Case No. S237014

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE ROY BUTLER (D-94869), On Habeas Corpus.	Court of Appeal Case No.: A139411 Superior Court Case No.: 91694B

California Court of Appeal, First Appellate District, Division Two
California Superior Court for Alameda County, Hon. Larry J. Goodman

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF; AMICUS BRIEF

HEIDI L. RUMMEL (183331)
hrummel@law.usc.edu
MICHAEL J. BRENNAN (40436)
mbrennan@law.usc.edu
ANNA FAIRCLOTH FEINGOLD (275636)
afeingold@law.usc.edu
USC Gould School of Law
Post-Conviction Justice Project
699 Exposition Boulevard
Los Angeles, CA 90089
Telephone: (213) 740-2865
Fax: (213) 821-5746

REBECCA BROWN
rbrown@law.usc.edu
USC Gould School of Law
699 Exposition Boulevard
Los Angeles, CA 90089
Tel: (213) 740-1892
Fax: (213) 740-5502

In support of Roy Butler

Case No. S237014

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE ROY BUTLER (D-94869), On Habeas Corpus.	Court of Appeal Case No.: A139411 Superior Court Case No.: 91694B

California Court of Appeal, First Appellate District, Division Two
California Superior Court for Alameda County, Hon. Larry J. Goodman

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF; AMICUS BRIEF

HEIDI L. RUMMEL (183331)
hrummel@law.usc.edu
MICHAEL J. BRENNAN (40436)
mbrennan@law.usc.edu
ANNA FAIRCLOTH FEINGOLD (275636)
afeingold@law.usc.edu
USC Gould School of Law
Post-Conviction Justice Project
699 Exposition Boulevard
Los Angeles, CA 90089
Telephone: (213) 740-2865
Fax: (213) 821-5746

REBECCA BROWN
rbrown@law.usc.edu
USC Gould School of Law
699 Exposition Boulevard
Los Angeles, CA 90089
Tel: (213) 740-1892
Fax: (213) 740-5502

In support of Roy Butler

APPLICATION

Per California Rule of Court 8.520(f)(1), Proposed Amici request permission to file the attached amicus brief in the above-captioned case.

The California Board of Parole Hearing's (Board) current implementation of the parole system for indeterminately sentenced inmates violates clear constitutional principles articulated by this Court. Far from being condoned by this Court or instituted by the California Legislature, the current constitutionally deficient parole system has been created by Board fiat. As described below, clear constitutional obligations dictated by this Court were recognized by the California Legislature in passing the 1977 Determinate Sentencing Law (DSL) and were initially implemented by the Board in its regulations. However, the Board gradually deviated from these basic principles through improper, systematic shifts in its regulations and practices that were unprompted by legislation at the time, and in direct contravention of the DSL. As a result, the parole process for indeterminately sentenced inmates evolved over time and ultimately became the current system, which defies this Court's constitutional mandates and enacts precisely the system that the Legislature intended to do away with for all inmates in passing the DSL.

The attached amicus brief is intended to shed light on the constitutional infirmities of the current parole system by offering a thorough historical and constitutional context. The brief seeks to illuminate

the legislative and legal history that is glossed over in the Board's attempt to wave away any concerns about what it is doing behind the curtain, and to ensure that this Court can make a decision based on an accurate understanding of how the system reached its current state.

In further efforts to provide the complete context underlying the current parole regime, Proposed Amici also submit the concurrently filed Appendix. This Appendix contains the legislative history, and prior versions of the California Penal Code and California Code of Regulations, on which the attached amicus brief relies.

Proposed Amici are the Post-Conviction Justice Project (PCJP) of USC Gould School of Law, a legal clinic that has represented many hundreds of indeterminately sentenced California inmates at parole suitability hearings for more than 20 years, and Professor Rebecca Brown, a nationally recognized constitutional law theorist and The Rader Family Trustee Chair at the USC Gould School of Law.

PCJP has an interest in the above-captioned case because the Board's current unconstitutional implementation of the parole system irreparably damages PCJP's clients. The Board's refusal, in defiance of this Court's rulings, to set any sort of constitutionally appropriate maximum prison term based on an inmate's culpability for his offense, and instead to allow length of confinement to be dictated by a subjective evaluation of factors that have nothing to do with culpability, violates

fundamental notions of proportionality and notice. It has led to myriad instances of PCJP clients being held in prison long after the expiration of any term that is constitutionally proportionate, or even rationally connected, to their crime, and continuing to be incarcerated based on factors that have nothing to do with culpability, such as a subjective Board finding that they are not particularly insightful, low cognitive function that prevents them from understanding abstract concepts of insight and remorse, or lack of access to certain programs at their prison. Below are just a few examples of the disproportionality of prison terms created by the current system:

- J.R., a teenaged mother, was subjected to domestic violence and ultimately kicked out of her home by her father-in-law, forever separating her from her first three children. After starting another family, she became involved in a dispute with her neighbor. In 1985, the neighbor became irate at one of her children, burst into her apartment, and got into a violent altercation with one of her apartment-mates. Terrified for her children's safety, J.R. gave the apartment-mate a gun and told him to shoot the neighbor. He chased down the neighbor and shot him. J.R., who had no prior violent history, was convicted of first-degree murder. J.R. was a model inmate, programmed extensively, and never received a disciplinary violation. But she has well-documented low cognitive function (with an IQ score in the .5 percentile), which made it difficult for her to understand her culpability for the crime or explain abstract concepts like insight and causative factors. From 2001 to 2016, J.R. had six parole hearings at which the Board repeatedly denied parole because of insufficient insight. The Board never set a base term for J.R. until 2014, at which point she had already exceeded her it. She was found suitable in 2016 and released after serving 32 years.

- M.D. was subjected to abuse by her father that led her to feel worthless and unaccepted. She was suicidal by age 13. She was ultimately diagnosed with bipolar disorder, struggled with maintaining her treatment regimen, and decompensated after her father committed suicide. When M.D. was 18, she ran away from

home and was living with her boyfriend, a 48-year-old man who was aggressive and controlling. M.D. has no history of violence. During a car trip with her boyfriend, the police attempted to pull them over for a traffic violation. The boyfriend directed M.D. to drive away, to avoid the police finding the cache of guns that he had stolen and put in the car. This led to a high-speed chase and shoot-out with police. No officers were injured. M.D. was convicted of attempted murder and sentenced to 7-years-to-life. She has been in prison for 17 years. Since 2007, she has had three full parole hearings. The Board has consistently found her unsuitable for parole – despite the fact that the Board's psychologists have repeatedly deemed M.D. a "low" risk of violence – based on, for example, the fact that she demonstrated disrespect and failed to report to work on a couple occasions in 2005 and 2006, and that she demonstrated insufficient growth regarding substance abuse (even though there is no evidence that she has used drugs or alcohol in prison). Until 2014, the Board never set a base term for M.D. She is nearly three years past her base term.

