No. S256149

IN THE
SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN RE WILLIAM M. PALMER, ON HABEAS CORPUS

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION TWO
CASE NO. A154269

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INTRODUCTION

Thirty-two years ago, William Palmer broke the law. He was reckless and impulsive, and he created a dangerous situation. He was also 17. Thankfully, no one but Mr. Palmer was physically injured by his ill-advised actions. He was shot by the off-duty police officer he unknowingly targeted during a clumsy robbery-turned-kidnapping that ended minutes after it began. Although he was a minor, he pleaded guilty in exchange for no benefit. He was sentenced to life with the possibility of parole, which is the mandatory sentence for an adult convicted of violating Penal Code section 209(b), plus two years for using an unloaded firearm. He had no resources or parental support to help him make sense of the charges he faced; the lawyer who encouraged his ill-advised plea was later disbarred. For more than 31 years—from February 17, 1988, until March 11, 2019—he served time behind bars. Now 49, Mr. Palmer should, according to the Attorney General, remain subject to 31 special conditions of parole and the threat of re-incarceration if he violates any of his parole conditions.

As the Court of Appeal correctly held, Mr. Palmer's continued punishment is constitutionally disproportionate under Article I, section 17 of the California Constitution and the Eighth Amendment of the United States Constitution. His continued punishment is unconstitutional when compared to (i) the nature of the offense and the offender; (ii) punishments for more serious offenses in California; and (iii) punishments for the same or similar offenses in other jurisdictions. *In re Lynch*, 8 Cal. 3d 410 (1972). Despite being a juvenile and physically injuring no one, Mr. Palmer was incarcerated far longer than the maximum sentence an *adult* in California would face if convicted of far more grievous offenses. He was imprisoned eight years longer than an adult would be imprisoned if convicted of rape and voluntary manslaughter of a 15-year-old. He was imprisoned for longer than the maximum sentence an *adult* would receive for his same

offense in a significant number of other jurisdictions. Under these circumstances, three decades of imprisonment plus an onerous and punitive period of parole is unconstitutional.

The Attorney General refuses to acknowledge that the law has changed. In 1988, when the criminal justice pendulum had swung from rehabilitation to retribution, the prevailing norm was that children should get "adult time for adult crimes." But that norm is now outdated. The law today recognizes what science has undisputedly established: juveniles deserve less punishment than adults because a juvenile's misconduct is less morally reprehensible than an adult's. Mr. Palmer's punishment would be excessive if he were an adult at the time of the crime, but it is plainly and grossly excessive for an offense he committed as a juvenile.

Discounting that Mr. Palmer is less culpable for his juvenile conduct, the Attorney General relies largely on cases that uphold adult sentences, including several that uphold sentences now categorically unconstitutional for juveniles. This authority has no relevance: Mr. Palmer is less culpable than an adult and cannot be punished to the same degree as an adult. The Attorney General also wrongly contends that the power of the legislative and executive branches to punish Mr. Palmer has no limit, refusing to accept that enforcing Mr. Palmer's right to be free of excessive punishment is the judiciary's purview. The Attorney General contends that parole is constitutional, even though he admits it is further punishment, because he thinks it will benefit Mr. Palmer. Here too, the Attorney General refuses to accept the constitutional limits on his power to punish. The Attorney General's obsolete and incorrect positions must be rejected.

California does not have the power to continue to punish Mr. Palmer for an offense for which he has already been excessively punished under the California and United States constitutions. The Court must order an end to all custody and punishment, including parole.

FACTUAL BACKGROUND

William Monroe Palmer II was born in 1970 in Riverside, California, to Felicia Harris and William Monroe Palmer. (5/11/2018 Petition ("Pet'n") Ex. P at 75; Ex. G at 39, Ex. U at 117.[1]) He has one sibling and five half-siblings. (Ex. P at 75.) For the first nine years of his life, he lived with his mother and four siblings in a low-income neighborhood in Riverside; his father, a sporadic presence during Mr. Palmer's earliest years, disappeared for good when he was still a child. (Ex. U at 117:14-17; Ex. W at 142:10-21; Ex. E at 33; Ex. Q at 88; Ex. Q at 81:12-21.) At certain points, his father was incarcerated. (Ex. Q at 81:12-21; Ex. G at 43.) His mother raised her children in part with welfare. (Ex. T at 114:1-2; Ex. P at 75.) Although his neighborhood was close-knit, it was also burdened by crime and violence. (Ex. P at 75; *see* Ex. G at 40.) Gunfire echoed daily, and once, when he was eight, he saw a dead body in an abandoned shopping cart. (Pet'n at 11.)

A single parent, his mother studied at night to obtain a degree, leaving Mr. Palmer in the care of a sibling. (Ex. T at 114:1-11.) His family eventually moved to a better neighborhood. (*Id.* at 113:25-114:12; *see* Ex. M at 66:17-22.) But while their new house was in a more affluent neighborhood, it was no longer just theirs. (Ex. P at 75; Ex. T at 113:25-114:12.) The home now doubled as a foster care center for children with traumatic backgrounds and emotional and behavioral issues. (Ex. P at 75; Ex. T at 113:25-114:12; Ex. M at 66:17-22.) By the time he was 12, he was expected to help his mother with the center. (Ex. M at 66:18-22.) With his new home came other new challenges: new school, new classmates, and new feelings of inadequacy. (Ex. U at 128:10-17.) His new classmates

[1] Unless otherwise indicated, all references to exhibits refer to the exhibits to the May 11, 2018 Petition.

bullied him for not having the right clothes (*id.* at 129:9-10), and he became insecure, self-conscious, and acutely aware of his inability to fit in with his wealthier peers. (*Id.* at 128:10-17; Ex. P at 75.) His self-esteem plummeted, and he lost interest in school. (Ex. G at 40; Ex. F at 36.)

As Mr. Palmer entered adolescence, California entered a new era of tough-on-crime policies. *See* Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount*, 31 Law & Ineq. 263, 266-69 (2013). Policymakers argued that youth were equally as culpable as adults. *See* Jill M. Ward, *Deterrence's Difficulty Magnified: The Importance of Adolescent Development in Assessing the Deterrence Value of Transferring Juveniles to Adult Court*, 7 U.C. Davis J. Juv. L. & Pol'y 253, 253-54 (2003). Punishments became more severe, transforming the juvenile justice system from an environment offering rehabilitation to one focused on retribution. *See* Kathryn Schofield, *California's Juvenile Justice: Assessing the Risk*, U.C. Davis J. Juv. L. & Pol'y 13, 14 (1999); Cynthia M. Conward, *Essay: Where Have All the Children Gone?: A Look at Incarcerated Youth in America*, 27 Wm. Mitchell L. Rev. 2435, 2439 (2001). By the late 1980s, California's juvenile incarceration rate had reached its peak. *See Addressing Disproportionate Representation of Youth of Color in the Juvenile Justice* System, 3 J. Ctr. for Families, Child. & Cts. 31, 32 (2001); Ilana Friedman, *Youth at the Center: A Timeline Approach to the Challenges Facing Black Children*, 63 St. Louis U. L.J. 583, 602 (2019).

Mr. Palmer lived these statistics. As a black juvenile, he was seven times more likely to be taken into custody. Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. Davis L. Rev. 1005, 1010 (2001); *see also* Conward, *supra*, 27 Wm. Mitchell L. Rev. at 2453 n.133; Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S.*

Incarceration, 69 Am. Soc. R. 151 (2004). Based on his father's incarceration, he was statistically six times more likely to be incarcerated. *See* Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 Nat'l Inst. of Justice Journal 10, 12 (2017).

In 1985, at age 15, Mr. Palmer spent two weekends in juvenile hall for driving a car without a license. (Ex. G at 41, 43.) In February 1986, he faced a charge that confused and embarrassed him. Based on allegations made by foster children living at his home, he agreed with the suggestion that he had observed the children masturbate. (Ex. P at 75-76; Ex. E at 32, 43.) He agreed in part because he thought it meant he would get to go home and that his mother would get to keep her daycare license. (Ex. P at 75.) Instead, he spent 30 days in juvenile hall. (Ex. G at 38.) After initially going along with the allegation in 1986, he consistently denied it. As one example, a social worker who evaluated him in 1988 acknowledged that he "adamantly denie[d]" the truth of the allegations and "appear[ed] honest" in his interview. (*See* Ex. G at 44.) He has no other record of sexually inappropriate behavior toward minors. (*See* Ex. U at 130:12-131:7.)[2]

Mr. Palmer came out of this ordeal feeling disillusioned and desperate to escape his circumstances. (*See* Ex. V at 137; Ex. T at 108:19-110:12.) He stopped attending school and was expelled for truancy. (Ex. T at 108:19-110:4.) He wanted to distance himself from that chapter of his life. (*See id.* at 110:8-12; Ex. V at 137.) He landed a job at a polo club near Palm Springs, and for a few weeks, his prospects seemed to improve.

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[2] Juveniles are "more compliant and suggestible," leading to a higher risk of false statements than with adults. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 260 (2007). This was before California enhanced protections for juvenile *Miranda* rights. *See* Stats. 2017, ch. 681 (Senate Bill No. 395).

(Ex. T at 105:7-12.) He was allowed to stay on the property on weekends. (*Id.* at 105:9-106:11.) But after some friends showed up for a party, he was fired. (*See id.* at 106:5-11.) He became depressed and felt his life was out of control yet again. (*See id.* at 106:20-107:2, 112:7-16.)

Then, at the age of 17, he made a decision that put him in California's increasingly punitive juvenile justice system. (*See* Ex. U at 124:3-7.) He decided to rob someone. (Ex. T at 106:20-107:2.) He took an unloaded revolver to a parking garage in an affluent area and waited for someone. (*See* Ex. A at 12-13; Ex. M at 63:14-16; Ex. L at 59.) Randall Compton happened to be that someone. (*See* Ex. A at 6, 7.)

