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In the

Supreme Court

of the

State of California

IN RE ROY BUTLER ON HABEAS CORPUS

SUPREME COURT
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SUPERIOR COURT OF ALAMEDA · HONORABLE LARRY GOODMAN · NO. 91694B

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

The Board of Parole Hearings ("the Board") has seized on inapplicable statutory reforms and an unrelated federal court order in an attempt to evade compliance with its court-ordered obligations. There has been no change in the law to justify modifying the Settlement Order. The relief sought in the Settlement Order vindicated Roy Butler's constitutional claims. Nothing about the Constitution has changed since the Board agreed to settle the matter.

Nor do the statutory amendments cited by the Board conflict with the relief to which it voluntarily assented. The new legislation cited by the Board does not prohibit the calculation of base terms. Indeed, at oral argument below, the Board admitted that "the statute does not explicitly preclude the Board from setting base terms." Tr. of Oral Argument at 25 (33:05-33:11), May 31, 2016. Because there is no conflict between the legislation as amended and the Settlement Order, the Court of Appeal was well within its discretion to deny the Board's motion to modify.

The Board's attempt to relitigate the merits of Mr. Butler's claims is barred not only by its settlement of those claims, but also by its subsequent conduct. After the Board voluntarily settled the case, the Board willfully and knowingly began to flout its provisions. The Board did not move to modify the order until after Mr. Butler informed it that he intended to ask the Court of Appeal to hold the Board in contempt. The disentitlement

doctrine bars the Board from seeking to modify a court order after it has chosen to disobey it.

The Board is also barred from relitigating the merits of the Settlement Order under the law of the case. In resolving Mr. Butler's motion for attorneys' fees, the Court of Appeal decided that Mr. Butler's claims vindicated the California Constitution's prohibition on cruel or unusual punishments. The Board chose not to appeal from that decision. Therefore, it cannot, in this petition for review, seek to rehash that same issue.

The Board's appeal is procedurally defective, and, in any event, lacks merit. Therefore, Mr. Butler respectfully requests that this Court affirm the Court of Appeal's denial of the Board's motion to modify.

II. QUESTION PRESENTED

May a party, while openly flouting a consent decree, seek to modify it by relitigating the merits of the underlying action it settled?

III. BACKGROUND

A. Factual Background

The truly pertinent facts in this appeal are simply these: The parties entered into a settlement that was judicially approved in a Stipulated Order, which the Board then flouted for years in contempt of court and now seeks to undo based on a spurious claim that the law has changed. But the Order

is based on the constitutional prohibition against excessive punishment, and that prohibition hasn't changed one iota. That's enough to decide this case.

We nevertheless provide below a brief history of how and why the Stipulated Order came to be. The issue is when and how the Board sets "base terms"—a case-by-case determination of the longest sentence that would be constitutionally proportionate to an inmate's individual culpability.

The broad outline of the story is that, with respect to inmates under indeterminate sentences—and there are still many of them—the Board has vacillated between a right way of doing things and a wrong way of doing things.

The right way is for the Board to set an inmate's base term promptly after he is imprisoned. The wrong way is to defer setting base terms until late in the game, when the inmate is granted parole. That way is wrong for three compelling reasons: (1) the inmate serves most of his sentence without any idea of when he will be freed, which is not only cruel but also so destructive of morale as to undermine prison discipline; (2) a base term doesn't serve its constitutional function if the Board only determines it—possibly years too late—when the inmate is finally granted parole; and (3) the Board panel has no way of knowing whether denying parole will result in an unconstitutionally lengthy period of imprisonment.

This Court put an end to the wrong way of doing things in its 1975 decision in *Rodriguez*, which faulted the Board for having abdicated its constitutionally based responsibility to set base terms—that is, setting base terms the wrong way. California's subsequent enactment of a determinate-sentencing scheme mooted *Rodriguez*'s teachings as to many crimes; but a broad range of crimes still remained subject to indeterminate sentencing, including many crimes for which the maximum punishment was life. *In re Rodriguez*, 14 Cal. 3d 639, 646 (1975). Nevertheless, the Board inexplicably concluded that *Rodriguez* no longer governed even as to those crimes. Soon the Board had reverted to setting base terms the wrong way.

Mr. Butler's suit successfully challenged the Board's unconstitutional backsliding. In the Stipulated Order, the Board agreed that *Rodriguez*'s constitutional protections extend to inmates under indeterminate sentences. The right way was back—in theory.

But not in practice, because the Board simply disregarded the Order. And then it got caught. Now that it is plainly in contempt of court, the Board wants to undo the Order and return the sentencing system to its pre-*Rodriguez* state of unconstitutionality.

Below, we tell this story in more detail.

1. Base terms are historically rooted in the Board's constitutionally mandated responsibility to fix proportionate terms.

Base terms first arose during a period in California's history when all defendants in the state were sentenced to an indeterminate amount of time. Under the Indeterminate Sentencing Law ("ISL") in effect before 1977, no government body set parole dates for inmates and "prisoners had no idea when their confinement would end, until the moment the parole authority decided they were ready for release." *In re Dannenberg*, 34 Cal. 4th 1061, 1077 (2005).

Between 1917 and 1935, the ISL required the Board's predecessor agency—the Adult Authority[1]—to "determine after the expiration of the minimum term of imprisonment . . . what length of time, if any, [an inmate] shall be confined." 1917 Cal. Stat. 665, § 1; *see also* 1929 Cal. Stat. 1930, § 1(1); 1935 Cal. Stat. 1700, § 1.1. In effect, the ISL required the Board to "promptly and irrevocably fix the maximum term of a prisoner," a function that we will refer to as "term fixing" or "term setting." *People v. Wingo*, 14 Cal. 3d 169, 184 (1975) (Clark, J., concurring in part and dissenting in part). However, in 1941, the Legislature amended the ISL, removing from the Code any reference to the Adult Authority's term-fixing responsibility. *See* 1941 Cal. Stat. 1083, §§ 13, 15. The elimination of term-fixing left the

[1] For the sake of clarity, we will refer to the agency and its predecessor as "the Board."

Board with broad discretion to determine how long an inmate could be imprisoned. *Id.* § 3020. In effect, the Board no longer was statutorily required to fix terms at all, let alone to consider whether those terms should be set at anything less than the maximum of life imprisonment. *Rodriguez*, 14 Cal. 3d at 646. The Board's unfettered discretion became a cause for concern as "[j]ust about everyone with a stake in the system argued that the lack of transparency in sentencing was a problem." Kara Dansky, *Understanding California Sentencing*, 43 U.S.F. L. Rev. 45, 64 (2008). As a result, the Board came under "intense pressure from the public to make sentences more uniform and less excessive." *Id.* at 65.

This Court addressed those concerns in its 1975 decision in *Rodriguez*. There the Court held that, to survive scrutiny under the Eighth Amendment and its California constitutional counterpart,[2] the ISL must be read to require that the Board initially "fix terms within the statutory range that are not disproportionate to the culpability of the individual offender." *Rodriguez*, 14 Cal.3d at 652. The Court dubbed this "fixed, constitutionally proportionate, term" the "'primary term'" and noted that the "primary term must reflect the circumstances existing *at the time of the offense*." *Id.* (emphasis added).

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[2] *See* Cal. Const., Art.. I, § 7(a).

But the Court hastened to add that the Board had another, "independent" statutory responsibility apart from term-fixing—namely, a responsibility to make discretionary decisions about granting parole and about adjusting the primary term—both of which are based on the prisoner's conduct in prison, efforts toward rehabilitation, ability to conform to the terms of parole, and readiness to "lead a crime-free life in society." *Id.* Unlike initial term-fixing, the Board's fulfillment of this second responsibility was "based in large measure on occurrences *subsequent* to the commission of the offense." *Id.* (emphasis added).

The Court found that, in the case before it, the Board "appear[ed] not to have recognized this distinction" between its term-fixing and parole-granting responsibilities. *Id.* at 653. As a result, when the Board decided to deny Rodriguez parole—a decision that the Court did not review[3]—the Board mistakenly thought that its job was done and therefore either had "failed to fulfill its obligation to fix [Rodriguez's] term at a number of years proportionate to his offense, or, having impliedly fixed it at life, [had] imposed excessive punishment on him." *Id.* Undertaking the task that the Board had ducked, the Court concluded that the 22 years of imprisonment served by Rodriguez were "excessive and disproportionate punishment" given his individual culpability; and the Court ordered him released. *Id.*

[3] *See id.* at 651, 656.

The Court also took aim at a number of practices that had evolved due to the Board's failure to distinguish between its term-fixing and parole-granting responsibilities—e.g.:

- The Board would fix a prisoner's primary term only when he appeared before a panel of the Board for his parole application to be considered; and if, like Rodriguez, the prisoner were denied parole, the Board typically gave no further consideration to determining his term. *Id.* at 646.
- When the Board did grant a tentative parole date, it also fixed the number of years of the term and the number to be served on parole if the prisoner was not discharged earlier; but when parole was suspended, revoked, or rescinded, the Board routinely refixed the term to match the statutory maximum and left it at maximum until a new parole date was granted. *Id.*

The Board immediately grasped Rodriguez's constitutional significance and moved to implement it. In Chairman's Directive No. 75/30, the Board's chairman clarified that term-fixing and parole-granting procedures "are different in significant respects, and should not be confused." Roy Butler's Mot. for Judicial Notice, March 20, 2017, Ex. A at 1. The directive provided that "[a] primary term [would] be fixed for each offense in conformance with the[] procedures and guidelines" laid out

therein. *Id.*. To achieve that aim, the directive instructed Board officials to "fix the base term" and "adjust the base term." *Id.* at 3, 5. Adopting *Rodriguez*'s nomenclature, the directive referred to the adjusted base term as the "primary term." *Id.* at 6.

