In the Supreme Court of the State of California

In re **WILLIAM M. PALMER II,** **On Habeas Corpus.**	Case No. S256149

First Appellate District, Division Two, Case No. A154269

ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

Amici's overarching theme is that juveniles are less criminally culpable than adults. But while Palmer's age at the time of his offense is certainly a factor to be considered in evaluating the constitutionality of his sentence, it does not change the answer here, given the other criteria this Court must also consider. The new arguments that Amici add—about recent statutory changes and the purported invalidity of mandatory indeterminate sentences for juveniles—do not change the outcome.

The last amicus brief, from the Prison Law Office, et al., focuses primarily on the remedy that a court should order upon finding that an inmate has served more time in custody than the state and federal Constitutions allow. Like Palmer, the Prison Law Office argues that if an inmate's period of incarceration has exceeded the constitutional maximum for his offense, parole would also be barred in all cases as constitutionally excessive. That ignores, however, the vast differences between incarceration and parole, and their effects on the remedy. For reasons explained below, the remedy should be closely tailored to end the particular aspect of the State's punishment that is determined to be cruel or unusual—it should not encroach on other facets of the State's punishment that furthers its legitimate penological interests and is not, in and of itself, found to be cruel or unusual.

The Prison Law Office also argues that elimination of parole is the correct remedy because of their policy disagreement with the Legislature about the effectiveness of parole. The Legislature has long viewed parole as not only helpful, but necessary, to the successful reintegration and positive citizenship of a previously incarcerated offender. That judgment—with which this Court's own statements agree—is entitled to substantially more deference than the Prison Law Office recognizes. The court below did not determine that the parole period itself would be unconstitutional,

and thus had no basis to release Palmer from his statutory obligation to serve his parole period.

ARGUMENT

I. YOUTH IS A FACTOR IN THE CRUEL OR UNUSUAL PUNISHMENT ANALYSIS; IT IS NOT DISPOSITIVE

Amici spend much of their effort demonstrating that developmental differences render juvenile offenders generally less culpable than adults. (HRW 4-15; Schiraldi 12-25; The Sentencing Project 29-32, 35-39.) The Board does not dispute this proposition. (Appellant's Opening Brief on the Merits (OBM) 29-30; Appellant's Reply Brief (RBM) 12-13.) Nor does the Board dispute that the characteristics of youth, as expressed in an individual juvenile offender's case, are important factors in determining whether that person's sentence is cruel and unusual. (OBM 29-30; RBM 12-13.) That does not mean, however, that every lengthy sentence imposed on a juvenile is unconstitutional. A court must consider the totality of offender- and offense-specific circumstances to decide whether a sentence is constitutionally excessive. (*In re Lynch* (1972) 8 Cal.3d 410, 425-426, 429-431; see, e.g., *People v. Garcia* (2017) 7 Cal.App.5th 941, 954 [upholding life with the possibility of parole despite the defendant's youth].) And as the Board has demonstrated, Palmer's sentence was not constitutionally disproportionate as compared to his individual culpability, under the circumstances.

HRW presumes, based on recent sentencing and parole reforms, that had Palmer committed his crime today, he would have been adjudicated in juvenile court and received a much shorter sentence, or if sentenced as an adult, he would have been granted parole much earlier. (HRW 16-17, 23-

25, 32-34.)[1] But even now, a 17 year old charged with kidnapping for robbery is eligible to be tried as an adult. (Pen. Code, § 209, subd. (b)(1).) And whether to try such a person as an adult (and, if that happens, when to grant parole) are inherently fact-bound determinations, requiring each decisionmaker to conduct an individualized assessment of the offender and the offense, including a myriad of characteristics related to his or her youth. (Welf. & Inst. Code, § 707 (a)(1), (3) [juvenile court decides whether to transfer juvenile offender to adult court based on statutory, youth-related factors]; Cal. Code Regs. tit. 15, § 2402 [parole decisions guided by non-determinative regulatory factors, focused on post-conviction behavior]; Pen. Code, § 4801, subd. (c) [youth offender parole factors].)

More importantly, the voters and the Legislature elected to make many of the reforms to the youth offender system relied on by HRW prospective only. These reforms, such as Proposition 57's juvenile court provisions, are limited to cases that were not yet final. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 303-304, 309 [holding Proposition 57's juvenile offender provisions apply only to cases not yet final as of the date of its passage]; see generally *In re Estrada* (1965) 63 Cal.2d 740 [statute reducing the punishment for a crime usually is only retroactive to any case in which the judgment was not final before the statute took effect].) Such reforms reflect considered decisions by the electorate and the Legislature to approach changes incrementally. They do not undermine *Lynch*'s test for deciding cruel or unusual punishment claims, which is based on the nature of the offender and the offense, and intra- and inter-state comparisons.