When Mr. Palmer approached him, Mr. Compton said he had no wallet or cash. (Ex. S at 98:14-18.) Confused, Mr. Palmer asked whether Mr. Compton had a bank card. (Ex. A at 12; Ex. S at 98:18-20.) When Mr. Compton said that he did, Mr. Palmer told Mr. Compton to drive them to a nearby ATM and withdraw $200. (Ex. A at 11-13; Ex. S at 98:20-22; *see also* Ex. U at 125:22-126:9.) It never occurred to him that this had suddenly escalated to kidnapping. (*See* Ex. U at 126:16-20.) Mr. Palmer also had no idea that Mr. Compton was an off-duty police officer with a service pistol in his car. (*See* Ex. A at 7-8, 10; Ex. P at 74.) After they arrived at the bank, Mr. Compton exited the car, retrieved his gun, and pointed it at Mr. Palmer. (Ex. A at 10.) As Mr. Palmer cowered in the back seat and cried that his revolver was not loaded (*id.* at 12), Mr. Compton emptied an entire 15-round magazine at Mr. Palmer, striking Mr. Palmer in the knee. (*Id.* at 10, 12; Ex. M at 63:24-64:10.) Once the shooting stopped, Mr. Palmer jumped from the car and ran. (Ex. A at 10-11.) Mr. Palmer was too panicked to feel his injury until he felt the blood running down his leg. (*Id.* at 11.) The entire ordeal lasted approximately 17 minutes. (Ex. A at 8 (Mr. Compton left apartment for garage at

approximately 9:05 PM); Ex. B at 15 (police responded at approximately 9:22 PM).) No one other than Mr. Palmer was physically hurt.

Police arrived at the scene of the shooting, apprehended Mr. Palmer nearby, and took him to the hospital. (Ex. B at 16; Ex. L at 60.) In the emergency room, Mr. Palmer revealed his misunderstanding of what he faced: "What will I get for doing this," he asked the officer accompanying him, "6 months or a year in custody?" (Ex. B at 16.) When officers questioned Mr. Palmer a few hours later—while he was in a hospital bed on pain medication and with no parent or lawyer present—Mr. Palmer acquiesced to the account that Mr. Compton had provided. (Ex. A at 11.)

On the advice of his since-disbarred attorney,[3] Mr. Palmer pleaded guilty, as an adult, to violating Penal Code section 209(b) for kidnapping for robbery—the most serious offense with which he could have been charged. He was sentenced to life with the possibility of parole, to be served consecutively with a two-year firearm enhancement. (*See* Ex. C; Ex. H at 47:18-25.) Life with parole is the mandatory sentence for a violation of Penal Code section 209(b) for an adult. Penal Code § 209(b).

Mr. Palmer was initially incarcerated at the California Youth Authority in Norwalk, California. (Ex. G at 44; Ex. D at 28:20-27; Ex. H at 47:24-27.) In October 1990, at age 19, he was transferred to the California Institution for Men in Chino. (Ex. L at 59; Ex. R. at 84.) Mr. Palmer spent over 30 years in state prison facilities, serving two years at Folsom State Prison, eight years at Calipatria State Prison, and twenty years at California State Prison Solano. (*See* Ex. L at 59; Ex. R at 84.)

By August 22, 1989, Mr. Palmer had completed the firearm enhancement term, and his life term commenced. (*See* Ex. X, Oct. 27, 2016 Legal Status Summary.) Mr. Palmer was first eligible for parole in

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[3] *See* http://members.calbar.ca.gov/fal/Licensee/Detail/86606.

1995. Over the next two decades, the Board of Parole Hearings and its predecessor (the "Board") denied parole 10 times. At his hearing in June 2015—27 years into his incarceration—the Board concluded that he should remain incarcerated for at least another five years based on two minor rules infractions. (Ex. W at 148:18-24, 149:23-150:1; *see* Ex. V at 135-36.)

Mr. Palmer challenged the tenth denial of parole in a petition filed on December 31, 2015 (the "2015 Petition"). (*In re William Palmer*, Case No. A147177.) The 2015 Petition was based on (i) the Board's failure to set Mr. Palmer's base and adjusted base terms pursuant to the terms it agreed to in *In re Butler*, 236 Cal. App. 4th 1222, 1234 (2015), and (ii) the Board's failure to give "great weight" to his youth offender factors under Penal Code section 4801(c). The Court of Appeal originally granted the 2015 Petition based on the Board's failure to calculate base terms and then, following this Court's reversal in *In re Butler*, 4 Cal. 5th 728 (2018), it granted relief in September 2018 based on Mr. Palmer's second basis, *In re Palmer*, 238 Cal. Rptr. 3d 59, 79 (Sept. 13, 2018) (depublished). The Court of Appeal again ordered a new hearing within 120 days. *Id.* On December 6, 2018, the Board held the court-ordered hearing and granted parole. (3/5/2019 Letter to the Court of Appeal.)

The California Department of Corrections and Rehabilitation ("CDCR") released Mr. Palmer from prison on March 11, 2019. (10/31/2019 AG Mot. for Judicial Notice at 22.) He was released to a five-year parole period under former Penal Code section 3000(b) (1988). *See also* Cal. Code Regs. tit. 15, § 2515(d). He was incarcerated for more than 29 years on his life sentence. (Ex. X at 152.) This Court granted review of

the Court of Appeal's September 2018 order. (*In re William Palmer*, Case No. S252145.)[4] Mr. Palmer remains on parole.

PROCEDURAL HISTORY

On May 11, 2018, Mr. Palmer filed the petition that forms the basis for the present appeal (the "2018 Petition"). In the 2018 Petition, Mr. Palmer sought release from all forms of custody on the ground that his continued punishment is excessive under both Article I, section 17 of the California Constitution and the Eighth Amendment of the United States Constitution. (5/11/2018 Pet'n, Case No. A154269.) On April 5, 2019, just a few weeks after he was released on parole, the Court of Appeal granted the 2018 Petition, finding his continued confinement grossly disproportionate to his underlying offense under both the California and United States constitutions and ordering the Attorney General to discharge him from all forms of custody, including parole. *In re Palmer*, 33 Cal. App. 5th 1199, 1202 (2019). The Attorney General did not appeal.[5]

On July 31, 2019, this Court, on its own motion, ordered review and briefing on two questions:

1. Did this life prisoner's continued confinement become constitutionally disproportionate under Article I, section 17 of

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[4] Mr. Palmer disagrees with the Attorney General's characterization of events that have occurred following his release on parole. (*See* 11/13/2019 Opp. RJN.) Because this dispute is irrelevant to this appeal, Mr. Palmer will not reiterate those points of disagreement here. (*See id.*)

[5] The Attorney General filed his Opening Brief on the Merits ("OBM") on behalf of "Petitioner Board of Parole Hearings." But this Court ordered that "the Attorney General is deemed the petitioner in this court." (7/31/2019 Order.) The Board is neither a party to this appeal nor the proceeding below. (*See* Pet'n at 10.) Accordingly, Mr. Palmer refers to the opposing party as the Attorney General.

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?

(7/31/2019 Order.)

ARGUMENT

I. MR. PALMER'S CONTINUED CONFINEMENT IS CONSTITUTIONALLY DISPROPORTIONATE

Both the California Constitution and the United States Constitution limit the government's power to inflict excessive punishment. *See In re Rodriguez*, 14 Cal. 3d 639, 652-53 (1975), citing Cal. Const. art. I, § 17; *Solem v. Helm*, 463 U.S. 277, 288 (1983), citing U.S. Const. amend. VIII; *see also Lynch*, 8 Cal. 3d at 420. In an as-applied challenge under either constitutional provision, an individual may petition for relief on the ground that their punishment is so excessive that it transgresses the limits of civilized standards. *See Lynch*, 8 Cal. 3d at 420; *Solem*, 463 U.S. at 288. An individual with an indeterminate sentence may bring such a claim well into their sentence. *See, e.g.*, *In re Dannenberg*, 34 Cal. 4th 1061, 1096 (2005); *In re Rodriguez*, 14 Cal. 3d at 656 ; *In re Butler*, 4 Cal. 5th 728, 744-45 (2018). A court must grant the petition when the punishment falls outside of constitutional limits. *People v. Dillon*, 34 Cal. 3d 441, 478 (1983); *see also Dannenberg*, 34 Cal. 4th at 1096; *Graham v. Florida*, 560 U.S. 48, 59 (2010).

Mr. Palmer's continued punishment—ongoing after three decades—has become grossly excessive. The Board's serial denials of parole have so prolonged his punishment that it has become unconstitutional in relation to his individual culpability. The Court of Appeal correctly concluded that his continued confinement is unconstitutional. This Court should affirm.

A. Mr. Palmer's Continued Confinement Is Constitutionally Disproportionate Under Article 1, Section 17 of the California Constitution

A punishment violates the California Constitution 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*, 8 Cal. 3d at 424. To determine whether a punishment is disproportionate, courts compare the challenged punishment to (i) the nature of the offense and the offender, (ii) punishments for more serious offenses in California, and (iii) punishments for the same or similar offenses in other jurisdictions. *See id.* at 410, 425-429. Any of these three comparisons may show that a punishment is unconstitutionally excessive. *See Dillon*, 34 Cal. 3d at 487 n.38; *see also Rodriguez*, 14 Cal. 3d at 656; *In re Nuñez*, 173 Cal. App. 4th 709, 725 (2009). Mr. Palmer's continued confinement is unconstitutionally excessive under any *Lynch* technique.