The Board went on to promulgate regulations implementing these requirements. *See* 15 Cal. Admin. Code §§ 2000-2725 (1976). Those regulations established that "the primary term is the maximum period of time which is constitutionally proportionate to the individual's culpability for the crime." 15 Cal. Admin. Code § 2100(a) (1976).

2. Term-setting continues to be critical for ensuring proportionality of sentences imposed upon inmates serving indeterminate sentences.

The ISL soon "came into disfavor for many reasons[,]" including the fact that it: "(1) failed to fit the punishment to the crime and (2) gave inmates no advance hope of a fixed date for release, thus actually promoting disciplinary problems within the prisons." *Dannenberg*, 34 Cal. 4th at 1088.

In 1976, the Legislature replaced the ISL with the Determinate Sentencing Law ("DSL"), Cal. Penal Code §§ 1170 *et seq.* The DSL—which remains in effect today—replaced indeterminate sentencing with fixed-term sentences for most crimes. The DSL categorized most offenses into five degrees of seriousness, each of which was assigned three definite

terms, or "triads," for the sentencing judge to choose from.[4] *See* Cal. Penal Code § 1170(b); *see also* Dansky at 67.

But defendants convicted of certain enumerated felonies continue to be subject to the indeterminate sentencing regime. Cal Penal Code § 1168(b). Despite this fact, in a July 26, 1979 memo that would later become central to the Board's arguments in this litigation, the Board Chairman unilaterally and inexplicably decided that *Rodriguez* "appears to have been rendered obsolete." *See* Roy Butler's Mot. for Judicial Notice, March 20, 2017, Ex. B at 3. The memo cited "the changed structure of life sentences," presumably referring to the passage of the DSL, to justify its conclusion that *Rodriguez* "is no longer applicable." *Id.* But the memo made no mention of any of the offenses that remained unaffected by the DSL and continued to be punishable by indeterminate life sentences with the possibility of parole. No judicial decision or legislative act ever has endorsed the memo's erroneous conclusion that *Rodriguez* is a dead letter.

Despite the memo's dismissal of *Rodriguez*, the Board never stopped fixing terms altogether. Instead, the Board turned to former California Penal Code Section § 3041(a)—which required the Board to set and

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[4] The U.S. Supreme Court found the imposition of the upper term to be unconstitutional. *Cunningham v. Cal.*, 549 U.S. 270 (2007). In response, the California Legislature enacted Senate Bill 40, which amended the DSL by vesting trial judges with discretion to choose which of the three triad sentences to impose. *See* Dansky at 70.

establish criteria for setting release dates—for authority to fix terms for inmates with indeterminate sentences. *See* Opening Br. on the Merits ("Opening Br."), Jan. 17, 2017 at 3-4. The Board additionally promulgated new regulations requiring the calculation of base terms.[5] *See* Cal. Code Regs. tit. 15, §§ 2280-2292, 2400-2411, 2420-2429.1, 2430-2439.1.

Today, for inmates who receive indeterminate sentences, term-fixing is no less important under the DSL than it was under the ISL. The seriousness of the offenses subject to indeterminate life sentences is wide-ranging. Those offenses include crimes spanning from first[6] and second-degree murder[7] to gross vehicular manslaughter committed by someone

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[5] The new regulations no longer employ the language "primary term." *See* Cal. Code Regs. tit. 15, § 2423. A primary term is the equivalent of what is now referred to as the "adjusted base term," which constitutes the base term after it has been adjusted for enhancements provided by the Board's new regulations. *See* Stip. and Order Regarding Settlement, ("Settlement Order") Dec. 16, 2013 ¶ 3.

[6] California Penal Code § 190(a) proscribes:

> Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life.

[7] Under California Penal Code §190(c), "[e]very person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life."

with prior convictions while intoxicated,[8] kidnapping for ransom that does not result in bodily harm,[9] and nonfatal train wrecking.[10] Inmates convicted of crimes that remain punishable by indeterminate sentences still rely on the Board's term-fixing procedures to protect them against unconstitutionally disproportionate sentences.

Current regulations provide that "[t]he [parole] panel shall set a base term for each life prisoner who is found suitable for parole." Cal. Code Regs. tit. 15, § 2282(a). The base term is established "solely on the gravity of the base offense, taking into account all of the circumstances of that crime." *Id.* This involves three steps.

First, as further explained below, the panel must use "the appropriate matrix of base terms" set forth in the regulations. *Id.* at § 2403(a).

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[8] California Penal Code §191.5(d) prescribes a sentence of 15 years to life for gross vehicular manslaughter when the person has previously been convicted of certain related offenses.

[9] California Penal Code § 209(a) provides that:

> Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person . . . shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

[10] California Penal Code § 219 prescribes a sentence of "imprisonment in the state prison for life with the possibility of parole" "where no person suffers death as a proximate result" of train wrecking, which includes unlawfully "throw[ing] out a switch, remov[ing] a rail, or plac[ing] any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derail[ing] the same."

Second, the panel must "impose the middle base term reflected in the matrix unless [it] finds circumstances in aggravation or mitigation." *Id.*

Third, the base term may be adjusted for "postconviction credit." Cal. Code Regs., tit.15 § 2411(a).

An example of the matrix for second-degree murders committed on or after November 8, 1978 is shown below:

Second Degree Murder Penal Code § 189 (in years and does not include post conviction credit as provided in § 2410)	A. *Indirect* Victim died of causes related to the act of the prisoner but was not directly assaulted by prisoner with deadly force; e.g., shock producing heart attack, a crime partner actually did the killing.	B. *Direct or Victim Contribution* Death was almost immediate or resulted at least partially from contributing factors from the victim; e.g., victim initiated struggle or had goaded the prisoner. This does not include victims acting in defense of self or property.	C. *Severe Trauma* Death resulted from severe trauma inflicted with deadly intensity; e.g., beating, clubbing, stabbing, strangulation, suffocation, burning, multiple wounds inflicted with weapon not resulting in immediate death or actions calculated to induce terror in the victim.
I. *Participating Victim* Victim was accomplice or otherwise implicated in a criminal act with the prisoner during which or as a result of which the death occurred, e.g., crime partner, drug dealer, etc.	15–16–17	16–17–18	17–18–19
II. *Prior Relationship* Victim was involved in a personal relationship with prisoner (spouse, family member, friend, etc.) which contributed to the motivation for the act resulting in death. This category shall not be utilized if victim had a personal relationship but prisoner hired and/or paid a person to commit the offense.	16–17–18	17–18–19	18–19–20
III. *No Prior Relationship* Victim had little or no personal relationship with prisoner or motivation for act resulting in death was related to the accomplishment of another crime, e.g., death of victim during robbery, rape, or other felony.	17–18–19	18–19–20	19–20–21

Id. § 2403(c). The vertical axis correlates with the relationship between the inmate and the victim. *Id.* The horizontal axis contains three categories that track the aggravating circumstances of the commitment offense. *Id.* The panel is required to "impose the middle base term reflected in the matrix unless the panel finds circumstances in aggravation or mitigation." *Id.* § 2403(a).

As for the timing of the base-term calculation, the Board's dismissal of *Rodriguez* as a historical relic predictably resulted in a return to the very practices that this Court condemned in that case. Up until entry of the Settlement Order in this case, the Board's accepted practice had become, once again, to defer calculating an inmate's base term until he was found suitable for parole. *See* Opening Br. at 6.

Despite the Legislature's best attempts to reform California' s criminal-justice system by enacting the DSL, the state continues to face the lack of transparency, hopelessness, and other problems that plagued it during the ISL era. In addition, the Board's continuing abdication of its responsibility to fix primary terms can only have contributed to prison overcrowding that undermines the humanity and effectiveness of California's punishment system. As one scholar noted decades into the DSL regime:

> California's current punishment system is marked by overcrowded and inhumane prisons; experts and public officials who agree that reducing our reliance on incarceration would be a sensible approach to prison overcrowding but who are reluctant to say so publicly; a general agreement that there are some people in prison who could safely be released and some dangerous individuals who need to be kept from society; an enormous corrections budget; people leaving prison in worse shape than when they entered; an unacceptable degree of unwarranted disparity in sentencing, especially with respect to race and class but also with respect to geography; and the fact that crime still happens.

> Sadly, this characterization accurately describes the California of 1850, the California at any time during the 1900s, and the California of today.

Dansky at 85. The U.S. Supreme Court recognized in a decision upholding a court-mandated prison population limit that the "degree of overcrowding in California's prisons is exceptional." *Brown v. Plata*, 563 U.S. 493, 502 (2011).

