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

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

(1) Did this life prisoner's continued confinement become constitutionally disproportionate under article I, section 17 of the California Constitution and/or the Eighth Amendment of the United States Constitution?

(2) If this life prisoner's continued confinement became constitutionally disproportionate, what is the proper remedy?

INTRODUCTION

William Palmer's life sentence with the possibility of parole and resulting incarceration for kidnapping for robbery neither shocks the conscience nor offends fundamental notions of human dignity. The court below held otherwise, and concluded that Palmer was not only entitled to be released from prison after serving 29 years on his life sentence, but also entitled to be relieved of his five-year parole period. But in granting Palmer relief, the Court of Appeal departed from this Court's jurisprudence governing cruel or unusual punishment claims. That jurisprudence requires courts to afford great deference to the legislatively imposed penalty for the crime—here, life in prison with the possibility of parole—as part of the constitutional analysis.

The court below concluded that no deference was owed. It reasoned that Palmer, who brought his claim after the Board of Parole Hearings denied him parole numerous times, did not challenge his indeterminate sentence, a claim the court acknowledged would have required deference to the Legislature. Rather, Palmer challenged the actual number of years he served in prison. According to the Court of Appeal, this was a distinction with a difference because the actual number of years served was a function of the Board's parole decisions. In this scenario, deference to the legislatively prescribed penalty was no longer warranted.

The appellate court's treatment of Palmer's claim as different from a claim challenging the indeterminate life sentence is unsupported by the law. While this Court has held that a life inmate may petition for habeas corpus relief if he believes his incarceration has become disproportionate to his individual culpability for the crime, nothing in this Court's jurisprudence suggests that the cruel or unusual analysis is different merely because the inmate brings his claim decades into his sentence and after he is denied parole. Indeed, the court's rationale for carving out a new legal standard—that the Board, and not the Legislature, determines a life inmate's term through its parole suitability function—is unpersuasive. This Court held long ago that the cruel or unusual punishment analysis measures the inmate's individual culpability against the sentence's maximum term not some lesser term fixed by the parole authority. This guiding principle recognizes that an inmate's sentence does not become constitutionally disproportionate based on the actual number of years an inmate has served. The life-maximum term is either constitutional or not when it is imposed. The Court of Appeal here applied an erroneous legal standard under state law by failing to defer to the legislatively proscribed maximum punishment for kidnapping for robbery—life with the possibility of parole. And although giving deference to the Legislature does not mean all sentences are constitutionally immune, the court below gave no deference and its disproportionality findings as to Palmer's sentence were wrong.

Similarly, the Court of Appeal misconstrued Palmer's claim as being cognizable under the Eighth Amendment of the United States Constitution when it is not. Neither the court below nor Palmer cited any federal authority enabling an inmate to bring a federal disproportionality claim based on the actual number of years served in prison following a parole denial. Even if such a claim exists, the Court of Appeal wrongly found

Palmer's sentence cruel and unusual under federal law. The court's judgment should be reversed.

If, after affording proper deference to the Legislature, Palmer served a period of incarceration in excess of constitutional limits, he was not, on this record, entitled to the elimination of his parole period. This Court has held that, in the absence of statutory authority, a court violates separation of powers when it shortens an inmate's parole period by crediting an excess period of incarceration against the inmate's parole period—even when the excess confinement is caused by unconstitutional state action. This is so because such a remedy materially defeats the executive branch's authority to decide the length and conditions of an inmate's statutorily required parole period. The Legislature and this Court have acknowledged that the executive branch's obligation to supervise inmates released from prison is an important aspect of reintegrating them into society and protecting the public—two considerations that are particularly important for Palmer, who was in prison for most of his life.

Here, neither Palmer nor the Court of Appeal pointed to any statute authorizing credit against Palmer's parole term. And while separation of powers does not prohibit a court from determining that a legislatively mandated parole period itself constitutes cruel or unusual punishment, Palmer did not make this claim and the Court of Appeal did not find such a violation. Thus, based on the circumstances in this case, the court below erred by eliminating Palmer's parole period. Indeed, because Palmer did not raise this claim and had already been released from prison at the time the appellate court granted relief, his petition had become moot and it should have been dismissed accordingly. The Court of Appeal's judgment should be reversed.

STATEMENT OF FACTS AND THE CASE

I. PALMER'S CRIME, CONVICTION, AND SENTENCE

In 1988, when Palmer was 17 years old, he kidnapped Randy Compton, an off-duty police officer, for the purpose of robbery. (Opn. at pp. 1, 8-9; See generally May 11, 2018 Petn. (Habeas Petn.), Exh. A.) Donning a ski mask, Palmer entered a secured, underground parking garage and waited for someone to kidnap and rob. (Opn. at p. 8; Habeas Petn., Exh. A at pp. 7-8, 12, Exh. G at p. 38.)

Compton was walking toward the driver's side of his truck when Palmer approached him from behind. (Opn. at p. 8; Habeas Petn., Exh. A at p. 8.) Palmer brandished a gun that he had stolen during a previous robbery; Compton was unaware that it was unloaded. (Habeas Petn., Exh. A at p. 8, Exh. U at p. 123; Opn. at pp. 10, 21.) Palmer ordered Compton to "Put up your hands" and to get into the truck. (Habeas Petn., Exh. A at p. 8.) Palmer sat in the backseat and said, "Let's drive." (*Id.* at p. 9.) Compton complied and Palmer ordered him where to go—keeping the gun pointed at Compton the entire time. (Habeas Petn., Exh. A at p. 9.)

While driving, Palmer asked Compton family-related questions—such as whether he was married and had kids—that made Compton fear for his life. (Habeas Petn., Exh. A at p. 9, Exh. G at p. 38.) Palmer also asked Compton about money, including where he banked and whether he had an ATM card. (Habeas Petn., Exh. A at pp. 9, 12.) Compton said he did and told Palmer that he could withdraw $200. (Habeas Petn., Exh. A at pp. 9, 12.) The men then drove to the bank. (Habeas Petn., Exh. A at pp. 10, 12.) Once there, Palmer ordered Compton to roll down the passenger-side window, leave the engine running, and withdraw the money. (Habeas Petn., Exh. A at p. 10.) He also told Compton, in effect, to "come right back." (*Ibid.*)

As Compton was getting out of the truck, he reached over surreptitiously to the passenger-side floorboard to pick up a backpack that contained his service weapon, police badge, and identification card. (Habeas Petn., Exh. A at p. 10.) Palmer, with the gun still pointed at Compton, became nervous and asked, "what's that?" and to "give it here." (*Ibid.*) Compton told Palmer that his wallet, with the ATM card, was in the backpack. (*Ibid.*) Palmer continued to point the gun at Compton, telling him to "Stop" and to "Give it to me." (*Ibid.*)

Compton was able to get his service weapon and began shooting at Palmer. (Opn. at p. 9; Habeas Petn., Exh. A at p. 10.) When Compton ran out of ammunition, he ran into the dark to hide. (Habeas Petn., Exh. A at p. 10.) Palmer, hit by a bullet in the knee, got out of the truck and ran away. (Opn. at p. 9; Habeas Petn., Exh. A at p. 10, Exh. M at p. 63.) The police later apprehended him. (Opn. at p. 9; Habeas Petn., Exh. A at p. 11.)

Palmer pleaded guilty to a violation of Penal Code section 209, subdivision (b), kidnapping for the purpose of robbery, and admitted to the special allegation of the use of a firearm, pursuant to Penal Code section 12022.5, and 1192.7, subdivision (c), subsection (8). (Habeas Petn., Exh. D at p. 26.) He was sentenced to life with the possibility of parole for the kidnapping for the purpose of robbery conviction, and a consecutive two-year sentence for the firearm enhancement. (*Id.*, Exh. H at p. 47; see also *id.*, Exh. D at p. 28.)

II. PALMER'S 2015 PAROLE DENIAL AND COURT-ORDERED RELEASE

Because Palmer was sentenced to an indeterminate life term of imprisonment, he was entitled to a parole consideration hearing when he became eligible for parole in 1995. (Pen. Code, §§ 3041, 3046, subd. (a)(1); Sept. 25, 2018 Return (Return), Exh. 6 at pp. 86-87 [Palmer's parole hearing history from 1995 to 2015]; Habeas Petn., Exh. I at pp. 51-52.) In

California, parole determinations are made by the Board of Parole Hearings, an arm of the executive branch. Its 17 commissioners are appointed by the Governor with the consent of the Senate. (Pen. Code, § 5075, subd. (b)(1).) The Board also employs numerous deputy commissioners, who are appointed under the civil service system and assist with discharging the Board's statutory obligations. (*Id.* at §§ 5075.6, 5076.1, subd. (b); California Department of Corrections and Rehabilitation, Board of Parole Hearings, Deputy Commissioners <https://www.cdcr.ca.gov/bph/deputy-commissioners/> [as of Oct. 28, 2019].) The Board is required, by statute, to determine parole suitability of parole eligible offenders, conduct hearings for mentally disordered offenders and sexually violent predators, and investigate requests for pardons, reprieves, and commutations of sentences, among other duties. (Pen. Code, § 5057.1.)

