

S237014

SUPREME COURT
FILED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AUG - 2 2017

Jorge Navarrete Clerk

In re ROY BUTLER,
on Habeas Corpus.

No. S237014

Deputy

FILED WITH PERMISSION

First Appellate District, Division Two, Case No. A139411

Alameda County Superior Court, Case No. 91694B

APPLICATION FOR PERMISSION TO FILE
AMICUS CURIAE MOTION FOR JUDICIAL NOTICE
OF SENATE CONCURRENT RESOLUTION No. 48

AMICUS CURIAE MOTION FOR JUDICIAL NOTICE
OF SENATE CONCURRENT RESOLUTION No. 48

California Evidence Code, section 459
California Rules of Court
Rule 8.50, 8.54, 8.520(g), and 8.252(a)

William Vogel P88353
and
Aubrey Grant B86403
Correctional Training Facility
P.O. Box 705
Soledad, CA 93960

RECEIVED

JUL 27 2017

CLERK SUPREME COURT

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE MOTION
FOR JUDICIAL NOTICE OF SENATE CONCURRENT RESOLUTION No. 48

To the Honorable Chief Justice of California:

Application is hereby made by amicus curiae Aubrey Grant and William Vogel in support of Roy Butler in No. S237014 for permission to file the attached motion for judicial notice of California Senate Concurrent Resolution No. 48 (SCR 48) as amended May 11, 2017.

SCR 48 addresses criminal sentencing and expresses the Legislature's contemporary resolve that punishment for crime is to be proportionate to individual culpability. Although the SCR 48 "felony-murder rule" subject matter per se is not at issue in Butler, the Legislature's tenor of proportionate punishment is both relevant and timely to the merits of this case, and reflects California law and public policy.

The attached motion includes a copy of SCR 48 and is supported by points and authorities allowing amicus curiae to bring matters to the Court's attention by way of a motion for judicial notice.

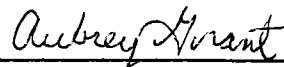
Good cause appearing, this application for permission to file should be granted.

Dated: 7/24/2017

Respectfully submitted,



William Vogel P88353



Aubrey Grant B86403

AMICUS CURIAE MOTION FOR JUDICIAL NOTICE
OF SENATE CONCURRENT RESOLUTION No. 48

To the Honorable Chief Justice and Associate Justices of the
California Supreme Court:

Pursuant to California Evidence Code section 459 and 452, Rule
8.520(g) and 8.252(a) of the California Rules of Court, and deci-
sional law of this State amicus curiae Aubrey Grant and William
Vogel hereby move the Court for judicial notice of California Senate
Concurrent Resolution No. 48 as amended May 11, 2017 in the matter
of Roy Butler, No. S237014.

Although the Resolution's "felony-murder rule" subject matter
per se is not at issue in Butler, the Legislature's contemporary
resolve that criminal sentencing is to be proportionate to individ-
ual culpability is relevant and timely to the merits of this case
and reflects California law and public policy. The Court may find
this is of substantial consequence in its determination to enforce
term fixing under subdivision (h) of Penal Code section 1170.2 as
raised in our amicus curiae briefs in support of Roy Butler.

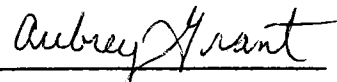
This motion is based upon the attached Memorandum of Points and
Authorities.

Dated: 7/24/2017

Respectfully submitted,



William Vogel P88353



Aubrey Grant B86403

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

California Evidence Code section 459, subdivision (a)(2) provides in relevant part that "[t]he reviewing court may take judicial notice of any matter specified in Section 452." Furthermore, "[i]n determining the propriety of taking judicial notice of a matter specified in Section 452...that is of substantial consequence to the determination of the action, or the tenor thereof...the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken." (Id., sec. 459, subd. (d).)

Evidence Code section 542 and subdivision (a) provide in relevant part that "[j]udicial notice may be taken of"... "[t]he decisional, constitutional, and statutory law of any state of the United States and the resolutions...of the Legislature of this state."

Here, amici curiae Grant and Vogel bring to the Court's attention and serve upon the parties Senate Concurrent Resolution No. 48 (SCR 48) which reflects the California Legislature's present (and continuing) resolve that criminal sentencing is to represent punishment commensurate with individual culpability. (See Exhibit A, key areas underscored.)

Although the SCR 48 "felony-murder rule" subject matter per se is not at issue in the Butler case, the Legislature's expressed tenor that criminal liability and sentencing should comport with individual culpability and not be disproportionate is directly relevant to this case and supports the merits of enforcing Penal Code section 1170.2, subdivision (h) term fixing as raised by our amicus curiae briefs in support of Roy Butler. As amicus curiae we request that the Court take judicial notice of SCR 48. (See In re C.H. (2011) 53 Cal. 4th 94, 98, n. 2 [judicial notice sought by amicus curiae law school and juvenile defenders]; Schifando v. City of Los Angeles

(2003) 31 Cal. 4th 1074 [County of Los Angeles as amicus curiae requested judicial notice].)