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[1] HRW cite to some reforms that would not apply to Palmer because of his age and sentence of life with the possibility of parole. (HRW 17, 22-23, 26-27.) It also relies on inadmissible anecdotal evidence. (Evid. Code, § 452, subds. (a)-(h); *Appel v. Superior Court* (2013) 214 Cal.App.4th 329, 342, fn. 6.)

The Sentencing Project makes a broader claim. The Sentencing Project argues that the length of Palmer's incarceration was unconstitutional because his sentence of life with the possibility of parole was statutorily mandated. (The Sentencing Project 18-50.) But Palmer has never argued that the mandated indeterminate sentence was unconstitutional on its own. Instead, he argued that the repeated denials of parole in the implementation of that sentence made his incarceration unconstitutional. (Habeas Petn.; ABM 21, 37 [as-applied proportionality challenge based on continued incarceration]; see also *Bd. of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1238-1239 [court cannot consider claims not expressly or implicitly raised in a habeas petition].) Indeed, as a general rule, this Court "will not consider issues raised for the first time by an amicus curiae.'" (*Cal. Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1048, fn. 12, quoting *In re Aurora P*. (2015) 241 Cal.App.4th 1142, 1154, fn. 7.)

This Court should also be especially wary of reaching The Sentencing Project's argument here, since it rests on a significant—and far from obvious—extension of existing precedent. This Court and the United States Supreme Court have held that, for juvenile offenders, death sentences or mandatory sentences of life *without* the possibility of parole (actual or de facto) are unconstitutional. (See, e.g., *Roper v. Simmons* (2005) 543 U.S. 551, 575; *Graham v. Florida* (2010) 560 U.S. 48, 75; (*Graham*); *Miller v. Alabama* (2012) 567 U.S. 460, 465; *People v. Caballero* (2012) 55 Cal.4th 262, 268.) Without the hope of release, juvenile offenders have no prospects for rehabilitation, "no chance for [meaningful] fulfillment outside prison walls" and "no chance for reconciliation with society." (*Graham*, at p. 79.)

These principles and the concerns they address are not implicated when the person who committed his crime as a juvenile receives a sentence

of life *with* the possibility of parole. Such a sentence expressly affords a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" (*Graham*, *supra*, 560 U.S. at p. 75; see also *People v. Franklin* (2016) 63 Cal.4th 261, 276-277), and "contemplate[s] a sufficient period [for a youth offender] to achieve reintegration as a productive and respected member of the citizenry" (*People v. Contreras* (2018) 4 Cal.5th 349, 368). Indeed, Palmer's sentence provided him with the possibility of parole and the opportunity for rehabilitation and hope for life beyond the prison walls.

II. THE REMEDY FOR AN EXCESS PERIOD OF CONFINEMENT IS RELEASE FROM THAT CONFINEMENT—NOT A REDUCTION OR ELIMINATION OF PAROLE

The Prison Law Office, like Palmer, contends that parole is a form of further punishment, and that the proper remedy for serving too much time in custody requires the elimination of parole too. (Prison Law Office 17-22.) According to that theory, once a period of incarceration has crossed the threshold into cruel or unusual punishment, any continuing limits imposed on that person's liberty, including parole supervision, are necessarily cruel or unusual. (Prison Law Office 18.)

That argument ignores the fundamental difference between incarceration and parole, with respect to the nature of restraint each has on one's liberty. (RBM 18-21.) A court's authority to provide a remedy for a sentence that is cruel or unusual should go no "further than necessary to eliminate the particular constitutional violation which promoted judicial intervention in the first instance." (*Spain v. Procunier* (9th Cir. 1979) 600 F.2d 189, 194 (*Spain*); *People v. Booth* (2016) 3 Cal.App.5th 1284, 1312 ["courts have broad discretion to formulate a remedy that is tailored to redress the particular constitutional violation that has occurred"].) A finding that an inmate's continued *incarceration* is cruel or unusual does

not necessarily mean *parole supervision* is also unconstitutional. (See *Lynch*, *supra*, 8 Cal.3d at pp. 425-429 [factors used to determine proportionality]; *United States v. Bridges* (7th Cir. 1985) 760 F.2d 151, 154.) The proper remedy is to end what is cruel or unusual. (RBM 21-22.)