These concerns are especially pressing for California's "lifer" prison population. As of July 2012, there were 25,680 inmates serving sentences of life with the possibility of parole in California—19,995 of whom the California Static Risk Assessment ("CSRA")[11] assessed as "low risk" and 9,000 of whom were past their Minimum Eligible Parole Date ("MEPD").[12] *See* Supp. Habeas Pet. App'x, Ex. Z ¶ 47. Meanwhile, the number of life-term prisoners has doubled as a percentage of the overall California prison population, from 8% in 1990 to 20% in 2010. *Id.*, Ex. X at A00243. Overall, there is only an 18% probability that the Board will grant a lifer parole. *Id.*

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[11] The CSRA is the California Department of Corrections and Rehabilitation's scientifically validated risk-assessment instrument. *See* Pet'r's App'x in Support of Supp. Pet. for Writ of Habeas Corpus ("Supp. Habeas Pet. App'x") May 28, 2013, Ex. X.

[12] An MEPD is "the earliest date on which an Indeterminate Sentence Law or life prisoner may legally be released on parole." Cal. Code Regs. tit. 15, § 3000 (2016).

Together, these facts compel the conclusion that "far too little attention has been given to the prison population serving life sentences with the possibility of parole under older *indeterminate sentencing* principles." *Id.* at A00242. Base-term calculations remain one of the few mechanisms in place to discourage the Board from holding these prisoners in an overloaded penal system for longer than what is constitutionally proportionate to their crimes.

B. Procedural Background

1. Mr. Butler's Action

This case arises out of one inmate's attempt to improve California's term-setting procedures for life prisoners. In 1988, Roy Butler pleaded guilty to second-degree murder of a man who was severely and regularly beating one of his close female friends while she was pregnant. *See* Supp. Pet. for Writ of Habeas Corpus ("Supp. Habeas Pet."), May 28, 2013 at ¶¶ 16-20. Mr. Butler confessed to being an accessory to the fatal stabbing of the victim. His role consisted of hiding in the bathroom with a kitchen knife while another man carried out the killing. *Id.* ¶¶ 16, 23. The California Department of Corrections ("CDC") recommended to the Superior Court that he only receive probation based on his "insignificant record" and minor role in the offense. *Id.* ¶¶25-26. It concluded, "[t]here is no evidence that he identifies with delinquent values, and he is not viewed as a threat to the community." *Id.* ¶ 26. Nonetheless, on August 9, 1988, the

court chose to sentence Mr. Butler to a term of 15 years to life for second-degree murder in violation of California Penal Code § 187. Thereafter, the Board repeatedly found Mr. Butler to be unsuitable for parole on five occasions, citing lack of insight and unsatisfactory post-release plans. *Id.* ¶¶ 63, 80.

Mr. Butler filed a pro per Petition for Writ of Habeas Corpus in the Court of Appeal, First Appellate District on December 10, 2012. *See* Pet. for Writ of Habeas Corpus, Dec. 10, 2012. His appeal raised two claims: (1) the Board's denial of parole was supported by insufficient evidence in his individual case; and (2) the Board's practice of deferring the calculation of base terms until it deemed the inmate suitable for parole violated the Eighth and Fourteenth Amendments and the California Constitution's parallel prohibitions. *Id.* The Court of Appeal appointed counsel for Mr. Butler and bifurcated his supplemental habeas petition into two separate cases. *See* Ct. of Appeal Order, Aug. 7, 2013. Mr. Butler's individual claim remained the subject of case number A137273, while the base-term claim was assigned to case number A139411. The Court of Appeal granted his petition as to the former claim and remanded it to the Board for another hearing. *In re Butler*, 224 Cal. App. 4th 469, 491, *ordered not to be officially published* (June 11, 2014). On April 25, 2014—after Mr. Butler had served over two decades in prison—the Board found him suitable for parole and approved his release. *See* Pet'r's Opp. to Resp't's Mot. to

Modify Order Regarding Stip. Settlement ("Mot. to Modify Opp."), Mar. 1, 2016, Jacob Decl., Ex. E at 0162. For the first time, it also provided him with a base-term calculation of 17 years—nine years less than the 26 he had already served. *Id.* at 0172.

Meanwhile, the parties to this action were concurrently litigating Mr. Butler's constitutional claims. In that matter, the parties ultimately held three settlement conferences before Justice Jim Humes starting on November 20, 2013. The Board, through its Executive Office and Chief Counsel, participated in each of the settlement conferences before Justice Humes. Stip. and Order Regarding Settlement, ("Settlement Order") Dec. 16, 2013 at 1. On December 13, 2013, the parties signed a settlement agreement stipulating to the terms of a Proposed Order that resolved Mr. Butler's base-term claim on terms described below. The Court of Appeal entered the Settlement Order on December 16, 2013.

The Settlement Order requires the Board to end its practice of waiting to calculate base terms until an inmate is found suitable for parole. Instead, the Board agreed to set base terms and to adjust base terms for life prisoners at their initial parole hearing, or at the next scheduled hearing. *See* Settlement Order, ¶¶ 3-4. The Settlement Order also directs the Board to amend its regulations to reflect the new policies and procedures set forth in the Settlement Order "as soon as reasonably practicable." *Id.* ¶¶ 5, 7.

The District Attorneys of San Diego and Sacramento Counties intervened to challenge the Settlement Order, asking this Court to transfer the action to itself in April 2014. Notably, both Mr. Butler ***and*** the Board opposed the request to transfer. This Court denied the applications on July 30, 2014. *See* Cal. Supreme Ct. Order, No. S217611, Jul. 30, 2014.

On May 15, 2015, the Court of Appeal granted Mr. Butler's request for attorneys' fees after establishing that the Settlement Order confers a significant benefit on a large class of persons—specifically, life prisoners. *See In re Butler*, 236 Cal. App. 4th 1222, 1244 (2015). The court's opinion affirmed the constitutional underpinnings of the Settlement Order. It determined that "the base term and adjusted base term relate to proportionality, and can serve as useful indicators of whether denial of parole will result in constitutionally excessive punishment." *Id.* at 1237. Once again, the District Attorney of San Diego County submitted a request in July 2015 asking this Court to either grant review or depublish the attorneys' fees opinion. Mr. Butler opposed the request. The Board took no position. This Court denied review and depublication on October 28, 2015. *See* Cal. Supreme Ct. Order, No. S227750, Oct. 28, 2015.

2. The Board's contempt of court and motion to modify

During the two years after the lower court entered the Settlement Order, the Board did not contact the Court or opposing counsel about ongoing compliance with Settlement Order—despite the occurrence of all

the legal challenges that the Board now cites as grounds for modifying the Order (i.e., the passage of S.B. 260 in 2013, the entry of the *Coleman v. Brown* order in early 2014, and the enactment of S.B. 261 and 230 one year later). S*ee Youth Offender Parole Hearings*, 2013 Cal. Legis. Serv. Ch. 312 (S.B. 260) (codified at Cal. Pen. Code, § 3051); *Sentencing: Parole*, 2015 Cal. Legis. Serv. Ch. 471 (S.B. 261) (codified at Cal. Penal Code § 3051); *Sentencing: Parole*, 2015 Cal. Legis. Serv. Ch. 470 (S.B. 230); *see also Coleman v. Brown*, Case No. 3:01-cv-01351-THE, Dkt. No. 2766 (N.D.C.A) ("*Coleman* Order").

Instead, the Board simply stopped calculating base terms for youth offenders and elderly inmates as a matter of formal policy, in violation of the Settlement Order. *See* Decl. of Andrea Nill Sanchez Charging the Cal. Board of Parole Hrgs. With Contempt ("Nill Sanchez Contempt Decl.") Aug. 15, 2016 ¶ 29. Between March 5, 2014 and February 15, 2016, the Board routinely failed to calculate base terms for eligible life-term inmates, including hundreds of parole hearings that qualified as neither youth nor elderly. *Id.* ¶¶ 21-26.

The Board also failed to complete the rulemaking process as required by the Settlement Order. *Id.* ¶¶ 32-36. Although the Board approved the proposed regulatory changes on August 18, 2014, former Board Chief Counsel Howard Moseley later informed the Board that the regulations would need to be revised and resubmitted for another vote.

See Nill Sanchez Contempt Decl.¶ ¶ 32-34. The Board never took any further action with respect to the regulations.[13] *Id.* ¶ 36.

The Board also never sought permission from the Court to modify its obligations under the Settlement Order until Mr. Butler's attorney contacted opposing counsel concerning allegations that it was violating the Settlement Order.[14] *See* Decl. of Sharif E. Jacob in Supp. of Pet'r's Unopposed App. for Ext. of Time Exs. A-B, Feb. 3, 2016. In response, the Board filed a motion to modify the Settlement Order.

In its brief, the Board argued that the Legislature stripped the Board of its authority to calculate base terms under the Settlement Order by amending California Penal Code § 3041 with the passage of Senate Bills 230, 260, and 261. *See* Resp't's Mot. to Modify Order Regarding Stip. Settlement ("Mot. to Modify"), Jan. 28, 2016 at 11-14. The Board also claimed that the *Coleman* Order similarly prevents it from calculating base terms for inmates who qualify as elderly offenders. *See* Resp't's Reply to

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[13] On October 21, 2016, the Court of Appeal stayed the Settlement Order's rulemaking requirements pending resolution of the Board's petition for review. *See* Order, Oct. 21, 2016.