Also relevant in SCR 48 is the Legislature's recognition that California's prisons continue to be overpopulated at a high annual cost per inmate to taxpayers, public policy issues that were behind the "purpose and intent of the people" in passing Proposition 57 (The Public Safety and Rehabilitation Act of 2016). These amici indicated that fixing proportionate terms under subdivision (h) when given an indeterminate sentence would be "a durable remedy to prison crowding which comes at great expense to taxpayers with no added safety to the public." (See Supplemental Amicus Curiae Brief, Part II. C. at 10-12.) Thus the Legislature's contemporaneous concerns and resolve in SCR 48 is wholly consistent with and relevant to the enforcement of subdivision (h) term fixing in this case. (See Calif. Rules of Court, Rule 8.252(a)(2)(A).)

Because SCR 48 originated April 27, 2017 and was amended May 11, 2017 it was not available to be presented to or judicially noticed by the trial and appellate courts. However, Evidence Code section 459 and 452 authorize this reviewing court to take judicial notice of the legislative resolution which supports the term-fixing proceedings and relief sought by Butler. Punishment proportionate to individual culpability is required to occur as a matter of law following a decision on the order or judgment under review. (See Rule 8.252(a)(2)(B)-(D).) A copy of Senate Concurrent Resolution No. 48 has been served with this motion upon the parties. (Rule 8.252(a)(3).)

CONCLUSION

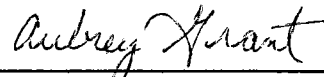
Based upon the foregoing, good cause appears and the Court should grant this motion for judicial notice.

Dated: 7/24/2017

Respectfully submitted,



William Vogel P88353



Aubrey Grant B86403

EXHIBIT

A

AMENDED IN SENATE MAY 11, 2017

Senate Concurrent Resolution

No. 48

Introduced by Senator Skinner
(Coauthor: Senator Anderson)

April 27, 2017

Senate Concurrent Resolution No. 48—Relative to criminal sentencing.

LEGISLATIVE COUNSEL'S DIGEST

SCR 48, as amended, Skinner. Criminal sentencing.

This measure would recognize the need for statutory changes to more equitably sentence offenders in accordance with their involvement in the crime.

Fiscal committee: no.

1 WHEREAS, According to the Department of Corrections and
2 Rehabilitation (CDCR) Internet Web site, California continues to
3 house inmates in numbers beyond its maximum capacity at an
4 average of 130 percent of capacity. In some institutions, such as
5 Wasco State Prison, the inmate population is at 169.7 percent of
6 capacity, housing well over 2,000 people over the designed
7 maximum capacity. Overpopulation has been the main contributing
8 factor to inhumane and poor living conditions; and

9 WHEREAS, In California, incarceration of an inmate by CDCR
10 is costing taxpayers \$70,836 annually, according to the Legislative
11 Analyst's Office as of the 2016-17 fiscal year; and

12 WHEREAS, It is a bedrock principle of the law and of equity
13 that a person should be punished for his or her actions according
14 to his or her own level of individual culpability; reform is needed

1 in California to limit convictions and subsequent sentencing in
2 both felony murder cases and aider and abettor matters prosecuted
3 under "natural and probable consequences" doctrine so that the
4 law of California fairly addresses the culpability of the individual
5 and assists in the reduction of prison overcrowding, which partially
6 results from lengthy sentences which are not commensurate with
7 the culpability of the defendant; and

8 WHEREAS, In California, defendants in felony murder cases
9 are not judged based on their level of intention or culpability but
10 are sentenced as if they had the intent to kill even if the victim of
11 the underlying felony actually commits the fatal act; and

12 WHEREAS, In California, a conviction for capital murder results
13 in a death or life without the possibility of parole sentence, a
14 conviction for noncapital first-degree murder results in a sentence
15 of 25 years to life imprisonment; and a sentence for second-degree
16 murder as long as the facts do not indicate a shooting from a
17 vehicle or the victim being a peace officer results in a sentence of
18 15 years to life; and

19 WHEREAS, A 17-percent grant rate in 2016 according to CDCR
20 demonstrates that a 25 years to life sentence generally results in
21 few defendants being granted parole; and

22 WHEREAS, Prosecutors must prove beyond a reasonable doubt
23 that a defendant acted with premeditation and deliberation and
24 expressly intended to kill the victim in order for the defendant to
25 be convicted of first-degree murder; and