The Board provided Palmer with his first parole consideration hearing in 1995 and regularly reviewed him for parole. (Pen. Code, §§ 3041, 3046; Return, Exh. 6 at pp. 86-87.) In June 2015, at Palmer's tenth parole consideration hearing, the Board again denied him parole, finding that he posed a current risk to public safety, in part, based on two recent disciplinary violations—one for misuse of handcrafter material and one for possession of a cell phone. (Habeas Petn., Exh. W at pp. 141-150; Return, Exhs. 2-4, Exh. 6 at pp. 86-87.)

Palmer successfully challenged the Board's decision in the Court of Appeal based on the claim that the Board violated the terms of a settlement agreement entered in *In re Butler*[1]—a case that was pending review in this

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[1] The settlement agreement required the Board to calculate base and adjusted base terms at a life-term inmate's initial parole suitability hearing. (*In re Butler* (2018) 4 Cal.5th 728, 732 (*Butler*).) At the time, base terms represented the earliest possible release date for inmates serving life sentences and were statutorily required. (*Ibid.*) Following the settlement (continued...)

Court at the time. (Habeas Petn., Exhs. Z, AA, BB, EE-HH.) The Board sought review and this Court granted the petition pending disposition of *Butler*. Palmer's case was ultimately remanded to the Court of Appeal for reconsideration in light of the *Butler* opinion. (*In re Palmer*, Case No. S244139.)

On remand, Palmer argued that he was entitled to relief because the Board failed to give "great weight" to the statutorily required youth offender factors.[2] The Court of Appeal granted his petition and ordered the Board to provide him with a new hearing. (See *In re Palmer*, Case No. S252145; Mar. 14, 2019 Letter Brief, Exh. 2.) Again, this Court granted the Board's petition for review, and that case is currently pending. (*In re William Palmer*, Case No. S252145.)

On December 6, 2018, the Board held the court-ordered hearing and granted Palmer parole. (Mar. 14, 2019 Letter Brief, Exh. 2.) He was released from prison on March 11, 2019, after serving approximately 29 years and six months on his life sentence. (*Id.* at Exh. 1; Habeas Petn., Exh. X at p. 152 [showing life-term start date of August 22, 1989]; see also Habeas Petn. Exh. I at pp. 51-52 [two-year consecutive term for firearm enhancement served before life term].) He was released to a five-year parole period under former Penal Code section 3000, subdivision (b) (1988). (See also Cal. Code Regs., tit. 15, § 2515, subd. (d).)

(...continued)
agreement, the Legislature dispensed with the statutory base-term requirement and this Court relieved the Board of its obligation to calculate them. (*Ibid.*)

[2] Penal Code section 3051 outlines the timing for youth offender hearings and Penal Code section 4801, subdivision (c) requires that the Board give great weight to certain youthful characteristics during those hearings.

Palmer has violated his parole conditions three times. (Request for Jud. Notice, Exhs. Aa-Dd.) In June 2019, Palmer verbally admitted to several parole violations, such as loitering where minors congregate, having contact with a minor and failing to tell his parole agent about it, and intentionally missing rehabilitation appointments. (*Id.*, Exh. Aa.) In July 2019, Palmer violated parole again for failing to complete a substance abuse program, illegally recording a conversation with his parole agent, loitering within 250 feet of a place where children gather, using a concealed device to record a person's body and undergarments in violation of Penal Code section 647, subdivision (j)(2), and making sexual comments on the video. (*Id.*, Exh. Bb; see also Mar. 21, 2019, Letter Brief, Exh. 1.) For these violations, he was verbally reprimanded and continued on parole. (Request for Jud. Notice, Exh. Aa at pp. 4, 6, Exh. Bb at pp. 3, 5.)

Finally, in September 2019, Palmer absconded from parole for two days. (Request for Jud. Notice, Exh. Cc.) For this violation, his parole agent filed a petition to revoke and Palmer was released to San Francisco County Superior Court's parole revocation court for more intense parole supervision. (*Id.* at Exhs. Dd-Ee; see also The Superior Court of California, County of San Francisco, <https://www.sfsuperiorcourt.org/divisions/collaborative> [as of Oct. 28, 2019].)

III. THE COURT OF APPEAL'S DISPROPORTIONALITY RULING

Before the Court of Appeal's "great weight" decision, Palmer filed another habeas petition, arguing that his incarceration was grossly disproportionate to his kidnap-for-robbery conviction, in violation of article I, section 17 of the California Constitution and the Eighth Amendment of the United States Constitution. (Habeas Petn.) He requested discharge from actual and constructive custody. (*Id.* at p. 51.)

The Court of Appeal granted Palmer's petition. (See generally Opn.) Although Palmer had already been released from prison, the court rejected the Board's argument that the petition was moot. (*Id.* at p. 3.) The court concluded that because Palmer was in constructive custody while on parole, the State continued to constrain his liberty and judicial relief remained available—discharge from parole. (*Ibid.*)

As to the merits, the court reasoned the "serial denials of parole Palmer experienced [by the Board] resulted in punishment so disproportionate to his individual culpability for the offense he committed, that it must be deemed constitutionally excessive." (Opn. at p. 1.) The court explained that Palmer was not challenging "the indeterminate life term to which he was sentenced but the actual term of years he was required to serve." (*Id.* at p. 5.) This latter claim, the court opined, was not based on the Legislature's sentence determination, but rather the result of the Board's decision to grant or deny parole. (*Id.* at pp. 5-6.) According to the court, "[i]n this sort of challenge, deference to the legislatively proscribed penalty is no longer a relevant factor, as the *actual* term of years served is a function of the Board's parole decisions, not the Legislature's determination of the appropriate penalty in this particular case." (Opn. at pp. 6-7, fn. omitted.)

The court then decided Palmer's continued incarceration had become constitutionally excessive based on the three factors this Court outlined in *In re Lynch* (1972) 8 Cal.3d 410, 425. As to the first factor, the nature of the offender and offense, the court concluded Palmer was less culpable because the kidnapping was a spur-of-the-moment decision, it was short in duration, he intentionally used an unloaded weapon, and that no one but Palmer was injured. (Opn. at pp. 8-17.) In addition, the court found that Palmer's age at the time of the crime—and his age during his

previous criminal activity—was highly relevant in reducing Palmer's culpability for the crime. (*Id.* at pp. 10-17.)

As to the second *Lynch* factor, an intrastate comparison of the punishment for more serious crimes, the court reasoned that Palmer's incarceration "greatly exceed[ed]" the maximum for other more serious offenses in California. (Opn. at p. 22.) The court distinguished *In re Maston* (1973) 33 Cal.App.3d 559, which held that life without the possibility of parole for kidnapping for robbery or ransom with bodily injury was constitutional. (Opn. at pp. 20-22.) The court disagreed with *Maston's* intrastate comparison of punishments because *Maston* looked to the defendant's maximum sentence, not the actual number of years served, as Palmer claimed. (*Ibid.*) Moreover, the court opined that the *Maston* comparison was inapposite given the mitigating factors in Palmer's case—such as the unloaded gun, the spontaneity of the kidnapping, and Palmer's youth—not present in *Matson*. (*Id.* at pp. 21-22.)

Regarding *Lynch*'s third factor, the court found this factor, an interstate comparison of punishment for kidnap for robbery in other jurisdictions, was the least useful because "it is so difficult to determine what sentence a like crime—considering all circumstances related to the offense and offender—would receive in other jurisdictions." (Opn.at p. 23.) The court also acknowledged that even if California's punishment is harsh, that does not mean it is constitutionally excessive. (*Ibid.*) Even so, the court thought that other states contemplate terms shorter than Palmer's for his kidnap-for-robbery conviction, even without considering Palmer's youth at the time of the crime. (*Id.* at pp. 24-25.)

For the same reasons, the court also decided that Palmer's incarceration "would yield the same conclusions under the federal Constitution." (Opn. at p. 26.)

Finally, the court concluded that because Palmer "was serving a sentence that had become constitutionally excessive," and thus, was unlawful (opn. at p. 29), he was "entitled to be freed from all custody, actual or constructive," including parole supervision (*ibid.*, citing *In re Wells* (1975) 46 Cal.App.3d 592, 604).

On July 31, 2019, this Court granted review on its own motion.

ARGUMENT

I. PALMER'S SENTENCE WAS NOT CRUEL OR UNUSUAL UNDER STATE OR FEDERAL LAW

Palmer's sentence, and his resulting incarceration, did not violate the constitutional prohibition against cruel or unusual punishment under the state and federal Constitutions. His sentence of life with the possibility of parole for kidnapping for the purpose of robbery was constitutional when imposed and remained so throughout his incarceration. In holding otherwise, the Court of Appeal failed to defer to the Legislature's judgment, and it misapplied the *Lynch* factors.