- S.V. was born to a drug-addicted mother and bipolar father. She suffered abuse as a child, and grew up in dangerous neighborhoods due to her mother's drug addiction. From a young age, she found safety and acceptance in the local gang. When she was 21, S.V. was involved in a street fight. After being pinned against a fence by one of the young men in the group, S.V. pulled out a pocketknife and jabbed him to force him off of her, and then she and a friend jumped into a nearby car and drove away. (The young man S.V. jabbed did not notice the small wounds at first, but later went to the hospital where he received a couple stitches and was discharged within a couple hours.) S.V. was convicted of carjacking and assault with a deadly weapon, and sentenced to 15-years-to-life. S.V. served 17 years before being released after her third parole hearing. At her first two parole hearings (in 2013 and 2015), the Board found her unsuitable because, for example, her mother and father were not good parents, and she demonstrated violence in prison prior to 2008. S.V.'s base term was not set until she had been incarcerated for 15 years, at which point she was four years past that base term.

- G.S. grew up in South Los Angeles in a tumultuous home, where he was neglected by his mother, and repeatedly subject to physical abuse by his mother's boyfriend. This led G.S. to seek safety and social connection outside the home. When he was 15, he went to a friend's house because he needed a place to stay. The friend asked him to participate in a robbery. The robbery was unsuccessful and

> G.S. started to flee the scene, but his friend cried out for help, and when G.S. looked back, he saw the would-be robbery victim had his friend in a chokehold. He shot the robbery victim in the arm, intending to injure him, but the man died. G.S. was convicted of second-degree murder. G.S. was found suitable and released after 15 years, *thus serving years less time* than the women in the three cases listed above, *even though they did not kill, and in two of the cases did not even severely injure, anyone.*

Professor Brown's interest in the above-captioned case lies in her expertise in constitutional law and in exposing the current parole system's violation of bedrock constitutional principles as articulated by this Court.[1]

Per California Rule of Court 8.520(f)(4), Proposed Amici state that no party or counsel in the above-captioned case authored any part of the attached amicus brief, and no person or entity other than Proposed Amici made any monetary contribution related to the attached amicus brief.

Proposed Amici respectfully request that the Chief Justice permit the filing of the attached amicus brief.

DATED: May 10, 2017

Respectfully submitted,

By: Heidi Rummel /AFF

HEIDI L. RUMMEL
ANNA FAIRCLOTH FEINGOLD
USC Gould School of Law
Post-Conviction Justice Project

REBECCA BROWN
USC Gould School of Law

In support of Roy Butler

[1] Proposed Amici would like to thank Marvin Mutch for his invaluable conceptual contributions.

Case No. S237014

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE ROY BUTLER (D-94869), On Habeas Corpus.	Court of Appeal Case No.: A139411 Superior Court Case No.: 91694B

California Court of Appeal, First Appellate District, Division Two
California Superior Court for Alameda County, Hon. Larry J. Goodman

AMICUS BRIEF

HEIDI L. RUMMEL (183331)
hrummel@law.usc.edu
MICHAEL J. BRENNAN (40436)
mbrennan@law.usc.edu
ANNA FAIRCLOTH FEINGOLD (275636)
afeingold@law.usc.edu
USC Gould School of Law
Post-Conviction Justice Project
699 Exposition Boulevard
Los Angeles, CA 90089
Telephone: (213) 740-2865
Fax: (213) 821-5746

REBECCA BROWN
rbrown@law.usc.edu
USC Gould School of Law
699 Exposition Boulevard
Los Angeles, CA 90089
Tel: (213) 740-1892
Fax: (213) 740-5502

In support of Roy Butler

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

It is unconstitutional for the California Board of Parole Hearings (Board) to continue to hold an individual in prison indefinitely because the Board has determined, in its very broad discretion, that the individual poses a risk to public safety. The current system completely divorces the length of an individual's confinement from his culpability for his crime, and thus violates the prohibitions on cruel/unusual punishment under both the U.S. and California Constitutions. The Board's power to imprison indeterminately sentenced inmates beyond their minimum terms, until the Board subjectively deems the inmates "suitable" for release, must be "subject to the overriding constitutionally compelled qualification that the maximum [term an inmate is required to serve] may not be disproportionate to the individual prisoner's offense." *In re Rodriguez*, 14 Cal. 3d 639, 652 (1975).

The Board's implementation of the parole system for indeterminately sentenced inmates has not always been unconstitutional. As described below, this Court has dictated clear constitutional obligations, which were recognized by the California Legislature and implemented by the Board in its regulations. However, as will be discussed, through the Board's gradual, systematic shifts in its regulations and practices – shifts that were improper and unprompted by statute – the parole process for indeterminately sentenced inmates has morphed over time. The Board's

unauthorized chipping away at clear constitutional limitations on its power has led to the current system that defies this Court's constitutional mandates and that enacts precisely the system that the Legislature intended to do away with for all inmates in passing the Determinate Sentencing Law (DSL).

In short, through regulatory opportunism, the Board abandoned its constitutional responsibility (as articulated by this Court) to set constitutional *maximum* terms (primary terms) for all indeterminately sentenced inmates. It then blurred the critical distinction between its "term-setting" and "parole-granting" powers, and warped its practices such that setting any "term" set for indeterminately sentenced inmates was delayed unless and until an inmate was found to be suitable for relase on parole, and such that this "term" served as a *minimum* instead of a *maximum* length of confinement. Now, after rendering meaningless the concept of "setting a term," the Board argues that it need not set any terms at all, and misleadingly attempts to use this Court's inapposite ruling in *Dannenberg* as an excuse for failing to fulfill its constitutional obligations and for resurrecting the parole regime that the DSL sought to eliminate.

Although there has been widespread confusion (and obfuscation) regarding the constitutional flaws in the parole regime – confusion in which this Court has been unwittingly caught up – now is the time to right the ship. The goal of this brief is to shed light on the constitutional infirmities

of our current parole system by offering a thorough historical and constitutional context. The brief seeks to illuminate the legislative and legal history that is glossed over in the Board's attempt to wave away any concerns about what it is doing behind the curtain, and to ensure that this Court can make a decision based on an accurate understanding of how the system reached its current state.[2]

This Court should order the Board's full compliance with *Rodriguez*, including the setting of constitutional maximum primary terms early in indeterminately sentenced inmates' confinement.

ARGUMENT

I. The Board's Current Parole Regime Violates Clear Constitutional Limits on Sentencing.

This Court held in *In re Rodriguez* that, under both the U.S. and California Constitutions, an individual who receives an indeterminate sentence may not be imprisoned past a maximum term that is constitutionally proportionate to his "culpability for the crime," as measured by the "circumstances existing at the time of the offense."

---

[2] This brief uses "Board" as a generic term to refer to the parole authority in California, which has had various names over the years. Prior to passage of the DSL, the parole authority for male inmates was called the "Adult Authority," and the parole authority for female inmates was called the "Women's Board of Terms and Paroles." The DSL combined these entities and renamed them the "Community Release Board," which was subsequently renamed the "Board of Prison Terms," and later, the "Board of Parole Hearings."

