S256149

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re William M. Palmer, on Habeas Corpus.	No. S256149

First Appellate District, Division Two, Case No. A154269

APPLICATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF WILLIAM M PALMER

[PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF WILLIAM M PALMER

California Rules of Court, Rule 8.520(f)

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To the Honorable Chief Justice of California:

I, William Vogel, hereby apply for leave to file an amicus curiae brief in support of William M. Palmer on habeas corpus in No. S256149. I am in custody and under the facility's Covid-19 restrictions. A recent docket printout suggested this case is still pending and I am familiar with the information presented as I was amicus curiae in *In re Roy Butler*, No. S237014. I am working with limited resources and no other person, party, entity, or counsel for a party has or will author or make a monetary contribution toward preparation or submission of this brief.

My brief informs the Court of the requirement to enforce subdivision (h) of Penal Code section 1170.2 which is jurisdictional and imposes a statutory duty upon the parole board to fix terms of punishment in conformance with section 1170 (Determinate Sentencing) to prevent and remedy disproportionately excessive punishment by tailoring punishment to an individual's culpability as is the law of this State. It becomes apparent that this administrative safeguard is necessary not only for indeterminate sentences but also for sentences of life with the possibility of parole like Palmer's once a statutory minimum eligible parole date is realized. If this matter has been decided I ask the Court to consider recalling the remittitur on its own motion to evaluate the merits of this brief.

The Court may also wish to revisit the initial amicus brief by Vogel and Grant in *Butler*, No. S237014 dated 3/28/2017 which may or may not be available at the Court's website, Briefs of Argued Cases for January 3-4, 2018. (A conformed copy will be re-submitted upon request.)

Dated: 6/23/2020

Respectfully submitted,

Wm Vogel

William Vogel P88353

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

INTRODUCTION

The problem of disproportionately excessive punishment frequently stems from serial parole denials when given an indeterminate term-to-life sentence -- or as in the case of Palmer, a life sentence with the possibility of parole -- which is remedied by the statutory "fixing" of a term proportionate to one's individual culpability as provided by subdivision (h) of Penal Code section 1170.2. This proportionality is the express legislative intent for the Determinate Sentencing Law (DSL) as stated in section 1170, subdivision (a)(1).

There is no evidence that the parole board (Board) regularly performs this term-fixing duty pursuant to subdivision (h) despite it being a public statute, jurisdictional, and the administrative safeguard provided for by the DSL. The Court should require enforcement of this term-fixing provision to prevent disproportionate punishment and reduce the use of judicial resources for litigating such claims.

DISCUSSION

A. Subdivision (h) of Penal Code section 1170.2 was added to safeguard proportionality of punishment as intended by the Determinate Sentencing Law in section 1170 for crimes committed on or after January 1, 1979.

Subdivision (h) was added to Penal Code[1] section 1170.2 by Senate Bill 709 (Stats. 1978, ch. 579, §31) and presently provides:

> In fixing a term under this section the Board of Prison Terms shall utilize the terms of imprisonment as provided

1. Subsequent statutory references are to the Penal Code unless stated.

in Chapter 1139 of the Statutes of 1976 and Chapter 165 of the Statutes of 1977.

The statutes and chapters are Senate Bill 42 and Assembly Bill 476 which comprised the California Uniform Determinate Sentencing Act made operative July 1, 1977.

Critically, Senate Bill 709 also provided:

> This act shall apply prospectively only for crimes committed on or after January 1, 1979.

(Stats. 1978, ch. 579, §48 (emphasis added); see *People v. Fain* (1983) 34 Cal. 3d 350, 354, n. 3 as to the SB 709 amendment to section 669 ["The amending statute expressly provided it would apply only to crimes committed on or after January 1, 1979. (Stats. 1978, ch. 579, §48....)"]; see Stats. 1978, ch. 579 at http://clerk.assembly.ca.gov/content/statutes.)

Notably, subdivision (b) of section 1170.2 (which converted ISL sentences for crimes committed "prior to July 1, 1977" to DSL terms) provides that a hearing shall be held "... within 120 days of receipt of the prisoner.... It is the intent of the Legislature that the hearings provided for in this subdivision shall be accomplished in the most expeditious manner possible. At the hearing... a release date shall be set.... In fixing a term under this section the board shall...." Clearly then, subdivision (h) is not redundant or surplusage and it specifically applies "prospectively only for crimes committed on or after January 1, 1979" and must be harmonized with the rest of the "section," section 1170.2 to arrive at a DSL maximum term.

To confirm this, recall that the Legislature in section 1170, subdivision (a)(1) of the DSL found and declared that the purpose of sentencing is "punishment" which is "best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentence of offenders committing the same offense under similar circumstances." The Legislature then provided section 1170.2 as the ways and means by which to achieve these goals by fixing a maximum term of punishment -- without exceptions -- based upon culpability rather

than the statute's punishment in the abstract.

