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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

William Palmer argues first that his continued incarceration for his kidnapping for robbery conviction was cruel and unusual punishment, and second, that this violation entitled him to a complete discharge from State supervision, including the elimination of his parole period.

In making the first argument, Palmer essentially adopts the Court of Appeal's view that deference to legislative punishment determinations does not apply to challenges raised years into a sentence. This argument is baseless—and Palmer's critique of the Board of Parole Hearings' *Lynch* analysis likewise fails to establish that his sentence was cruel or unusual punishment under state or federal law.

Moreover, even if Palmer could show that the length of his incarceration exceeded constitutional bounds, his attempt to extend that into the automatic elimination of his parole period is wrong. Parole affects an offender's liberty drastically differently, and serves reintegration goals that are distinct from incarceration's punitive purposes. A parole period may be unconstitutionally excessive to the offense and offender in a particular case. But a finding that an inmate's incarceration is cruel or unusual does not necessarily mean the parole period is also unconstitutional. Because a remedy for a constitutional violation must be tailored to the violation, a court cannot reduce an inmate's parole period absent statutory authority or a finding that the parole period itself is constitutionally excessive. This conclusion is consistent with separation of powers principles and protects the authority of the three co-equal branches of government: the Legislature's declaration that parole is critical to an inmate's successful reintegration into society, the Board's authority in parole matters, and the court's responsibility to determine whether an inmate's punishment is cruel or unusual. Those who have been incarcerated too long are in no lesser

need of services upon their release—and society needs their successful reintegration as well. The Court of Appeal's judgment should be reversed.

ARGUMENT

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

A. The Court of Appeal Failed to Defer to the Legislature's Prescribed Punishment

Palmer does not dispute that the Legislature prescribed life with the possibility of parole as the maximum punishment for his offense. (See Answering Brief on the Merits (ABM) 45-47.) Like the Court of Appeal, however, he views that legislative choice as without significance, stating that it is not entitled to deference because the Board decided the length of his incarceration. (ABM 46-47.) As the opening brief showed, that view is incorrect. As this Court has recognized for almost 50 years, the Legislature's expertise in defining crimes and prescribing punishments—and its constitutional role as the legislative body in this State—is entitled to deference in the cruel or unusual punishment context. (*In re Lynch* (1972) 8 Cal.3d 410, 414-415, 419, 424.)

Palmer contends that the Board's argument for deference amounts to a request for judicial abdication. (ABM 47-48.) That is incorrect. A court may still find a particular sentence unconstitutionally excessive based on the facts of a particular case. But before reaching that conclusion, the court must give serious consideration to the Legislature's prescribed punishment, keeping in mind the Legislature's ability to make constitutionally proper judgments about the relative gravity of criminal conduct. As this Court has recognized, the "choice of fitting proper penalties is not an exact science, but a legislative skill." (*Lynch*, *supra*, 8 Cal.3d at p. 423.) This skill includes "the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will . . . ." (*Ibid.*) A court

must defer to the legislatively prescribed punishment unless the punishment "shocks the conscience" or "offends fundamental notions of human dignity." (*Id.* at p. 424.)

Moreover, Palmer argues the court correctly refused to defer to the Legislature's prescribed punishment for kidnapping for robbery because the Board decides a life-term inmate's prison term through its power to grant or deny parole. (Answer Brief on the Merits (ABM) 46-47.) This argument also misses the mark.

The Board's decision to deny Palmer parole was a function of his sentence of life with the possibility of parole based on its separate and independent statutory authority to decide when Palmer could safely be released from prison. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205.) This inquiry largely focuses on post-conviction behavior (*id.*, at pp. 1205-1206, 1214)—a factor that is irrelevant to the cruel-or-unusual punishment analysis (*People. v. Dillon* (1983) 34 Cal.3d 441, 479). While a parole denial results in an inmate's continued incarceration, the fact of the denial—including the reasons for it—is not germane to the constitutionality of the underlying life sentence. As this Court recently reaffirmed, the Board is not required to consider constitutional proportionality principles as part of its suitability determination. (*In re Butler* (2018) 4 Cal.5th 728, 744-747; see also *In re Dannenberg* (2005) 34 Cal.4th 1061, 1071, 1096-1098)[1] Proportionality review is a fact-specific inquiry based on the nature