A. The Court of Appeal Applied the Wrong Legal Standard to Palmer's Claim

Although the Court of Appeal correctly noted that Palmer challenged the length of time he had spent in prison for his crime as unconstitutional, it erred in concluding it did not owe deference to the Legislature's unique authority to prescribe punishment. (Opn. at pp. 5-6.) The court acknowledged that when a defendant challenges the imposition of a sentence as constitutionally excessive, "'[t]he judicial inquiry commences with great deference to the Legislature.'" (Opn. at p. 5, citing *Harmelin v. Michigan* (1991) 501 U.S. 957, 998 (conc. opn. of Kennedy, J.) and *People v. Dillon* (1983) 34 Cal.3d. 441, 477.) But the court noted that "Palmer presents a different question, as he challenges not the indeterminate life term to which he was sentenced but the actual term of years he was

required to serve." (Opn. at p. 5.) After surveying the Board's statutory duties for determining parole suitability of life inmates, the court opined that in "this sort of challenge, deference to the legislatively prescribed penalty is no longer a relevant factor, as the *actual* term of years served is a function of the Board's parole decisions, not the Legislature's determination of the appropriate penalty in this particular case." (*Id.* at pp. 6-7.) The court seemingly concluded that legislative deference was not owed because the Legislature left it to the Board, through its parole suitability function, to determine the term of years Palmer was to serve. By failing to provide the appropriate deference owed, the appellate court applied the wrong legal standard to Palmer's claim. (*Lynch*, *supra*, 8 Cal.3d at pp. 414, 423-424.)

The appellate court's conclusion that Palmer raised a distinct cruel or usual punishment claim appears based on its reading of *In re Dannenberg* (2005) 34 Cal.4th 1061. (Opn. at p. 6.) *Dannenberg* considered whether the Board must consider sentence uniformity principles before it may deny parole for public safety reasons. (*Dannenberg*, *supra*, 34 Cal.4th at p. 1070.) In holding that the Board is not required to consider sentence uniformity, this Court reaffirmed the constitutional principle under state law that no inmate may be held in prison for a period grossly disproportionate to his or her individual culpability for the crime, even where the Board reasonably determines, based on public safety, that the inmate is unsuitable for parole. (*Id.* at p. 1071.) This Court also held that, while the Board was previously obligated to set maximum prison terms based on each offender's individual culpability under the Indeterminate Sentencing Law, the Board was no longer required to do so with the enactment of the Determinate Sentencing Law. (*Id.* at pp. 1096-1097.) Given this change in the law, this Court reasoned that "[l]ife inmates who believe that such Board decisions have kept them confined beyond the time

the Constitution allows for their particular criminal conduct may take their claims to court." (*Id.* at p. 1098.)

But nothing in *Dannenberg* suggests the constitutional inquiry under the cruel or unusual punishment clause of the State constitution is different for claims brought years into a sentence following a parole denial than for claims brought when the sentence is first imposed. This does not mean, of course, that a life-term inmate is prohibited from challenging his life-maximum sentence as constitutionally excessive years into his sentence under state law. (*Dannenberg*, *supra*, 34 Cal.4th at p. 1098; see also *Butler*, *supra*, 4 Cal.5th at pp. 744-746.) It only means that when a claim is made decades into a sentence, the reviewing court must determine if the sentence "shocks the conscience" or "offends fundamental notions of human dignity," (*Lynch*, *supra*, 8 Cal.3d at p. 424), while giving appropriate deference to the punishment prescribed by the Legislature and using the inmate's maximum sentence as a measure of proportionality (*id.* at pp. 419, 423-424).

This Court has held that legislative deference in the disproportionality context is vital to respecting the separation of powers between the three co-equal branches of government. "[I]n our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments, and that such questions are left in the first instance to the judgment of the Legislature alone." (*Lynch*, *supra*, 8 Cal.3d at p. 414; see also *People v. Crooks* (1997) 55 Cal.App.4th 797, 806; *People v. Thompson* (1994) 24 Cal.App.4th 299, 305.) Choosing the proper penalty "is not an exact science," but a legislative skill involving "the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will[.]" (*Lynch*, *supra*, 8 Cal.3d at p. 423; *People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) "The doctrine of separation of powers is firmly entrenched in the law of California and a

court should not lightly encroach on matters which are uniquely in the domain of the Legislature." (*People v. Wingo* (1975) 14 Cal.3d 169, 174; see also *People v. Baker* (2018) 20 Cal.App.5th 711, 724, 729.)

This Court has also recognized that deference to the Legislature's prescribed punishment is required when analyzing an inmate's cruel or unusual punishment claim, irrespective of when the claim is brought. (See, e.g., *Lynch*, 8 Cal.3d at pp. 414-416, 425-439 [analyzing petitioner's disproportionality claim based on maximum term of confinement and giving appropriate deference to the Legislature's prescribed penalty]; *In re Rodriguez* (1975) 14 Cal.3d 639, 644-649, 653-656 [discussing validity of criminal statute and holding petitioner's 22 years of incarceration was constitutionally disproportionate to his crime].) When a life-term inmate challenges his sentence as unconstitutional, courts consider whether "the maximum term of imprisonment permitted by the statute punishing [the individual's] offense exceeds the constitutional limit" even if "a lesser term may be fixed in his particular case by the [parole authority]." (*Lynch*, *supra*, 8 Cal.3d at p. 419; *Wells*, *supra*, 46 Cal.App.3d at p. 596; *People v. Cadena* (2019) 39 Cal.App.5th 176, 183-184, 187.)

Here, the Legislature's determination that kidnapping for robbery warrants a life sentence is entitled to deference. (Pen. Code, § 209, subd. (b)(1); see also former Pen. Code, § 209, subd. (b) (1988).) "[E]ven *simple* kidnapping—quite apart from the aggravated nature of [an offender's] crime—presents a grave risk of danger." (*In re Nunez* (2009) 173 Cal.App.4th 709, 725; *Maston*, *supra*, 33 Cal.App.3d at p. 563 ["kidnaping is one of the most serious of all crimes"].) "By its very nature [kidnapping] involves violence or forcible restraint," and "substantively increase[s] the risk of bodily harm." (*Maston*, *supra*, 33 Cal.App.3d at p. 563.) The appellate court's failure to give appropriate deference to the legislatively prescribed life-maximum punishment for Palmer's kidnapping for robbery

conviction—and its failure to find Palmer's sentence was constitutionally proportionate—warrants reversal of the judgment.

The appellate court's rationale for parting ways with established precedent requiring legislative deference is unpersuasive. The court below suggests that no deference is owed to the Legislature because the inmate's continued confinement is attributable to the Board: "the *actual* term of years served is a function of the Board's parole decisions, not the Legislature's determination of the appropriate penalty in this particular case." (Opn. at pp. 6-7.) But Palmer's continued confinement following the Board's parole denial is a function of his life sentence imposed for his conviction of kidnapping for robbery. The Board's parole decisions did not alter the legal basis for Palmer's incarceration; he remained incarcerated because of his life sentence. (Habeas Petn., Exh. I a pp. 51-52.) The Board's parole decisions reflected the carrying out of that sentence in accordance with the Board's statutorily defined duties. (Pen. Code, § 3040 et seq.) There is no sound basis, therefore, to conclude that when an inmate challenges his life sentence as disproportionate to his individual culpability following the Board's denial of parole, deference is no longer owed to the Legislature. Indeed, the Legislature "is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches." (Opn. at p. 5, citing *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 998 (conc. opn. of Kennedy, J.) and *Dillon*, *supra*, 34 Cal.3d. at p. 477.) If Palmer's confinement was unconstitutional, it was because his life sentence was unconstitutional when it was imposed.

Finally, the Court of Appeal's contrary conclusion that no legislative deference is owed conflicts with its acknowledgment that the "proportionality of a sentence turns entirely on the culpability of the offender as measured by 'circumstances existing *at the time of the offense*.'" (Opn. at p. 6, citing *Rodriguez*, *supra*, 14 Cal.3d at p. 652.)

Because the historical fact of the number of years Palmer spent in prison on the life sentence in no way informed whether the sentence imposed was constitutionally excessive, the appellate court erred by failing to give deference to the legislative determination of the appropriate punishment for this offense.

B. Palmer's Sentence Was Constitutional Under *Lynch*

The California constitution prohibits the infliction of cruel or unusual punishment. (Cal. Const., art. I, § 17.) Punishment violates the state prohibition if "'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*Lynch*, *supra*, 8 Cal.3d at p. 424.) "Findings of disproportionality have occurred with exquisite rarity." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.)

In the cruel-or-unusual punishment analysis, the reviewing court considers three factors: "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*Lynch, supra,* 8 Cal.3d at p. 425); a comparison of the challenged penalty with the punishments prescribed for more serious offenses in California (*id.* at p. 426), and a comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions (*id.* at p. 427). "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*Martinez*, *supra*, 76 Cal.App.4th at p. 496, citing *People v. Mora* (1995) 39 Cal.App.4th 607, 615-616.)