1. Mr. Palmer's Continued Confinement Is Grossly Disproportionate to the Offense and the Offender (First *Lynch* Technique)

Mr. Palmer's petition should succeed when analyzed under the first *Lynch* technique alone: the challenged penalty far exceeds the nature of the offender and the offense. *Lynch*, 8 Cal. 3d at 425. More than three decades is grossly disproportionate for an offense committed at age 17 that resulted in no injury to anyone but Mr. Palmer.

The "nature of the offense" inquiry looks to the specific facts of the offense, with a particular focus on any harm caused. *Rodriguez*, 14 Cal. 3d at 654. An offense causing a loss of human life is more serious than an offense that causes minimal or no physical injury. *See People v. Mendez*, 188 Cal. App. 4th 47, 65 (2010); *People v. Baker*, 20 Cal. App. 5th 711,

724-25 (2018); *Lynch*, 8 Cal. 3d at 426.[6] Other relevant factors include whether the offender exercised caution to avoid harm, the duration of the offense, the degree of planning, the use of weapons, and whether the offense involved a vulnerable victim. *People v. Jones*, 53 Cal. 3d 1115, 1155 (1991) (planned nature of offense relevant to culpability); *Baker*, 20 Cal. App. 5th at 725 (vulnerability of victim relevant to culpability); Cal. R. Ct. 4.421 (vulnerable victim is an aggravating factor); Cal. R. Ct. 4.423(a)(6) (exercising caution to avoid harm is a mitigating factor).

The "nature of the offender" inquiry looks at the petitioner at the time of the offense, including "his age, prior criminality, personal characteristics, and state of mind." *Dillon*, 34 Cal. 3d at 479. An offender who is particularly vulnerable and unsophisticated is less culpable. *Id.* at 488; *Rodriguez*, 14 Cal. 3d at 655. All juveniles are categorically less culpable than adults. *People v. Contreras*, 4 Cal. 5th 349, 367 (2018). This is because they are immature, have an underdeveloped sense of responsibility, and are more susceptible to negative influence and outside pressures. *See People v. Franklin*, 63 Cal. 4th 261, 283 (2016). These mitigating features can be dispositive in proportionality inquiries. *People v. Gutierrez*, 58 Cal. 4th 1354, 1381 (2014). Evidence of a difficult family history or emotional disturbance is particularly mitigating for juveniles because they cannot control their circumstances. *Mendez*, 188 Cal. App. 4th at 65-66.

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[6] The Eighth Amendment recognizes the same principle. *See, e.g.*, *Graham*, 560 U.S. at 69 (murder and attempted murder are categorically worse than non-murders); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (crimes that result in a loss of life are distinguishable from crimes that do not).

a. Mr. Palmer's Continued Confinement Is Grossly Disproportionate to His Offense

The facts of Mr. Palmer's offense show that his continuing punishment is excessive. Two facts in particular mitigate his culpability: (i) his offense caused no physical or economic harm to anyone but himself, and (ii) he committed the kidnapping impulsively, reflecting his juvenile nature. Although the offense was serious and harrowing for Mr. Compton, it was also short in duration, and Mr. Palmer intentionally used an unloaded gun to reduce the risk of harm. (*See* Ex. A at 8; Ex. B at 15; Ex. G at 42.) That he did not target a vulnerable victim further reduces his culpability.

The Attorney General does not dispute that the offense caused no physical injury to Mr. Compton, ended within minutes, involved an unloaded gun, and did not involve a particularly vulnerable victim. (*See* Opening Brief on the Merits ("OBM") at 26, 32.) Rather, the Attorney General argues that the short duration and lack of physical injury should not mitigate Mr. Palmer's culpability because these were the result either of chance or of Mr. Compton's actions, not Mr. Palmer's. (*See id.* at 32.) The Attorney General also contends that Mr. Palmer's crime was sophisticated and showed a high degree of control. Neither argument is correct.

First, the absence of actual physical harm weighs heavily in favor of Mr. Palmer's lessened culpability—regardless of what determined that outcome. *See, e.g.*, *Rodriguez*, 14 Cal. 3d at 654-55; *Lynch*, 8 Cal. 3d at 426; *Nuñez*, 173 Cal. App. 4th at 716-19. Although indisputably traumatic for Mr. Compton, the lack of actual harm to him is still mitigating despite any risk of harm that was created. *See Mendez*, 188 Cal. App. 4th at 51-53 (sentence was unconstitutional based on lack of physical harm where defendant used a loaded gun during a carjacking); *Nuñez*, 173 Cal. App. 4th at 716-19 (sentence was unconstitutional based on lack of physical harm where petitioner demanded money and drugs from victim's family after

keeping victim tied up overnight). In *Rodriguez*, the punishment was disproportionate in large part because the offense "caused no physical harm to the victim[.]" *Rodriguez*, 14 Cal. 3d at 655. This was true even though the petitioner abducted and molested a 6-year-old after a prior arrest for child molestation. *Id.* at 648.

Because Mr. Palmer did not cause any physical harm to Mr. Compton, a sentence that might be justified for an offense causing severe physical harm, even death, is not justified for Mr. Palmer's offense. The Attorney General errs in suggesting otherwise. (*See* OBM at 21, 24-29, 34, citing *People v. Em*, 171 Cal. App. 4th 964 (2009) (sentence for first-degree murder, use of firearm, and gang enhancement upheld); *People v. Garcia*, 7 Cal. App. 5th 941 (2017) (sentence for attempted murder with use of firearm causing great bodily injury upheld); *People v. Mora*, 39 Cal. App. 4th 607 (1995) (sentence for first-degree murder with special circumstances and three other counts upheld); *People v. Martinez*, 76 Cal. App. 4th 489 (1999) (sentence for attempted murder with use of firearm causing great bodily injury upheld); *People v. Weddle*, 1 Cal. App. 4th 1190 (1991) (sentence for first-degree murder, second-degree burglary, and two counts of felony hit and run upheld); *People v. Thompson*, 24 Cal. App. 4th 299 (1994) (sentence for first-degree murder upheld); *People v. Ordonez*, 226 Cal. App. 3d 1207 (1991) (sentence for aggravated kidnapping and second-degree murder upheld).) These cases do not support the Attorney General's position because, unlike the offenses committed by the defendants in these cases, Mr. Palmer's offense did not cause any physical harm.

Second, the juvenile nature of Mr. Palmer's offense further lessens his culpability, regardless of whether it was "a reaction to escalating circumstances" during the offense or a badly planned affair motivated by a lack of control over his life. (*See* OBM at 29); *compare Dillon*, 34 Cal. 3d

at 483. The Court of Appeal correctly concluded that the "spur of the moment" decision to kidnap Mr. Compton resembled the impulsive nature of the unplanned crime in *Dillon*. There, the defendant "neither foresaw the risk he was creating nor was able to extricate himself without panicking[.]" 34 Cal. 3d at 488. It did not matter that the defendant created the situation, his response showed his impulsivity, which lessened his culpability. *Id.* at 483, 486. Mr. Palmer's offense is comparable. While he may have planned a robbery, the decision to kidnap Mr. Compton was made impulsively after he learned Mr. Compton did not have a wallet. (Ex. R at 89; Ex. S at 98:17-22, 100:12-16; *see also* Ex. U at 124:10-12).)

Similarly, there are other ways that Mr. Palmer's offense was motivated by immaturity. It was not an intricately planned scheme but an ill-conceived reaction to losing his job. (*See* Ex. S at 101.) Mr. Palmer's behavior afterward further illustrates his "failure to appreciate [the] risk and consequences" of his actions. *See Miller v. Alabama*, 567 U.S. 460, 477 (2012). With his entire future on the line, he asked a police officer: "What will I get for doing this, 6 months or a year in custody?" (Ex. B at 16.)

The Attorney General argues that the offense showed "sophistication" and a "high degree of control" (*see* OBM at 30), but that is not true. First, this argument is based on the Attorney General's mistaken view that the Court of Appeal should have interpreted the record "in the light most favorable to the judgment." (*See id.* at 24, 30, 31 n.5.) Presumably, the Attorney General is referring to the judgment of conviction, but this judgment is equally consistent with Mr. Palmer acting impulsively versus having planned the kidnapping. *See Mora*, 39 Cal. App. 4th at 615; *Martinez*, 76 Cal. App. 4th at 496. Second, even if the Court were to find that the kidnapping aspect was planned, the offense is not accurately described as sophisticated or controlled. Mr. Palmer had limited control during the offense and no plan, and when his improvised scheme

unraveled, he was shot by Mr. Compton. (Ex. A at 10-13; Ex. S at 99:17-100:23, 124:10-12, 125:4-126:24.) For this reason, the Attorney General's analogy to *People v. Felix* is inapt. Unlike the defendant in *Felix*, Mr. Palmer was not a leader who gave orders to his accomplices to execute a multi-person plan. *People v. Felix*, 108 Cal. App. 4th 994, 1001 (2002). Mr. Palmer acted alone and had no plan.

b. Mr. Palmer's Continued Confinement Is Grossly Disproportionate in Light of His Personal Characteristics

Mr. Palmer's punishment is excessive when measured by his offense alone. When evaluated in light of his age and circumstances at the time, his punishment appears all the more shocking and excessive. Two facts are most relevant to this analysis: (i) Mr. Palmer was 17 and (ii) Mr. Palmer had a difficult family situation that was outside his control.

First, as a juvenile, Mr. Palmer is categorically less culpable for his conduct. *See, e.g.*, *Contreras*, 4 Cal. 5th at 367; *Graham*, 560 U.S. at 68. His behavior and state of mind were also consistent with those of a juvenile: he was immature, focused on matching the lifestyle of his peers (*see* Ex. P at 75); he was irresponsible, failing to attend school and getting expelled as a result (*see* Ex. T at 108); and he was susceptible to negative influence and outside pressures, allowing his friends to party with him, then losing his job as a result (*see id.* at 106).