Rodriguez, 14 Cal. 3d at 652-53. This maximum term, which the Court called the "primary term," is not the maximum penalty allowed by law. Instead, it is a term of imprisonment determined to be proportionate to the "culpability of the individual offender" for his particular participation in the particular crime. *Id.* *Rodriguez* explicitly recognized that the "measure of the constitutionality of punishment for crime is individual culpability." *Id.* at 653. The U.S. Supreme Court, too, has placed culpability at the heart of the inquiry into the appropriateness of a punishment under the Eighth Amendment to the U.S. Constitution. *See Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

The *Rodriguez* Court recognized that, once an inmate's appropriate sentence has been set, the Board had power to consider "occurrences subsequent to the commission of the offense" – such as conduct in prison, rehabilitative programming, and parole plans – in deciding whether to release an inmate on parole *prior* to the expiration of his constitutional maximum "primary term," such that the remainder of that term would be served in the community. *Rodriguez*, 14 Cal. 3d at 652. Critical to the Court's reasoning, however, was its insistence that this "power to grant parole" is "independent" of the "basic term-fixing responsibility" to set a constitutional maximum primary term. *Id.*

The clear principles established by *Rodriguez* dictate fundamental constitutional parameters on sentencing and parole – parameters that the

Board has hustled to the sidelines or sought to do away with completely. First, under *Rodriguez*, prison terms are only constitutionally acceptable to the extent they are proportional to an individual's culpability for his crime. Second, this culpability must be determined based on the circumstances at the time of the offense. Determining a maximum sentence by any other measure – including by post-conviction conduct or a subjective evaluation of "suitability" – undermines the legislative intent of retribution and uniformity in sentencing, and works at cross purposes with the constitutional requirements of proportionality and notice.

The U.S. Supreme Court has held that prison terms are subject to proportionality analysis, which was also the linchpin of the *Rodriguez* Court's analysis. *See Solem v. Helm*, 463 U.S. 277, 288-89 (1983). While there are different types of proportionality, the one that is relevant here involves assurance of similar punishment for similar crimes and similar levels of individual culpability. "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Id.* at 291. To the extent that federal constitutional cases reflect a reluctance to impose strict proportionality limits on prison terms, the Court has made clear that its primary concern has been to ensure that judgments "be informed by objective factors to the maximum possible extent." *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (quoting *Cohen v. Georgia*, 433 U.S. 584, 592

(1977)). This goal necessarily places importance on the "legislative prerogative" of determining appropriate sentences. *Estelle*, 445 U.S. at 274. As explained below, in California, the legislative judgments so critical to constitutional legitimacy, as well as any semblance of objective factors, have receded into obscurity.

Since the constitutional guideposts were established by this Court in *Rodriguez*, the Board has gradually dismantled the parole system established to meet those guideposts. In its place, the Board has created a system in which the maximum sentence for every single indeterminately sentenced inmate – regardless of the severity or circumstances of, or the inmate's level of participation in, the crime – is life in prison, because there is never a time when an inmate is entitled to an assessment of a constitutional maximum primary term within the available statutory range based on his culpability for his individual offense. Because a term is never specified, there is no opportunity for an administrator or court to consider whether the sentence imposed is proportionate to the offender's culpability, as both the U.S and California Constitutions require. (Indeed, prior to 2016, the only time the Board assessed the individual's culpability was to set a *minimum*, rather than a maximum, term, and since 2016 it argues that it can throw out that ritual altogether.)

Further, the life-in-prison maximum is reduced only if the Board subjectively determines that the inmate is "suitable," largely based on

various post-conviction factors that have no constitutional basis. 15 Cal. Code Regs. § 2281(d) (listing factors tending to show suitability). Thus, two individuals, who committed the same offense under identical circumstances and received the identical statutory sentence of years-to-life, could serve vastly disparate terms of confinement based solely on subjective administrative judgments based on post-conviction circumstances. If a prisoner is repeatedly denied a finding of suitability for parole – as most are – he will frequently exceed his constitutionally appropriate primary term before he even receives it. This makes the judicial protection against disproportionate sentencing impossible, as *Rodriguez* held. *See Rodriguez*, 14 Cal. 3d at 650 (holding that indeterminate sentencing was being implemented in an unconstitutional manner because terms were not "fixed with sufficient promptness to permit any requested review of their proportionality to be accomplished before the affected individuals have been imprisoned beyond the constitutionally permitted term").

The parameters from *Rodriguez* – that maximum prison terms must be based on culpability at the time of the crime – are critically important because they are the only way to hold true to the hierarchy of sentences established by the Legislature and carried out by sentencing courts. For crimes where the offender's significant culpability renders life in prison constitutionally appropriate, the Legislature has created a separate available

sentence (life without parole), which is distinct from indeterminate sentences. *See, e.g.*, Cal. Penal Code § 190.2. By contrast, sentencing a defendant to an indeterminate sentence (*e.g.*, 15-to-life, 25-to-life) necessarily involves a finding that the crime does *not* render life imprisonment constitutionally appropriate – either because life without parole is not an available sentence for that crime, or because it is not merited by the facts of the case. The existing parole process collapses this distinction – a distinction enacted in state law and imposed by sentencing courts – by creating a de facto maximum sentence, for all indeterminately sentenced inmates, no different from the sentence statutorily reserved for those whose crimes merited life without parole.

Similarly, by making all indeterminately sentenced inmates subject to the same maximum term – life in prison – the Board's practice collapses the statutory distinctions between different indeterminately sentenced crimes enacted by the Legislature and implemented by sentencing courts. For example, the Penal Code distinguishes between second-degree murder (15-to-life) and first-degree murder (25-to-life), reflecting a judgment that these two crimes are not the same in terms of severity and that they deserve different punishments. *See* Cal. Penal Code §§ 189, 190(a). Yet, under the Board's current parole regime, inmates serving these sentences are subject to an identical maximum term (life in prison) that will only be reduced based on a variety of factors, most of which have nothing to do with

individual culpability or the commitment offense, and many of which involve subjective assessments of occurrences subsequent to the crime. *See* 15 Cal. Code Regs. § 2281(c)-(d).

Significantly, as recognized by the Legislature, life in prison is simply not the appropriate maximum term for every person who receives an indeterminate sentence. If culpability does not play its constitutional role in dictating the appropriate maximum term, a third-striker who is convicted of purse-snatching has the same maximum sentence as the individual convicted of a multiple murder, *see* Cal. Penal Code §§ 667(e)(2)(A) (Three Strikes Law), 1192.7(c)(19) (defining robbery as a "serious" felony), 211 (defining "robbery"), 190(a) (setting penalty for first-degree murder), and the only thing that will reduce this maximum is the Board's determination that the inmate has become particularly insightful, or has done a sufficient number of rehabilitative programs, and whether the Board and the Governor have made a subjective evaluation of "suitability."

In addition to the constitutional concern about proportionality, the Board's practices raise serious concerns about due process. The federal Due Process Clause is violated when vagueness in sentencing limits invites "a wide-ranging inquiry" that "both denies fair notice to defendants and invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (striking down vague enhancement provision in federal law). The Board's current system cruelly denies fair notice by leaving inmates

with no idea of whether, even after decades in prison, there is any end in sight or they will continue on a perpetual cycle of periodic parole hearings in which they are told they are not yet entitled to know when their sentence will have been fully served. The Legislature, as detailed below, was concerned about this issue and its effect on prison morale and violence. *See infra* at pp. 27-31. Moreover, the problem of arbitrariness in enforcement is substantial. As the system stands now, periodic parole hearings hold the key not just to *early* release to serve the remainder of a term in community, but to ever being released *at all*, as an end-point need never be supplied.