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[1] Although this Court reaffirmed certain constitutional disproportionality principles in *Dannenberg*, and noted an inmate may bring a cruel-or-unusual punishment claim following a parole denial (*supra*, 34 Cal.4th at pp. 1071, 1098), proportionality was not at issue in that case. Rather, *Dannenberg* contemplated whether the Board was required to consider sentence uniformity before it could deny parole for public safety reasons. (*Id.* at pp. 1069-1070; see *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195 ["language in a judicial opinion

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of the offense and the offender's individual culpability at the time of the crime, giving appropriate deference the Legislature's prescribed punishment. (*Lynch*, *supra*, 8 Cal.3d at p. 425; *Dillon*, *supra*, 34 Cal.3d at p. 479.)[2] The Court of Appeal failed to defer to the Legislature here and its judgment should be reversed.

B. Palmer's Sentence Was Constitutional

As set forth in the opening brief, Palmer's sentence was constitutional under *Lynch* and federal law. (Opening Brief on the Merits (OBM) 24-38.) Palmer's arguments, which are addressed in turn below, are without merit.

With respect to the first *Lynch* factor, the nature of the offender and offense, Palmer notes that he was 17 years old when he committed the crime. Palmer's youth is undoubtedly important in the cruel-or-unusual punishment analysis. But neither this Court nor the United States Supreme Court has held that a sentence of life with the possibility parole is categorically disproportionate for a youth offender's violent, non-homicide, offense. (See *Roper v. Simmons* (2005) 543 U.S. 551, 575 [no *death penalty* for juvenile offenders]; *Graham v. Florida* (2010) 560 U.S. 48, 74-

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is to be understood in accordance with the facts and issues before the court"].) Because disproportionality focuses on the specific nature of the offender and offense, these claims are more logically brought when the sentence is imposed. (See, e.g, *People v. Mendez* (2010) 188 Cal.App.4th 47, 50-51 [direct appeal]; *In re Nunez* (2009) 173 Cal.App.4th 709, 714 [habeas petition]; *People v. Felix* (2002) 108 Cal.App.4th 994, 998-999 [objection to enhancement as cruel or unusual in trial court].) Early adjudication of these claims has the added benefit of helping ensure inmates do not serve a period of incarceration in excess of constitutional limits.

[2] An inmate may challenge a parole denial on constitutional grounds. (*In re Shaputis* (2011) 53 Cal.4th 192, 198, 210.) If the record fails to support the parole authority's conclusion the inmate is unsuitable for parole, the denial violates due process. (*Ibid.*)

75 75 [no *life without the possibility of parole* for nonhomicide juvenile offenders; must have meaningful opportunity for parole within their lifetime]; *Miller v. Alabama* (2012) 567 U.S. 460, 465 [no *mandatory life without the possibility for parole* for juvenile homicide offenders]; *People v. Caballero* (2012) 55 Cal.4th 262, 268 [under *Graham*, term of years with *eligibility date outside of juvenile offender's natural life expectancy* is cruel and unusual punishment]; *People v. Contreras* (2018) 4 Cal.5th 349, 367-370, 379 [based on *Graham*, *no possibility of release until age 66* violated Eighth Amendment]; see also ABM 24.) Youth is and remains a factor in deciding whether an inmate's sentence is constitutionally proportionate, but it is not necessarily conclusive. (See *People v. Garcia* (2017) 7 Cal.App.5th 941, 954 [upholding life with the possibility of parole despite the defendant's youth].)

As Palmer notes (ABM 24), *People v. Gutierrez* (2014) 58 Cal.4th 1354, read *Graham* and *Roper* as indicating that the "mitigating features of youth can be dispositively relevant." (*Id.* at p. 1381.) But *Gutierrez*'s conclusion from those cases addressed a very different issue than the one presented here. *Gutierrez* held that a presumption in favor of life *without* the possibility of parole for juvenile offenders for special circumstance murder under Penal Code section 190.5, subdivision (b) violated the Eighth Amendment. (*Id.* at pp. 1360, 1368.) The offender's youth decided the answer to that question in the same way it decided the answers in *Graham* (considering life without the possibility of parole) and *Roper* (considering the death penalty). (*Gutierrez*, at pp. 1360, 1368; *Roper, supra,* 543 U.S. at p. 575; *Graham, supra,* 560 U.S. at pp. 74-75.) While youth undoubtedly remains important to the proportionality of a particular offender's sentence of life with the possibility of parole, *Gutierrez* does not mean that youth will be necessarily dispositive in every case, when the offender will receive a meaningful opportunity for release in his or her lifetime. (See *People v.*