Second, the circumstances of Mr. Palmer's upbringing—which left him even more vulnerable—further mitigate his culpability. *Mendez*, 188 Cal. App. 4th at 65-66 (personal and family life and upbringing are critically "important" to the "characteristics of the offender" inquiry). Mr. Palmer's "unstable family situation" contributed to his initial delinquency. (*See* Ex. G at 43.) This instability was defined by the absence of Mr. Palmer's father and growing up in a house that doubled as a

foster home. (Ex. W at 142; Ex. R. at 88; Ex. U at 131.) By the time of his offense, Mr. Palmer had not had contact with his father in over five years. (*See* Ex. U at 117-118.) Through no fault of his own, he was denied a male role model and felt abandoned and rejected. (*See* Ex. E at 35; *id.* at 32.)

His family's move, which triggered a change in Mr. Palmer's status compared to his peers, was also outside his control, motivated the offense, and diminishes his culpability. (*See* Ex. W at 142; Ex. E at 32-35.) After the move, Mr. Palmer's self-esteem suffered, and he became obsessed with keeping up with his wealthier peers. (*See, e.g.*, Ex. E at 33; Ex. F at 37; Ex. P at 74; Ex. U at 128:10-18, 129:6-13.) Then, when he suddenly lost his job, he made an irresponsible decision. (Ex. T at 107: 3-11.) He was "motivated by mere emotion" to respond irresponsibly and irrationally to the stress of his life. *See Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988); *see also Gutierrez*, 58 Cal. 4th at 1389.

Because Mr. Palmer was a juvenile, cases upholding punishments for adult offenders—many of whom also committed far more serious offenses—are inapposite. The Attorney General ignores this distinction, citing cases with inapplicable facts. (*See* OBM at 29-36, citing *People v. Crooks*, 55 Cal. App. 4th 797 (1997) (sentence for 30-year-old convicted of first-degree burglary with intent to commit rape, sexual battery, and three counts of rape by force or fear upheld); *People v. Martinez*, 71 Cal. App. 4th 1502 (1999) (sentence for 43-year-old convicted of possession of methamphetamine and attempting to deter an officer from performance of duty while driving under the influence with prior felony convictions for serious felonies involving threats of violence upheld); *Baker*, 20 Cal. App. 5th at 715 (sentence for 50-year-old convicted of oral copulation of 6-year-old and two lewd acts upheld).) The Attorney General even relies on cases upholding sentences that are categorically unconstitutional as applied to juvenile offenders. (*See* OBM at 31-32, citing *People v. Webb*, 6

Cal. 4th 494 (1993) (death sentence for adult for two counts of first-degree murder upheld); *In re Maston*, 33 Cal. App. 3d 559 (1973) (sentence of life without parole for adult for kidnap for robbery with bodily injury upheld).) Because Mr. Palmer is less culpable than an adult, and cannot be subjected to death or life without parole categorically, these cases do not establish that his punishment is constitutional.

Although the Attorney General concedes that Mr. Palmer's age is important in the abstract, he argues that his "criminal history" and "escalating criminal behavior" should negate his juvenile status. (*See* OBM at 26-27, 29.) But the Court should not disregard Mr. Palmer's categorically diminished culpability because of less serious conduct that occurred when he was *even younger*. The specific facts of the three prior offenses relied on by the Attorney General illustrate the flaw in his position. The first two—driving without a license and violating probation by skipping class—were non-violent, minor offenses that bear no relation to any danger Mr. Palmer "present[s] to society." *Lynch*, 8 Cal. 3d at 425. The third—an admission to an alleged violation of Penal Code section 288—also does not aggravate Mr. Palmer's culpability. (Ex. G at 38, 41.) The Attorney General refers to this as "a felony sex crime against a child," but Mr. Palmer's statements show only that he admitted to watching two boys, aged 9 and 12, masturbate, when he himself was 14. (*See id.* at 38.) Any other underlying facts are unproven and unknown. Mr. Palmer's decision to admit this violation was based on a mistaken understanding that doing so would prevent his mother from losing her livelihood and would allow him to go home. (Ex. P at 78.) This anomalous incident—inconsistent with Mr. Palmer's history and distinct from a kidnapping for robbery—cannot increase his culpability for a very different offense. *Cf. People v. Carmony*, 127 Cal. App. 4th 1066, 1079-80 (2005) (the court's

focus must be on the offense directly being punished to avoid double jeopardy).

The Attorney General also refers to other, unprosecuted acts that purportedly show further evidence of "escalating criminal behavior." (*See* OBM at 27 (claiming that Mr. Palmer "burglarized numerous homes without getting caught" and "stole the gun used in the kidnapping").) In support of these unproven allegations, the Attorney General relies on police reports for other incidents and parole hearing transcripts. But Mr. Palmer cannot be presumed guilty of something for which he was never arrested, much less charged or convicted. *See Mendez*, 188 Cal. App. 4th at 66.

c. Existing Precedent Favors Mr. Palmer, and No Precedent Requires the Denial of Relief

While the first *Lynch* technique considers many facts, three are decisive here: (i) the number of years of punishment implicated by the challenged punishment, (ii) the degree of bodily injury caused by the offense, and (iii) the offender's age. The Attorney General provides *no case* upholding a punishment as severe as Mr. Palmer's when measured in years for an offense that caused no physical injuries and that was committed by a juvenile. By contrast, *Dillon* and *Rodriguez* favor granting relief for Mr. Palmer when these three decisive factors are compared. *See Dillon*, 34 Cal. 3d at 482, 489 (sentence imposed on 17-year-old for first degree murder held unconstitutional);[7] *Rodriguez*, 14 Cal. 3d at 654 (22

[7] In *Dillon*, the defendant was initially sentenced to life for first-degree murder, and would have been eligible for parole after seven years. *See People v. Superior Court*, 115 Cal. App. 3d 687, 689-92 (1981) ; Voter Information Guide for 1978 at 32, General Election (1978), http://repository.uchastings.edu/ca_ballot_props/844. This Court remanded for sentencing for second-degree murder, the maximum punishment for which was seven years at the time. *Dillon*, 34 Cal. 3d at 487, 489; Penal Code § 190 (1977).

years of incarceration inflicted on adult for offense causing no physical injury held unconstitutional).

Instead of relying on comparable cases, the Attorney General cites inapposite cases upholding punishments that are categorically unconstitutional for juveniles; or were inflicted for murders or attempted murders; or were inflicted for more serious offenses committed by adults. Apart from these cases, the Attorney General is left with three Court of Appeal cases: *People v. Felix*, *In re DeBeque*, and *People v. Perez*. *Felix* and *DeBeque* uphold punishments so different from Mr. Palmer's that the cases are also incomparable. In *Felix*, the court upheld a mandatory 10-year gun enhancement. 108 Cal. App. 4th at 1000-02. The defendant did not challenge his punishment for the underlying offense. *Id.* at 997. In *DeBeque*, the court upheld a requirement that the petitioner register as a sex offender. *In re DeBeque*, 212 Cal. App. 3d 241, 255 (1989).

Finally, *Perez* is distinguishable based on the facts of the offense, the offender, and the challenged punishment. There, the Court of Appeal upheld two consecutive sentences for a juvenile of 15 years to life with the possibility of parole for four convictions. *People v. Perez*, 214 Cal. App. 4th 49, 53 (2013). The court summarily dismissed the defendant's gross disproportionality claim because his offense "was horrendous," he showed "no remorse," he had "already compiled a criminal record," and he presented no argument that "other American jurisdictions impose on 16-year olds significantly more lenient sentences than the ones given here." *See id.* at 60. As explained above, Mr. Palmer is less culpable for his injury-free offense. Mr. Palmer also makes the comparative inquiry that was lacking in *Perez*. *See* sections I.A.2-3, *infra*.

Because Mr. Palmer is a less culpable offender who committed a less culpable offense but has a more severe punishment than any defendant

or petitioner in any case cited by the Attorney General, this Court should hold that Mr. Palmer's punishment is grossly disproportionate.

2. Mr. Palmer's Continued Confinement Is Grossly Disproportionate When Compared to the Maximum Penalty for Adults Who Commit More Serious Crimes (Second *Lynch* Technique)

Mr. Palmer's punishment is also excessive when evaluated under the second *Lynch* technique: compared to the prescribed punishments for adults for more serious offenses, his continued punishment is disproportionate. Although not required for a finding of gross disproportionality (*see Mendez*, 188 Cal. App. 4th at 64-65; *Nuñez*, 173 Cal. App. 4th at 725), this analysis further shows Mr. Palmer's punishment is unconstitutional.[8]

The second *Lynch* technique compares the challenged penalty with the punishments prescribed in the same jurisdiction for more serious offenses. *Lynch*, 8 Cal. 3d at 426. The assumption underlying this comparison is that "the Legislature may be depended upon to act with due and deliberate regard for constitutional restraints in prescribing the vast majority of punishments set forth in our statutes." *Id.* As a result, punishments for more serious offenses are "illustrative of constitutionally permissible degrees of severity," and, if more serious crimes are punished less severely, the penalty is suspect. *Id.*

Consider the following maximum penalties:

- Voluntary manslaughter – 11 years (Penal Code § 193(a));

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[8] The Attorney General contends that a failure to show gross disproportionality under the first technique can be dispositive. (*See* OBM at 25.) Not true. *People v. Webb* explains only that courts are not required to undertake "intercase proportionality review" at a defendant's request by comparing, for example, the facts of a first-degree murder resulting in a death sentence to the facts of other first-degree murders resulting in lesser sentences. 6 Cal. 4th at 546. *Webb* does not overrule *Lynch*. *See id.*

- Mayhem, which requires intentionally mutilating, disabling, or disfiguring a person – 8 years (*id.* § 204);
- Assault upon the person of another using a machine gun – 12 years (*id.* § 245(a)(3));
- Assault with intent to commit mayhem, rape, sodomy, or oral copulation – 6 years (*id.* § 220(a));
- Assault with caustic chemicals or flammable substances – 4 years (*id.* § 244);
- Rape of a child under 14 years of age, if perpetrator is fewer than seven years older than the victim – 13 years (*id.* §§ 264(c)(1); 269), or 14 years if acting in concert with another person (*id.* § 264.1(a), (b)(1));
- Rape of a minor over 14 years of age, regardless of perpetrator's age – 11 years (*id.* § 264(c)(2));

Mr. Palmer would have completed his sentence at least a decade and a half ago had he committed any of the above crimes. Mr. Palmer has now been incarcerated for eight years longer than the maximum sentence an adult would face if convicted of *both* voluntary manslaughter *and* rape of a 15-year-old. *Id.* §§ 193(a), 264(c)(2). This disparity "shocks the conscience" and compels the conclusion that Mr. Palmer's continuing punishment is unconstitutional. And even if Mr. Palmer had committed any of these more serious crimes and received the maximum sentence *plus* a 10-year maximum gun enhancement, he would have already completed his sentence *and* any subsequent five-year parole period. *Id.* § 12022.53.[9]

[9] Although this comparison is not required because Mr. Palmer challenges his continuing punishment for kidnapping for robbery, not the two-year gun enhancement, it further demonstrates that his punishment is disproportionate.