This reality cannot stand in the face of *Rodriguez*. *Rodriguez* made clear that the "oft-stated" maxim that "life is life," is as erroneous as it is callous. *Rodriguez*, 14 Cal. 3d at 652; *see also id.* at 650 (rejecting the Board's assertion that it "has no obligation, either statutory or constitutional, to ever fix [an indeterminately sentenced inmate's] term at less than life imprisonment"). That opinion resoundingly qualified the general rule that a prisoner has no right to a term fixed at less than the statutory maximum because of the "overriding constitutionally compelled qualification that the maximum may not be disproportionate to the individual prisoner's offense." *Id.* at 652. *Rodriguez* made clear that maximum terms must be dictated by individual culpability at the time of the crime.

The Board argues that *In re Dannenberg*, 34 Cal. 4th 1061 (2005), supports the unconstitutional parole regime it created, but *Dannenberg* need not preclude this Court from acting. First, as described below, the *Dannenberg* Court was presented with, and relied on, incomplete information, leading to a misunderstanding of the legislative history behind the DSL and the evolution of the parole system over time. Second, the Board's reliance on *Dannenberg* as a proxy for its assertion that the Board has no constitutional term-fixing responsibility is misplaced. *Dannenberg* did not actually consider the Board's term-fixing obligation – something the Board had long before abandoned; instead, it only addressed the Board's "independent" and distinct parole-granting power. The Board's use of *Dannenberg* to justify its position is yet another instance of avoiding its constitutional obligation.

II. The Board Systematically Dismantled A Parole Process That Complied With Its Constitutional Obligation To Set A Proportionate Maximum Term.

In 1976, the Board implemented regulations to bring the parole system into compliance with the constitutional mandate of *Rodriguez* – that indeterminately sentenced inmates receive a constitutional maximum "primary term" based on culpability, within which the Board can set an earlier parole release date based on suitability for release. The California Legislature relied on the Board's term-setting practices under these regulations when it enacted the DSL in order to address the abuses of

indeterminate sentencing. Rather than indicating a belief that the previously existing parole system was only problematic for those whose sentences became determinate, the legislative history of the DSL reveals that the Legislature was equally concerned about those who remained indeterminately sentenced after the DSL's passage. As for those inmates, legislators explicitly relied on the Board's then-existing practice of setting constitutional maximum "primary terms," and it sought to further curb the abuses of the prior parole system by revising the statutes governing the Board's parole-granting power.

However, over the years, the Board systematically dismantled the parole system that met the constitutional requirements mandated by this Court and intended by the Legislature. Through piecemeal changes not authorized by statute, the Board ceased setting constitutional maximum primary terms for indeterminately sentenced inmates. It eroded the limitations on its parole-granting power, and ultimately, it began setting only one "term" for indeterminately sentenced inmates – a term that served as a *minimum* sentence. Under this system, each indeterminately sentenced inmate's maximum term was the same – life in prison – and that maximum could only be reduced by the Board's subjective evaluation of "suitability," based on a variety of factors, most of which had nothing to do with culpability or the circumstances of the crime. This system – in which punishment is not dictated by culpability, and there is no certainty about

length of terms and no notice to the inmate of the penalty imposed for various crimes – is not only unconstitutional, but is precisely the system the Legislature intended the DSL to eliminate.

After reducing "term-setting" to a meaningless formality that serves no constitutional purpose and does not even attempt to fulfill the Board's constitutional obligation, the Board has argued various things – including that "terms" need not be set until an inmate is found suitable, and that terms need not be set, by the Board, at all. The Board also relies heavily on *In re Dannenberg*, in which the Attorney General wrongly argued – and this Court accepted – that the Legislature passed the DSL *intending* to retain the problematic previously existing parole system for inmates who remained indeterminately sentenced. But none of these arguments has any basis in fact, and none is a substitute for the Board's constitutional duty to set constitutional maximum primary terms.

A. The Parole System Under the Indeterminate Sentencing Law (ISL)

Prior to passage of the DSL, under California's Indeterminate Sentencing Law (ISL), most defendants convicted of a felony were sentenced to an indeterminate prison term. Parnas & Salerno, *The Influence Behind, Substance and Impact fo the new Determinate Sentencing Law in California*, 11 U.C.D. L. Rev. 29, 29-30 (1978). Under the ISL, courts were prohibited from fixing the actual term a defendant would serve

in prison, and the length of a prison term for a given crime was not set by the legislature. Appendix of Sources In Support of Amicus Brief (Amicus App'x) Ex. P (Cal. Penal Code §§ 1168, 1168a (1971)); Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 Pac. L.J. 5, 8 (1978). Instead, courts imposed sentences as a range – such as 1 year to life or 5 years to life – and the Board was tasked with determining how many years the defendant ultimately served until release. *Id.* The Board had the power to fix the inmate's prison term at less than the maximum (life), and also to allow the inmate to leave prison prior to that maximum and serve the rest of his or her term on parole. *See* Amicus App'x Ex. O (Cal. Penal Code §§ 3020, 3040 (1970)); *Rodriguez*, 14 Cal. 3d at 645-46.

This system garnered tremendous criticism for being arbitrary and unfair. Although the Board was authorized to make decisions early on about how long an individual inmate would likely have to serve, it rarely did so. Cassou & Taugher, at 9. Instead, it regularly withheld the setting of an ultimate release date until it decided the inmate was ready for release – a calculation that focused, not on the inmate's culpability for the commitment offense, but on the authority's subjective assessment of the inmate's level of rehabilitation and its prediction of the inmate's likely future behavior. *Rodriguez*, 14 Cal. 3d at 646. This resulted in endless "ambiguity," as inmates had no idea when their confinement would end (until it actually did), creating "tension" and "cynicism" among inmates. Parnas & Salerno,

at 30. It also gave rise to significant disparities in length of confinement between individuals who committed the same crimes, and raised serious proportionality concerns given the disparity between the severity of a crime and the length of time an individual was imprisoned for it. Cassou & Taugher, at 11.

B. The Board's Response to *Rodriguez*

In June 1975, this Court held that the parole authority's practice of deferring the setting of a prison terms was unconstitutional. *Rodriguez*, 14 Cal. 3d at 650. In that case, although the petitioner had served 22 years on a one-year-to-life sentence, the Board had never determined what the appropriate prison term would be, and had refused to grant parole, keeping the petitioner imprisoned indefinitely. *Id.* at 643-44. Deeming this practice unconstitutional, the *Rodriguez* Court held that "the [Board] must fix terms within the statutory range that are not disproportionate to the culpability of the individual offender." *Id.* at 652. As noted above, this Court explained that the prohibition against cruel/unusual punishment (in both the U.S. and California Constitutions) entitles each inmate to have a "primary term" set based on "individual culpability" and the "circumstances existing at the time of the offense." Significantly, it must be set with sufficient promptness to enable effective review of a proportionality challenge. *Id.* at 650. The *Rodriguez* Court emphasized that "[t]his basic term-fixing responsibility . . . is independent of the [Board's] power to grant parole"

prior to the expiration of the primary term – a power whose exercise can be based on occurrences "subsequent to the commission of the offense." *Id.* at 652.