The *Lynch* factors are not "absolute rules," "but are merely guidelines to be used in testing the validity of a particular penalty." (*In re Debeque* (1989) 212 Cal.App.3d 241, 249, citing *In re Jones* (1973) 35 Cal.App.3d 531, 541; *People v. Almodovar* (1987) 190 Cal.App.3d 732, 735; *Dillon*, *supra*, 34 Cal.3d at p. 487, fn. 38 [*Lynch* factors are only

examples of how to approach the proportionality problem].) The importance of each factor depends on the specific facts; the application of the first factor alone may suffice in determining whether a punishment is cruel or unusual. (See *People v. Webb* (1993) 6 Cal.4th 494, 536 [recognizing comparative review is not required by the cruel and unusual punishment clause in the state or federal Constitutions]; *Weddle*, *supra*, 1 Cal.App.4th at pp. 1197-1200 [relying on first *Lynch* factor alone to find no constitutional disproportionality].) Given the rarity of disproportionality findings, the petitioner "must overcome a 'considerable burden' in convincing [the court] his sentence was disproportionate to his level of culpability." (*Weddle*, *supra*, 1 Cal.App.4th at p. 1197, quoting *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 529.)

1. Palmer's Individual Culpability Shows His Sentence Was Not Cruel or Unusual

Applying the *Lynch* factors, Palmer's life sentence for kidnapping for robbery is not cruel or unusual. As to the first *Lynch* factor "[i]n examining 'the nature of the offense and the offender,' [the court] must consider not only the offense as defined by the Legislature but also 'the facts of the crime in question' (including its motive, its manner of commission, the extent of the defendant's involvement, and the consequences of his acts). (*Crooks*, *supra*, 55 Cal.App.4th at p. 806, quoting *Thompson*, *supra*, 24 Cal.App.4th at p. 305.) This includes "the defendant's individual culpability in light of his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

Palmer, a 17 year old, wanted money and to live a more affluent lifestyle. (Opn. at pp 1, 13-14; Habeas Petn., Exh. A at pp. 12-13, Exh. E at pp. 33; Exh. F at pp. 35, 37, Exh. G at p. 42.) To accomplish this, Palmer waited in a secured parking structure wearing a ski mask until approaching Compton, an off-duty police officer, with a gun pointed at him. (Opn. at p.

8; Habeas Petn., Exh. A at pp. 8, 12-13, Exh. G at p. 38; see also *id.*, Exh. G at p. 42 [rather than selling drugs, Palmer "decided it would be easier to just take the money from someone else"].) Compton did not know the gun was unloaded, and Palmer ordered Compton to get into his car and to start driving. (Habeas Petn., Exh. A at pp. 8-9.) Throughout the crime, Palmer kept the gun pointed at Compton, asking him personal questions about his family and whether he had money or an ATM card, which made Compton fear for his life. (*Id.*, Exh. A at pp. 9, 12, Exh. G at p. 38.) Discovering Compton had an ATM card, Palmer made him drive to a bank. (*Id.*, Exh. A at pp. 9, 12.) When they parked, Compton was fortuitously able to get his service weapon from a backpack and free himself by firing at Palmer, hitting him in the knee. (Habeas Petn., Exh. A at p. 10; Opn. at p. 9.) Compton later explained to police that he shot at Palmer so he could get away from him, and because he believed "that [Palmer] was going to take him into the hills and kill him and take his truck." (Habeas Petn., Exh. A at pp. 9-10; see also *id.* at pp. 8-10, Exh. G at p. 38.)

The crime was not Palmer's first offense. At a young age, Palmer began stealing from stores. (Habeas Petn., Exh. U at p. 128; Return, Exh. 1 at p. 36.) In 1985, Palmer admitted to driving without a license, was declared a ward of the court, and sentenced to two to four weekends in juvenile hall. (Habeas Petn., Exh. G at pp. 38, 41.) He later admitted committing a felony sex crime against a child. (*Ibid.*) For this offense, Palmer was again declared a ward of the court, and ordered to serve 30 to 60 days in juvenile hall. (*Ibid.*)[3] He also later violated the terms of his

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[3] Although Palmer admitted to a felony sex crime under Penal Code section 288, the specific section or subdivision is unclear. (Opn. at p. 13 [citing Penal Code section 288a]; Petn., Exh. G at pp. 38, 41 [identifying a violation of Penal Code section 288, subdivision (a)].) And, although

(continued...)

probation by refusing to attend school and not following his probation officer's directions, and was continued a ward of the court. (*Id.* at pp. 38, 41.)[4] Before the commitment offense, Palmer burglarized numerous homes without getting caught. (Habeas Petn., Exh. A at p. 13; Exh. E at p. 32; Return, Exh. 1 at p. 37.) It was during one of these burglaries that Palmer stole the gun used in the kidnapping. (Habeas Petn., Exh. U at p. 123; see also Exh. Q at p. 80.) Based on Palmer's escalating criminal behavior—resulting in the kidnapping for robbery—and his personal culpability for the offense, the life sentence is not the rare case of cruel or unusual punishment.

Dillon and *People v. Garcia* (2017) 7 Cal.App.5th 941, which involved 17- and 15-year-old offenders respectively, and *People v. Felix* (2003) 108 Cal.App.4th 994, which involved a 20-year old offender, illustrate this point. In *Dillon*, the petitioner and some friends decided to steal some marijuana from a nearby farm and armed themselves with guns. (*Dillon*, *supra*, 34 Cal.3d at pp. 451-452.) During the attempted robbery, one of the boys accidently fired his gun twice, causing Dillon to fear for his safety and shoot the victim as he approached, who died. (*Id.* at p. 452.)

The Court explained that Dillon's involvement in the commitment offense escalated from "youthful bravado [for stealing some marijuana] to uneasiness, to fear for his life, to panic." (*Dillon*, *supra*, 34 Cal.3d at p. 482.) The Court concluded that "[t]he shooting in this case was a response to a suddenly developing situation that [Dillon] perceived as putting his life in immediate danger." (*Id.* at p. 488.) And while the situation was of his

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(...continued)
Palmer claims he is innocent of this crime, the fact of his conviction remains. (Habeas Petn., Exh. G at p. 41; see Opn. at p. 13.)

[4] Palmer admitted to using marijuana on a daily basis, including the day of the life offense. (Petn., Exh. G at pp. 41, 43.) He also claimed that he had used cocaine, crystal methamphetamine, LSD, and alcohol. (*Ibid.*)

own making, testimony during Dillon's trial showed that he was exceptionally immature such that the judge and jury were reluctant to sentence him to life in prison. (*Id.* at pp. 483-488.) Moreover, Dillon "had no prior trouble with the law" and "was not the prototype of a hardened criminal who poses a grave threat to society." (*Id.* at p. 488.) Based on these specific facts, the Court concluded that Dillon's life sentence for first degree felony murder was constitutionally excessive. (*Id.* at p. 489.)

In *Garcia*, the court held the 15-year-old defendant's 32-year-to-life sentence for attempted murder with a firearm enhancement was not cruel or unusual. (*Garcia*, *supra*, 7 Cal.App.5th at pp. 945, 954.) The court explained that despite the defendant's youth and lack of criminal history, he "showed serious signs of rebelliousness and unwillingness to abide by the law, or by the rules at home[]" (*id.* at p. 953), that it was only by chance that he did not kill the victim, and that he was the direct perpetrator of the crime (*id.* at p. 954). The court concluded that under these circumstances, "[w]e cannot say the California Constitution compels the reduction of this sentence." (*Ibid.*)

Finally, in *Felix*, the court reversed the trial court's judgment, which found the defendant's mandatory gun use enhancement was cruel or unusual. (*Felix*, *supra*, 108 Cal.App.4th at pp. 997, 1002.) The 10-year enhancement to the defendant's carjacking conviction was constitutional because he intentionally armed himself with the gun and decided to use it to threaten the victim during the crime purely for personal financial gain. (*Id.* at p. 1000; *ibid.* [the defendant pressed gun hard into the victim's ribs].) The court also found it was relevant that the defendant was the "leader" and not "passive" in carrying out the crime and attempting to cover it up. (*Id.* at p. 1001.) Indeed, while the court noted that the "crime was not as violent as some armed carjackings" (*id.* at p. 1001), the enhancement did not

require extreme violence, and the trial court erred in reducing the mandatory term as cruel or unusual (*id.* at p. 1002).