Mr. Palmer's punishment is even more disproportionate than this adult-specific analysis reflects because of his diminished culpability as a juvenile. *See, e.g.*, *Miller*, 567 U.S. at 471 (juveniles have categorically diminished culpability). It is shocking that *adults* convicted of many offenses more serious than Mr. Palmer's face maximum sentences of less than half his term of imprisonment.

Instead of recognizing the dissonance between Mr. Palmer's punishment and those prescribed for more serious offenses for adults, the Attorney General seeks to define the universe of comparable offenses so narrowly that Mr. Palmer cannot possibly succeed. To do so, the Attorney General contends that offenses cannot be included in the analysis if (i) they warrant a determinate sentence or (ii) are "single-act" offenses. (OBM at 33.) After removing all such offenses, the Attorney General is left with only "offenses with life-maximum sentences or greater." (*Id.*) Because that is the equivalent or greater than what Mr. Palmer received, Mr. Palmer could not show "more serious crimes punished less severely than the offense in question." *Lynch*, 8 Cal. 3d at 426.

The Attorney General's citations do not support his position; there is no precedent for excluding determinate sentences or "single-act" offenses and no reason to do so. *See id.*, citing *People v. Cooper*, 43 Cal. App. 4th 815, 826 (1996); *People v. Jefferson*, 21 Cal. 4th 86, 92 (1999); and *Crooks*, 55 Cal. App. 4th at 807. *Cooper* rejects a comparison between a 25-to-life sentence imposed under the Three Strikes Law for multiple offenses and a sentence for first-degree murder because (i) the maximum punishment for first-degree murder "is much greater" than the challenged punishment and (ii) a single murder is incomparable to multiple felonies in the abstract. 43 Cal. App. 4th at 826. *Jefferson* is likewise inapplicable; it explains, in the context of a different issue, only that some felonies carry determinate sentences while others carry indeterminate sentences. 21 Cal.

4th at 92, 102. And in *Crooks*, the defendant was sentenced to 25 years to life with the possibility of parole under the "first strike" sentencing law for convictions of first-degree burglary with intent to commit rape, sexual battery, and three counts of rape by force or fear. 55 Cal. App. 4th at 897. He sought to compare his sentence to the sentence imposed for a single count of murder or any single sexual offense. *Id.* Because his five offenses were graver "than the sum of their parts," they could not properly be compared to the single offenses. *Id.*

The Attorney General's approach is also inconsistent with *Lynch* and *Rodriguez*. In both those cases, this Court did what the Attorney General contends cannot be done. In *Rodriguez*, the Court compared the 22 years that Mr. Rodriguez had been imprisoned pursuant to an indeterminate sentence with the determinate term-of-years punishments for several different offenses. *Rodriguez*, 14 Cal. 3d at 655. And in *Lynch*, the Court compared Mr. Lynch's indeterminate sentence of one year to life for a second-offense indecent exposure to several determinate sentences. *Lynch*, 8 Cal. 3d at 432.

After wrongly eliminating all other offenses from the comparison, the Attorney General claims that Mr. Palmer's punishment is proportionate because it is less severe than punishments prescribed for first-degree murder, second-degree murder, and kidnapping for ransom where the victim is exposed to bodily injury, death, or a substantial likelihood of death. (*See* OBM at 34, citing *Maston*, 33 Cal. App. 3d at 563.) Mr. Palmer does not dispute that his punishment is less than the maximum possible punishment for an adult who either commits a murder. But that is not the apt comparison. First-degree murder by an adult was and is still punishable by death, but that did not make Mr. Lynch's or Mr. Rodriguez's punishments any more constitutional. Life without parole and death are also categorically inapplicable to Mr. Palmer, such that this comparison

actually favors Mr. Palmer's position. Mr. Palmer would face the *same* maximum punishment—life with the possibility of parole—even if he had violated subsection (a) of Penal Code section 209 as a juvenile, which the Attorney General admits is a *more* serious crime. That indicates disproportionality, not the opposite.

Finally, the Attorney General wrongly contends that the second *Lynch* technique requires a comparison between Mr. Palmer's offense and punishment "in the abstract" with other offenses and punishments in California "in the abstract." (OBM at 35-36.) That is not true. In an as-applied challenge, courts compare the specific facts of the offense to other offenses in the abstract. *See, e.g.*, *People v. Cadena*, 39 Cal. App. 5th 176, 191 (2019); *Rodriguez*, 14 Cal. 3d at 650. For example, in *Rodriguez*, this Court found that although some violations of Penal Code section 288 could involve grave injury or death, Mr. Rodriguez's offense did not. 14 Cal. 3d at 648, 654-55. The Court then compared Mr. Rodriguez's punishment for his offense to punishments for more serious crimes involving violence, injury, or threat of injury. *Id.* at 655.

The Attorney General ignores *Rodriguez* and asks that the Court treat Mr. Palmer's case as a facial challenge, relying on *Lynch* and *People v. Haller*. (*See* OBM at 35.)[10] But neither case requires this "abstract" comparison for an as-applied challenge. *Lynch* is a facial challenge, and strikes the punishment in the abstract. *Haller* is an as-applied challenge,

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[10] In the alternative, the Attorney General wrongly contends that, if the comparison is not done in the abstract, then the Court must compare Mr. Palmer's specific offense and punishment with other specific offenses and punishments in California. (*See* OBM at 35.) The Attorney General cites no precedent for this seemingly impossible task, which suggests a comparison that would require huge amounts of information that Mr. Palmer could not reasonably access. The Attorney General's proposal is explicitly contradicted by *Webb*, 6 Cal. 4th at 546.

and the court did not adopt the Attorney General's approach explicitly, or implicitly. (*See id.*); *see also People v. Haller*, 174 Cal. App. 4th 1080, 1092-93 (2009). In *Haller*, the court summarized the defendant's arguments, mentioned specific facts of the defendant's offense, and concluded that the sentence was not disproportionate. *Id.* The Attorney General's "abstract" approach is unsupported by law or logic.

3. Mr. Palmer's Continued Confinement Is Grossly Disproportionate When Compared to the Penalties in Other Jurisdictions for Adults Who Commit the Same Offense (Third *Lynch* Technique)

Because the first two *Lynch* techniques support a finding of disproportionality, the Court need not reach the third *Lynch* technique, which shows that Mr. Palmer's confinement is grossly disproportionate compared to penalties in other jurisdictions. *Dillon*, 34 Cal. 3d at 487 n.38. Nonetheless, the third *Lynch* technique compels the same conclusion.

The third *Lynch* technique compares the challenged punishment to the punishments prescribed for the same offense in other jurisdictions. *Rodriguez*, 14 Cal. 3d at 656. If the challenged penalty exceeds the maximum sentence in "a significant number" of jurisdictions, that "disparity is a further measure of its excessiveness." *Lynch*, 8 Cal. 3d at 427. The proper comparison is between Mr. Palmer's 30 years of incarceration plus parole and the maximum penalties prescribed by other states for the same or substantially similar offenses. *See Rodriguez*, 14 Cal. 3d at 656.

Mr. Palmer was incarcerated for as long as, if not longer than, the *maximum* sentence that could apply to his offense when committed by an *adult* in at least 21 states. (*See* Ex. KK.)[11] That analysis considers any

[11] Three states were inadvertently excluded from Exhibit KK: Colorado, Idaho, and Kentucky. Colorado prescribes a sentence of 21 to 53 years for Mr. Palmer's offense, Colo. Rev. Stat. Ann. §§ 18-3-301(1)(a), 18-3-

firearm enhancements analogous to Penal Code section 12022.5.[12] Over half of those 21 states impose statutory maximums of 20 years or less.[13] In at least five of those states, the statutory maximum is 15 years or less—half the time that Mr. Palmer has already been punished.[14] The Attorney General's brief does not contest any of this. (*See* OBM at 36.)

Moreover, these are *maximum* sentences under the relevant statutes. Unlike Penal Code section 209(b), which mandates a life sentence, 20 of these 21 states' statutes provide a range within which the sentencing court has discretion.[15] In several states, the maximum sentences used for this analysis are available only if the judge or jury specifically finds that the offense was so aggravated as to justify an upward departure from the presumptive maximum sentence.[16]

301(2), 18-3-301(3), 18-1.3-406(1)(a), 18-1.3-406(2)(a)(I)(A), 18-1.3-406(2)(a)(II)(D), 18-1.3-406(7)(a), and Idaho prescribes a punishment of one to 40 years, Idaho Code Ann. §§ 18-4501, 18-4503, 18-4504(2), 19-2520. In Kentucky, the punishment is 20 to 50 years, or life. Ky. Rev. Stat. Ann. §§ 509.040(2); 532.060(2)(b), 527.040(1)(b), 532.060(2)(a).