The Board promptly changed its practices in response to the Court's decision in *Rodriguez*. On September 2, 1975, the Chairman of the Board (then called the Adult Authority) issued Directive No. 75/30 entitled "Implementation of *In re Rodriguez*," detailing new operating procedures. *See* 3/20/17 Butler Mot. for Judicial Notice, Ex. A (Directive No. 75/30). The stated goal of the procedures was to "bring Adult Authority term setting practices into compliance with recent changes in the law." *Id.* at 1. Directive No. 75/30 interpreted the ISL to comply with *Rodriguez*, and explained that a "primary term" would be fixed for "each offense" in conformance with guidelines designed to "assur[e] equal treatment in sentencing practices." *Id.* In setting the primary term, the Adult Authority relied on information specific to an inmate's personal culpability for the crime and criminal history, and could not rely on conduct subsequent to the offense. *Id.* at 2-6. "Once fixed, the primary term for that offense cannot be refixed upward," and in general, "no primary term will be fixed above 25 years." *Id.* at 1, 6. The Directive clarified that its procedures were specific to "term fixing," and were "distinct" and "should not be confused with the procedures governing parole granting." *Id.* at 1. The Directive

also anticipated that, "[i]n the vast majority of cases, an inmate will serve a portion of his primary term inside prison and a portion of it on parole." *Id.*

By 1976, the Adult Authority had promulgated regulations implementing *Rodriguez*'s requirement that ISL inmates receive a constitutional maximum primary term, separate from discretionary earlier parole release. As amended, Division 2 of Title 15 included Chapter 2 (Term Fixing) and Chapter 4 (Parole Release). Amicus App'x Ex. K (Reg. 76, No. 21, p. 151 (May 22, 1976)). In Chapter 2, the 1976 regulations provided that a "primary term" must be fixed for all indeterminately sentenced felons, and that it should be set at the initial parole hearing (§ 2100(a), (c)). *Id.* at 179. The regulations were clear in establishing that the primary term is "the maximum period of time which is constitutionally proportionate to the individual's culpability for the crime," and "should not be confused with the parole release date" (§ 2100(a)). *Id.* Under the regulations, setting a primary term was solely rooted in an assessment of culpability. The primary term was calculated by setting a base term – using "typical" and "aggravated" ranges of years established by the regulations for various crimes – which could be adjusted upward based on prior convictions or prison terms (§§ 2150-2156). *Id.* at 183-85.

Separately, the 1976 regulations specifically provided for the setting of a "parole release date" within the period of the constitutional maximum primary term (§ 2250). *Id.* at 207. Early release through parole was

reserved for those inmates found "suitable" (§ 2300). *Id.* at 209. Suitability, in turn, involved a judgment about whether the inmate would pose an "unreasonable risk of danger to society" if released early, based on specific factors relating to criminal history (not post-conviction conduct) that tend to show unsuitability (§§ 2300-2301). *Id.* If the inmate was found suitable, a "parole release date" was set by determining a "total period of confinement" (§ 2350). *Id.* at 210. Notably, the "total period of confinement" was calculated by using the same base term used in primary term fixing (focusing on culpability for the offense), which could then be adjusted up and/or down based on various pre-conviction, commitment, and post-conviction factors (§§ 2250, 2350-2356). *Id.* at 207, 210-13.

C. Senate Bill 42 – The DSL

At the end of 1974 – prior to the decision in *Rodriguez* – the California Legislature introduced Senate Bill 42 (SB 42), the Determinate Sentencing Law (DSL), to reform some of the objectionable elements of the indeterminate sentencing regime. In 1976, after *Rodriguez*, legislators revived SB 42, which ultimately passed and became effective July 1, 1977, fundamentally altering the sentencing scheme in California.[3] Stats. 1976, ch. 1139, pp. 5061-5178.

---

[3] SB 42 was originally introduced in late 1974, but it hit roadblocks and ultimately failed to pass out of the Assembly Criminal Justice Committee in August 1975. Cassou & Taugher, at 11-16. It lay dormant for several months before being revived in 1976. *Id.* at 16-17.

There is no question that the DSL was intended to target the widely acknowledged and criticized abuses of the indeterminate sentencing regime. It had several specified goals. For one, the bill sought to take down the prevailing "medical model," under which length of confinement was dictated by the parole authority's evaluation of an inmate's rehabilitation rather than the inmate's culpability for the crime. As explained by SB 42's primary sponsor, Senator John A. Nejedly, the bill was intended to "[e]nd subjective evaluation of rehabilitation as a factor in determining release," and address the problem that "the eventual length of [inmates'] prison stays will really depend not on what the offense was," or on their behavior, but rather on "subjective evaluation by psychologists and laymen on whether a convict is rehabilitated." Amucis App'x Ex. A (6/12/75 Nejedly Letter to Governor, at 1, 3). The Senate record includes testimony that the fundamental principle underlying the "medical model" – the predictability of future violence – was "untenable," and that numerous studies had shown that most offenders predicted to be violent when released were not. Amicus App'x Ex. B (Summary of 4/15/75 Testimony of Professor John Monahan, UC Irvine before the Senate Select Committee on Penal Institutions (in Senate Judiciary file)); *see also, e.g.*, Parnas & Salerno, at 30 (noting that the medical model had been "totally invalidated"). Following this testimony, Senator Nejedly expressed to the Governor that the "medical model" should be "cast off," as it has "not produced law-

abiding offenders either inside the prison or ex-offenders outside and seem[s] unlikely to do so in the future." Amicus App'x Ex. A (Memo attached to 6/12/75 Nejedly Letter to Governor, at 2); *see also, e.g.*, *id.* Ex. C (9/20/76 Enrolled Bill Report on SB 42 prepared for Governor by Department of Corrections, at 3 (noting the problems that proponents of the bill claim are created by the "medical model")).

Moreover, the bill sought to address the disparities in, and lack of uniformity of, sentencing that resulted from the ISL, which Senator Nejedly described as "manifestly unjust." Amicus App'x Ex. A (Memo attached to 6/12/75 Nejedly Letter to Governor, at 2); *see also, e.g.*, *id.* Ex. D (8/17/76 Nejedly Letter to Superior Court Judge John E. Longinotti, at 4 (stating indeterminacy "has resulted in unfairness and injustice")); *id.* Ex. E ("Benefits of SB 42, As Amended April 22, 1976 in Comparison with Current Law" (in Governor's file) (listing as benefits of SB 42 that it "[r]emoves disparity in prison sentences for same crimes currently due to use of invalid behavior science predictors" and "[a]voids disparity in prison sentences for same crimes currently due to conscious or unconscious influences of personal biases of parole board members under a system which provides unparalleled discretion")).

In addition, the bill sought to reduce violence in prison. As Senator Nejedly explained, "The lack of uniformity in sentencing breeds resentment and greater tensions within the prisons, which contribute to an atmosphere

of violence." Amicus App'x Ex. A (6/12/75 Nejedly Letter to Governor, at 3); *see also, e.g., id.* (Memo attached to 6/12/75 Nejedly Letter to Governor, at 2 (same)). He continued, the "clouded picture" of what is required to earn parole release "contributes significantly to prison unrest." *Id.* (6/12/75 Nejedly Letter to Governor, at 3); *see also, e.g., id.* Ex. C (9/20/76 Enrolled Bill Report on SB 42 prepared for Governor by Department of Corrections, at 12 (recommending that the Governor sign SB 42 because the application of the ISL presents "paralyzing uncertainties, anxieties and frustrations that sometime tend to precipitate violence")).