In *Spain*, for example, the Ninth Circuit affirmed the district court's finding that use of tear gas and mechanical restraints for certain inmates constituted cruel or unusual punishment. (*Spain*, *supra*, 600 F.2d at pp. 193-199.) The Ninth Circuit, however, narrowed the district court's remedy because it did more than necessary to cure the constitutional violation. (*Id.* at pp. 194, 197.) It held the district court's remedy, which prohibited tear gas use in all but the most-dire situations was overly broad, noting that the prison may well use tear gas in less-dire situations without running afoul of the Eighth Amendment. (*Id.* at pp. 195-196.) The Ninth Circuit also held that some use of mechanical restraints would not be constitutionally excessive or unreasonable. (*Id.* at pp. 198-199.)

This case is one of many that exemplifies the remedy should be specific and extend no further than necessary to end the constitutional violation. (See *Hutto v. Finney* (1978) 437 U.S. 678, 686-688 [upholding order limiting solitary confinement to 30 days after the state's repeated failure to remedy cruel and unusual punishment violations, but allowing some solitary confinement to continue]; *Wright v. Rushen* (1981) 642 F.2d 1129, 1132-1134 [holding district court erred by relying on the totality of prison conditions to fashion a broad remedy to effectuate prison reform, "rather than tailoring its remedy to ensure that the requirements to the Eighth Amendment are satisfied"]; *Brown v. Plata* (2011) 563 U.S. 493, 510-511, 517-522, 527-530 [upholding order capping prison population after finding crowding was primary cause of Eighth Amendment violation and no other relief would remedy violation, but leaving population reduction to the state].)

Indeed, it is hard to see how the general rule could be otherwise. A prisoner who suffers from physical abuse, deliberate indifference to a medical condition, or other unconstitutional conditions of confinement has by definition received punishment that exceeds what the State can impose under the prohibition against cruel or unusual punishment. The Board is unaware, however, of any precedent holding that these types of constitutional violations would justify a court in eliminating any remaining and proportionate punishment, including the inmate's continued, lawful incarceration. (Cf. *People v. Jackson* (1987) 189 Cal.App.3d 113, 120 [affirming trial court's refusal to consider prison conditions in resentencing the defendant, noting that release of inmates from custody, or enjoining confinement under such conditions, "is not an appropriate remedy [for] established unconstitutional conditions of confinement"]; *In re Hutchinson* (1972) 23 Cal.App.3d 337, 341-342 [holding inmate's maximum-security segregation was excessive because prison authorities offered no facts to justify its continuance and ordering inmate's return to the general population]; *Crawford v. Bell* (9th Cir. 1979) 599 F.2d 890, 891-892 [holding petition should be dismissed for lack of habeas corpus jurisdiction and noting that remedy for challenge to conditions of confinement as cruel or unusual was "judicially mandated change in conditions and/or an award of damages, but not release from confinement"].)

In Palmer's case, the Court of Appeal found he had served too much time in custody, but did not find that the parole period itself was cruel or unusual. Without this finding, the court imposed a remedy broader than necessary—one that infringed on the executive branch's right to impose and determine the appropriate length of his parole period, thus violating separation-of-powers principles. (See *In re Lira* (2014) 58 Cal.4th 573,

579, 583-584 [discussing Board's control over length of an inmate's parole term].)[2]

Lira's reasoning is instructive. (OBM 39-44; RBM 23.) Although the Prison Law Office argues *Lira* entailed a categorically different claim and that Lira sought a different remedy (Prison Law office 21), both *Lira* and this case involve the same type of purported constitutional injury: continued incarceration due to an alleged constitutional violation. Both cases also implicate the same separation of powers concerns: the judiciary's ability to materially impair the inherent functions of another, co-equal branch. (See *Lira*, *supra*, 58 Cal.4th at pp. 583-584.) Given these similarities, the remedies should align. A court undoubtedly has authority to cure a constitutional violation, but separation-of-powers principles counsel against a remedy that extends beyond the actual constitutional violation and undercuts constitutionally permissible legislative and executive determinations. The Court of Appeal's remedy violated this principle by eliminating Palmer's parole period without independently determining whether Palmer was constitutionally entitled to a reduced period of parole supervision.