[12] Mr. Palmer received a two-year sentence enhancement because he "use[d] a firearm in the commission of a felony" within the meaning of section 12022.5. (Ex. H; Ex. I.) A number of other jurisdictions have laws that similarly provide for enhanced sentencing for crimes committed while armed. Those laws were applied in calculating the maximum sentences used in this analysis.

[13] (*See* Ex. KK (Georgia, Hawaii, Kansas, Massachusetts, Missouri, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island).)

[14] (*See* Ex. KK (Massachusetts, Missouri, New Hampshire, Ohio, Oregon).)

[15] (*See* Ex. KK.) The sole exception is Massachusetts, which prescribes a 10-year sentence for an armed kidnapping not committed for ransom. *See* Mass. Gen. Laws ch. 265, § 26.

[16] (*See* Ex. KK (Kansas, Mississippi, New Mexico, North Carolina, Washington).)

The Attorney General contends that Mr. Palmer's sentence is constitutional because it is within the range of prescribed punishment in over half of all states. (*See* OBM at 36.) But the Attorney General fails to describe the sentencing practices of those states for the Court. Although 19 of the remaining 29 jurisdictions appear to authorize a life-maximum sentence, only *one*—West Virginia—is like California in making it *mandatory* for both adult and juvenile offenders.[17] W. Va. Code Ann. §§ 61-2-14a(a)(1), 61-2-14a(a)(3), 61-11-23(a). Although Nebraska also has a mandatory life-maximum sentence for a comparable offense, an exception is made for juveniles. *See* Neb. Rev. Stat. §§ 28-105, 28-105.02(1), 29-2204(1). California, as one of only two states with a mandatory life sentence for juveniles, is thus unusually likely to impose a punishment that is grossly disproportionate. *Cf. Hatter v. Warden, Iowa Men's Reformatory*, 734 F. Supp. 1505, 1525 (N.D. Iowa 1990), *aff'd sub nom. Hatter v. Iowa Men's Reformatory*, 932 F.2d 701 (8th Cir. 1991) ("[T]he mandatory nature of the penalty is relevant to determining whether the sentence is disproportionate.").

The Attorney General also ignores that several of the jurisdictions that authorize a sentence longer than Mr. Palmer's punishment either allow or require that juveniles be treated differently at sentencing. For example, South Dakota permits a life-maximum sentence for kidnapping-for-robbery, but does not allow the sentence to be imposed on juveniles. *See* S.D. Codified Laws §§ 22-19-1(2), 22-6-1(C), 22-6-1.3, 22-14-12. Montana exempts juveniles from a mandatory minimum sentence that would otherwise apply to the comparable offense. Mont. Code Ann. § 46-18-222;

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[17] Courts have repeatedly emphasized the need to consider a juvenile's individual culpability at sentencing. *See, e.g.*, *Miller*, 567 U.S. at 474-78 (criticizing mandatory sentencing regime for ignoring characteristics and circumstances of juvenile defendants).

id. § 45-5-303(1)(b). Florida allows a downward departure from the lowest authorized sentence if the defendant was "too young to appreciate the consequences of the offense." Fla. Stat. Ann. § 921.0026(2)(k). In Illinois, courts must consider youth-related factors as mitigation when sentencing juveniles to a comparable offense. *See* 730 Ill. Comp. Stat. 5/5-4.5-105(a). Mr. Palmer was not afforded any of these protections, and the Attorney General fails to account for this in contending that California is aligned with the majority.

B. Mr. Palmer's Continued Confinement Is Constitutionally Disproportionate Under the Eighth Amendment

The United States Constitution is no less tolerant of Mr. Palmer's grossly disproportionate punishment than the California Constitution. The question under both constitutions is whether his continued confinement has become "grossly disproportionate" to his specific crime or his individual culpability; the factors relevant to the answer are essentially the same. *Compare Solem*, 463 U.S. at 288, 290-92 *with Lynch*, 8 Cal. 3d at 425, 431, 436. The Court of Appeal correctly concluded that its analysis under the California Constitution "would yield the same conclusions under the federal Constitution." *In re Palmer*, 33 Cal. App. 5th at 1221 (2019).

The Attorney General contends that the federal claim fails because of a lack of federal authority and for the same reasons that the California claim fails. (*See* OBM at 37-38.) The Court should reject these contentions. First, the analysis relevant to Mr. Palmer's federal claim is identical to California's for all purposes here. Second, the federal cases on which the Attorney General relies do not support denying relief because none consider proportionate sentences for juvenile offenders. Finally, that no court has yet granted an Eighth Amendment claim based on the term of years served means only that this is a novel question, not that Mr. Palmer's claim must be denied.

1. The U.S. Constitution Prohibits Mr. Palmer's Grossly Disproportionate Punishment

Binding federal and state law interpreting the two constitutional provisions at issue rely on the same analysis and the same factors to answer the same question—is the punishment grossly disproportionate to the specific crime and/or the individual offender? *See Solem*, 463 U.S. at 288 (summarizing test for proportionality); *Mendez*, 188 Cal. App. 4th at 64. When assessing the first federal factor—the gravity of the offense and the harshness of the penalty—a court evaluating a federal claim should consider, as under California law, the nature of the individual offender, including his "mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history." *Graham*, 560 U.S. at 88; *Lynch*, 8 Cal. 3d at 425. The analyses under the second and third factors are also substantively the same. *See Solem*, 463 U.S. at 291-292; *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991); *Graham*, 560 U.S. at 60; *Lynch*, 8 Cal. 3d at 431, 436.[18]

In Mr. Palmer's case, applying the same analysis yields the same result. The Attorney General does not disagree that both constitutions prohibit a punishment that is "grossly disproportionate" or that the analysis is fundamentally the same. (OBM at 37-38.) And the Attorney General provides no principled reason that a sentence that shocks the conscience under California's Constitution would not shock the conscience under the United States Constitution.

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[18] The sole difference is that the first factor is a "threshold inquiry" under the federal constitution, whereas all three factors are independently valid under the California constitution. *Dillon*, 34 Cal. 3d at 487 n.38. This difference is not relevant here.

2. Federal Precedent Does Not Bar Mr. Palmer's Claim

The federal cases on which the Attorney General relies do not support denying relief because none consider proportionate sentences for juveniles. In recent decades, the United States Supreme Court has repeatedly explained that juveniles are "constitutionally different." *Miller*, 567 U.S. at 471. This difference controls the application of constitutional protections for juveniles. *See, e.g.*, *Thompson*, 487 U.S. at 835 (plurality opinion); *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 473-74. The diminished culpability of juveniles is based on three key differences between them and adults: (i) juveniles are defined by "a lack of maturity and undeveloped sense of responsibility" that leads to "recklessness, impulsivity, and heedless risk-tasking," *Miller*, 567 U.S. at 471 (internal quotations omitted); (ii) juveniles are more susceptible to external pressures—"from their family or peers"—and "have limited control over their own environment" and therefore "lack the ability to extricate themselves from horrific, crime-producing settings," *id.*; and (iii) a juvenile's character is less fixed and therefore "less likely to be evidence of irretrievable depravity." *Id.* Each of these key differences is relevant to the federal analysis.

The constitutional significance of youth applies equally to the Eighth Amendment proportionality inquiry and California's equivalent. *See Graham*, 560 U.S. at 91-92 (Roberts, C.J., concurring). In his *Graham* concurrence, Chief Justice Roberts concluded that the sentence was unconstitutionally excessive. *Id.* at 91-94. Justice Roberts found that the petitioner's personal culpability was greatly reduced because he "committed the relevant offenses when he was a juvenile—a stage at which, *Roper* emphasized, one's culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."

Id. at 91. Justice Roberts explicitly distinguished *Rummel*, *Harmelin*, and *Ewing* on the ground that they evaluated adult punishments, and thus have little value when evaluating a juvenile's punishment, as a juvenile is "in a significantly different category." *Id.* at 90.

Because they are adult cases, the Attorney General cannot rely on *Harmelin v. Michigan*, *Hutto v. Davis*, and *Rummel v. Estelle* here either. (*See* OBM at 38.) None of the cases consider punishments imposed on juveniles, and all three were decided before the Supreme Court ruled on the constitutionally diminished culpability of juveniles. *See Harmelin*, 501 U.S. at 961, 994-95; *Hutto v. Davis*, 454 U.S. 370, 371-72 (1982); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). In *Harmelin*, the Supreme Court upheld a sentence imposed on an adult that has since been ruled unconstitutional if imposed on a juvenile. 501 U.S. at 960 (sentence of life without parole for possession of more than 650 grams of cocaine upheld) ; *Graham*, 560 U.S. at 82 (sentence of life without parole categorically unconstitutional for juvenile non-homicides).

3. Federal Precedent Supports Mr. Palmer's Claim

The Attorney General provides no principled reason Mr. Palmer's Eighth Amendment claim should fail because it was brought three decades into his punishment, rather than at the time his sentence was imposed. Adopting this position would be particularly unfair to Mr. Palmer: if Mr. Palmer had brought his challenge in 1988, he would not have known that he would actually be punished for more than 30 years. In fact, based on representations made by the prosecutor at the time of his plea, he understood he would be released after eight or nine years. (*See* Pet'n at 19 n.6.) And, as the Court of Appeal correctly remarked, it would be "absurd and unjust" to bar a challenge to a punishment as unconstitutionally excessive "on the basis that it was brought *too late into his confinement.*" *In re Palmer*, 33 Cal. App. 5th at 1204 (2019) (internal quotation marks

omitted). Contrary to the Attorney General's claim otherwise, it is irrelevant that no federal case has yet granted an Eighth Amendment claim based on the actual term of years served. The Attorney General cites no case that has rejected such a claim, meaning only that this is a novel question, not that the claim must be rejected. (*See* OBM at 37); *cf. Roper*, 543 U.S. at 559-60 (affirming prohibition on juvenile executions first articulated by Missouri court).