26 WHEREAS, Under the felony-murder rule, criminal liability
27 for a homicide is significantly broadened; and a prosecutor only
28 needs to prove that the defendant is involved in the commission,
29 attempted commission, or flight following the commission or
30 attempted commission of a statutorily enumerated felony (Section
31 189 of the Penal Code) to secure a first-degree murder conviction
32 even if the defendant did not do the killing, and even if the killing
33 was unintentional, accidental, or negligent; and

34 WHEREAS, In the case of second-degree felony murder, the
35 prosecutor only has to prove that the defendant intended to commit
36 an "inherently dangerous" felony; and

37 WHEREAS, Under the felony-murder rule, a defendant does
38 not have to intend to kill anyone, nor commit the homicidal act,
39 to be sentenced to first-degree murder or second-degree murder;
40 and

1 WHEREAS, It is fundamentally unfair and in violation of basic
2 principles of individual criminal culpability to hold one felon liable
3 for the unforeseen results of another felon's action, especially
4 when such conduct was not agreed upon; and

5 WHEREAS, Criminal liability and sentencing should comport
6 with individual culpability, thereby making conviction under a
7 felony murder theory inconsistent with basic principles of law and
8 equity; and

9 WHEREAS, In California, to be liable for special circumstance
10 felony murder and sentenced to death or to life without the
11 possibility of parole, pursuant to Section 190.2 of the Penal Code,
12 the prosecution must prove the defendant intended to commit the
13 underlying felony and also prove two additional elements: that the
14 person who did not commit the homicidal act acted as a major
15 participant in the felony and acted with reckless indifference to
16 human life; (see *People v. Banks* (2015) 61 Cal.4th 788); and

17 WHEREAS, The California Supreme Court in the *Banks*
18 decision stated that imposing these two statutory additional
19 requirements—required to impose either life without the possibility
20 of parole or a death sentence—comports with the United States
21 Supreme Court Eighth Amendment jurisprudence proscribing cruel
22 and unusual punishment; and

23 WHEREAS, In cases not prosecuted under a felony-murder
24 theory, in order to convict a defendant of first-degree murder, a
25 jury has to find beyond a reasonable doubt that a person acted with
26 intentional malice; and

27 WHEREAS, In California, under the felony-murder rule, the
28 prosecution does not have to prove that a killing was intended and
29 need only prove that a defendant intended to commit the underlying
30 felony or intended to commit an inherently dangerous felony; and

31 WHEREAS, Both Hawaii and Kentucky eradicated the practice
32 by statute and Michigan abrogated the felony-murder rule through
33 case law; and

34 WHEREAS, The Michigan Supreme Court noted when it
35 abolished the felony-murder rule, "Whatever reasons can be
36 gleaned from the dubious origin of the felony-murder rule to
37 explain its existence, those reasons no longer exist today. Indeed,
38 most states, including our own, have recognized the harshness and
39 inequity of the rule as is evidenced by the numerous restrictions
40 placed on it. The felony murder doctrine is unnecessary and in

1 many cases unjust in that it violates the basic premise of individual
2 moral culpability upon which our criminal law is based" (People
3 v. Aaron (1980) 299 N.W. 2d 304); and

4 WHEREAS, The due process clause found in both the
5 Fourteenth and Fifth amendments to the United States Constitution
6 requires proof beyond a reasonable doubt of every fact necessary
7 to constitute the crime in order to convict the accused. This should
8 hold true for felony murder cases, but the doctrine of felony murder
9 circumvents this important principle and allows for conviction and
10 punishment to be the same as for those who committed a murder
11 with malice aforethought; and

12 WHEREAS, Felony murder was conceived in England in the
13 1700s and brought to the United States in the early 1800s. After
14 much criticism from the courts in England due to the
15 disproportionality of sentencing individuals who had no malice or
16 intent to kill the same as perpetrators of the fatal act, Parliament
17 abolished the felony-murder rule in 1957; and

18 WHEREAS, The United States is one of the only countries in
19 the world that still allows prosecutions under the felony-murder
20 rule; and

21 WHEREAS, In addition to the disproportionate sentencing that
22 occurs in felony murder cases, there is need for additional reform
23 when addressing aider and abettor liability for other criminal
24 matters, specifically the "natural and probable" consequences
25 doctrine, which also results in greater punishment for lesser
26 culpability; and

27 WHEREAS, In California, people who commit a felony are not
28 sentenced according to their individual level of culpability, but all
29 participants, even those who indirectly encouraged the commission
30 of a felony, even by words or gestures, may be held to the same
31 degree of culpability as the person who committed the offense
32 (People v. Villa (1957) 156 Cal.App.2d 128); and

33 *WHEREAS, Defendants charged and convicted under felony*
34 *murder are subject to the same sentencing as the actual perpetrator*
35 *of the murder, even if their actual involvement was limited to a*
36 *lesser crime, judges and jurors are not allowed to apportion*
37 *degrees of culpability. Good public policy dictates that after*
38 *conviction, judges or jurors should be given this opportunity;*
39 *similar to the method currently employed for serious felonies called*

e hearings.” In this way a defendant may receive a more appropriate sentence for the crime committed; and