The separation of powers principles discussed in *Lira* are consistent with another state's recent discussion of the topic. In *Committee for Public Counsel Services et al. v. Chief Justice of the Trial Court et al.*, petitioners argued that the Supreme Judicial Court should eliminate a rule that motions to revise or revoke a sentence be filed within 60 days of the sentence's imposition so that courts could release inmates in response to the COVID-19 pandemic. (*Committee for Public Counsel Services et al. v. Chief*

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[2] As noted in the reply brief, there may be cases where an offender's incarceration *and* the parole period are constitutionally disproportionate to his or her individual culpability. (RBM 24.) But the Court of Appeal here made no such determination about Palmer's parole.

Justice of the Trial Court et al. (Mass. 2020) 142 N.E.3d 525, 449-450, opn. mod. 143 N.E.3d 408 (*Committee for Public Counsel Services*) [affirming opinion on separation-of-powers principles, but modifying opinion in other respects].) The Supreme Judicial Court declined petitioners' invitation based on separation-of-powers principles. (*Id.* at pp. 449-451.) The court held that absent a constitutional violation, which the petitioners agreed had not been established, courts had no authority over parole for incarcerated individuals serving valid sentences. (*Id.* at pp. 445-446, 449-452.) The court explained that granting parole is a discretionary act of the parole board and allowing courts to "cut short" sentences in the current circumstances "would be to perform a function of the parole board, thereby 'effectively usurp[ing] the decision-making authority constitutionally allocated to the executive branch.'" (*Id.* at pp. 451-452, citations omitted.)

The same is true here. As in *Committee for Public Counsel Services*, the elimination of parole in Palmer's case did not cure a constitutional violation. The Court of Appeal did not independently find Palmer's parole period was cruel or unusual. Moreover, as in *Committee for Public Counsel Services*, the executive branch is vested with unequivocal authority over parole, and allowing courts to "cut short" an offender's parole period absent a constitutional violation would materially defeat this power. (*Lira*, *supra*, 58 Cal.4th at p. 584; see also *In re Coca* (1978) 85 Cal.App.3d 493, 502 [holding remedial order for cruel and unusual violation did not usurp the [California Department of Correction and Rehabilitation's] "power over security and management of its institution" because the order allowed the Department discretion to implement alternative means of compliance].)

Finally, the Prison Law Office disputes the necessity and wisdom of the entire practice of parole. The Prison Law Office presents selected data, studies, and anecdotal evidence as support for its view that parole is ineffective at reducing recidivism and can even be counterproductive.

(Prison Law Office 22-32.) But it is the Legislature's assessment—not the Prison Law Office's—that is entitled to deference. (Pen. Code, § 3000, subd. (a)(1); see *Graham*, *supra*, 560 U.S. at pp. 73-74 ["It is for legislatures to determinate what rehabilitative techniques are appropriate and effective"].) And the Legislature has left no doubt that "the period immediately following incarceration is critical to successful reintegration of the offender into society," and that "[i]t is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees." (Pen. Code, § 3000, subd. (a)(1).)

The Legislature has, accordingly, designed a parole system that furthers reintegration and rehabilitation. "Upon their release from prison on parole, parolees are informed of their parole conditions and are further notified of the availability of social services, medical and psychological treatment resources, drug and alcohol dependency services, job counseling, and services for obtaining a general equivalency certificate, all designed to assist their transition back into society at no cost to them." (*In re Taylor* (2015) 60 Cal.4th 1019, 1030; California Department of Corrections and Rehabilitation, <https://www.cdcr.ca.gov/rehabilitation/programs/after-prison-programs/> and <https://www.cdcr.ca.gov/rehabilitation/resources/> [as of May 27, 2020]; see also Mar. 21, 2019, Reply to Letter Brief, Exh. 1 [parole conditions include completion of a substance abuse treatment program, a parole outpatient clinic, and a transitional housing program].)

Parole provides opportunities that assist recently released offenders with their successful reintegration into society. For example, parole service centers assist parolees with life-skills training and job preparation to "obtain and maintain self-sufficiency, employability, and successful reintegration back into the community." (California Department of Corrections and Rehabilitation, <https://www.cdcr.ca.gov/rehabilitation/psc/> [as of May 27, 2020].) The

program "offers services that focus on parolee needs such as employment, job search and placement training, stress management, victim awareness, computer supported literacy, and life skills," including substance abuse education and a domestic violence program. (*Ibid.*) There are also Day Reporting Centers and Community-Based Coalitions that "offer an array of services designed to increase the success of at-risk parolees discharging from prison," such as anger management programs, employment services, and counseling. (*Id.* at <https://www.cdcr.ca.gov/rehabilitation/drc/> [as of May 27, 2020].)

