J. ANTHONY KLINE
PRESIDING JUSTICE

STATE OF CALIFORNIA
Court of Appeal
FIRST APPELLATE DISTRICT
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July 10, 2019

Honorable Tani G. Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Opposition to Amended Request for Depublication of *In re Palmer* (2019) 33 Cal.App.5th 1199, Case No. A154269; Supreme Court Case No. S256149

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The thesis of the California District Attorneys Association (CDAA) request to depublish *In re Palmer* (2019) 33 Cal.App.5th 1199 (*Palmer*) is that the opinion "contravenes established case law by unjustly expanding *In re Lynch* [(1972) 8 Cal.3d 410 (*Lynch*)] to [a determinate] sentencing scheme that did not exist at the time it was decided."[1] *Palmer* achieved this unjust expansion of *Lynch*, the CDAA claims, by "misplaced reliance on *In re Rodriguez* (1975) 14 Cal.3d 639 [(*Rodriguez*)]" (Request at p. 4), and the result of this is to "provide inmates with a de facto workaround [of] the public safety construct governing parole release decisions." (Request at pp. 8–10.)

The CDAA is, of course, right that the Indeterminate Sentence Law (ISL) in effect at the time *Rodriguez* was decided was different from the provisions of the Determinate Sentence Law (DSL) relating to indeterminate sentencing now in effect. But, for present purposes, there is one respect in the similarities of the situations in *Rodriguez* and *Palmer*

[1] The CDAA also claims that the facts in the case "do not warrant the extraordinary, rare relief given to this inmate." (Request at p. 10.) As I believe the facts adequately speak for themselves, I do not address this argument except to say that, as fully discussed in the opinion, while the offense was clearly serious and traumatic for the victim, the circumstances of this particular kidnapping for robbery were much less egregious than they might have been: It was of relatively short duration, the distance travelled was short, and Palmer, 17 years old at the time, used an unloaded gun to avoid the risk of hurting anyone and was himself the only person physically injured during commission of the offense.

are more important than any of the differences between the sentencing schemes. The petitioners in both cases claimed that the maximum term (life in prison) to which they were subjected was constitutionally excessive, *as was the number of years they had already served.* The *Rodriguez* court concluded that the statutorily authorized life term did not *on its face* violate the cruel and/or unusual penalty provisions of the state and federal Constitutions because the statute encompassed a broad range of criminal conduct, some of which could permissibly be punished by a life term. However, Rodriguez also claimed—and the Supreme Court agreed—that the term he had actually served was constitutionally disproportionate to his individual culpability for the commitment offense. (*Rodriguez, supra*, 14 Cal.3d at p. 653.) Palmer made precisely the same claim and—using the same *Lynch-Foss* test employed by the Supreme Court in *Rodriguez*—we agreed. Our analysis was hardly novel.

The fact that the parole board no longer has an obligation to fix a life prisoner's term at a number of years proportionate to his or her offense does not render *Rodriguez* wholly "inapposite" to the situation and issues in *Palmer*, as the CDAA argues. The replacement of the ISL with the DSL may have relieved the parole board of the responsibility to consider an inmate's individual culpability for the commitment offense during the process of determining suitability for release, but it certainly did not relieve *the courts* of the responsibility to measure the "gradations of culpability" that must be the basis of any judicial assessment of the constitutionality of punishment. (*Rodriguez, supra* 14 Cal.3d at p. 647.) To the contrary, this court has repeatedly made clear that enforcement of the constitutional principle of proportionality in sentencing is essentially a judicial responsibility. (*In re Butler* (2018) 4 Cal.5th 728, 745 (*Butler*); *In re Dannenberg* (2005) 34 Cal.4th 1061, 1098 (*Dannenberg*).) While the sentencing scheme to which *Rodriguez* applied expired less than a year after that opinion issued, this court has repeatedly reaffirmed the enduring principle for which it still stands—that proportionality to individual culpability sets the outer limit of constitutional punishment. As this court stated in *Dannenberg*, decided long after the ISL had been repealed, "even 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. Such excessive confinement, we have held, violates the cruel or unusual punishment clause (art. I, § 17) of the California Constitution. (*Rodriguez*, [at pp.] 646–656; *People v. Wingo* [(1975)] 14 Cal.3d 169, 175–183.) Thus, we acknowledge, Penal Code section 3041 subdivision (b) cannot authorize such an inmate's retention, even for reasons of public safety, beyond this constitutional maximum period of confinement."

(*Dannenberg*, at p. 1096,)[2] The lasting relevance of *Rodriguez* is that it rendered constitutionally untenable the idea that public safety trumps proportionality.