The Court should consider the issue in light of recent jurisprudence. Modern "standards of decency" apply when deciding whether the continued punishment of Mr. Palmer is grossly disproportionate to his culpability for the reckless but physically injury-free crime he committed as a 17-year-old. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Eighth Amendment "is not static"; it "must draw its meaning from the evolving standards of decency"); *Weems v. United States*, 217 U.S. 349, 378 (1910) (the standards embodied in the Eighth Amendment evolve "as public opinion becomes enlightened by a humane justice"). Since Mr. Palmer was first incarcerated, the United States Supreme Court has enforced increasingly robust protections for juveniles in the criminal system. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005); *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 473-74. These cases require recognizing the diminished culpability of juveniles—including those like Mr. Palmer who were sentenced indeterminately before their diminished culpability was recognized—under the federal proportionality framework.

C. The Court of Appeal Applied the Correct Legal Standard to Mr. Palmer's Claims

The Attorney General contends that the Court of Appeal "applied the wrong legal standard" and its decision offends the notion of a separation of powers, but the opposite is true: the decision exemplifies the success of the separation of powers principle. (*See* OBM at 19-24.) The Court of Appeal

acted squarely within its judicial function when it determined that Mr. Palmer's continuing punishment is unconstitutionally excessive.

The judiciary is the sole authority for determining whether punishments are disproportionate under the California and United States constitutions. The judiciary—as the ultimate safeguard of "the politically weak and underrepresented"—enforces constitutional limits on legislatively sanctioned behavior. *Bixby v. Pierno*, 4 Cal. 3d 130, 143 (1971); *Lynch*, 8 Cal. 3d at 415 ("[J]udicial review assures a government under the laws."); *Dillon*, 34 Cal. 3d at 478 (determining whether the legislature's punishment "exceeds constitutional limits is a judicial function"). Thus, legislative authority "remains ultimately circumscribed" by the courts' constitutional review. *Dillon*, 34 Cal. 3d at 477. The judiciary's power to define the boundaries of constitutional punishment applies to both legislatively sanctioned life sentences, *see Butler*, 4 Cal. 5th at 744 ("an inmate sentenced to an indeterminate term cannot be held for a period grossly disproportionate to his or her individual culpability"), and the Board's parole determinations, *see In re Wells*, 46 Cal. App. 3d 592, 604 (1975).

The Court of Appeal correctly stated the role of the judiciary. It first explained that the prison terms that the indeterminately sentenced actually serve are normally a function of the Board's decisions, not the Legislature's. *In re Palmer*, 33 Cal. App. 5th at 1202 (2019). This is because the legislature has delegated its authority to the Board in such cases. *See, e.g.*, *In re Lawrence*, 44 Cal. 4th 1181, 1202 (2008); *In re Morganti*, 204 Cal. App. 4th 904, 916 (2012). The Court of Appeal then concluded that "deference to the legislature" is not the correct framing of the issue when an indeterminately sentenced petitioner challenges his continued incarceration, because the legislature has delegated the relevant function to the Board. *Palmer*, 33 Cal. App. 5th at 1206. All of these statements are correct. The Attorney General construes this as a rejection

of all deference. (OBM at 20.) Not so. Rather, the Court of Appeal stated that any punishment—whether the product of the legislature or the Board—is subject to constitutional limits enforced by the courts. This too is correct.

In arguing that the Court of Appeal failed to properly defer to the legislature, the Attorney General cites, but fails to appreciate, *In re Lynch.* (OBM at 21, citing *Lynch*, 8 Cal. 3d at 424.) *Lynch* instructs a court to find a punishment constitutionally excessive if it "shocks the conscience and offends fundamental notions of human dignity." 8 Cal. 3d at 424. Thus, while the Attorney General argues that a court cannot find Mr. Palmer's sentence unconstitutional without infringing on legislative authority, the Attorney General also offers the very standard the California Supreme Court has fashioned for judicial review of this *exact* sort—the same standard the Court of Appeal applied. *Lynch* confirms that when a court reviews a legislatively prescribed indeterminate punishment for constitutional excessiveness, it acts within its proper judicial function—and has established a standard for doing so. *See id.*

In addition to serving as a check on the legislature, the judiciary serves another critical role: protecting individual rights. *See Rodriguez*, 14 Cal. 3d at 650 (right to challenge punishment is particularly important for indeterminate sentences). The Attorney General's theory threatens to erase this protection. The Attorney General contends that his theory "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." (OBM at 21.) But it means exactly that. If this Court were to determine that courts overstep their judicial authority when they find facially permissible punishments unconstitutional as applied to particular individuals, indeterminately incarcerated individuals serving legislatively prescribed sentences could not challenge their punishments

without courts violating the separation of powers doctrine. In other words, they could not challenge their punishments at all.

This Court should affirm the Court of Appeal's grant of habeas relief as a proper exercise of its judicial power.

II. THE PROPER REMEDY IS TO ORDER AN END TO ALL EXCESSIVE PUNISHMENT, INCLUDING PAROLE

The Attorney General concedes that parole is continued punishment for Mr. Palmer's offense. (*See* OBM at 40 ("both parole and incarceration are punishment for the conviction").) The parties disagree whether Mr. Palmer can continue to be punished beyond constitutional limits. The Attorney General insists that he can, relying on the statutory basis for parole—Penal Code section 3000 *et seq.*—and the separation of powers doctrine. Mr. Palmer disagrees, relying on his right to be free from excessive punishment and the courts' inherent power to remedy constitutional violations. Because no statute can trump Mr. Palmer's constitutional rights, this Court can and must craft a remedy that ends all ongoing, excessive punishment, including parole.

A. The Petition Is Not Mooted by Release on Parole

Because a parolee is still in custody, though constructive and not actual, a petition for a writ of habeas corpus is not automatically mooted by the paroling of the petitioner. *In re Sturm*, 11 Cal. 3d 258, 265 (1974) (habeas corpus petition not rendered moot by the petitioner's release on parole while his petition was pending because parolee is in constructive custody); *Wells*, 46 Cal. App. 3d at 593 (same); Penal Code § 3056(a) (parolee under supervision of CDCR). More generally, a writ, like an appeal, is mooted only "if events have made any effective relief impracticable or impossible." *See, e.g.*, *Ogunsalu v. Superior Court*, 12 Cal. App. 5th 107, 111 (2017) (quoting *Lockaway Storage v. Cty. of Alameda*, 216 Cal. App. 4th 161, 174-75 (2013)); *cf. Union of Med.*

Marijuana Patients, Inc. v. City of San Diego, 7 Cal. 5th 1171, 1190 n.7 (2019) (appeal not moot where effective relief can still be granted); *In re Bye*, 12 Cal. 3d 96, 100 n.2 (1974) (challenge to denial of outpatient status not moot after outpatient status restored because it remained subject to revocation).

The Attorney General's mootness argument (*see* OBM at 48 ("the court should have denied the petition as moot")) is contrary to well-established precedent and the doctrine's scope. The Attorney General cites *Frias v. Superior Court* and *National Ass'n of Wine Bottlers v. Paul*, but neither supports him. (*See id.*) In *Frias*, the petitioner sought release from "the maximum segregation area," which had already occurred. *Frias v. Superior Court*, 51 Cal. App. 3d 919, 923 (1975) (petition mooted where "resolution of the question originally presented [was] academic and of no practical effect"). In *Wine Bottlers*, an appeal of an order declaring a marketing order of the Director of Agriculture void was mooted by the termination of the marketing order during the pendency of the appeal. *Nat'l Ass'n of Wine Bottlers v. Paul*, 268 Cal. App. 2d 741, 746 (1969) ("Since the marketing order on which this case is based is no longer in effect, a decision of this court obviously cannot affect it.").

Resolution of Mr. Palmer's petition is not academic. Mr. Palmer does not seek the remedy of release on parole—he seeks the termination of all custody, including the termination of parole. Thus, the grant of parole by the Board does not make the relief he seeks impractical, impossible, or academic. A writ of habeas corpus seeking discharge from all custody is not mooted by a change in custody status from actual to constructive, especially where his custody status could still revert back from constructive to actual. *See* Penal Code §§ 3056(b), 3000.08(h) (CDCR's power to request parole revocation); 3062 (governor's power to revoke parole).

B. Parole Is Unconstitutional Further Punishment for the Offense

This Court previously addressed whether parole is further punishment for the underlying offense and directly held that it is:

> The concept of punishment is broader than the term of imprisonment. ... [A] period of parole following a prison term has generally been acknowledged as a form of punishment ... a form of punishment accruing directly from the underlying conviction. ... Thus, a prison sentence contemplates a period of parole, which in that respect is related to the sentence. ... Being placed on parole is a direct consequence of a felony conviction and prison term.

People v. Nuckles, 56 Cal. 4th 601, 608-09 (2013) (internal citations and quotation marks omitted) (defendant who assisted parolee in absconding was properly convicted as accessory to parolee's offense because parolee was still being punished); *compare People v. Mosley*, 60 Cal. 4th 1044, 1066 (2015) (residency restrictions of Jessica's Law not "punishment" because, unlike parole, residency restrictions do not involve oversight by penal authorities and their violation cannot result in revocation of a conditional release), *with People v. Pinon*, 6 Cal. App. 5th 956, 965-66 (2016) (parole is punishment for the underlying offense); *People v. VonWahlde*, 3 Cal. App. 5th 1187, 1194, 1197 (2016) (same); *In re Carabes*, 144 Cal. App. 3d 927, 931-32 (1983) (same). It follows that, where a petitioner alleges that their continued punishment for a specific offense has already become excessive, there is only one appropriate remedy: an end to the punishment for that offense, including discharge from all custody, which includes parole. *See Wells*, 46 Cal. App. 3d at 604 (ordering the parolee-petitioner discharged "from all custody, actual, or constructive" after finding he had already served more than permissible term); *Rodriguez*, 14 Cal. 3d at 656 (ordering that the respondent "discharge petitioner from custody" after he already served an

unconstitutionally excessive sentence); *Lynch*, 8 Cal. 3d at 439 (ordering the petitioner "discharged from custody" because he was "entitled to his freedom" after serving longer than permissible term).