2
3 WHEREAS, An aider and abettor is criminally responsible not
4 only for the crime he or she intends, but also for any crime that
5 “naturally and probably” results from his or her intended crime;
6 the result of this doctrine is that all participants in a fistfight can
7 be held liable for first-degree murder when only one defendant
8 commits a murder, notwithstanding the fact that the other
9 participants did not know the defendant was armed, the killing
10 occurred after the fistfight ended, and the participants did not aid
11 or abet the shooting (People v. Medina (2009) 46 Cal.4th 913);
12 resulting in individuals lacking the mens rea and culpability for
13 murder being punished as if they were the ones who committed
14 the fatal act; and

15 WHEREAS, As stated by Justice Goodwin Liu in People v.
16 Cruz-Santos, this leads to overbroad application: “At its essence,
17 the natural and probable consequences doctrine imposes liability
18 on the basis of negligence layered on top of a defendant’s
19 culpability for aiding and abetting a target offense. (See People v.
20 Chiu, (2014) 59 Cal.4th 155 at p. 164 [“because the nontarget
21 offense is unintended, the mens rea of the aider and abettor with
22 respect to that offense is irrelevant and culpability is imposed
23 simply because a reasonable person could have foreseen the
24 commission of the nontarget crime.”].) Although reasonable
25 foreseeability can be a legitimate basis for assigning culpability,
26 courts and commentators have long observed that the concept is
27 susceptible to overbroad application. (See Thing v. La Chusa
28 (1989) 48 Cal.3d 644, 668 [“there are clear judicial days on which
29 a court can foresee forever”]; Goldberg v. Housing Authority of
30 City of Newark (N.J. 1962) 186 A.2d 291, 293 [“Everyone can
31 foresee the commission of crime virtually anywhere and at any
32 time.”]; Guthrie et al. (2001) Inside the Judicial Mind, 86 Cornell
33 L.Rev. 777, 799 [“Hindsight vision is 20/20. People overstate their
34 own ability to have predicted the past and believe that others should
35 have been able to predict events better than was possible.
36 Psychologists call this tendency for people to overestimate the
37 predictability of past events the ‘hindsight bias.’” (fn. omitted)];
38 Rachlinski (1998) A Positive Psychological Theory of Judging in
39 Hindsight, 65 U. Chi. L.Rev. 571, 571 [“Nothing is so easy as to
40 be wise after the event.” (fn. omitted, quoting Comman v. The

1 Southern Counties Railway Co. (Exch. 1859) 157 Eng. Rep. 1050,
2 1052].); and

3 WHEREAS, It is the proper role of trial courts to screen out
4 cases in which the concept of foreseeability cannot bridge the gap
5 between a defendant's culpability in aiding and abetting the target
6 offense and the culpability ordinarily required to convict on the
7 nontarget offense. This judicial check serves to ensure that natural
8 and probable consequences liability—a judge made doctrine in
9 tension with the usual mens rea requirement of the criminal law—is
10 kept “consistent with reasonable concepts of culpability.” People
11 v. Chiu (2014) 59 Cal.4th 155, 165; and

12 WHEREAS, It can be cruel and unusual punishment to not
13 assess individual liability for nonperpetrators of the fatal act or in
14 nonhomicide matters, the criminal charge resulting in prosecution
15 and impute culpability for another's bad act, thereby imposing
16 lengthy sentences that are disproportionate to the conduct in the
17 underlying case; now, therefore, be it

18 Resolved by the Senate of the State of California, the Assembly
19 thereof concurring, That the Legislature recognizes the need for
20 statutory changes to more equitably sentence offenders in
21 accordance with their involvement in the crime; and be it further

22 Resolved, That the Secretary of the Senate transmit copies of
23 this resolution to the author for appropriate distribution.

PROOF OF SERVICE

I, William Vogel, applicant, hereby declare under penalty of perjury that I mailed a true copy of:

APPLICATION FOR PERMISSION TO FILE
AMICUS CURIAE MOTION FOR JUDICIAL NOTICE
OF SENATE CONCURRENT RESOLUTION No. 48

AMICUS CURIAE MOTION FOR JUDICIAL NOTICE
OF SENATE CONCURRENT RESOLUTION No. 48

in No. S237014 to the parties listed below on July 24, 2017 by placing said documents in a postage-paid envelope and handing it to a Correctional Officer to be sent via United States mail.

First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102-4712

California Attorney General
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004

Keker, Van Nest & Peters LLP
633 Battery Street
San Francisco, CA 94111-1809
(Counsel for Roy Butler)

I declare under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Soledad, California.

Date: 7/24/2017



William Vogel P88353
Correctional Training Facility
P.O. Box 705
Soledad, CA 93960