Palmer's case is different from *Dillon* and more like *Garcia* and *Felix*. Palmer had a criminal history and his crime for kidnap for robbery was not based on circumstances that occurred during its commission that caused things to spiral out of control. Before his commitment offense, Palmer admitted to several crimes, including a burglary where he stole the gun used during the kidnapping. (Habeas Petn., Exh. G at pp. 38, 41, Exh. E at p. 32, Exh. U at p. 123; Return, Exh. 1, at p. 37; see *Garcia*, *supra*, 7 Cal.App.5th at p. 953 [finding "serious signs of rebelliousness and failure to abide by the law" to support proportionality]; *People v. Perez* (2013) 214 Cal.App.4th 49, 60 [finding 16-year old's 30-year-to-life sentence for forcible lewd acts was not constitutionally excessive partially based on defendant's criminal history].) Palmer's crime also was not, as in *Dillon*, a reaction to escalating circumstances during the commission of the crime. Rather, like *Garcia* and *Felix*, Palmer was in control of his kidnap for robbery—using a gun and questioning Compton about his family to frighten and intimidate him into forced compliance—until the moment Compton was fortuitously able to escape. (Habeas Petn., Exh. A at pp. 8-10, 12-13; Exh. G at pp. 38, 44; see *Garcia*, *supra*, 7 Cal.App.5th at p. 954 [the defendant was direct perpetrator]; *Felix*, *supra*, 108 Cal.App.4th at p. 1001 [the defendant was the leader and was not a passive criminal participant]; *Id.* at pp. 1000-1001 [gun use to force victim compliance]; see also *Baker*, *supra*, 20 Cal.App.5th at p. 725 [defendant was in complete control and actions were unprovoked].)

Moreover, while age is an important factor in the cruel-or-unusual punishment analysis (*Nunez*, *supra*, 173 Cal.App.4th at p. 726; *Dillon*, *supra*, 34 Cal.3d at p. 482-483; *People v. Em* (2009) 171 Cal.App.4th 964, 976; Opn. at pp. 10, 12, 14 [citing United States Supreme Court authority

regarding the significance of youth in sentencing juvenile offenders]), Palmer's age in the case does not render his sentence unconstitutional—as can be seen by the contrast between his case and the facts in *Dillon*. In *Dillon*, the defendant was unusually immature, functioning "like a much younger child" (*Dillon*, *supra*, 34 Cal.3d at p. 483), and both the judge and jury struggled with finding Dillon guilty of a crime that would subject him to a life sentence and send him to state prison (*id.* at pp. 483-487). But there is no similar evidence here. (Cf. *Em*, *supra*, 171 Cal.App.4th at p. 976 [finding limited evidence in record of youth offender's immaturity]; *Nunez*, *supra*, 173 Cal.App.4th at p. 733 [unrebutted evidence that the defendant's compromised mental functioning and behavior was based on posttraumatic stress disorder from his brother's death]; *Garcia*, *supra*, 7 Cal.App.5th at p. 954 [upholding life sentence despite the defendant's youth].) And although the record shows that Palmer displayed youthful characteristics at the time of his crime (habeas petn., exhs. E at pp. 32-33, exh. F at pp. 35, 37; exh. G at pp. 42-44), he also had a level of sophistication not present in *Dillon*: he perpetrated the crime alone, he intended to kidnap Compton for the purpose of robbery (*id.*, exh. A at pp. 9-13), and he maintained a high degree of control during the kidnapping and robbery by using a gun and asking the victim questions about his family in an apparent attempt to evoke fear to ensure the victim remained docile and compliant (*id.*, exh. A at p. 9-11). (See also *Felix*, *supra*, 108 Cal.App.4th at pp. 1000-1001.)

The court below should have construed these facts in the light most favorable to the trial court's judgment and sentence. (*Lynch*, *supra*, 8 Cal.3d at p. 414; *Martinez*, *supra*, 76 Cal.App.4th at p. 496.) Instead, it construed them in the light most favorable to Palmer. The court found the kidnapping was a "spur of the moment" decision, that it was short in duration, and that Palmer used an unloaded gun to reduce the risk of injury.

(Opn. at pp. 9-10, 12-13.)[5] But these factors made the crime no less serious and terrifying to the victim—as contemplated by the Legislature when it decided that this crime warrants a maximum life sentence. (*Maston*, *supra*, 33 Cal.App.3d at p. 563; *Nunez*, *supra*, 173 Cal.App.4th at pp. 725-726; Pen. Code, § 209.)

This conclusion is not changed by the court's comparisons to *Rodriguez* and *People v. Mendez* (2010) 188 Cal.App.4th 47, 50, 65 (*Mendez*). *Mendez* held that a 16-year-old defendant's 84-year-to-life sentence for carjacking, assault with a firearm, and robbery was constitutionally excessive, noting that he did not commit murder or rape, and that while the defendant used a loaded gun, he did not inflict physical injury or fire the weapon. (*Mendez*, at pp. 50, 65-66.) *Rodriguez* held that the petitioner's 22 years of incarceration was unconstitutional for lewd and lascivious acts against a minor. (*Rodriguez, supra*, 14 Cal.3d at p. 656.) This Court concluded that while the crime was "by no means 'trivial," its commission was not violent, caused no physical harm to the victim, lasted

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[5] The court's statement that the kidnapping was "spur of the moment" is based on disputed facts in the record. (Opn. at p. 9; *Martinez*, *supra*, 76 Cal.App.4th at p. 496.) Shortly after the crime, both Compton and Palmer told police that Palmer forced Compton into the truck and to start driving before Palmer asked Compton if he had any money, whether he had an ATM card, and how much money he could withdraw, and that Palmer then ordered Compton to drive to the bank. (Habeas Petn., Exh. A at pp. 9-10, 12.) Although there are subsequent documents suggesting Palmer decided to kidnap Compton after he found out Compton had an ATM card (see, e.g., *id.*, exh. G at p. 38), this contradicts what Palmer and Compton told police shortly after the crime. (Habeas Petn. at Exh. A at pp. 9-10, 12-13; *Martinez*, *supra*, 76 Cal.App.4th at p. 496). Compton and Palmer's statements to police suggest that the kidnapping was not a spur-of–the-moment-decision, but that Palmer planned to kidnap Compton for the purpose of robbery. (Petn., Exh. A at pp. 9-10, 12.)

only a few minutes, and that the petitioner's culpability was reduced by his age (26) and his "intellectual and sexual inadequacy." (*Id.* at pp. 654-655.)

Unlike *Mendez*, Palmer did not receive a de facto sentence of life without the possibility of parole; Palmer's sentence rendered him eligible for parole after seven years. (See *Mendez*, *supra*, 188 Cal.App.4th at p. 66; *Graham v. Florida* (2010) 560 U.S. 48, 75 ["Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender"]; Habeas Petn., Exh. I at pp. 151-152; Mar. 14, 2019 Letter Brief, Exh. 2; Pen. Code, § 3046.) Moreover, Palmer's use of the gun was instrumental to kidnapping Compton. (Habeas Petn. Exh. A at pp. 8-13, Exh. G at p. 38.) Although the gun was unloaded, Compton did not know that. Even unloaded, the gun greatly increased the risk of violence—indeed, it caused Compton to draw his own gun and shoot. (*Id.* at Exh. A at p. 10-11, Exh. G at p. 38.) And, unlike *Rodriguez*, while it was happenstance that no one else was physically injured, Palmer's deliberate actions caused Compton severe psychological trauma. (*Id.* at Exh. A at pp. 8-11, Exh. G at p. 38; *Crooks*, *supra*, 55 Cal.App.4th at p. 806.) Finally, the duration of the kidnapping should not weigh in Palmer's favor. The kidnapping ended when it did because of Compton's actions, not Palmer's. (Habeas Petn., Exh. A at p. 10.)

For the reasons above, this factor alone is sufficient to conclude that Palmer's sentence was not cruel and unusual. (See *People v. Webb*, *supra*, 6 Cal.4th at p. 536.) The court below erred in concluding otherwise.

2. Palmer's Sentence Was Not Cruel or Unusual Based on an Intrastate Comparison with More Serious Crimes

Palmer's incarceration is not cruel or unusual compared with other, more serious crimes in California. (See *Lynch*, *supra*, 8 Cal.3d at pp. 414, 426.) Under this factor, Palmer's crime should be compared to other, more

serious offenses carrying a life-maximum sentence or greater because "[p]roportionality assumes a basis for comparison." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826.) Crimes warranting a determinate sentence and crimes warranting life with the possibility of parole, or worse, are not comparable. (See *ibid.*; see *People v. Jefferson* (1999) 21 Cal.4th 86, 92 [most felonies carry a determinate term, but "some serious felonies" are punished with an indeterminate term]; cf. Opn. at pp. 18, 22-23 [comparing Palmer's crime to non-kidnapping/robbery crimes with determinate sentences].) Moreover, crimes committed for the purpose of committing another crime, like kidnap for robbery, do not compare to single-act crimes. (See *Crooks*, *supra*, 55 Cal.App.4th at p. 807 [finding commission of two offenses (burglary and rape), where one was for the purpose of committing the other, not comparable to single offenses]; *Cooper*, *supra*, 43 Cal.App.4th at p. 826; Opn. at pp. 22-23.) And although a court could construe some determinate-sentence crimes as "more serious" than kidnapping for robbery (opn. at pp. 22-23), the Legislature is responsible for defining crimes, assessing seriousness, and assigning punishment (*Lynch*, *supra*, 8 Cal.3d at p. 414; *Baker*, *supra*, 20 Cal.App.5th at pp. 724, 729). "Punishment is not cruel or unusual merely because the Legislature may have chosen to permit a lesser punishment for another crime. Leniency as to one charge does not transform a reasonable punishment into one that is cruel or unusual." (*People v. Bestelmeyer*, *supra*, 166 Cal.App.3d at pp. 530-531.)