It's important to realize that in the intervening years the United State Supreme Court required that any alleged fact of aggravation or enhancement that can increase the "sentencing floor" be found by a jury under the Sixth Amendment to the United States Constitution. (See *Alleyne v. United States* (2013) 570 U.S. 99, headnotes 7, 9, 11.) Thus it appears that the Board's term-fixing power may now be limited but it must nonetheless recognize and regard the jury's maximum sentence determination under *Alleyne* and apply the section 3046 minimum eligible parole date (MEPD) to that sentence.

B. The wide range of punishment encompassed by some statutes must be tailored to an individual's culpability by subdivision (h) term-fixing.

As found by this Court in *In re Rodriguez* (1975) 14 Cal. 3d 639 some statutes encompass "offenses reflecting a wide range of culpability" (*Id.* at 648) and the measurement of "punishment for crime" is based upon "individual culpability [which] is well established in the law of this state." (*Id.* at 653.)

In the case of Palmer's life sentence with the possibility of parole, his 7-year "minimum" term (MEPD under section 3046) signaled that a a range of punishment existed, analogous to an indeterminate term-to-life sentence, which necessitates a maximum proportionate term be fixed based upon his culpability which the Board had the power and obligation to do under subdivision (h). This would have eliminated Palmer's use of judicial resources to determine whether or not his punishment had become disproportionate (along with the many others who repeatedly challenge parole denials because they have no fixed term from which to measure the proportionality of their punishment.) Promptly fixing terms upon entry into prison would help reduce such court intervention to "meaningful review" of the Board's action. (See *Rodriguez*, *supra*, at 654, n. 18.)

C. The parole board has no authority to disregard its term-fixing duty and thereby cause disproportionate punishment through serial denials of parole and due process.

As exemplified by Palmer's ten parole denials over 19 years the "absence of any yardstick by which to guage the proportionality" of his punishment was due to a lack of the DSL term-fixing process due him. With the possible exception of the intervening holding in *Alleyne v. United States* mentioned above, there has never been authority for the Board *not* to regularly perform its statutory subdivision (h) term-fixing duty as a function independent of parole consideration. (Cf. *In re Rodriguez*, supra, 14 Cal. 3d at 652.)

Note that in its *In re Roy Butler*, No. S237014 Opening Brief on the Merits dated 1/17/2017 at Part III pp. 8-11 the Board correctly understood that Senate Bill 230 amended former parole section 3041 by replacing "shall normally set a parole release date [ ] in a manner that will provide uniform terms..." with "shall normally grant parole." (See Stats. 2015, ch. 470, §1.) But the Board misperceived the SB 230 amendments as a "new parole regime" where one must simply be "found suitable" and reach his MEPD to be released. It thus disregarded (and misrepresented) the consequence of parole denial and any need for DSL proportionality or uniformity by stating its "authority to set release dates" and its term matrices or criteria were deleted. Yet "establish criteria" (emphasis on "establish") in former section 3041 was not expressly or impliedly repealed or deleted because the Legislature knew that the "criteria" provide the "terms of imprisonment" required for subdivision (h) term fixing.

Thus the Board completely misconstrued the Legislature's purpose for SB 230 and its castigation that the Board's regulations and administration of base terms from its matrices for the parole function "creat[ed] 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" and was "confusing," "convoluted," "com-

plex," and "inconsistent." (See *Butler*, No. S237014 Opn. Brf., *supra*, at pp. 10-11, quoting the Sen. and Assem. Pub. Safety Com. Rpts. on SB 230.)

In the end, this Court in *In re Roy Butler* (2018) 4 Cal. 5th 728, 748 relieved the Board "of its obligation to calculate base terms and adjusted base terms" for *parole* on constitutional grounds: But the Board nevertheless has an obligation to calculate and fix these terms on the *statutory* grounds of the DSL and subdivision (h) "only for crimes committed on or after January 1, 1979."

CONCLUSION

Based on the foregoing, Palmer was entitled to a fixed proportionate term under the DSL where his life sentence with the possibility of parole encompassed a wide range of culpability and had a MEPD like an indeterminate term-to-life sentence, and where subdivision (h) of section 1170.2 is the statutory remedy to safeguard against disproportionate punishment.

Dated: 6/23/2020

Respectfully submitted,

William Vogel

William Vogel F88353

PROOF OF SERVICE

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

APPLICATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF WILLIAM M PALMER

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in No. S256149 to the parties listed below on June 23, 2020 by placing said documents into a postage-paid envelope and handing it to a Correctional Officer to be sent via United States mail.

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(counsel for Palmer)

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

Date: 6/23/2020

William Vogel

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