Finally, Senator Nejedly tied the reforms of SB 42 directly to due process concerns. In a letter to a superior court judge, he wrote:

> [N]otice of the penalty to be incurred for violation of the law [i]s a basic tenet of due process. That fundamental precept is heightened rather than reduced by SB 42 because the only real notice which existed under the [ISL] was either the meaningless statutory ranges or the statistics for actual time served in past years; the latter always with the unknown quantity of the extent of political or economic expediency changing those statistics by the 'whim and caprice' of the unbridled discretion of the Adult Authority.

Amicus App'x Ex. D (8/17/76 Nejedly Letter to Superior Court Judge John E. Longinotti, at 3-4). He further stated: "A person should not be made to guess what his actual punishment will be." Amicus App'x Ex. A (Memo attached to 6/12/75 Nejedly Letter to Governor, at 2).

When the DSL was passed in September 1976, it expressly emphasized its purpose of proportionality and uniformity and codified the

Legislature's constitutional concerns regarding notice, uniformity, proportionality, and meting out punishment according to culpability for an offense rather than according to subjective evaluations of future behavior. *See, e.g.*, Amicus App'x Ex. R (Stats. 1976, ch. 1139, pp. 5140, 5151-52).

D. Indeterminate Sentencing Under the DSL

Although six crimes would still carry indeterminate sentences following passage of the DSL – first-degree murder, kidnapping for ransom, trainwrecking, assault by a life prisoner, sabotage, and injury by explosives, *see* Cassou & Taugher, at 29 – the legislative history suggests that the Legislature was concerned that the basic problems with the ISL *also* applied to those crimes. The legislative history of SB 42 shows that the Legislature believed it was addressing those concerns for those who remained indeterminately sentenced, despite the fact that their actual sentences remained indeterminate.

First, the legislative history shows an explicit belief by the Legislature that those who remained indeterminately sentenced under the DSL would still have constitutional maximum primary terms set as required by *Rodriguez*. For example, in a letter, Senator Nejedly confirmed that the Board would be required to "set a parole date for those left indeterminate[ly sentenced]," but explained that "[t]his is nothing new but rather is simply in keeping with the import of recent court decisions and Adult Authority policy." Amicus App'x Ex. D (8/17/76 Nejedly Letter to Superior Court

Judge John E. Longinotti, at 7). Indeed, the Legislature was well aware of *Rodriguez* and the requirements it imposed on the parole authority. In letters about SB 42, Senator Nejedly repeatedly explained that *Rodriguez* "requires the Adult Authority, on the basis of the crime the individual has committed, to set a 'primary term' soon after the inmate enters prison, a sentence that can be reduced but cannot be increased," and he recognized that "the Adult Authority has been carrying out a policy of setting parole release dates for most all inmates." Amicus App'x Ex. F (9/2/76 Nejedly Memo to All Interested Persons, at 2); *see also id.* Ex. D (8/17/76 Nejedly Letter to Superior Court Judge John E. Longinotti, at 9); *id.* Ex. G (8/24/76 Nejedly Memo to All State Legislators, at 2). With *Rodriguez* and the parole authority's resulting practices in the background, the legislative history materials make clear the Legislature's understanding that constitutional maximum primary term setting *would continue* for those who remained indeterminately sentenced under the DSL.[4]

---

[4] *See, e.g.*, Amicus App'x Ex. C (9/20/76 Enrolled Bill Report on SB 42 prepared for Governor by Department of Corrections, at 8 (explaining that, under the DSL, parole release dates for indeterminately sentenced inmates "will be determined by a board in a manner generally similar to that now used")); *id.* Ex. H (9/3/76 "Highlights of Senate Bill 42," at 3 (in Governor's file) (explaining that under the DSL, the parole board will "set[] terms for inmates remaining indeterminately sentenced")); *id.* Ex. I (Criminal Justice Newsletter, vol. 7, no. 18, at 2 (Sept. 13, 1976) (in Governor's file) (same)); *id.* Ex. J (Bill Analysis prepared by Assembly Committee on Criminal Justice, at 1 (in Senate Judiciary file) (noting that the parole authority's determinations of the actual prison term to be served, and how much of that time could be served on parole,

In addition, nothing in the legislative history suggests that the Legislature did not believe its primary concerns about parole practices under the ISL applied to those who remained indeterminately sentenced under the DSL. In elaborating on the problems with the ISL – *e.g.*, the lack of uniformity and proportionality of sentences, the lack of notice to criminal defendants of what their sentence would be, and the basing of actual prison terms on subjective predictions of future behavior instead of on culpability – the sponsors of the bill never suggested that these problems were only concerns for those convicted of less severe crimes. To the contrary, a document in the Governor's file on SB 42 specifically enumerates as a "benefit" of SB 42 that, for inmates who remain indeterminately sentenced under the DSL, their "crime . . . rather than 'prediction of behavior' [would be the] criteria for parole date setting." Amicus App'x Ex. E ("Benefits of SB 42, As Amended April 22, 1976 in Comparison with Current Law" (in Governor's file)). The Legislature intended to address the same fundamental problems that resulted from indeterminate sentencing, albeit in different ways, both for those whose

---

"[h]istorically . . . were not made until long into the prison sentence," but that "[c]urrently" the parole authority "attempt[s] to make these decisions early in the term")).

sentences would become determinate and those whose sentences would remain indeterminate.[5]

Further, the Legislature reformulated the statutory provision governing parole-granting power in a manner that addressed its concerns about indeterminacy. The DSL amended Penal Code § 3041 to provide that, at an inmate's initial parole hearing, a "parole release date" shall "normally" be set. Amicus App'x Ex. R (Stats. 1976, ch. 1139, pp. 5151-52). Notably, the term "parole release date" is the exact term used in the then-existing Board regulations relating to its parole-granting, as opposed to its term-setting, power, *see* Amicus App'x Ex. K (Reg. 76, No. 21, pp. 207, 210 (May 22, 1976) (§§ 2250, 2350)), indicating that § 3041 was *not* intended to govern term-setting. Also, consistent with the Legislature's intent to address sentencing disparities, the DSL provides that parole release dates must be set "in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public." Amicus App'x Ex. R (Stats. 1976, ch. 1139, p. 5151 (§ 3041(a))). The Legislature's overarching concern that culpability be the measure of punishment is also reflected in its designation of the one circumstance in which the Board can deviate from its duty to "normally" set a parole release

---

[5] An L.A. Times article reported that capital offenses retained indeterminate sentences under the DSL because "[s]upporters thought it would be impossible to secure legislative agreement on a more specific term." *Finally, Sentences with Periods*, L.A. Times, at 6 (Sept. 2, 1976).

date: where the inmate's crime and criminal history pose a particular cause for concern. *See id.* at 5152 (§ 3041(b) (stating that the board may decline to set a parole release date if it determines "that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past 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 at this meeting")).