Here, Palmer's punishment is less serious than the penalties for first and second degree murder, which are 25 and 15 years to life, respectively. (Pen. Code, § 190, subd. (a).) While all three crimes result in a life sentence, Palmer had the opportunity to be found suitable for parole after seven years—eight to 17 years earlier than if he had committed these other life crimes. (Compare Pen. Code, § 3046, subd. (a)(1) with Pen. Code, §

190, subd. (a); Return, Exh. 6 at p. 87.) His sentence is also less severe than the punishment for more serious kidnapping offenses, such as kidnap for the purpose of ransom where the victim suffers bodily harm, is exposed to a substantial likelihood of death, or death. (Pen. Code, § 209, subd. (a); *Maston*, *supra*, 33 Cal.App.3d at p. 563 ["[k]idnapings for ransom are coldly planned, deliberate schemes," and kidnapping for robbery involve "far less deliberation"].) Those offenses result in a sentence of life without the possibility of parole (Pen. Code, § 209, subd. (a)), demonstrating that the Legislature has chosen to punish kidnappers commensurate with the seriousness of the crime's circumstances (see *Baker*, *supra*, 20 Cal.App.5th at p. 729 [finding increasing punishment for more serious sex crimes against children suggested "a certain logic" to the mandatory 15-year-to-life sentence]).

While Palmer could not have been sentenced to life without the possibility of parole for a nonhomicide offense today (see *People v. Caballero* (2012) 55 Cal.4th 262, 266-269), *Maston*'s reasoning is still relevant to whether Palmer's sentence is constitutionally proportionate. In *Maston*, the court considered whether the mandatory sentence of life without the possibility of parole was grossly disproportionate to the crime of kidnap for robbery with injury. (33 Cal.App.3d at p. 561.) The court held that, despite some sentencing anomalies (*id.* at pp. 564-565), a sentence of life without the possibility parole for this crime "is not disproportionate by the standard of internal California comparison." (*Id.* at p. 565.) The court explained that "kidnaping is one of the most serious of all crimes," which, "by its very nature [] involves violence or forcible restraint," and that increasing the penalty for kidnapping causing injury served the purpose of deterring the kidnapper from harming his victim and instead would, "induce him to release the victim unharmed." (*Id.* at p. 563; see also *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1235 & fn. 7

[recognizing that long-standing, ancient terror of kidnapping presents substantial risk to human life].) These concerns are still present as evidenced by the Legislature's hierarchy of punishment for kidnapping offenses based on their seriousness. (See, *supra*, at pp 27-29.)

The Court of Appeal's rejection of *Maston* and finding that an intrastate comparison reveals Palmer's sentence is constitutionally disproportionate is flawed. As to *Maston*, the court found the case inapposite because it analyzed kidnapping for robbery in the abstract and concluded its reasoning did not "hold up" when applied to the particular circumstances of Palmer's crime. (Opn. at p. 21.) But a fact-specific analysis is not part of intrastate comparisons; that occurs under the first *Lynch* factor, which looks at the nature of the offense and the offender. (*Lynch*, *supra*, 8 Cal.3d at pp. 425-426, 430-431; see, e.g., *People v. Haller* (2009) 174 Cal.App.4th 1080, 1092-1093 [objective comparison of third-strike offender's punishment to second strikers and habitual offenders].)

And even if the second *Lynch* factor is intended to be specific as to the particular petitioner's case, then the specific facts of the comparative case must also be taken into account. The court would have to compare the punishment for the specific circumstances of Palmer's crime with the punishment for the specific circumstances of another inmate's more serious crime. The Court of Appeal did not do that here. Rather, the court compared the specifics of Palmer's crime with the punishment imposed for a variety of crimes without regard to their fact-specific context. (Opn. at pp. 22-23.) These two things are not similar. (See *Cooper*, *supra*, 43 Cal.App.4th at p. 826.) And, as shown above, Palmer's sentence is

constitutional compared to the punishment for other, more serious offenses.[6]

3. Palmer's Sentence Was Not Cruel or Unusual in Comparison with Punishment Prescribed for the Same Offense in Other Jurisdictions

Palmer's sentence is within the range of prescribed punishments in other states. Over half of the states contemplate a maximum penalty of greater than 30 years for kidnaping for robbery where a firearm is used. (Habeas Petn., Exh. KK at pp. 272-274.) By comparison, Palmer's claim that he has served greater than the maximum sentence for his offense in 21 states reflects that California is not out of step with the majority of the country. (*Id.* at p. 48, Exh. KK; see, e.g., *Maston*, *supra*, 33 Cal.App.3d at p. 566 ["sentence is not so out of line with the scale of punishments throughout the nation that a court may call it either cruel or unusual"].)

Although some states have discretion not to sentence an inmate to the maximum, such as life or a lengthy number of years, based on a variety of factors (Habeas Petn., Exh. KK at pp. 272-274; opn. at p. 24), this does not mean Palmer's imprisonment was constitutionally excessive. Because the first and second *Lynch* factors demonstrate Palmer's sentence and continued confinement is constitutional, even if California were to impose the longest sentence in the nation for an offense, it would not mean the punishment is cruel or unusual. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516-1517.) As this Court has stated, California need not be "concerned . . . with conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide . . . . [O]ur codes have served as a model for the nation rather than a mere mirror of the laws

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[6] Even if the comparison is fact specific, for the reasons stated above, Palmer's incarceration is not constitutionally excessive under *Lynch's* second factor. (See, *supra*, at pp. 20-27.)

of other jurisdictions . . . ." (*Wingo, supra*, 14 Cal.3d at p. 179.) Rejecting a sentence simply for being the harshest would mean "California could never take the toughest stance against . . . any . . . type of criminal conduct.'" (*People v. Martinez, supra*, 71 Cal.App.4th at p. 1516.) And because Palmer's sentence is not constitutionally disproportionate under the California Constitution, this Court should reverse the Court of Appeal's judgment.[7]

C. Palmer Did Not Allege a Cognizable Federal Proportionality Claim and Even if He Did, His Sentence Is Not Grossly Disproportionate Under Federal Law

The federal Constitution separately prohibits cruel and unusual punishment. (U.S. Const., 8th Amend.) But neither the Court of Appeal nor Palmer cited any federal authority enabling an inmate to bring a federal proportionality claim based on the actual term of years served on the sentence, rather than when the sentence was initially imposed. And petitioner is unaware of any binding federal authority supporting this claim. As such, Palmer's Eighth Amendment claim should be rejected.

Even if this claim is cognizable, a punishment violates the federal cruel-and-unusual prohibition only if it is grossly disproportionate to the offense. (*Ewing v. California* (2003) 538 U.S. 11, 20.) "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." (*Rummel v. Estelle* (1980) 445 U.S. 263, 272 [100 S.Ct. 1133, 1138, 63 L.Ed.2d 382].)

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[7] The inherent difficulty, identified by the court below, in conducting an interstate comparison on a fact-specific case-by-case basis is accurate, but entirely beside the point. (Opn. at pp. 23, 25.) The interstate comparison is objective, not fact specific. (*Lynch, supra*, 8 Cal.3d at pp. 427-428, 436-437.)

For the same reasons as above, Palmer's sentence is not grossly disproportionate under federal law. Indeed, the United States Supreme Court has rejected Eighth Amendment challenges to far more severe sentences in cases involving far less egregious conduct than Palmer's behavior here. (See *Harmelin, supra,* 501 U.S. at pp. 961, 994-995 [mandatory sentence of life without the possibility parole for possessing 672 grams of cocaine not cruel or unusual]; *Hutto v. Davis* (1982) 454 U.S. 370, 371-372 [102 S.Ct. 703, 704-705, 70 L.Ed.2d 556] (*per curiam*) [$10,000 fine and 40 years imprisonment for two counts of marijuana possession for sale and sale of nine ounces of marijuana not cruel or unusual]; *Rummel v. Estelle*, *supra*, 445 U.S. at pp. 265-266, 285 [rejecting cruel-and-unusual challenge to life sentence under a recidivist statute for current conviction of obtaining $120.75 by false pretenses and prior convictions for passing a forged check for $28.36 and using fraudulent credit card to obtain $80 of goods or services].) Given these precedents, this case is not so "'exceedingly rare'" that it violates the United States Constitution. (*Rummel v. Estelle*, *supra*, 445 U.S. at p. 272; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 73.)