[14] Mr. Butler first became aware that the Board might have violated the Settlement Order when defense attorney Susan L. Jordan informed Mr. Butler's counsel on September 9, 2015 that the Board had determined that one of Jordan's clients was ineligible to receive his base-term calculation. *See* Nill Sanchez Contempt Decl. ¶ 28. Counsel for Mr. Butler contacted the Board after counsel's investigation confirmed that the Board was routinely violating the Settlement Order by failing to calculate base terms for elderly inmates and youth offenders as a matter of policy. *Id.* ¶¶ 29-30.

Mot. to Modify, March 18, 2016 at 11. In response, the Board urged the Court of Appeal to modify the Settlement Order to require that all life prisoners be notified of their MEPD at their initial parole consideration hearing, instead of the base term as the Settlement Order presently requires. *See* Resp't's Mot. to Modify at 6. The Board erroneously reasoned that the MEPD "is now the functional equivalent of the base term." *Id.*

The Court of Appeal denied the Board's motion on July 27, 2016. The court's decision rejected the Board's attempt to evade its Settlement Order obligations, finding that no relevant change had been made to the law. The court determined that "the Board's authority to set base terms and adjusted base terms is entirely unimpaired by any of the changes in the law posited by the Board as depriving it of the authority to set base and adjusted base terms." *See* Order Denying Resp't's Mot. to Modify Order Regarding Stip. Settlement ("Mot. to Modify Order"), July 27, 2016 at 4. Specifically, "the stipulated order does not conflict with section 3041 by precluding the Board from releasing prisoners who have been granted parole but have not reached their base terms." *Id.* at 6. The Court also concluded that the Settlement Order is consistent with the objectives of the *Coleman* Order. *Id.* at 12.

The Court found that the "purpose of the settlement and stipulated order is to alter the parole process so that the setting of the base term and adjusted base term are no longer deferred until after the grant of parole

(which may be long after the adjusted base term) but fixed at the initial parole hearing, so that parole officials can know at the time they decide whether to grant or deny parole whether denial might result in punishment disproportionate to the individual culpability of the life prisoner." *Id.* at 7. By arguing otherwise, "the Board is confusing its base term fixing obligations—addressed in the settlement agreement—with its parole-granting authority, which SB 230 addressed." *Id.* at 6.

Given the Board's fundamental misunderstanding of the Settlement Order's purpose of promoting constitutionally proportionate sentences, the court was also compelled to remind it of the function that base terms play—namely, "to indicate whether the ***denial*** of parole might result in constitutionally excessive punishment." *Id.* at 7 (emphasis added). The court clarified that "[t]he Board's authority to set base terms does not arise under any of the statutes amended by SB 260 but under our order, to which it stipulated, which facilitates enforcement of the cruel and/or unusual punishment provisions of the federal and state Constitutions that protect all life prisoners." *Id.* at 10.

Approximately three weeks after the Court of Appeal issued its decision, Mr. Butler sought to hold the Board in contempt of court for violations of the Settlement Order. *See* Nill Sanchez Contempt Decl. Mr. Butler's request is still awaiting adjudication. On September 2, 2016, the Board filed its petition for review of the Court of Appeal's decision

denying its motion to modify. Pet. for Review, Sept. 2. 2016. On November 16, 2016, this Court granted review as to whether the Board must calculate base terms under the Settlement Agreement in light of the purely statutory reforms the Board has invoked. Order, Nov. 16. 2016. The answer is that no change in the law has occurred that justifies releasing the Board of its court-ordered obligations.

IV. STANDARD OF REVIEW

It is a "universally followed" rule that whether to grant, modify, or dissolve an injunction "rests in the sound discretion" of the lower court "upon a consideration of all the particular circumstances of each individual case." *Salazar v. Eastin*, 9 Cal. 4th 836, 849–50 (1995). The Settlement Order at issue in this case consists of "[a] stipulated injunction approved by a court and entered as a judgment," and is otherwise known as a consent decree. *Vasquez v. State*, 45 Cal. 4th 243, 260 (2008), *as modified* (Dec. 17, 2008) (citations omitted). Accordingly, the Court of Appeal's decision to deny the Board's request to modify the Settlement Order is reviewed for an abuse of discretion.[15] *See id.*; *see also Prof'l Engineers v. Dep't of Transp.*, 15 Cal. 4th 543, 562 (1997).

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[15] The Board suggests that some aspects of the Court of Appeal's decision may be subject to de novo review. Opening Br. at 14. However, the first case it cites deals solely with the standard of review applicable to a decision to grant or deny a motion to recuse, which is not remotely related to the issues involved in this case. *See Haraguchi v. Superior Court*, 43 Cal. 4th 706, 711 (2008). The Board is unable to point to a single California

V. ARGUMENT

A. The Board's request improperly attempts to modify a Settlement Order although there has been no material change in the underlying law or facts.

A motion to modify a consent decree based on a change in the law presents a simple question: has the law upon which the complaint was based changed so that the decree now "conflicts with or violate[es]" current law? *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 526 (1986). Here, the answer is clear. Mr. Butler's claims, as set forth in his petition, sought to vindicate the constitutional rights of inmates under the state and federal due-process clauses[16] and the state and federal proscriptions against cruel or unusual punishment.[17] And nothing in the Federal or California Constitutions has changed since the Board stipulated to the Settlement Order. That is the

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Supreme Court opinion applying the de novo standard in cases involving the modification or dissolution of an injunction or consent decree. At most, it relies on a Court of Appeal decision which upheld a trial court's denial of a request to dissolve an injunction, stating that only "***pure*** questions of law," such as the interpretation of a statute, are reviewed de novo. *People ex rel. Feuer v. Progressive Horizon, Inc.*, 248 Cal. App. 4th 533, 540, *reh'g denied* (June 14, 2016), *review denied* (Sept. 14, 2016) (emphasis added). Indeed, as a matter of practice, a lower court's decision whether to modify or dissolve an injunction is generally upheld. *See e.g., Prof'l Engineers*, 15 Cal. 4th at 562; *Union Interchange, Inc. v. Savage*, 52 Cal. 2d 601, 606 (1959); *Salazar*, 9 Cal. 4th at 850.

[16] Cal. Const., art. I, § 7(a); U.S. Const., amend. XIV, § 1.

[17] U.S. Const., amend. VIII; Cal. Const., art.1, § 17. *See* Supp. Habeas Pet. at 34, 55-59, 65-72; *see also* Mot. for Request for Award of Reasonable Att'y's Fees and Supp. Decl., October 22, 2014 at 2, 11-13.

beginning and end of this Court's inquiry. The time to litigate the constitutional basis for the claims the Board settled has passed.

The parties to this case agree that a court may only modify a consent decree or injunction when there has been a "material change" in the facts or law upon which it was granted, or when "the ends of justice would be served." Cal. Civ. Proc. Code § 533; *see also* Opening Br. at 13. A consent decree may not "conflict[] with or violate the [source of law] upon which the complaint was based." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 526. Indeed, if a law conflicts with the California Constitution, that law—not the injunction—is invalid. *See Prof'l Engineers*, 15 Cal. 4th at 572. However, a court is not "barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 525.

"In a stipulated judgment, or consent decree, litigants voluntarily terminate a lawsuit by assenting to specified terms, which the court agrees to enforce as a judgment." *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Superior Court*, 50 Cal. 3d 658, 663 (1990). "As the high court has recognized, stipulated judgments bear the earmarks both of judgments entered after litigation and contracts derived through mutual agreement . . . " (citing *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 519); *accord Rufo v. Inmates of Suffolk Cty. Jail*, 502

U.S. 367, 378 (1992) (explaining that a consent decree represents "an agreement of the parties" that is partially contractual in nature). "It is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Id.*

"[T]he voluntary nature of a consent decree is its most fundamental characteristic." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 521-22. "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *Id.* at 522 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)). "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 522 (quoting *Armour & Co.*, 402 U.S. at 681-82). "[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 522.

While courts have some flexibility in considering requests for modification, "a party seeking modification of a consent decree bears the burden of establishing that a ***significant*** change in circumstances warrants

revision of the decree." *Rufo*, 502 U.S. at 383 (emphasis added). Even if the moving party has met its burden, the court must also determine "whether the proposed modification is suitably tailored to the changed circumstance." *Id.* at 391. Any modification shall not "create or perpetuate a constitutional violation." *Id.*; *see also Union Interchange, Inc. v. Savage*, 52 Cal. 2d 601, 606 (1959) (upholding a trial court's refusal to dissolve a temporary injunction where there was "substantial doubt as to the constitutionality of the statute" at issue).

Since the beginning of this case, the Court of Appeal has interpreted Mr. Butler's claim as a constitutional one, describing it as challenging "the Board's practice of deferring calculation of inmates' base terms until after a finding of suitability for parole result[ing] in petitioner serving a sentence constitutionally disproportionate to the crime he committed." *See* Ct. of Appeal Order, Aug. 7, 2013; *see also In re Butler*, 236 Cal. App. 4th at 1237. Indeed, the Board itself stipulated that Mr. Butler's supplemental habeas petition was a "systemic, ***constitutional challenge*** to the Board's base term setting practices." Settlement Order at 1 (emphasis added). Therefore, the Board cannot show that the law that forms the basis for the Settlement Order has changed at all—much less in a way that conflicts with the relief it provides.