Ault (2004) 33 Cal.4th 1250, 1268, fn. 10 [case cannot be authority for proposition not considered]. Rather, in such cases, the offender must still prove disproportionality under *Lynch*. (*People v. Perez* (2013) 214 Cal.App.4th 49, 60 [examining two different cruel-or-unusual punishment claims—one under *Miller* and its progeny, and the other under *Lynch*]; *Caballero*, *supra*, 55 Cal.4th at p. 266.)

As to the second *Lynch* factor, an intrastate comparison of punishments, Palmer identifies crimes that he believes are more serious and only require a determinate sentence in an attempt to show his sentence was constitutionally excessive. (ABM 33-34.) But the legislative determination that some crimes (even if perceived as more serious) require lesser punishment than others does not mean Palmer's sentence is cruel or unusual. (See *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 530-531; OBM 32-34.)[3]

Relying on *In re Rodriguez* (1975) 14 Cal.3d 639, 652 and *Lynch*, Palmer attempts to compare his crime and indeterminate life sentence with crimes carrying determinate sentences. (ABM 36.) But this Court did not make such a comparison in these cases. Instead, under the Indeterminate Sentencing Law in effect at the time, this Court compared indeterminate, range-of-year terms with other, more serious crimes also warranting indeterminate, range-of-year terms. (*Rodriguez*, *supra*, 14 Cal.3d at p. 655; *Lynch*, *supra*, 8 Cal.3d at pp. 431-432, 435-436; see also *Dannenberg*,

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[3] Contrary to Palmer's claim, the first *Lynch* factor can be dispositive of proportionality. (ABM 33, fn. 8; but see ABM 23.) In *People v. Webb* (1993) 6 Cal.4th 494, 536, this Court held that it did not need to engage in comparative sentence review and instead found that the defendant's sentence was not disproportionate to his culpability based on the first *Lynch* factor alone. (See also *In re Debeque* (1989) 212 Cal.App.3d 241, 249 [first *Lynch* prong "alone may suffice in determining whether a punishment is cruel and unusual"].)

supra, 34 Cal.4th at pp. 1077, 1096 [discussing sentencing under former sentencing scheme]; Cal. Crim. Law Practice, Cont. Ed. Bar (1969), Continuing Representation, ch. 23, at pp. 514-515 (Cont. Ed. Bar).)514-515 [discussing mandatory life sentences under Indeterminate Sentencing Law].)[4] And, as discussed in the opening brief, crimes that the Legislature has decided warrant a determinate sentence, and crimes that the Legislature has decided warrant life with the possibility of parole or greater, are not comparable. (See *People v. Cooper* (1996) 43 Cal.App.4th 815, 826.)

Palmer also contends that statutory punishments such as life without the possibility of parole or death for certain crimes are simply irrelevant to the analysis of his case, since such punishments are not available for juveniles. (ABM 36-37; see *Caballero*, *supra*, 5 Cal.4th at pp. 266-269.) But the Legislature's choice of punishments for those crimes demonstrates its judgment as to the relative seriousness of particular offenses. These legislatively mandated punishments are highly relevant in determining whether Palmer's much lesser sentence, life with the possibility of parole after seven years, shocked the conscience. (OBM 34-36.)

Finally, Palmer appears to misunderstand the Board's argument that intrastate comparisons are not fact specific. (ABM 37-38; OBM 35.)[5] A court should look at the crime and punishment as prescribed by the

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[4] Reliance on *Rodriguez* may be flawed for another reason. Society's evolving standards of decency have changed as to sex offenders such that they are considered more dangerous than in the past and have greater restrictions placed on them for their sex-related convictions. (See, e.g., Pen. Code, §§ 290 et seq.; *People v. Garcia* (2017) 2 Cal.5th 792, 796-798, 800-802.) This change calls into question cases like *Rodriguez* that are based on prior societal norms.