II. THE PROPER REMEDY FOR A CONSTITUTIONALLY EXCESSIVE SENTENCE IS RELEASE FROM PRISON, NOT ELIMINATION OF THE PAROLE PERIOD

Palmer's sentence was not constitutionally excessive and the court below erred by providing him relief, including the elimination of his parole period. Yet where a court concludes an inmate has been incarcerated beyond the constitutional maximum for his offense, the proper remedy is release from prison.[8] This is so because, in the absence of statutory

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[8] In cases where a court has found that the defendant's sentence is constitutionally excessive on direct appeal, the proper remedy is to sentence the inmate to a constitutionally proportionate term. (*Cadena*, *supra*, 39

(continued...)

authority, the separation of powers doctrine prohibits a court from reducing a parole period in an amount equal to a period of excess confinement. (*In re Lira* (2014) 58 Cal.4th 573, 583-584; *In re Prather* (2010) 50 Cal.4th 238, 254.) Here, because there is no authority allowing the court to eliminate Palmer's parole period, the court's remedy of discharging Palmer from parole violated the separation of powers doctrine. Palmer neither claimed that a statute entitled him to credit for excessive time in custody, nor did he argue that the parole period itself amounted to cruel or unusual punishment under *Lynch*. The Court of Appeal failed to abide by these principles when it eliminated Palmer's parole period.

A. Separation of Powers Prohibits Reduction of the Parole Period Absent Statutory or Constitutional Authority

In the habeas context, courts are empowered to craft a remedy that is "tailored to redress the particular constitutional violation that has occurred" (*People v. Booth* (2016) 3 Cal.App.5th 1284, 1312), "'as the justice of the case may require'" (*In re Crow* (1971) 4 Cal.3d 613, 619, quoting Pen. Code, § 1484). (See also *In re Crow*, at p. 619, fn. 7 ["Inherent in the power to issue the writ of habeas corpus is the power to fashion a remedy for the deprivation of any fundamental right which is cognizable in habeas corpus"].) Any remedy, however, must respect the separation of powers between the three co-equal branches of government. (Cal. Const., art. III, § 3.)

(...continued)
Cal.App.5th at pp. 192-193 [remanding to trial court to impose punishment]; *Mendez*, *supra*, 188 Cal.App.4th at p. 68 [remanding matter to trial court for reconsideration of the defendant's sentence]; *Nunez*, *supra*, 173 Cal.App.4th at p. 739 [ordering trial court to hold new sentencing hearing consistent with opinion]; *Dillon*, *supra*, 34 Cal.3d at p. 489 [reducing the defendant's first degree murder conviction to second degree murder].)

"The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." (*Prather*, *supra*, 50 Cal.4th at p. 254, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 662; *Lira*, *supra*, 58 Cal.4th at p. 583.) Although one branch may take action that will affect another, "the doctrine is violated when the actions of one branch 'defeat or materially impair the inherent functions of another branch." (*Lira*, *supra*, 58 Cal.4th at pp. 583-584, quoting *Prather*, *supra*, 50 Cal.4th at pp. 254-255.)

1. *Lira* Requires Courts to Respect the Executive Branch's Parole Authority

As this court recognized in *Lira*, courts must respect the executive branch's authority in parole. "Intrusions by the judiciary into the executive branch's realm of parole matters may violate the separation of powers." (*Lira*, *supra,* 58 Cal.4th at p. 584, quoting *Prather*, *supra,* 50 Cal.4th at pp. 254-255; see also *In re Roberts* (2005) 36 Cal.4th 575, 588 ["[t]he executive branch has 'inherent and primary authority' over parole matters], citation omitted.) That is the case where, as here, a court's remedy is broader than necessary to cure the constitutional violation and materially defeats the Board's authority in parole matters. (*Booth*, *supra*, 3 Cal.App.5th at p. 1312; *Lira*, *supra*, 58 Cal.4th at pp. 583-584; *Prather*, *supra*, 50 Cal.4th at pp. 254-255.) Although both parole and incarceration are punishment for the conviction (see *People v. Nuckles* (2013) 56 Cal.4th 601, 608-609), they are "distinct phases under the legislative scheme" (*In re Roberts*, *supra*, 36 Cal.4th at p. 589, citation omitted). (See also *Jefferson*, *supra*, 21 Cal.4th at p. 95 ["the prison 'term' is the actual time served in prison *before* release on parole, and the day of release on parole marks the *end* of the prison term"].) The objectives of incarceration include "protecting society, punishing offenders, deterring future crimes, and treating with uniformity those committing the same types of offenses[.]"

(*In re Roberts*, *supra*, 36 Cal.4th at p. 589.) The goal of parole, on the other hand, "is, through the provision of supervision and counseling, to assist in the parolee's transition from imprisonment to discharge and reintegration into society." (*Id.* at pp. 589-590, citing Pen. Code, § 3000, subd. (a)(1).)

Parole is one of the Board's core functions and both this Court and the Legislature have made clear that parole supervision is important. (Pen. Code, § 3000, subd. (a); see also *In re Roberts*, *supra*, 36 Cal.4th at p. 590 [prison sentence contemplates a parole period].) The Legislature has consistently declared that "the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship." (Former Pen. Code, § 3000 (1988); see also Pen. Code, § 3000, subd. (a)(1) [same].) The Legislature explained "[i]t is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees to provide education, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge." (Former Pen. Code, § 3000 (1988); see also Pen. Code, § 3000, subd. (a)(1) [same]; Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game* (1978) 9 Pacific L.J. 5, 73 (Cassou & Taugher).)

The Board decides whether to release an inmate to parole by determining the inmate's parole suitability. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1204.) If the Board concludes the inmate would not pose a current unreasonable risk of danger if he were to be released, parole is granted. (*Ibid.*; Pen. Code, § 3041, subd. (b)(1).) In cases involving murder convictions, the Governor may review the Board's decision and modify, affirm, or reverse the Board's parole grant. (Cal. Const., art. V, § 8, subd. (b).) In others cases, the Governor "may request review of a decision by a parole authority concerning the grant or denial of parole to any inmate

in a state prison." (Pen. Code, § 3041.1.) The Board alone determines whether parole is required and, if so, its duration, up to the maximum period allowed by statute. (Former Pen. Code, § 3000, subds. (a)-(d) (1988); Pen. Code, § 3000, subds. (b)(1), (b)(5)(A), (b)(6); see also Cal. Code Regs., tit. 15, §§ 2514 [parole waiver and discharge for good cause], 2515, subd. (d) [seven-year maximum parole period for life prisoner released after 1979], 3720 et. seq [discharge reviews].) The Board also may impose parole conditions that the inmate must follow. (Pen. Code, §§ 3000 [parole periods for life offenses (except murder) and certain sex offenses], 3053, subd. (a) [imposing conditions of parole]; Cal. Code Regs., tit. .15, § 2510 et seq. [conditions of parole]; Mar. 21, 2019, Reply to Letter Brief, Exh. 1).

In *Lira*, this Court recognized the Board's unequivocal authority in parole. (*Lira*, *supra*, 58 Cal.4th at pp. 583-584.) There, the petitioner alleged he was entitled to credit against his five-year parole period for the time he was confined between the Governor's constitutionally deficient parole denial and the inmate's eventual release. (*Id.* at pp. 578-579.) This Court rejected Lira's claim, reiterating its previous warning that: "'Intrusions by the judiciary into the executive branch's realm of parole matters may violate the separation of powers.'" (*Id.* at p. 584, quoting *Prather*, *supra*, 50 Cal.4th at pp. 254-255.)

This Court recognized the Legislature's decree that the parole period is critical to "successful reintegration of the offender into society and to positive citizenship" remained "true even when the Governor's reversal of a Board decision is unsupported and delays the prisoner's release from prison." (*Lira*, *supra*, 58 Cal.4th at p. 584.) This Court reasoned that "[s]uch circumstances, while unfortunate, do not diminish the Board's responsibility to decide, based on the factors it has identified as relevant, whether to retain a parolee on parole for as long as the law permits." (*Ibid.*)

If there were any doubt about the impropriety of the judiciary interfering with the Board's unique power over parole, this Court made clear that the judiciary is foreclosed from entering that realm: "A court's general authority, on habeas corpus, to craft a remedy 'as the justice of the case may require [citation]'" does not license the court "to interfere with the Board's control over the length of a prisoner's parole term in the absence of specific statutory authorization not present here." (*Ibid.*; see also *id.* at pp. 579-581 [concluding no statute authorized credit toward Lira's parole period].)

Lira's reasoning applies to this case. A judicial decision eliminating the parole period based on a finding that the inmate's sentence is constitutionally excessive eviscerates the Board's authority in parole matters and violates the separation of powers because it "'defeat[s] or materially impair[s] the inherent functions of another branch." (*Lira*, *supra*, 58 Cal.4th at pp. 583-584, quoting *Prather*, *supra*, 50 Cal.4th at pp. 254-255.) The Board is deprived of the opportunity to enforce the Legislature's stated purpose of parole: an inmate's successful reintegration into society. And this purpose remains true even if a court decides an inmate's sentence is constitutionally disproportionate.