Discharge from parole is also the only remedy that makes sense under California's parole system, where a violation of the conditions of parole may cause a return to actual custody. *See* Penal Code § 3000.08(f)-(g); *id.* § 3056(a); s*ee also Samson v. California*, 547 U.S. 843, 853-54 (2006); *Morrissey v. Brewer*, 408 U.S. 471, 478-80 (1972) (parole imposes a risk of re-incarceration without the same due process afforded to non-parolees). Where there is no lawful actual custody, there can be no lawful parole.[19]

The Attorney General concedes, as he must, that parole is inherently punitive and punishment for the underlying offense. (*See* OBM at 40.) Yet the Attorney General attempts to distinguish parole from imprisonment to support his contention that parole is not inevitably unconstitutional where imprisonment has become excessive. Although Mr. Palmer does not disagree that imprisonment and parole are "distinct phases" with somewhat different objectives (*see Nuckles*, 56 Cal. 4th at 608-09), that is irrelevant, because (i) parole and imprisonment are both still punishment, and (ii) lawful re-imprisonment is a necessary premise to a lawful parole period. These two facts mandate an end to all punishment for Mr. Palmer's 1988 offense, including parole.

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[19] Assuming any amount of parole is lawful, the length of Mr. Palmer's parole term is governed by the law in 1988, and is a five-year base period, with a maximum period of seven years. *See* Penal Code § 3000(b)(1); Cal. Code Regs. tit. 15, § 2515(d). If he is found to have violated a parole condition, his parole can be revoked and he can be re-incarcerated for up to 180 days. Penal Code § 3000.08(f)-(g); *id.* § 3056(a). The governor also has the independent power to revoke his parole. *Id.* § 3062.

To follow the Attorney General's recommendation would lead to an absurd result: Mr. Palmer would remain on parole with conditions that could never be lawfully enforced. Rather than adopt this incongruous approach, the Court should adopt Mr. Palmer's: if there can be no constitutional consequence for any violation of a parole condition by Mr. Palmer, parole itself cannot be proper and the only appropriate relief is to discharge Mr. Palmer from all forms of custody, including parole.

The Attorney General suggests that Mr. Palmer should have brought a separate claim as to his parole period, and any constitutional challenge as to the parole period "would require an additional analysis of the *Lynch* factors as applied to that parole period." (OBM at 47-48.) But the cases he cites—*People v. Gaythe*r, 110 Cal. App. 3d 79 (1980), and *State v. Mossman*, 294 Kan. 901 (2012)—challenge only the probation or post-release practice, and in neither had the court found that the individual's punishment had already become excessive when it found the challenged probation and post-release practices permissible. *See Gaythe*r, 110 Cal. App. 3d at 87-90; *Mossman*, 294 Kan. at 908-21.

Mr. Palmer's special conditions of parole further illustrate how parole can be extremely punitive in a specific individual's case. Mr. Palmer's conditions of parole bear no relation to his underlying offense, severely inhibit his ability to successfully reintegrate, and deny him fundamental freedoms enjoyed by non-parolees. For example, if Mr. Palmer walks through a park, he can be re-incarcerated. (3/21/2019 Letter to Court of Appeal, Ex. 1, Parole Condition No. 20.) He can be re-incarcerated for talking to his children or having a relationship with anyone with minor children. (*Id.* Nos. 16, 21.) The power to re-incarcerate implicit in parole is not hypothetical in Mr. Palmer's case; while on parole Mr. Palmer has been subject to a petition to revoke and significant periods of re-incarceration. (*See* RJN Ex. Dd.) Ignoring the punitive nature of

parole, the Attorney General contends that parole "is critical to [Mr. Palmer's] successful reintegration." (OBM at 41.) That is untrue and irrelevant. The Attorney General's unwelcome offer of assistance—with a string attached leading to re-incarceration—ignores that any return to actual custody would be unlawful.

C. The Court Is the Appropriate Authority with Power to Order an End to Mr. Palmer's Excessive Punishment

Contrary to the Attorney General's suggestion, courts have the power to fashion a remedy that ends an unconstitutional punishment, including by terminating parole. *See People v. Booth*, 3 Cal. App. 5th 1284, 1312 (2016) (habeas corpus is equitable remedy and court's power is not limited to discharge from or remand to custody); *In re Crow*, 4 Cal. 3d 613, 619 (1971) (same); *see also* Penal Code § 1484 (courts empowered to craft remedy for writ of habeas corpus "as the justice of the case may require"). At a minimum, the Court must remedy any evident deprivation of Mr. Palmer's constitutional rights. *See, e.g.*, *Lawrence*, 44 Cal. 4th at 1211 ("judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights"); *see also Barber v. Mun. Court*, 24 Cal. 3d 742, 755, 760 (1979) (ordering "only effective remedy" necessary to protect petitioner's constitutional rights *and* "to deter the state from such unlawful intrusions in the future").

Ignoring the judiciary's role in vindicating constitutional rights, the Attorney General misreads *Lira* to manufacture a "separation of powers" controversy that does not exist. The remedy sought in *Lira* is not sought by Mr. Palmer, and the constitutional violation alleged by Mr. Palmer was not alleged in *Lira*. *In re Lira*, 58 Cal. 4th 573, 578, 581-82 (2014). There, the petitioner asked for a reduced parole term based on the time between when he was actually paroled and when he would have been paroled if the governor had not improperly revoked the Board's prior grant of parole. *Id.*

at 581-82. Unlike in *Lira*, Mr. Palmer does not ask the Court to calculate the time he spent unlawfully confined and to credit that time against his time on parole. Rather, Mr. Palmer contends that the Attorney General cannot unconstitutionally inflict *any parole period* on him. Because both the claim and remedy were different, *Lira* is entirely inapposite. *Id.* at 582.

At the same time, the Attorney General admits that the separation of powers principle is violated only where a remedy "is broader than necessary to cure the constitutional violation" (OBM at 40) but fails to explain how the Court of Appeal's remedy was broader than necessary. Because parole is punishment, the only remedy that cures the ongoing violation of Mr. Palmer's constitutional rights is discharge from parole.

The Attorney General's contention amounts to an argument that the executive and the legislature may continue to violate Mr. Palmer's constitutional rights in the purported interest of public safety or rehabilitation, and the courts can do nothing about it. This Court in *Dannenberg* expressly rejected this idea when it held that, for an inmate who has already been excessively confined, no theory can "authorize such an inmate's retention, even for reasons of public safety, beyond this constitutional maximum period of confinement." 34 Cal. 4th at 1096. The government's interest in public safety does not permit a violation of an individual's constitutional rights. *Id.*

D. The Eighth Amendment Requires Terminating Parole

A violation of Mr. Palmer's Eighth Amendment rights also requires Mr. Palmer's discharge from all custody, including parole. California courts have the power and duty to stop continued constitutional violations of federal law too, and courts properly exercise this power when they order termination of the practice causing an Eighth Amendment violation. *See, e.g.*, *In re Coca*, 85 Cal. App. 3d 493, 503-04 (1978) (where medical treatment of prisoner violated Eighth Amendment, ordering certain access

to facilities did not usurp Department of Corrections' power to manage its institution); *In re Hutchinson*, 23 Cal. App. 3d 337, 341-42 (1972) (where duration of segregation in maximum security violated the Eighth Amendment, court ordered return of prisoner to the general population). The Attorney General does not dispute that the remedy analysis is the same under the California and federal claims. (*See* OBM at 38-48.)

The State should not be permitted to continue to punish Mr. Palmer for an offense for which the punishment that has already been inflicted on him is shockingly cruel under both the California and United States constitutions. No prior court has ever permitted this. This Court should not be the first. It should affirm the Court of Appeal's order ending Mr. Palmer's excessive punishment and giving him his freedom.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: January 2, 2020

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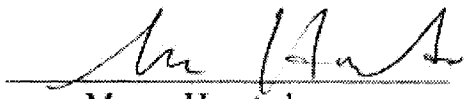
CERTIFICATE OF WORD COUNT

I certify that the attached Answer Brief on the Merits uses 13-point Times New Roman font and contains 13,311 words.

Dated: January 2, 2020 By: 

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PROOF OF SERVICE

Case Name: **In re Palmer**

Case No.: **S256149**

I, Maggie T. Vuong, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Two Embarcadero Center, 28th Floor, San Francisco, California 94111-3823. I am over 18 and am not a party to this action.

On January 2, 2020, I served the within document(s):

ANSWER BRIEF ON THE MERITS

by placing a true and correct copy thereof together with an unsigned copy of this declaration, in a sealed envelope addressed as follows, with delivery fees paid or provided for, for delivery the next business day:

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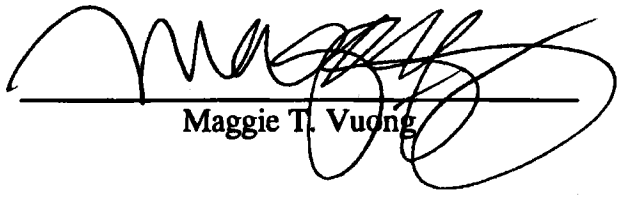
I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 2, 2020, at San Francisco, California.



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