISOLATION FROM THE REST OF THE CASE, AND IGNORING THE CLARIFICATION WHICH FOLLOWED

Despite the clear indication that suitability is the predicate fact before a parole grant can occur, and term fixing is required, the Board entered into a stipulation that required it to set base terms and adjusted base terms at an initial parole hearing, or at the next scheduled hearing that resulted in a grant of parole, a denial of parole, a tie vote, or a stipulated

denial of parole. (See Attorney General Petition for Review, Exh. 2, Stipulation and Order Regarding Settlement, p. 3.) This stipulation was in response to a lawsuit Butler brought that alleged such deferred term fixing was illegal.

Thereafter, the San Diego County District Attorney and Sacramento County District Attorney respectfully requested this Court transfer the matter to itself due to the established precedent which conclusively contravened this allegation. That request was denied. (*In re Butler*, S217611.) Subsequently, the Board began to set base terms and adjusted base terms per the settlement (with the exception of youthful and elder parole hearings because term setting was unnecessary due to the requirement of immediate release subject only to the brief review periods). However, the Board never wavered from the established principle that suitability was, and still is, the predicate question, and that a parole grant could not occur unless the Board believed the inmate no longer posed a current threat to public safety under the *Lawrence* case.

As noted above, Senate Bill No. 230 removed the requirement that uniform terms be set pursuant to section 3041, and provided that upon a grant of parole, "the inmate shall be released subject to all applicable review periods," once they reach their MEPD. (§ 3041, subd. (a)(4).) Senate Bill No. 230 also left the public safety exception undisturbed except for a minor change in language. Thus, after Senate Bill No. 230, all inmates serving indeterminate life sentences were now treated the same as youthful and elder parole hearings: now, no dates are required, and all inmates who are granted parole are eligible for release subject to the applicable review periods. Understandably, the Board no longer felt the need to set base and adjusted base terms, since the entire scheme, including the familiar term setting matrices, were superseded by a new, simple construct that completely did away with uniform terms and future dates.

The Board moved to modify the settlement to conform to the new legal landscape. However, the Court of Appeal denied the request for modification, finding that the setting of a base term still has legal significance. The question is how a court can reach such a conclusion in light of the fact that term setting is now an obsolete practice and has been replaced with the MEPD (or earlier eligibility in the case of youthful or elder parole hearings) as the controlling release date upon a finding of suitability?

The answer is that the Court of Appeal has relied upon a misplaced concept of proportionality in denying the motion. Relying on both *Dannenberg* and its own decision in *In re Butler* (2015) 236 Cal.App.4th 1222, the court reasoned that the terms have continued significance in determining the point at which the confinement in state prison becomes presumptively disproportional. In so doing, the court ignored many years of "suitability first" legal jurisprudence and has turned *Dannenberg* case upside down.

The court hung its hat on a single peg—that portion of *Dannenberg* which states:

> Of course, even if sentenced to a life-maximum term, no prisoner can be held for a period *grossly disproportionate* to his or her individual culpability for the commitment offense. Such excessive confinement, we have held, violates the cruel or unusual punishment clause (art. I, § 17) of the California Constitution. [Citations.] Thus, we acknowledge, section 3041, subdivision (b) cannot authorize such an inmate's retention, even for reasons of public safety, beyond this constitutional maximum period of confinement.

(*Id.* at p. 1096, emphasis added.)

The difficulty here is that in the ensuing paragraphs immediately following this quote, this Court made clear that these proportionality issues were more common under the older ISL (pre-1976 law), and the new ISL

scheme greatly lessened their possibility; in the rare case that they did arise the court stated an inmate could bring their claim to court, and suitability still must remain the predicate fact without regard to term length. . (*Dannenberg*, *supra*, 34 Cal.4th at pp. 1096-1098.) In referring to the proportionality quote relied upon by the lower court, this Court clarified: "Our prior ruling that the parole authority had such a general duty [to set terms] was influenced by the nature and provisions of the more comprehensive indeterminate sentencing system then in effect." (*Id.* at p. 1096.)

The main reason for this statement was that the prior ISL law "subjected most convicted felons to a broad disparity between their statutory minimum and maximum periods of confinement, and it imposed life maximums for a wide range of offenses, serious and less serious." (*Dannenberg*, *supra*, 34 Cal.4th at p. 1096.) For example, in *In re Rodriguez*, the inmate was serving 22 years of an indeterminate life sentence consisting of one year to life in prison for a single count of child molest. (*In re Rodriguez* (1975) 14 Cal.3d 639 (*Rodriguez*).) The inmate in *Wingo* was serving a sentence of six months-to-life for a conviction of assault by means of force likely to cause great bodily injury. (§ 245, subd. (a); *Wingo*, *supra*, 14 Cal.3d at p. 169.) There are many similar examples of the wide range and uncertain punishment afforded to those inmates under the older ISL law—virtually every state prisoner was a "lifer" with a broad sentencing range of a few months-or years-to-life.