[5] Palmer's Answering Brief (ABM 37), like the Board's Opening Brief (OBM 22, 38), cites a case that was depublished between the two briefs' filing dates: *People v. Cadena* (2019) 39 Cal.App.5th 176 [252 Cal.Rptr.3d 135], review den., opn. ordered depub. Dec. 11, 2019.

Legislature and compare them with the legislatively prescribed punishments for more serious crimes. (*Lynch*, *supra*, 8 Cal.3d at pp. 414, 426.) This is consistent with what this Court did in *Rodriguez* and the appellate court did in *Haller*. (*Rodriguez*, *supra*, 14 Cal.3d at p. 655; *In re Haller* (2009) 174 Cal.App.4th 1080, 1093.) It is not what the Court of Appeal did here. Under the second *Lynch* factor, the Court of Appeal addressed the specific facts of Palmer's commitment offense, such as his use of an unloaded gun, the lack of physical injury, and the (erroneous) conclusion that the kidnapping was impulsive, to conclude the life-maximum sentence was cruel and unusual. (Opn. 21-23.) But these facts are only relevant to *Lynch*'s first factor, which looks at the nature of the offense and the offender.

As to the third *Lynch* factor, an interstate comparison of punishments for the same or similar crimes, Palmer's argument that he prevails based on lesser punishment prescribed in other jurisdictions fails. Although many states have discretion to sentence an inmate to less than the maximum available, such as life or a lengthy number of years (see ABM 38-41), this does not mean Palmer's life sentence is cruel or unusual. (OBM 36-37.) And even if California imposed the harshest punishment, it would not be dispositive of disproportionality. (See *People v. Wingo* (1975) 14 Cal.3d 169, 179.) This is especially true here, where the first and second *Lynch* factors demonstrate Palmer's sentence and continued confinement was constitutional under state law.[6]

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[6] Palmer argues that the interstate comparison should take into account the length of his parole period. (ABM 38, citing *Rodriguez*, *supra*, 8 Cal.3d at p. 656.) But Palmer himself does not consider his parole period or the parole period for the same or similar offenses in other jurisdictions when discussing *Lynch*'s third factor. (ABM 38-41.) In any event, comparison of parole periods would seem most relevant to determining

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Finally, for the same reasons above, Palmer is wrong that federal precedent concerning juvenile offenders supports an Eighth Amendment violation in his case. (ABM 41-45.) The United States Supreme Court has explained that a juvenile offender is entitled to a meaningful opportunity for parole within his or her lifetime, but that a state "is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime." (*Graham*, *supra*, 560 U.S. at p. 75.) Indeed, Palmer's life-maximum sentence was not grossly disproportionate to his kidnapping for robbery conviction such that it violated the United States Constitution. (*Rummel v. Estelle* (1980) 445 U.S. 263, 272; see also *Harmelin v. Michigan* (1991) 501 U.S. 957, 997 (conc. opn. of Kennedy, J.) [Eighth Amendment "encompasses a narrow proportionality principle"].)

More importantly, however, neither this Court nor the United States Supreme Court has held that an Eighth Amendment disproportionality claim could be brought for the first time in habeas based on a parole denial, rather than raised at the time of sentencing and addressed on initial appeal. (See generally *People v. Speight* (2014) 227 Cal.App.4th 1229, 1247-1248 [listing cases noting forfeiture rule for raising an Eighth Amendment claim]; AMB 41 [arguing Eighth Amendment claim is a novel issue that should be addressed].) For these reasons, Palmer's federal disproportionality claims fails.

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whether Palmer's parole period itself is cruel or unusual—a separate inquiry from whether his incarceration was disproportionate. (See below at pp. 13-19.)

II. THE REMEDY FOR CONSTITUTIONALLY EXCESSIVE INCARCERATION IS RELEASE FROM PRISON, NOT ELIMINATION OF SUBSEQUENT PAROLE

Even if Palmer's incarceration period is judged unconstitutional, that does not necessarily entitle him to immunity from parole. Parole is much less intrusive than incarceration, and parole serves significantly different societal interests. The Court of Appeal never decided that Palmer's parole period itself was disproportionate to his crime. In the absence of such a determination, its remedy for unconstitutional incarceration should have been limited to ordering Palmer's release from prison.