Thus, although the DSL allowed for a consideration of public safety in conjunction with evaluating parole suitability of indeterminately sentenced inmates, it is clear that there was never an intention that this assessment would dictate an indeterminately sentenced inmate's maximum term. Given the Legislature's expressed understanding that the Board would continue to set constitutional maximum primary terms, in amending this section, and in lifting the term "parole release date" directly from the Board's 1976 regulations implementing *Rodriguez*, the Legislature clearly intended that parole release dates would be set *within* the primary term, allowing the inmate to leave custody early and serve the remainder of his term out in the community.

E. The Board's Policy Shifts Eroded The Constitutional Limits On The Parole System.

Following the passage of SB 42, and a subsequent clean-up bill AB 476, Stats. 1977, ch. 165, pp. 639-80, the new Community Release Board

promulgated updated regulations in 1977, which muddied the DSL's commitment to the two distinct Board functions of term-setting and parole-granting.

On the one hand, the Board renamed the Chapter entitled "Term Fixing," labeling it "Term Decisions," and altered the provisions so that they did not relate to the setting of primary terms. Amicus App'x Ex. L (Reg. 77, No. 28, p. 151 (July 9, 1977)); *id.* at 191-94.

On the other hand, the Board amended the separate "Parole Release" Chapter of the regulations in a manner relatively consistent with the DSL. The 1977 regulations continued to provide that the Board would "normally" set a "parole date" for inmates who were "suitable," and that suitability required considering whether the inmate posed an "unreasonable risk of danger to society" if released (§ 2280). *Id.* at 228-29. The updated regulations tracked the language of Penal Code § 3041. They maintained the importance of uniformity, proportionality, and culpability in determining *whether to set a parole date* (§§ 2280-2281), although post-conviction factors could be used *to calculate* that date when it was set. *See id.* at 228-29 (providing that a parole date "shall normally be set," that it must be set in a manner that provides for "uniform terms," and that "the timing and gravity of the current offense or past offenses" should be considered in determining whether to set a parole date). The regulations also remained consistent in that calculating a parole date for parole-suitable

inmates required determining a "total period of confinement" based on a base term, established by guidelines in the regulations, that is adjusted up and/or down based on pre-conviction, commitment, and post-conviction factors (§§ 2285-2291, 2296). *Id.* at 232-35, 237.

However, over the next few years, the Board made further changes – unauthorized and unprompted by legislation – that systematically whittled away parole process protections established by the DSL. First, in August 1978, the Board drastically expanded the list of factors tending to show unsuitability that could be used to defer setting a parole release date (§ 2281(c)). Amicus App'x Ex. M (Reg. 78, No. 31, p. 330 (Aug. 8, 1978)). Rather than tying the unsuitability factors to past criminal history – as provided in Penal Code § 3041(b) and prior versions of the regulations – the August 1978 revisions broaden the bases for finding unsuitability to include childhood abuse *suffered by the inmate* and post-conviction institutional behavior. *Id.*

Even more significantly, the August 1978 revisions emptied "parole dates" of their "total period of confinement" protection. Rather than a suitability finding requiring the calculation of a "total period of confinement" that could be reduced by good behavior in prison, a suitability finding required the Board to set a "base term" (§ 2282). *Id.* at 231. This base term must reflect the gravity of the commitment offense, as dictated by guidelines in the regulations, but there is no provision that it be

adjusted, reduced by positive post-conviction factors, and used as a *maximum* total period of confinement within the primary term. *Id.* Because the base term is not determined until an inmate is deemed suitable, and at that point it is combined with any enhancements and other crimes to establish the "total life term," it serves as a functional *minimum* that is often surpassed by the time the inmate is found suitable, as the Board recognized (§ 2289). *See id.* at 238 (specifically providing for situations in which "the time already served by the prisoner exceeds the [total life term]"). Thus, the Board, with no legislative authorization whatsoever, effectively transformed a "parole release date" required to be set by Penal Code § 3041(a) into a *minimum* term of incarceration of indefinite duration, while simultaneously abdicating its responsibility to set a *maximum* constitutionally proportionate term.[6] *See* Board Opening Br. at 5-6

---

[6] Long after this unauthorized shift in Board practice, Deputy Attorney General Michael Wellington issued a memo regarding a meeting by the "Morrissey 8" (Morrissey Memo), discussing several "legal conclusions" made by the Board. *See* Amicus App'x Ex. S. Notably, the Morrissey Memo acknowledges the Board's obligation (under *Rodriguez*) to set maximum primary terms for indeterminately sentenced inmates, but baselessly concluded that this obligation "ha[d] been rendered obsolete." *Id.* at 1, 2, 3. To justify this conclusion, the memo points to: (1) the repeal of Penal Code § 2940 *et seq.* by AB 476 (the SB 42 clean-up bill); and (2) the fact that Proposition 7 amended to Penal Code to increase the MEPDs for first-degree murder (25 years) and second-degree murder (15 years).

The Morrissey Memo's "legal conclusion" is utterly baseless. First, the repeal of Penal Code § 2940 *et seq.* (two full years earlier) is irrelevant to the Board's obligation to fix maximum primary terms, which stems from the U.S. and California Constitutions, not from statute, as explained by *Rodriguez*. Although the statutes referenced by the Board (Penal Code

(arguing that once an indeterminately sentenced inmate is found suitable, the regulations require the calculation of a "base term," which is a "minimum term of confinement").

Following this drastic, unauthorized shift in the regulations, the Board further dismantled the protections the Legislature intended to put in place in the DSL. Specifically, in 1979, the Board removed the requirement that a parole date "normally" be set – contrary to the express language of Penal Code § 3041(a). Amicus App'x Ex. N (Reg. 79, No. 24, p. 230.1 (June 16, 1979) (§ 2280(a))).

F. This Court Became Entangled In The Board's Deflection And Obfuscation.

This Court's decision in *In re Dannenberg*, 34 Cal. 4th 1061 (2005), relies on the grave misunderstanding that the Board's interpretation created. In addressing a challenge to a denial of parole based on public safety, the

---

§ 2940 *et seq.*) did previously provide a few sparse statements about the parole authority's ability to fix terms, *see* Amicus App'x Ex. P (Cal. Penal Code § 2940 *et seq.* (1971)), the legislative history of the DSL establishes that their repeal by AB 476 was *not* an indication that the Legislature meant to revoke that ability.

Second, Proposition 7's adjustment of the *minimum* eligible parole date (MEPD) for first- and second-degree murder has no affect on the Board's obligation to set a *maximum* primary term.

Notably, and contrary to the Board's argument that the 2015 legislation Senate Bill 230 somehow newly created statutory minimum terms, *see* Board Opening Br. at 1, 9, 15, minimum terms are now, *and have always been*, established by statute. *See, e.g.*, Amicus App'x Ex. O (Cal. Penal Code §§ 3043-3049 (1970)); *id.* Ex. Q (Cal. Penal Code §§ 3046-3049 (1977)); Cal. Penal Code § 3046.

Dannenberg Court examined the statutory language of § 3041, with its reference to a "parole release date," and held that the Board was not unreasonable in refusing to set such a "parole release date" until after it had found a prisoner suitable for parole. *Dannenberg*, 34 Cal. 4th at 1071. Reading the statutory language in isolation, that interpretation appears sensible. But the Board is currently using this Court's determination about its parole-granting power as a proxy for a determination of its constitutional term-setting obligation. After the Board's regulatory opportunism obfuscated the critical distinction between these two powers, and rendered empty the concept of "setting a term," the Board relies on the *Dannenberg* Court's ruling to excuse its failure to set any type of term at all and return to the pre-*Rodriguez* ISL regime.