Dannenberg recognized that the new ISL law significantly changed the legal landscape. The *Dannenberg* court stated,

> Different considerations apply under current law. In contrast with the prior situation, the number of persons now serving indeterminate life-maximum sentences, while substantial, is but a fraction of California's prison population. And, unlike the former system, which imposed life maximums for a broad

> range of offenses, the current scheme reserves such sentences for a much narrower category of serious crimes and offenders.

(*Id.* at p. 1097.) Significantly, this Court went on to state:

> Moreover, as we have explained, section 3041 expressly instructs the Board to set an indeterminate life prisoner's parole release date—the equivalent of term-setting in such cases—unless it finds that the aggravated nature of the inmate's offense or criminal history raises public safety considerations warranting longer incarceration for that inmate. All these factors diminish the possibility that the Board's refusal, under section 3041, subdivision (b), to set parole release dates in individual cases will result in the de facto imposition of constitutionally excessive punishment, or will overwhelm the courts' ability to assess claims of constitutional disproportionality.

(*Ibid.*)

Thus, the lower court's reliance on the older ISL construct is misplaced; the statutory scheme was never intended to operate this way after the 1976 amendments.

VI.

PROPORTIONALITY CONCERNS ARE ADJUDICATED BY THE COURTS, NOT THE BOARD

Given the new ISL construct in which minimum terms are frequently 15 years-to-life for second degree murder, and 25 years-to-life for first degree murder, this Court saw little issue with deferring term-setting until after a finding of suitability and no serious concern that proportionality would become a frequent issue:

> Constitutional rights are thus adequately protected by holding that those indeterminate life prisoners who have been denied parole dates, and who believe, because of the particular circumstances of their crimes, that their confinements have become constitutionally excessive as a result, may bring their claims directly to court by petitions for habeas corpus.

(*Dannenberg, supra*, 34 Cal.4th at p. 1098.) This Court recognized that a proportionality limitation will "*rarely apply* to those serious offenses and offenders currently subject by statute to life-maximum imprisonment." (*Id.* at p. 1071, emphasis added.) And this Court has *twice stated* in its opinion that "[l]ife inmates who believe that such Board decisions have kept them confined beyond the time the Constitution allows for their particular criminal conduct may take their claims to court." (*Ibid.*)

Unfortunately, the Court of Appeal has ignored and abrogated this reasoning in favor of an invitation to challenge to the length of a life-top term in every case using the base and adjusted base term as a constitutional yardstick. Moreover, the Court of Appeal suggests the Board should determine proportionality as part of its parole release decision. No such basis exists in law. While the Board is in an excellent position to determine suitability, it is not similarly situated to determine proportionality, which involves a complex legal issue determined by cruel and unusual punishment standards. (See *In re Lynch* (1972) 8 Cal.3d 410.) The latter is clearly a matter for the courts. Unfortunately, the Court of Appeal has conflated a complex sentencing decision (proportionality) with a parole decision that focuses upon the risk of danger to public safety under the *Lawrence* case.

Further, the Court of Appeal has misapplied legal concepts from the *Rodriguez* case that this Court found to have limited applicability to the current ISL scheme. The need to set terms to enable proportionality challenges died with the statutory repudiation of the older ISL scheme that incorporated virtually every state prison inmate within its vast sentencing range. With the MEPD as the determining date for release *once a finding of suitability is reached*, the setting of a base and adjusted base term is nothing more than an idle act. The Board should not be required to set "zombie terms" from a legal construct that died long ago to facilitate proportionality claims, when case law provides that there is ample relief available in the

courts to those rare inmates who feel they are being imprisoned excessively or disproportionately.

VII.

THE DECISION DENYING THE STIPULATION MODIFICATION HAS GRAVE PUBLIC SAFETY IMPLICATIONS

Following the reasoning of the Court of Appeal leads to the unmistakable conclusion that even an inmate too dangerous for release must be paroled if the Board finds that his or her term is "disproportionate." "[B]oth the legislature and the voters have otherwise indicated, in multiple ways, their abiding concern that the Board not schedule the release [of] *any* life-maximum prisoner who is still dangerous." (*Dannenberg*, *supra*, 34 Cal.4th at p. 1088, emphasis in original.) The defendant's position in this case, embraced by the lower court, is "incompatible" with the Board's responsibility to preserve public safety. (*Id.* at p. 1086.)