Unable to point to any change in the federal or state constitutions, the Board instead insists that "***legislative*** revisions to the parole system

have . . . emptied base terms of any meaning or function." Opening Br. at 15 (emphasis added). The Board seeks to modify the Settlement Order because its requirements "lack any ***statutory*** basis or point under current law;" and the Board further concludes that "[t]he stipulated order cannot be reconciled with this new ***statutory*** structure." *Id.* at 1, 15 (emphases added). But Mr. Butler never presented a statutory claim against the Board. Moreover, no principle of law prevents the parties from agreeing to—and the Court from enforcing—a consent decree that provides relief beyond that provided for by statute. *See Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 526. Thus, the fact that the California Penal Code has changed is irrelevant for purposes of evaluating whether a change in the law underlying the Settlement Order has taken place.

Instead of arguing that the Constitution has changed, the Board argues that the Constitution does not mandate the relief that Butler obtained after litigating the action and negotiating the settlement agreement. But that is irrelevant. After stipulating to the Settlement Order, the Board cannot evade it by arguing that Mr. Butler's constitutional claims lacked merit. A clarification in the law does not "automatically open[] the door for relitigation of the merits of every affected consent decree[,]" as that "would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation." *Rufo*, 502 U.S. at 389.

The cases that the Board cites in support of its argument actually buttress Mr. Butler's position. For example, in *Wright*, the U.S. Supreme Court overturned a lower court's denial of a request to modify a consent decree. Unlike the present case, constitutional considerations were not implicated. Indeed, as Mr. Butler has consistently advocated, the Court determined the law upon which the consent decree was granted (the Railway Labor Act) by looking at the complaint. *Sys. Federation No. 91 Ry. Employees' Dep't v. Wright*, 364 U.S. 642, 643 (1961). The consent decree prohibited union-shop agreements. *Id.* at 645-646. At the time of the complaint, the Railway Labor Act also prohibited union-shop agreements. *Id.* After the consent decree was entered, Congress passed a law permitting union-shop agreements. *Id.* at 644. As the Supreme Court explained, "the consent decree [was] incompatible with the terms of the Act." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 527. Because there was a direct conflict between the statute upon which the relief was granted and the relief itself, modification was appropriate. Here, the authority upon which the Settlement Order was based has not even changed—much less come into conflict with the Order.

Nor has any court reinterpreted the constitutional provisions that underpin the Settlement Order's requirements, as was the case in *Salazar v. Eastin*—another case on which the Board mistakenly relies. In that case, this Court approved the dissolution of an injunction which prohibited any

charge for school transportation. *Salazar*, 9 Cal. 4th at 850. The injunction was based on the lower court's determination that the statute violated the free-school and equal-protection provisions of the California constitution. *Id.* Yet, following a contrary decision from this Court which held the statute to be constitutional, "the assumptions about the law upon which the injunction was based" changed in such a way that justified vacating the injunction. *Id.*

Here, by contrast, the Board cites no intervening case law clarifying the constitutional principles on which the Settlement Order is based.[18] At most, the Board claims that it was forced to "restructure[ ] the parole process" for elderly inmates following the issuance of the federal court order in *Coleman v. Brown* on February 10, 2014. The *Coleman* Order was issued by a three-judge district-court panel mandating the reduction of California's prison population. *See* Case No. 3:01-cv-01351-THE, Dkt. No. 2766 (N.D. Cal.). The *Coleman* Order is part of the remedy afforded to federal-court plaintiffs who challenged the constitutionality of medical and mental-health care available to California prison inmates. *See Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 888 (E.D. Cal. 2009). The *Coleman*

[18] The Board incorrectly states that the Court ***upheld*** the lower court's decision to modify the injunction. *See* Opening Br. at 17. Instead, it upheld the ***denial*** of the plaintiff's request to modify the injunction. *Salazar*, 9 Cal. 4th at 851.

Order did not adjudicate the types of claims that Mr. Butler asserted and, indeed, has nothing to do with base terms.

Nowhere in its brief does the Board attempt to explain how the *Coleman* Order could conflict with the Board's obligations under the Settlement Order. Indeed, if anything, the Settlement Order would only promote the aims of the *Coleman* Order by reducing the number of life-term prisoners who are held beyond their base term.[19]

The Board likewise never identifies any change in the underlying facts that could justify modifying the Settlement Order. Instead, the Board argues that it would be "inequitable to continue to bind the Board to the stipulated order." Opening Br. at 15. According to the Board, the Settlement Order will "create unnecessary and unjustified practical difficulties, public expense, and confusion[,]" citing in part the "idle act of setting base terms" and necessary rulemaking process. *Id.* at 19. Yet it is undisputed that the Board can calculate a base term in less than five minutes. *See* Mot. to Modify Opp., Jacob Decl. Ex. E at 0172 (110:7-9); Tr. of Oral Argument at 5 (5:33-5:54), May 31, 2016.[20] And the Board already

[19] At most, the Board argues that it would be required to create new base-term matrices "each time the Legislature (or the voters) alters minimum eligible parole dates." Opening Br. at 19. The Board provides no basis for this projection and in any event cannot obtain a Settlement Order modification based on a vaguely anticipated change in the law.
[20] Mr. Butler has prepared a transcript of the oral argument hearing for the convenience of the Court, but does not seek its admission into the record. Mr. Butler therefore provides parallel citations to the location in the Court

has drafted a version of the implementing regulations. *See* Nill Sanchez Contempt Decl. ¶ 29(i). The required fiscal-impact assessment of the Settlement Order is unlikely to involve a complex or burdensome analysis, because fixing base terms is quick and automated. *See* Cal. Gov't Code § 11346.3 (requiring state agencies to "assess the potential for ***adverse*** economic impact" of any administrative regulation) (emphasis added). Putting aside the inaccuracy of these factual claims, "modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." *See Rufo*, 502 U.S. at 385. All of the facts the Board cites as compelling a modification of the Settlement Order existed when the Board stipulated to it.

Nothing about the Board's proposal is "suitably tailored" to the changed circumstances it alleges to have occurred, as the Board is required to show. *See Rufo*, 502 U.S. at 391 ("Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the district court should determine whether the proposed modification is suitably tailored to the changed circumstance."). In its brief, the Board only vaguely alludes to its proposed modification: that it be allowed to inform inmates of their MEPD in lieu of their base term calculation. Opening Br. at 11. For two reasons, the MEPD

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of Appeal's audio recording of the argument at which the cited statements can be located. Mr. Butler has lodged a copy of the recording with this Court.

is not a substitute for the base-term calculation. First, by the Board's own admission, the MEPD amounts to nothing more than the ***minimum*** statutory sentence, less good-time credits for certain convictions. *See* Opening Br. at 9 n.3. In other words, the MEPD merely specifies the earliest time at which an inmate may be released. It does not specify the maximum sentence that is proportionate to the inmate's crime. Second, the Board's proposal would render the Settlement Order superfluous as the Board already has a statutory duty to provide inmates with their MEPDs. *See* Cal. Penal Code § 3041(a)(1).

Ultimately, the legal standard governing modification of a consent decree does not call for an inquiry into the merits of the Settlement Order. The Board's motion to modify the Settlement Order is based on nothing more than its refusal to recognize the fundamental constitutional principles underlying the Settlement Order. But that is not enough to justify modifying its terms.

B. The Settlement Order is consistent with the plain meaning, history, and policy goals embraced by the legislative reforms.

In addition to being irrelevant, the Board's argument that a change in the Penal Code requires modification of the Settlement Order lacks merit.

The Board's argument is based on three legislative reforms enacted through the passage of S.B. 260, 261, and 230. Two months before the Court of Appeal entered the Settlement Order at the end of 2013, the

California Legislature passed S.B. 260, which the Governor later signed. S.B. 260 provides that inmates qualifying as "youth offenders"[21] must be released once the Board finds them suitable for parole, regardless of their MEPD. *Youth Offender Parole Hearings*, 2013 Cal. Legis. Serv. Ch. 312 (S.B. 260) (codified at Cal. Penal Code § 3046(c)). One year later, in 2014, the California Legislature passed S.B. 261, which expanded the scope of S.B. 260 to apply to inmates who committed specified crimes when they were under age 23 instead of 18. *Id.* at § 3051(a)(1).

That same year, the California Legislature also approved S.B. 230, which applies to all inmates who are not youth offenders. S.B. 230 amended Penal Code § 3041 to require the Board to release an inmate "[u]pon a grant of parole."[22] *Sentencing: Parole*, 2015 Cal. Legis. Serv. Ch. 470 (S.B. 230). The difference between the youth-offender bills and S.B. 230 is that inmates covered by the latter will not be released before reaching their MEPDs. *Id.* (codified at Cal. Penal Code § 3041(a)(4)).

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[21] Under S.B. 260, a "youth offender" is an inmate who committed certain crimes before the age of eighteen. *See Youth Offender Parole Hearings*, 2013 Cal. Legis. Serv. Ch. 312 (S.B. 260) (codified at Cal. Penal Code § 3051).