It is difficult to fathom the CDAA's claim that *Palmer* represents an unjust "expansion" of the three-part analysis developed in *Lynch* and its progeny, which asks whether the challenged punishment is excessive because it is (1) greater than the punishment imposed in this state for offenses which may be deemed more serious, or (2) greater than punishment imposed in other jurisdictions for the same offense, or (3) because the nature of the offense and the offender do not warrant imposition of the maximum punishment. (*Rodriguez, supra,* 14 Cal.3d at p. 647.) The validity of these criteria is not limited to any particular sentencing scheme and they remain the accepted measures for assessing the constitutionality of punishment under the California Constitution. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 479; *In re Garcia* (2017) 7 Cal.App.5th 941, 952; *In re Nunez* (2009) 173 Cal.App.4th 709, 725.) Palmer's petition for habeas corpus relied on that analysis, as did the return to the order to show cause filed by the Attorney General. The CDAA offers no basis for concluding the *Lynch-Foss* techniques should not have been applied to this case; it simply disagrees with our analysis of the nature of the offense and offenders.

The CDAA says the "unwarranted expansion" of the principles set forth in *Lynch*, by the *Palmer* opinion should be depublished because otherwise it will provide inmates a "de facto workaround [of] the public safety construct governing parole release decisions." (Request at p. 8.) The "public safety construct" the District Attorneys refer to is most concisely described in the following provision of the parole board's regulations: "*Regardless of the length of time served*, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released." (Cal. Code Regs., tit. 15, § 2281, subd. (a).)

This so-called "construct," which makes public safety the paramount consideration in *board determinations* of suitability for release, does not purport to apply to *judicial determinations* whether the board's denial of parole results in constitutionally excessive punishment. The CDAA's complaint is not really with *Palmer*, but with the principles set forth in *Lynch* that *Palmer* relies upon. The subtext of the request to depublish is that a *Lynch* inquiry into the proportionality of punishment imposed by the parole board should not be made until and unless the inmate in question is found suitable for release,

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[2] The CDAA claims *Dannenberg* establishes that "public safety trumps term length in Life-Top cases." (Request at p. 6.) *Dannenberg* holds only that public safety trumps uniformity in sentencing. Unlike uniformity, proportionality is not just a legislative policy, but a constitutional mandate. As indicated, *Dannenberg* expressly *repudiates* the idea the public safety trumps proportionality in sentencing.

regardless of the length of time that inmate has served. That idea is completely indifferent to this court's repeated reminders that "no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense . . . even for reasons of public safety." (*Dannenberg, supra,* 34 Cal.4th at p. 1096.)

The CDAA also claims that if *Palmer* is not depublished it "will result in voluminous, unmeritorious constitutional claims of excessive sentences in life top cases." The claim is baseless.

To begin with, most indeterminately sentenced life prisoners eligible for parole are as a practical matter *unable* to file voluminous claims of constitutionally excessive punishment. Such prisoners have no right to appeal from the denial of parole, and no right to counsel other than at an in-prison suitability hearing (where they are represented by assigned counsel paid no more than $50 per hour for a maximum of 8 hours). No judge will assign counsel to a life prisoner challenging the constitutionality of continued incarceration as excessive punishment in a writ proceeding unless the prisoner is able to explain—in the demanding manner required by *Lynch* and its progeny—that the punishment is disproportionate to his or her culpability for the commitment offense. And even if life prisoners are aware of their rights under the cruel and/or unusual punishment provisions of the federal and state Constitutions, the laborious research and analysis required for assertion of those rights is far more difficult than what is necessary for the conventional lifer claim that the denial of parole is not supported by "some evidence."

Furthermore, though legal assistance is invariably essential, public defenders and the criminal defense bar have effectively abandoned life prisoners, who cannot pay and whose claims are usually difficult. The number of attorneys who competently represent such prisoners other than at in-prison parole hearings is miniscule. In fact, the most remarkable aspect of *Palmer* may be that he was from the outset represented (presumably pro bono) by a major national law firm (O'Melveny & Meyers) that devoted five exceptionally competent attorneys to his cause. This is unlikely to become a habit of the private bar.

For the foregoing reasons, *Palmer* will not likely stimulate voluminous lawsuits on behalf of life prisoners claiming constitutionally excessive punishment.

Finally, the concern that *Palmer* will stimulate such lawsuits is not an appropriate basis for depublication. Any judicial opinion affirming prisoners' constitutional rights could result in the filing of unmeritorious cases; there is nothing unique about *Palmer* in this regard. If *Palmer* is correct, depublication would be a cynical means of discouraging life inmates from asserting their constitutional rights. Moreover, although the Attorney General declined to file a petition for review, this court has the power to grant review on

its own motion, and will presently decide whether to do so. If after consideration of the merits by this court Palmer's analysis is found to be erroneous in any way, the judicial process will have proceeded in due course. The CDAA's request for depublication seeks to achieve its desired result back-handedly, in a case that does not even involve the primary harm it relies upon for justification—the release of life prisoners seen by the parole board as presenting a risk to public safety.

Sincerely,

J. Anthony Kline
Presiding Justice

cc: Jorge Navarrete ✓
Jake Dear
Richard J. Sachs
Cara L. Gagliano
Phillip J. Lindsay