Notably, the *Dannenberg* Court was not presented with full information about the history behind the DSL and its requirement to set primary terms. Before the Court, the Attorney General wrongly argued that the Legislature *intended* for the ISL parole system to remain unchanged for inmates who remained indeterminately sentenced under the DSL. *See In re Dannenberg*, 2003 WL 1918571, Opening Br. at 18 (Feb. 14, 2003) ("[T]he Legislature plainly intended . . . to retain the old concept of the subjective, individualized consideration of parole-release decisions by an executive board" for indeterminately sentenced inmates). This Court accepted that assertion, and premised its decision on it. *Dannenberg*, 34 Cal. 4th at 1083

(relying on the assertion that, in passing the DSL, the Legislature intended to apply determinate sentencing principles to those whose crimes became determinately sentenced, "[b]ut" *not* to "certain serious criminals" for whom it "retained" indeterminate sentences) (citing *People v. Jefferson*, 21 Cal. 4th 86, 95-96 (1999)).[7] Although respondent's brief in *Dannenberg* discussed the history of the DSL and argued that the Board's practices created a system that is precisely what the DSL was designed to eliminate, it did not provide key information from original sources of legislative history. *In re Dannenberg*, 2003 WL 21396723, Answering Br. at 18-22, 28-31 (Apr. 16, 2003). As discussed above, the legislative history for SB 42 evidences the Legislature's clear intent both that constitutional maximum primary terms be set for inmates who remained indeterminately sentenced, and that the revisions to the parole-granting process remedy concerns that existed under the ISL for those inmates (*i.e.*, uniformity, proportionality, notice, and basing punishment on culpability rather than a subjective evaluation of likely future behavior).

---

[7] *Dannenberg*'s ruling also relied on dicta from *Jefferson* that stated, with absolutely no basis, that under the DSL, a parole date marks the end of a prison term for both determinately and indeterminately sentenced inmates (rather than, for indeterminately sentenced inmates, marking a point at which the inmate may be released to serve the rest of his term in community). *See Dannenberg*, 34 Cal. 4th at 1083 (citing *Jefferson*); *Jefferson*, 21 Cal. 4th at 95-96 (citing Cassou & Taugher, at 28, which does *not* support that proposition).

Although *Dannenberg*'s holding is not dispositive of the present case – because the Court considered the Board's parole-granting, and not its term-setting, obligations – its understanding of the system underlying its decision was clearly confused. The language of the opinion reveals a blending of the distinct concepts of constitutional maximum terms and parole release dates, and a blurring of the Board's two separate and independent functions. For example, the Court repeatedly used the term "fixed parole release date." *See Dannenberg*, 34 Cal. 4th at 1069, 1080. However, it is only constitutional maximum primary terms that have ever been "fixed" under the law, and parole release dates have always been subject to adjustment based on the inmate's institutional behavior.

Had the *Dannenberg* Court had more information about the legislative history behind SB 42 and the development of the parole regulations, and had its confusion about the Board's dual function been resolved, its holding would likely have been different. The Court's assertion, in dicta, that under the DSL, "the 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 offenders," *id.* at 1084, is directly contradicted, both by the evidenced intent of the Legislature in passing the DSL, and by the clear mandate of *Rodriguez*.

Further, the Board's assertion in this case – based on *Dannenberg* – that setting an inmate's maximum term can be delayed until after the inmate is found suitable is similarly baseless. If a prisoner is repeatedly denied a finding of suitability for parole – as most are – the inmate will frequently exceed his constitutional maximum primary term before even receiving it. This makes the constitutional protection against disproportionate sentencing impossible to enforce, as *Rodriguez* recognized. *See Rodriguez*, 14 Cal. 3d at 650 (maximum terms must be "fixed with sufficient promptness to permit any requested review of their proportionality to be accomplished before the affected individuals have been imprisoned beyond the constitutionally permitted term"). This is particularly so given that there are currently more than 25,000 indeterminately sentenced inmates – more than 19,000 of whom are either past their MEPD or assessed as a "low" risk by Board psychologists. *See* Butler Answering Br. at 15. The Board's assertion that it can delay setting a term also undermines every stated goal of the DSL – to make punishment more uniform according to culpability, to reduce the violence and stress attributable to the unpredictability and uncertainty of sentencing, and to further the aims of due process by providing clear notice.

Amici respectfully suggest that *Dannenberg* does not command precedential authority on either the meaning or validity of the statute at issue or the Board's obligations.

CONCLUSION

This Court should order the Board's full compliance with *Rodriguez*, including the setting of constitutional maximum primary terms early in indeterminately sentenced inmates' confinement.

DATED: May 10, 2017

Respectfully submitted,

By: Heidi Rummel /AFF

HEIDI L. RUMMEL
ANNA FAIRCLOTH FEINGOLD
USC Gould School of Law
Post-Conviction Justice Project

REBECCA BROWN
USC Gould School of Law

In support of Roy Butler

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), I, Heidi L. Rummel certify according to the computer program used to prepare this brief that this amicus brief consists of 8,315 words.

DATED: May 10, 2017

Respectfully submitted,

By: Heidi Rummel /AFF

HEIDI L. RUMMEL
ANNA FAIRCLOTH FEINGOLD
USC Gould School of Law
Post-Conviction Justice Project

In support of Petition Roy Butler

PROOF OF SERVICE

State of California, county of Los Angeles

I am over the age of eighteen and not a party to this action. My business address is Post-Conviction Justice Project, University of Southern California Gould School of Law, 699 Exposition Blvd., Los Angeles, California 90089-0071.

On May 10, 2017, I served the **APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF; AMICUS BRIEF** on the parties to this action by placing true copies thereof in sealed envelopes addressed as follows:

Sharif E. Jacob
Andrea Nill Sanchez
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111-1809
Attorneys for Roy Butler

Aimee Feinberg
DEPUTY SOLICITOR GENERAL
1300 I Street
Sacramento, CA 95814
Attorney for Board of Parole Hearings

FIRST DISTRICT APPELLATE PROJECT
475 14th Street
Suite 650
Oakland, CA 94612

Nancy O'Malley
ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE
1225 Fallon Street, Room 900
Oakland, CA 94612-4203

Brian C. Kinney
Deputy Attorney General
OFFICE OF THE CALIFORNIA ATTORNEY GENERAL
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004
Attorney for Board of Parole Hearings

Clerk of Court
Criminal Division
Rene C. Davidson Courthouse
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
1225 Fallon Street, Room 107
Oakland, CA 94612-4293
(*Case No. 91694B*)

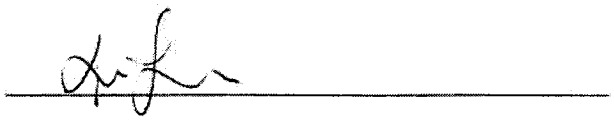
Clerk of Court
CALIFORNIA COURT OF APPEALS
First Appellate District
Division 2

350 McAllister Street
San Francisco, CA 94102
(*Case No. A139411*)

BY MAIL. I deposited said envelope in Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

EXECUTED on May 10, 2017 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Anna Faircloth Feingold