[22] Former Cal. Penal Code § 3041(a) previously stated that "[o]ne year prior to the inmate's minimum eligible parole release date . . . [the Board] shall normally set a parole release date." It also required the Board to "establish criteria for the setting of parole release dates." *Id.*

As explained in Part V.A, *supra*, modification is only justified where the law upon which a consent decree was granted has changed in such a way that it conflicts with the decree itself. But the Board admitted at oral argument below that "the statute does not explicitly preclude the Board from setting base terms." Tr. of Oral Argument at 25, (33:05-33:11) May 31, 2016. Indeed, the amended Penal Code is not only consistent with the Settlement Order; both items are wholly complimentary in that they help address the problem of prison overcrowding. Therefore, the Court of Appeal acted entirely within its discretion when it denied the Board's motion to modify.

Notably, nowhere in its brief does the Board actually conduct a formal statutory analysis, a necessary predicate to any showing of inconsistency between the amendments and the Settlement Order. In construing statutes such as the Penal Code, courts "strive to ascertain and effectuate the Legislature's intent." *In re Dannenberg*, 34 Cal. 4th 1061, 1081 (2005) (quotation marks and citation omitted). First, a court should examine the words of the statute itself according to their plain and contextual meaning. *Id.* (citation omitted). Second, if the statutory language is ambiguous, a court will look to its legislative history. *Id.* (citation omitted). Finally, a court may consider the public policy consequences of a certain interpretation. *Id.* at 1082 (citations omitted).

None of the legislative or judicial reforms have altered the fundamental intent of the DSL, the purpose of which is to promote "public safety achieved through punishment, rehabilitation, and restorative justice." Cal. Penal Code § 1170(a)(1). The Legislature has unambiguously found and declared that "this purpose is best served by terms that are ***proportionate*** to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." *Id.* (emphasis added). To the extent the Board claims it now lacks the explicit authority to set base terms because § 3041 no longer directs it to set release dates, § 1170(a)(1) of the Penal Code itself, together with the language of the Settlement Order, serve as ample sources of authority upholding the Board's power to calculate base terms. *See* Settlement Order ¶ 5 (directing the board to "initiate the process to amend its regulations to reflect the base term setting practices described in this order"); *see also Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 522 ("[I]t is the parties' agreement that serves as the source of the court's authority to enter any [consent] judgment at all.")

The calculation of base terms not only advances proportionality in accordance with the stated purpose of the DSL, it is also compatible with the plain meaning of the most recent legislative reforms. As to the youth offender bills, their stated purpose is to "create a process by which growth and maturity of youthful offenders can be assessed and a meaningful

opportunity for release established." *Youth Offender Parole Hearings*, 2013 Cal. Legis. Serv. Ch. 312 (S.B. 260). S.B. 260 now requires the Board to release youth offenders found suitable for parole, whether or not they have served their MEPDs or base terms. *See* Cal. Penal Code § 3046(c)). Similarly, S.B. 230 amended the law to instruct the Board to release inmates upon a grant of parole. *See id.* § 3041(a)(4). On their face, the statutes are solely concerned with what happens ***after*** an inmate is found suitable for parole. They are silent as to the term-fixing responsibilities and proportionality considerations that must take place ***prior*** to any suitability determination.

The legislative history confirms the unambiguous wording of the statutes. At no point did a single lawmaker indicate an intent to eliminate base terms as a measure for proportionality. Instead, in passing S.B. 260, the Legislature was seeking to address the potential flood of habeas petitions on cruel and unusual punishment grounds by "inmates serving extended prison terms who were convicted as minors" in the wake of recent case law. Mot. to Modify Opp., Jacob Decl. Ex. A at 0042. The Legislature sought to craft a "viable mechanism" for reviewing such cases, amending the law to account for the fact that a youth offender who has spent a "substantial period of incarceration and can show maturity and

improvement."[23] *Id.* at 0047. Nonetheless, the legislative history of S.B. 261 expressly acknowledged that it is not intended as any guarantee of parole.[24] And while nothing in the legislative history for the youth offender bills implicates the Settlement Order, base terms calculations can play a critical role in facilitating judicial review of habeas claims not addressed by S.B. 260 or 261. *See Rodriguez*, 14 Cal. 3d at 654 n.18 ("Prompt term-fixing will not only relieve the courts of the burden of reviewing repeated complaints by prisoners whose terms have not been fixed, but will also make possible the type of meaningful review of [Board] actions to which prisoners are entitled.").

The Board argues without support that, in enacting S.B. 230, "the Legislature was aware of the settlement in this case when it decided to dismantle the base-term system." Opening Br. at 18. However, nowhere in the legislative history of S.B. 230 does a representative decry base terms as a useful measure of proportionality for inmates who have repeatedly been

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[23] The Legislature later passed S.B. 261 to expand the youth offender parole process. *See* Mot. to Modify Opp., Jacob Decl. Ex. B.

[24] The legislative history of S.B. 261 states:

> To be clear: SB 261 is by no means a "free ticket" for release. There is no mandate to a reduced sentence or release on parole . . . there is no guarantee for a grant of parole. The Board still has to examine each inmate's suitability for parole, *the criteria for which this bill does not change.*

See Mot. to Modify Opp., Jacob Decl. Ex. B at 0052 (emphasis added).

denied parole. The Legislature did demonstrate an awareness that the Board was improperly using base terms to justify holding inmates for a longer period of time that is necessary. Its reference to base terms was limited to a critique of how "term calculations can extend or alter an individual's sentence, creating a system of back-end sentencing in which a judge's sentence may bear little resemblance to the actual time an individual serves under correctional control." *See* Mot. to Modify Opp., Jacob Decl. Ex. C at 0055.

The Settlement Order, however, does not support this practice. Quite the contrary, it was intended to discourage (if not prohibit) the continued imprisonment of inmates past their base term. Its implementation is entirely consistent with the stated purpose of S.B. 230, which is to "ensure[] that once the Board of Parole Hearings determines that an inmate is eligible, suitable, and safe for parole, the implementation of that decision is expedited." *Id.* at 0054.

The policy consequences of the Board's interpretation of the legislative reforms as conflicting with its term-setting responsibilities are severe. The Settlement Order furthers the overarching legislative goal of curbing the prolonged incarceration of individuals who have served their time and pose no danger to society. Without it, the Board will stop fixing terms altogether and inmates who are denied parole will continue to languish in prison with no sense of whether or when their continued

incarceration is constitutionally excessive. Moreover, the courts—in reviewing habeas petitions—will be deprived of the Board's own calculation of the proportionate sentence for the crimes.

In sum, the legislative reforms the Board points to all relate to the Board's parole-granting authority. The Settlement Order does not require the Board to continue to incarcerate inmates who are suitable for parole because they have not reached their base terms; it simply requires the Board to ***calculate*** base terms. By conflating its statutory parole-granting powers with its constitutional duty to consider proportionality, the Board repeats the same error of its predecessor in *Rodriguez*: It "has not distinguished its responsibility to fix the primary term of prisoners . . . from its parole-granting function." 14 Cal. 3d at 653.

C. The disentitlement doctrine bars the Board from seeking to modify a court order after it has chosen to disobey it.

Long before it moved to modify the Settlement Order, the Board knowingly and voluntarily began to disobey the provisions it now seeks to excise. Pursuant to the disentitlement doctrine, a party "cannot, with right or reason, ask the aid or assistance of this [C]ourt in hearing [its] demands while [it] stands in an attitude of contempt to the legal orders and processes of the courts of this state which [it] seeks to avoid through the intervention of an appeal to this tribunal." *Knoob v. Knoob*, 192 Cal. 95, 97 (1923); *accord MacPherson v. MacPherson*, 13 Cal. 2d 271, 277 (1939).

This Court has the inherent power to dismiss an appeal by a party that refuses to comply with a lower court order. *See id.*; *see also Gwartz v. Weilert*, 231 Cal. App. 4th 750, 757 (2014), *reh'g denied* (Nov. 18, 2014), *review denied* (Feb. 18, 2015)(citing *Stoltenberg v. Ampton Investments*, 215 Cal. App. 4th 1225, 1229 (2013), *as modified* (May 6, 2013), *as modified on denial of reh'g* (June 5, 2013)). Courts have applied the doctrine in a wide array of cases, including matters where a judgment debtor frustrated efforts to enforce the judgment, parties willfully refused to respond to postjudgment interrogatories, and where an appellant disobeyed a prejudgment order requiring the deposit of partnership funds into a trustee account. *See Gwartz*, 231 Cal. App. 4th at 758 (listing cases). Dismissal of an appeal is justified so long as the appellant has "willfully disobeyed the lower court's orders or engaged in obstructive tactics"—a formal judgment of contempt is not necessary. *Id.* at 757-758 (citing *Stoltenberg*, 215 Cal. App. 4th at 1230).

The Board's contempt of the Settlement Order is well documented. After a lengthy investigation, Mr. Butler discovered over 1,600 violations of the Settlement Order. Nill Sanchez Contempt Decl. ¶¶ 21-26. And the violations stand undisputed. Indeed, the Board has admitted that it did not calculate base terms for youthful offenders and elderly inmates. *See id.* ¶ 29(iii). Of the 1,641 parole hearings where the Board did not conduct a base term calculation, 676 qualified as youth offender hearings and 466 as

elderly parole hearings, respectively. *Id.* ¶ 25. Mr. Butler's investigation discovered that the Board failed to calculate a base term in approximately 500 regular hearings as well, approximately thirty percent of its documented violations. *Id.* ¶ 26.