A court's disproportionality finding does not diminish the Board's obligation to determine how long and under what conditions a life-term inmate, like Palmer, should remain on parole. Indeed, eliminating the parole period denies inmates public services that both the legislative and executive branches have determined will help him succeed in society, such as transitional housing and rehabilitative services. (California Department of Corrections and Rehabilitation, Division of Adult Parole Operations, Parole Services, <https://www.cdcr.ca.gov/parole/parole/parole-services/> [as of Oct. 28, 2019].) This assistance is especially beneficial for someone, like Palmer, who has been in prison much of his life and has performed

poorly on parole. (Petn., Exh. I at pp. 151-152; Request for Jud. Notice at Exhs. Aa-Ee.)

2. The Court of Appeal Misinterpreted *Lira* and Misapplied *Wells*

The Court of Appeal dismissed *Lira*'s relevance to this case because "*Lira* was never serving an unlawful sentence." (Opn. at p. 28.) According to the court, because Palmer was "serving a prison sentence that had become constitutionally excessive . . . his continued imprisonment was *unlawful*" (*id.* at p. 29). As a result, based on *Wells*, the court concluded Palmer was entitled to be released from all custody, including parole supervision. (*Ibid.*, citing *Wells*, *supra*, 46 Cal.App.3d at p. 604.) The court's determinations, however, are contrary to *Lira*'s reasoning and wrongly interpret *Wells*.

In *Lira*, this Court rejected the petitioner's argument that his incarceration following an unconstitutional parole decision was unlawful, finding that Lira overlooked "the significance of the Governor's independent constitutional authority to review parole suitability decisions" (58 Cal.4th at p. 581), and the Governor and Board's processes in deciding whether an inmate was suitable for parole (*id.* at pp. 581-582). Finding that the time Lira spent in custody was a consequence of the parole process, this Court reasoned that there was "little room for Lira to argue that the Governor's reversal, later judicially determined to be unsupported, somehow retroactively rendered unlawful the period of his continued incarceration . . . ." (*Id.* at p. 582.) Instead, "Lira was lawfully imprisoned during this period until the day he was released, and that he received credit against his term of life imprisonment for all such days and is not entitled to any credit toward his parole term." (*Ibid.*)

Lira's broad principle is instructional here: a life inmate's incarceration does not become retroactively "unlawful" requiring credit

against his parole period because a court, at some point, finds he has served an additional period of incarceration as a result of a constitutional violation. (See *Lira*, *supra*, 58 Cal.4th at p. 582.) Thus, applying that principle here: even if Palmer had served an excess period of incarceration and was entitled to release from prison, the Court of Appeal erred by retroactively granting Palmer credit against his parole period.

Yet the Court of Appeal seems to have inferred by negative implication that if a period of incarceration is unlawful, an inmate is entitled to a corresponding reduction of his parole period. (Opn. at pp. 28-29.) But here again, *Lira* demonstrates the court erred. After concluding that Lira was not entitled to credit against his parole period because his incarceration was lawful (*Lira*, *supra*, 58 Cal.4th at pp. 581-582), this Court also rejected Lira's premise that credit would have been appropriate even if the excess period of confinement was deemed unlawful (*id.* at pp. 582). This Court explained that "Lira's effort to shorten his parole term based on the *asserted unlawfulness* of [a] portion of his term of imprisonment . . . also runs afoul of the rule that a parole term begins only after release from prison." (*Id.* at p. 582, emphasis added.) This Court opined that the Legislature demonstrated a clear intent for parole to begin only after release from prison and that Lira's argument "would undermine the Legislature's intent in requiring the service of three continuous years of parole after release from confinement and therefore must be rejected." (*Id.* at p. 583; see also *In re Roberts*, *supra*, 36 Cal.4th at pp. 589-590; *Jefferson*, *supra*, 21 Cal.4th at p. 95.)

Based on *Lira*, to effectuate the Legislature's intent that parole begins only after release from prison, and to maintain the separation of powers, the appropriate relief for a court's "rare" disproportionality finding, where a court determines that an inmate has served the constitutionally maximum period of incarceration, is release from prison. And because

Palmer had already been released from prison when the appellate court granted his petition, he was not entitled to additional relief. The Court of Appeal erred in concluding otherwise.

Finally, the court's reliance on *Wells* is similarly flawed. In *Wells*, under the former indeterminate sentencing law, the petitioner was convicted of child molestation which, with a previous sex-related conviction, resulted in an indeterminate prison term of one year to life. (46 Cal.App.3d at pp. 594-595.) The parole authority eventually fixed Wells's sentence at 20 years and granted him parole after serving approximately 11 total years in prison. (*Id.* at p. 595.) The court held that the life sentence constituted cruel or unusual punishment. (*Id.* at p. 604.)

When addressing the "question of relief," the *Wells* court recognized that the same offense had since become punishable by a maximum of five years in prison and, considering Wells had served more than five years, he was entitled to be freed from all forms of custody, actual or constructive. (*Id.* at p. 604.) But *Wells* does not help Palmer here for three reasons.

First, the court did not explain why discharge from custody, actual or constructive, was the appropriate remedy. (*Wells*, *supra*, 46 Cal.App.3d at p. 604.) And *Wells* cannot be authority for a proposition not considered. (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) Second, the result in *Wells* is best understood as involving a ministerial application of the sentencing law then in effect and therefore is inapplicable here. (Cf. *Lira, supra*, 58 Cal.4th at p. 582 [rejecting Lira's reliance on cases involving a ministerial application of various types of sentence credits for determinate-term inmates].) Finally, at the time *Wells* was decided, incarceration and the parole period constituted a single term that could be adjusted and re-adjusted by the parole authority until the offender reached his maximum prison term. (*Dannenberg*, *supra*, 34 Cal.4th at pp. 1077, 1096-1097; *Jefferson*, *supra*, 21 Cal.4th at pp. 92-93, 94-96; *Rodriguez*, *supra*, 14

Cal.3d at p. 646; 2 Cal. Crim. Law Practice, Cont. Ed. Bar (1969), Continuing Representation, ch. 23 at pp. 514-515, 519-520; Cassou & Taugher, *supra,* 9 Pacific L.J. 5, 28.) In comparison, today, an inmate's incarceration and parole supervision are two separate and distinct phases, serving overlapping purposes, and administered by two different, but co-equal, branches of government. (*Nuckles*, *supra*, 56 Cal.4th at p. 608; *In re Roberts*, *supra*, 36 Cal.4th at pp. 589-590.) The remedy in *Wells* is inconsistent with this current sentencing scheme and does not support eliminating Palmer's parole period.

B. There Is No Statutory or Independent Constitutional Basis to Reduce the Parole Period

A court cannot interfere with the Board's control over the length of an inmate's parole period unless there is authorization to the contrary, such as a statute authorizing credit (see *Lira*, *supra*, 58 Cal.4th at p. 582), or a separate constitutional determination that the parole period is unconstitutional. Neither is present here.

Palmer and the Court of Appeal have not pointed to any statute permitting any excess period of incarceration to be credited against Palmer's parole term. Similarly, while the parole period, as punishment, can be deemed cruel or unusual (Cal. Const., art. I, § 17; *Nuckles*, *supra*, 56 Cal.4th at pp. 608-609; see, e.g., *People v. Gayther* (1980) 110 Cal.App.3d 79, 87-90 [challenging mandatory denial of probation as cruel or unusual punishment]; *State v. Mossman* (2012) 294 Kan. 901, 905 [challenging statutorily mandated lifetime postrelease supervision as cruel and unusual]), Palmer did not allege, and the appellate court did not find, that the State's execution of the legislatively mandated parole period was itself a separate constitutional violation under *Lynch*. (See generally Petn. & Opn.) Indeed, any constitutional challenge to a parole period as cruel or unusual would require an additional analysis of the *Lynch* factors as applied to that parole

period. Without a separate constitutional determination, reducing the parole period in whole or in part as a remedial measure based on a theory that the inmate served an unlawful period of incarceration violates the separation of powers doctrine because it materially impairs the Board's broad authority in parole. (See, *supra*, at pp. 34-39.) Indeed, because Palmer did not allege a constitutional or statutory basis for reducing or eliminating the parole period, and the court found none, the court should have denied the petition as moot. (*Frias v. Superior Court* (1975) 51 Cal.App.3d 919, 923; *Nat. Assn. of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746.)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: October 30, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 12,412 words.

Dated: October 30, 2019

XAVIER BECERRA
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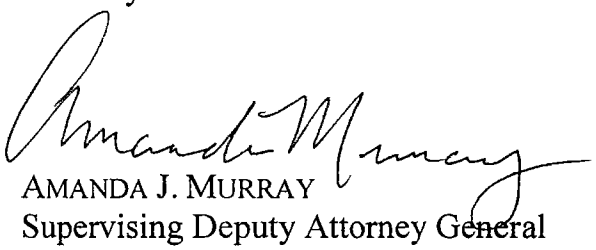

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **In re Palmer**
No.: **S256149**

I declare:

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; my business address is: 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266.

On October 30, 2019, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with **Federal Express**, addressed as follows:

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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 October 30, 2019, at San Diego, California.

Maria Soria
Declarant

Signature