The sanction system under parole likewise serves rehabilitative goals. In response to parole violations, parole agents must consider intermediate sanctions before seeking court intervention (*People v. Perlas* (2020) 47 Cal.App.5th 826, 833-834; Cal. Rules of Court, rule 4.541(e) [parole agent must explain reasons intermediate sanctions are inappropriate]), such as "rehabilitation and treatment services and appropriate incentives for [parole] compliance" (Pen. Code, § 3000.08, subd. (d); see also Request for Jud. Notice 12-13). It is true as the Prison Law office note (Prison Law Office 23-29), that parolees such as Palmer may be returned to custody as a result of future parole violations.[3] But such custody is of limited duration, and courts may also impose sanctions short of incarceration to encourage rehabilitation, such as modifying the parolee's conditions or referring them to a reentry court or another evidence-based program. (Pen. Code, § 3000.08, subd. (f)(1), (3).)

[3] Indeed, on May 6, 2020, Palmer was arrested for a new crime and was in local custody until his arraignment on May 20, 2020. The superior court released Palmer on his own recognizances. He is due in court on June 3 for an evaluation of whether he is again suitable for the collaborative court program.

Indeed, Palmer's submissions to this Court suggest that after his parole agent filed a petition to revoke, the court assigned him to a collaborative court program. (Opp'n to Request for Jud. Notice; see also Request for Jud. Notice 51, 55.) The program provides Palmer with more individualized attention and a collaborative team to deliver social services to him. (Request for Jud. Notice 55.) Palmer portrays the experiment as successful. (Opp'n to Request for Jud. Notice, Palmer Decl., p. 9 at ¶ 32; but see, *supra*, at p. 14, fn. 3.)

To the extent Palmer disagrees with his parole conditions, a parole agent has some discretion in modifying parole conditions (Department Operations Manual, §§ 81010.16-81010.16.2), and if a parolee believes that his conditions are preventing reintegration and rehabilitation, he can ask parole officials to reconsider them. A parolee can also administratively appeal his conditions of parole. (Cal. Code Regs., tit. 15, §§ 3084.1 et seq.; Cal. Code Regs., tit. 15, §§ 3480 et seq. [eff. Jun. 1, 2020]) And unlawful conditions can be set aside through a habeas corpus petition. (See *In re Stevens* (2004) 119 Cal.App.4th 1228, 1234.)

The anecdotal evidence and studies that the Prison Law Office cites suggest an imperfect system. But it would be no more reasonable to expect perfection in this aspect of the criminal justice system than in any other. And the Prison Law Office's chosen studies and inadmissible anecdotes do not suffice to defeat the Legislature's considered judgment that parole supervision for former life-term inmates has value. (See Pen. Code, § 3000, subd. (a)(1); *Lira*, *supra*, 58 Cal.4th at pp. 579; 583-584.) Like other aspects of the criminal justice system, the parole system has been the subject of recent evolution and reform, and continues to improve. (See Mia Bird et al., Recidivism of Felony Offenders in California, Public Policy Institute of California, 2019, https://www.ppic.org/wp-content/uploads/recidivism-of-felony-offenders-in-california.pdf at p. 27

["recidivism rates have improved under recent policy changes"].) Such legislative changes—rather than the constitutionally unsupported remedy here—are how parole's perceived inadequacies should be addressed. (See, e.g., *In re R.C.* (2019) 41 Cal.App.5th 283, 287 [appellant's novel theory about juvenile criminality best addressed by the Legislature, not the court]; *People v. Sipe* (1995) 36 Cal.App.4th 468, 482-483 [courts do not second-guess whether the Legislature selected the correct remedy for a problem or determine whether the law is wise as a matter of public policy], citing *Buhl v. Hannigan* (1993) 16 Cal.App.4th 1612, 1621.)

CONCLUSION

This Court should reverse the Court of Appeal's judgment.

Dated: May 29, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO AMICUS CURIAE BRIEFS uses a 13 point Times New Roman font and contains 3560 words.

Dated: May 29, 2020

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No.: **S256149**

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I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 29, 2020, at San Diego, California.

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Supreme Court of California

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