The Board knowingly and voluntarily chose to disobey the Settlement Order's requirements without first seeking permission or even providing notice to the parties or the Court. Its violations were largely the product of a formal, deliberate policy that directly conflicts with the requirements of the Settlement Order. *Id.* ¶¶ 27-29. As far back as May 2014, the Board distributed proposed regulations at an executive board meeting affirmatively directing hearing panels ***not*** to select a base term or calculate an adjusted base term for youth offenders. *Id.* ¶ 29(i). Furthermore, its rulemaking efforts implementing the Settlement Order stalled in August 2014. *Id.* ¶ 36 . It is unclear when or whether the Board would have even moved to modify the Settlement Order had Mr. Butler not learned of its violations and sent it a letter threatening to seek that the Board be held in contempt. *See Id.* ¶¶ 30-31; *see also* Tr. of Oral Argument at 45 (1:00:57-1:01:19; 1:02:20-1:02:34) May 31, 2016 (Kline, P.J. : "I must tell you, personally, []I'm kind of offended at[] what's happened here. What[] I'm hearing from Mr. Jacob—and maybe this is wrong—is you just ignored the settlement. And belatedly moved to modify it after you realized there was going to be a contempt proceeding. . . Mr. Kinney: Mr. Jacob is

correct that with regard to youth offenders and inmates under the elderly parole program, [] through the three-judge panel, the board is not [] setting—or calculating base terms for those individuals.").

This appeal is an open attempt by the Board to remove from the Settlement Order the provisions it violated. Not only could the Board have anticipated some of the legislative reforms that took place, SB 260 passed the Legislature before the Settlement Order was even entered. *Youth Offender Parole Hearings*, 2013 Cal. Legis. Serv. Ch. 312 (S.B. 260) (codified at Cal. Penal Code, § 3051). The disentitlement doctrine was developed to prevent precisely that sort of abuse of the Court's process. *See Stoltenberg*, 215 Cal. App. 4th at 1230. *see also Signal Oil & Gas Co. v. Ashland Oil & Refining Co.*, 49 Cal. 2d 764, 776 n.6 (1958) ("It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.") (quoting *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922)). Rather than modify the Board's obligations to conform to its contempt, the Court should continue enforcing the Settlement Order and hold the Board responsible for its failure to comply with its requirements.

D. The Board is barred from relitigating the merits of the Settlement Order under the law of the case doctrine.

A motion to modify a consent decree is not an opportunity to relitigate the constitutional claims that underlie the decree. *See supra* Part V.A. But even if it were, the Board's challenge is now barred by law of the case. The Board's request for modification revolves entirely around its premise that "the Board's obligations under the stipulated order are not grounded in the Constitution." *See* Opening Br. at 21. However, that issue has been squarely decided by the lower court in proceedings that the Board left unchallenged on two separate occasions. The Board is barred from using a motion to modify as a vehicle for revisiting the Court of Appeal's prior decisions.

Under the law of the case doctrine, "the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." *Sargon Enterprises, Inc. v. Univ. of S. California*, 215 Cal. App. 4th 1495, 1505 (2013) (internal quotation marks and citation omitted); *see also* Cal. Prac. Guide Civ. App. & Writs Ch. 14-D ¶ 14:172. The law of the case doctrine binds the Supreme Court to the legal findings of a previous appeal before the Court of Appeal in the same case, even where the Supreme Court

may conclude that the Court of Appeal opinion was erroneous. *See People v. Stanley*, 10 Cal. 4th 764, 786 (1995).

The Board expressly opposed the first opportunity to review the merits of the Settlement Order. In requesting transfer to the Supreme Court of the Settlement Order, Sacramento County District Attorney Jan Scully made the same statutory arguments the Board presents today. *See* Ltr. from Jan Scully, District Att'y to Cal. Supreme Ct., April 23, 2014 ("This [settlement] order conflicts with the legislative direction contained in Penal Code section 3041, subdivision (b)[.]"). However, the Board opposed her request, arguing that "the Court of Appeal has held that comparable orders granting motions to enforce settlement . . . are final orders because they 'dispose[] of the litigation' and leave the court with 'nothing . . . to do other than enforce its order.'" *See* Resp't's Answer to Request for Transfer May 15, 2014 at 3 (quoting *Critzer v. Enos*, 187 Cal. App. 4th 1242, 1252 (2010)). Notably, by that time, S.B. 260 was already in effect and the *Coleman* Order had been issued. *See Rufo*, 502 U.S. at 385 (1992) ("If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking . . . ").

The Board also chose not to seek review of the Court of Appeal's opinion awarding Mr. Butler attorneys' fees. In deciding the motion, the court had to determine whether the Settlement Order resulted in the "enforcement of an important right affecting the public interest[.]" Cal. Civ. Proc. Code § 1021.5. In opposition to Mr. Butler's motion for attorneys' fees, the Board argued that a right to a base term calculation at the initial parole suitability hearing "did not exist until the settlement went into effect." Resp't's Opp. to Mot. to Att'y Fees, November 5, 2014 at 4. The Court of Appeal squarely rejected the Board's position, determining that the Settlement Order vindicated the constitutional rights the Board once again claims it does not. *See In re Butler*, 236 Cal. App. 4th at 1230, 1233-1235 (explaining that the Board's arguments "ignore[] the role the base and adjusted base terms play in promoting proportionality, which is both constitutionally mandated and an express goal of the DSL"); *see also Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 318 (1983) (holding that litigation that vindicates rights "of constitutional stature" satisfy the public interest element of Cal. Civ. Proc. Code § 1021.5) (quoting *Serrano v. Priest*, 20 Cal. 3d 25, 46 n.18 (1977)). The Board, however, never sought reconsideration, Supreme Court review, or even depublication of the Court of Appeal's opinion.[25]

[25] On October 28, 2015, the Supreme Court declined a third-party request to review or depublish the decision. *See* Cal. Supreme Ct. Order,

The merits of the Settlement Order—having already been decided in a prior appeal—are not subject to review in this case. Following two foregone opportunities to seek review, the Settlement Order's constitutional significance has become the law of the case. The Board cannot use a motion to modify to sidestep established issues in this case that it failed to appeal at the proper time.

E. The Settlement Order vindicates the California Constitution's prohibition on cruel or unusual punishment.

Even if the Board could relitigate the underlying merits of Mr. Butler's constitutional claims after settling them, Mr. Butler should prevail. Article 1, section 17, of the California Constitution ***mandates*** the Board imprison every parole-eligible life inmate for no longer than the term proportional to his or her crime. *See Rodriguez*, 14 Cal. 3d at 650. The Board cannot escape its constitutional obligation to fix a term proportionate to an inmate's offense.

That obligation extends as far back as the final years of the DSL, when this Court affirmed that the Board must fix terms so that no life prisoner in its custody serves a constitutionally excessive period of time. Starting with *Wingo*, 14 Cal. 3d at 182, the Supreme Court stated that inmates have a "vested right" in ensuring their terms are fixed proportionately to their offense. It therefore held that "judicial review must

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No. S227750, Oct. 28, 2015.

await an initial determination by the [Board] of the proper term in the individual case." *Id.* at 183. One month later, in *Rodriguez*, this Court detailed the Board's term-fixing responsibility.

The Board's argument that "base terms have no constitutional significance" flouts *Rodriguez*. Opening Br. at 21. In *Rodriguez*, the Supreme Court qualified the "oft-stated rule that a prisoner has no right to a term fixed at less than maximum[.]" *Rodriguez*, 14 Cal. 3d at 652. That rule is "subject to the overriding constitutionally compelled qualification that the maximum may not be disproportionate to the individual prisoner's offense." *Id.* In order to discharge that duty, the Court held that the Board has a "basic term-fixing responsibility," which requires setting terms "within the statutory range that are not disproportionate to the culpability of the individual offender." *Id.* Specifically, the Board has a constitutional duty to assure both that inmates "will have their terms fixed at a number of years proportionate to their individual culpability," and "that their terms will 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." *Id.* (citation omitted).

The Court explained that the Board's term-setting responsibility is different from its parole-granting authority. *Id.* at 652-653. The latter is concerned with an inmate's conduct after imprisonment, and allows the

Board to keep the inmate for up to the full term if he poses a danger to society, or to reduce his term if he rehabilitates in prison. *Id.* at 652. The former "must reflect the circumstances existing at the time of the offense." *Id.* That is so because the California Constitution requires the Board to "fulfill its obligation to fix petitioner's term at a number of years proportionate to his offense." *Id.* at 653. Where it fails to fix any term at all, the Board "impliedly" fixes the term at life, which constitutes "excessive punishment" if a life sentence is disproportionate to the conviction offense. *Id.* Finally, the *Rodriguez* Court explained that term-setting also facilitates judicial review of the numerous habeas petitions brought by prisoners who "believe[] their continued imprisonment to be constitutionally impermissible" but lack the "necessary supporting data." *Id.* at 654 n.18.

The Board's argument that base terms have no constitutional significance also contradicts its own prior guidance provided in Chairman's Directive No. 75/30.[26] As explained in Part III.A.1,, the Board issued that Directive in response to *Rodriguez*. The purpose of the Directive was to set forth detailed procedures for setting the primary term, or adjusted base term. *See* Roy Butler's Mot. for Judicial Notice, March 20, 2017, Ex. A. The agency ultimately promulgated regulations requiring it to fix a

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[26] The Board's argument that base terms represent a minimum sentence fail for the same reason. *See* Opening Br. at 21-22. As the Court below explained, "[t]he base term has never been considered the minimum term a prisoner must serve; its function is to indicate the point at which a prison term becomes constitutionally excessive." Mot. to Modify Order at 6.