This Court has recognized many times that the paramount consideration in parole release cases is public safety. Given the obligation of the Board to allow input from the public and victims in each case, "[a] conclusion that section 3041, subdivision (a), *ever* requires the Board to fix such a prisoner's parole date, under principles of term 'uniform[ity],' *despite* the Board's factually supported belief that the particular circumstances of the inmate's crime indicate a continuing public danger would contravene this clear policy." (*Dannenberg*, *supra*, 34 Cal.4th at p. 1088, emphasis in original.)

The lower court's finding that proportionality remains a significant concern despite the changes made by the post-1976 ISL scheme and that base terms still have constitutional significance which the Board must weigh in a parole release decision is extremely alarming. Amicus respectfully submits that this Court should reverse the Court of Appeal's

decision to avoid the disastrous consequences which will flow from an improvident grant of parole and to settle this important question of law.

Finally, the words of this Court in *Dannenberg* are chillingly applicable here:

> [T]he Court of Appeal's construction could force the Board to schedule the release of inmates serving statutory life-maximum sentences— penalties now reserved for serious offenders, including murderers—despite the Board's reasonable belief that the particular circumstances of their commitment offenses indicated a continuing risk to the community at large. For the multiple reasons set forth above, we are convinced the Legislature did not wish section 3041 to operate in that way.

(*Id.* at p. 1094.)

Amicus wholeheartedly agrees. We respectfully support the position of the Board of Parole hearings as represented by the California Attorney General.

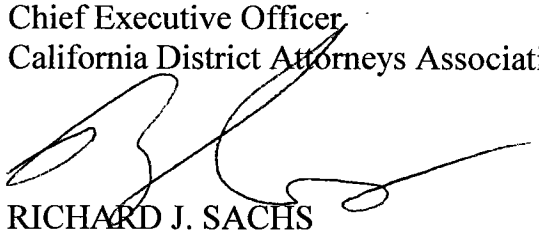
CONCLUSION

The Court of Appeal erred in finding that base and adjusted base terms need to be set after the passage of Senate Bill No. 230. This ruling invites ad hoc constitutional challenges to the length of an indeterminate term and elevates an obsolete matrix that has always been secondary to parole suitability as a constitutional yardstick. The California District Attorneys Association respectfully urges this Court to reverse the decision below and grant the Board of Parole Hearings' motion for modification of the stipulation in order to settle this important and significant legal question.

Dated: May 9, 2017

Respectfully Submitted,

MARK ZAHNER
Chief Executive Officer
California District Attorneys Association



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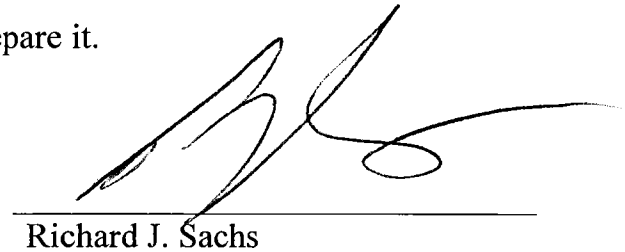
CERTIFICATE OF WORD COUNT

I certify that this AMICUS CURIAE BRIEF, including footnotes, and excluding tables and this certificate, contains 5,482 words according to the computer program used to prepare it.



Richard J. Sachs
Supervising Deputy District Attorney
San Diego County Lifer Hearing Unit
CDAA Lifer Committee Member

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **ROY BUTLER,** **On Habeas Corpus.**	For Court Use Only
	Supreme Court No.: S237014 Court of Appeal No.: A139411 Superior Court No.: 91694B

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On May 10, 2017, a member of our office served a copy of the within **AMICUS CURIAE BRIEF** to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid, in the United States Mail, addressed as follows:

Sharif E. Jacob, Esq. Andrea Nill Sanchez, Esq. Keker & Van Nest LLP 633 Battery Street San Francisco, CA 94111-1809 ***Attorney for Respondent Roy Butler, D-94869***	California Court of Appeal First Appellate District, Div. 2 355 McAllister Street San Francisco, CA 94102 (*Case No. A139411*)
County of Alameda Criminal Division – Rene C. Davidson Courthouse Superior Court of California 1225 Fallon Street, Room 107 Oakland, CA 94612-4293 (*Case No. 91694B*)	First District Appellate Project 475 Fourteenth Street, Suite 650 Oakland, CA 94612
Xavier Becerra Attorney General of California 1300 I Street Sacramento, CA 95814	Nancy O'Malley District Attorney Alameda County District Attorney's Office 1225 Fallon Street, Room 900 Oakland, CA 94612-4203

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 10, 2017 at 330 West Broadway, San Diego, CA 92101.

Deborah D. Campana