"primary term," which consisted of a "base term and adjustments." *See* 15 Cal. Admin. Code §§ 2000-2725 (1976); *see also* App'x of Pet'r's Opp. to Resp't's Mot. to Modify, Tab 5, March 1, 2016. The agency's own regulations noted that "the primary term is the maximum period of time which is constitutionally proportionate to the individual's culpability for the crime." 15 Cal. Admin. Code § 2100(a) (1976).

Despite the Board's argument to the contrary, the term-fixing mandate of *Rodriguez* continues to be good law. Although the Court issued the decision during the ISL era, nothing in subsequent case law or the opinion itself suggests that it does not still apply to the many prisoners who continue to be sentenced to indeterminate terms. *See* supra Part III.A. To the contrary, in *Dannenberg*, this Court affirmed the principle that "no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense." 34 Cal. 4th at 1096. Citing *Rodriguez*, it further explained that "[s]uch excessive confinement, we have held, violates the cruel or unusual punishment clause (art. I, § 17) of the California Constitution." *Id.* (citing *Rodriguez*, 14 Cal.3d at 646–656).

Much of *Dannenberg*'s reasoning has now been rendered obsolete by the amendments to California Penal Code § 3041. *Dannenberg* was primarily concerned with reconciling the public safety and uniformity provisions of California Penal Code § 3041. Those provisions are no longer

part of the statute following the passage of SB 230.[27] In fact, the *Dannenberg* court granted review to the following limited question: Whether the Board was required to undertake a base term calculation prior to finding a suitability of parole under § 3041 of the California Penal Code. *Id.* at 1077. The Court's holding was limited to the determination that "[t]he words of section 3041 strongly suggest that the public-safety provision of subdivision (b) takes precedence over the 'uniform terms' principle of subdivision (a)." *Id.* at 1082. Now that the "uniform terms" provision has been removed from § 3041, *Dannenberg*'s holding offers little guidance.[28] Thus, even if the legislative changes conflict with the Settlement Order—which they do not—no change in the Penal Code could relieve the Board of its constitutional obligation to fix a term proportionate to an inmate's offense. For example, in *Professional Engineers v. Department of Transportation*, the Supreme Court found that intervening legislation that contradicted a constitutional requirement did not justify dissolving or

[27] At the time, § 3041 both required the Board to set a parole release date "in a manner that will provide uniform terms" unless the Board determined that the inmate is presently unsuitable for the fixing of a parole date based on a finding that public safety required a longer sentence. *Id.* at 1079 (citing former Cal. Penal Code § 3041(a)(b)).

[28] Even if *Dannenberg*'s statutory analysis of the now-deleted portion of § 3041 retained vitality, it provides no justification for the modification that the Board seeks. *Dannenberg* merely indicated that the Legislature intended to allow the Board to "postpone" the fixing of a term subject to the prohibition on disproportionate sentences. 34 Cal. 4th at 1090. Here, the Board is not asking to postpone the setting of base terms. Its proposed modifications to the Settlement Order abandon the practice entirely.

otherwise modifying the injunction in question. 15 Cal. 4th 543. In that case, the enjoined party similarly argued that certain legislative changes "undermined the trial court's injunction and related orders and justified their dissolution." *Id.* at 555. This Court soundly rejected the argument, reasoning that it would not "disregard three decades of jurisprudence applying and construing the constitutional provision" at issue. *Id.* at 567. The court recognized that, although it must "give legislative findings great weight and should uphold them unless unreasonable or arbitrary, [it] also must enforce the provisions of our Constitution and may not lightly disregard or blink at a clear constitutional mandate." *Id.* at 569 (internal citations and alterations omitted).

As to the Board's critique of the Settlement Order as a "judicially imposed remed[y] that interfere[s] with the Board's discretion to determine parole suitability," Opening Br. at 29, the Constitution—not the Settlement Order—compels the Board to consider proportionality. The Settlement Order merely requires the Board to calculate base terms, which in turn do not dictate, but ***inform*** the proportionality inquiry that the Board is constitutionally required to undertake.

The Board's proposed modification—which would allow it to stop calculating base terms entirely—could foment a constitutional crisis. "[A] sentence may be unconstitutionally excessive either because the [Board] has fixed a term disproportionate to the offense or, in some circumstances,

because no term whatever has been set." *Wingo*, 14 Cal. 3d at 182. If the Board's proposed modification were adopted, the courts would be required to presume that every parole-eligible life inmate who raises a disproportionate sentence claim will be held to a life term, and to adjudicate their claims subject to that presumption. *Rodriguez*, 14 Cal. 3d at 653.

The Board's suggestion that every parole-eligible life inmate could be constitutionally imprisoned for life cannot withstand even the most cursory examination of the range of conviction offenses of those inmates. An individual convicted of first-degree murder in cold blood plainly merits a different sentence than an inmate found guilty of kidnapping someone without causing death or serious bodily harm or one who placed an obstruction in a railroad path that did not fatally hurt anyone. *See* Cal. Penal Code § 190(a); § 209(a); § 219.

Indeed, the circumstances of Mr. Butler's own conviction undermine the Board's suggestion that it can constitutionally render the possibility of parole meaningless for every single one of the 9,315 life prisoners who—as of the filing of Mr. Butler's supplemental petition—had served sentences beyond their minimum eligible parole dates. Supp. Habeas Pet. App'x. Ex. Z (Decl. of Austin) ¶ 24. Although Mr. Butler was convicted of second degree murder, a serious crime, the murder itself was committed by an accomplice while Mr. Butler was hiding in the bathroom out of fear. Supp. Habeas Pet. ¶¶ 20, 23. While no one applauds Mr. Butler's actions, at

sentencing the State of California itself argued that probation was the appropriate sentence for his crime. *Id.* ¶ 65. The Board's suggestion that it does not have to even ***consider*** the proportionality of the crime to the period of imprisonment it imposes cannot be reconciled with the Constitution's prohibition on disproportionate sentences.

The Board should not be permitted to regress back to the days when it gave inmates "no advance hope" of their release dates and failed to fit a punishment to their crimes. *See Dannenberg*, 34 Cal. 4th at 1088. Not only would this promote disciplinary problems, *see id.*, it is likely the courts would have to grapple with the fallout in the form of an increased load of habeas petitions. *See Rodriguez*, 14 Cal. 3d at 654 n.18 ("Prompt term-fixing will not only relieve the courts of the burden of reviewing repeated complaints by prisoners whose terms have not been fixed, but will also make possible the type of meaningful review of [Board] actions to which prisoners are entitled."). [29]

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[29] The Board's "separation-of-powers concerns" are unfounded. *See* Opening Br. at 29. The Board argues that the judiciary may not impose limits on its ability to determine parole suitability. Just as it did in *Rodriguez*, the Board confuses its term-fixing obligations with its parole-granting authority. 14 Cal. 3d at 652. The Board's parole-granting authority is set out in Cal. Penal Code § 3041. The Board's term-fixing obligations are mandated by the Constitution. *Id.* at 652; *see also In re Dannenberg*, 34 Cal. 4th at 1096 ("[E]ven 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."). This Court's vigilant enforcement of the Constitution against the Executive does not implicate separation of power concerns—indeed it is the Court's solemn duty.

Ultimately, the Board's interpretation of the statutory reforms would set California back by several decades and place the parole system on a collision course with the federal and state constitutions. Before the DSL's passage, this Court proclaimed that a purely indeterminate sentencing scheme that does not take into account proportionality is unconstitutional. *See Wingo*, 14 Cal. 3d at 182; *see also Rodriguez*, 14 Cal. 3d at 652. The passage of the DSL may have eliminated the practice of indeterminate sentencing for most defendants, but it left the status quo largely intact for those convicted of certain enumerated crimes. Simply because there are fewer of them than there were when *Rodriguez* was decided does not diminish their right to a sentence that fits their crime. The Board's prior term-setting practice permitted the violation of this right. The Settlement Order ensures the Board considers proportionality at a meaningful stage of the parole process as a means of correcting an injustice that will otherwise repeat itself.

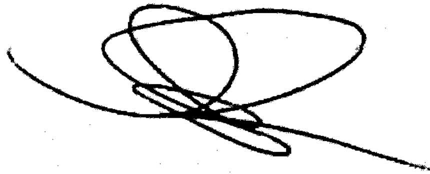
VI. CONCLUSION

For the foregoing reasons, Mr. Butler respectfully requests that the Court affirm the Court of Appeal's decision denying the Board's motion to amend.

Respectfully submitted,

Dated: March 20, 2017

KEKER, VAN NEST & PETERS LLP



By: ______________________________
SHARIF E. JACOB
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By Appointment of the Court of Appeal of the First Appellate District

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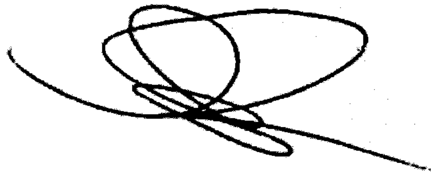
Dated: March 20, 2017



SHARIF E. JACOB

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