A. Parole Is Drastically Different Than Incarceration

Incarceration and parole should be treated differently in the disproportionality context. Incarceration involves a near complete loss of liberty. (*Wolff v. McDonnell* (1974) 418 U.S. 539, 555-556.) Inmates have no freedom to leave prison and live in a highly constrained environment where almost every aspect of life is regulated. (See generally Cal. Code Regs., tit. 15, §§ 3000 et seq.) Inmates are classified, housed, and subject to surveillance based on the seriousness of their crimes and the danger they pose to safety and security. (*Id.* at §§ 3375-3378; 3269-3269.1.) Daily activities are tightly controlled, such as visiting with family and friends (*id.* at §§ 3170-3178), sending and receiving mail or phone calls (*id.* at §§ 3018, 3130-3146, 3282), receiving medical care and treatment (*id.* at §§ 3999.110-3999.116, 3999.200-3999.215, 3999.225-3999.415), choosing which food to eat (*id.* at §§ 3050-3055), buying consumer products (*id.* at §§ 3090-3095), deciding what to wear (*id.* at §§ 3030-3032), choosing where to go within the prison (*id.* at § 3274), and dealing with personal care (*id.* at §§ 3220-3220.5 [recreation and physical education], 3230-3237 [activity groups]), and communal living (see *id.* at §§ 3060-3064).

Parole is very different. (See *In re Roberts* (2005) 36 Cal.4th 575, 589-590; *Morrissey v. Brewer* (1972) 408 U.S. 471, 482.) As the United States Supreme Court has explained, "[t]hough the State properly subjects [a parolee] to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison." (*Morrissey*, at p. 482.) "The liberty of a parolee enables him to do a wide variety of things open to persons who have never been convicted of any crime." (*Ibid.*) Subject to certain parole conditions,[7] a parolee may seek gainful employment, associate with family and friends, and "form the other enduring attachments of normal life." (*Ibid.*) Simply put, a parolee has vastly greater control over his day-to-day life. He has more choice about his relationships with family and friends, communicating with others, and making daily decisions, such as deciding where to go and what to do. The differences in liberty between an inmate and a parolee is reflected in the strong value inmates place on getting paroled—and the due process protections that must be provided before denying an inmate parole. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 660-661, 664 [discussing liberty interest in parole]; *Lawrence*, *supra*, 44 Cal.4th at pp. 1201-1206 [discussing due process protections for parole decisions].)

Moreover, prison and parole serve different functions. In 1988, when Palmer was sentenced, the legislatively declared "purpose of imprisonment for crime [was] punishment." (Former Pen. Code, § 1170, subd. (a)(1) (1988).) A currently corresponding provision states that the purpose of incarceration is now "public safety achieved through punishment, rehabilitation, and restorative justice." (Pen. Code, § 1170, subd. (a)(1).)

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[7] A parolee may separately challenge his parole conditions. (See *In re Stevens* (2004) 119 Cal.App.4th 1228, 1234; *In re Taylor* (2015) 60 Cal.4th 1019, 1023, 1038-1039, 1042; see ABM 52 [arguing special conditions of parole are unreasonable].)

In contrast, parole is imposed because the Legislature has determined it is critical to successful reintegration into society and to positive citizenship after the punishment of incarceration has ceased. (Pen. Code, § 3000, subd. (a)(1); *In re Lira* (2014) 58 Cal.4th 573, 582-584; see also OBM 43). To serve this purpose, the State provides to parolees "educational, vocational, family and personal counseling . . . to assist [the] parolees in the transition between imprisonment and [parole] discharge." (Pen. Code, § 3000, subd. (a)(1).)

The design of California's current parole system reflects these purposes. If a parolee violates the law or a condition of his parole, the supervising agency's response may be to "impose additional and appropriate conditions of supervision." (Pen. Code, § 3000.08, subd. (d).) This includes "rehabilitation and treatment services and appropriate incentives for [parole] compliance." (*Ibid.*) It also may include "flash incarceration"—lasting from one day to 10 days—"as one method of punishment for violation of a parolee's conditions of parole." (*Ibid.*; see also *id.*, subd (e) [defining flash incarceration]). If these intermediate sanctions are inappropriate, (*id.*, subd. (f)), and the court finds "that the person has violated the conditions of parole," there are three available remedies.[8] The court may return the person to parole supervision with parole condition modifications, including a period of incarceration in county jail; refer the person to reentry court to assist with the person's rehabilitation, or revoke parole and order the person's return to local custody. (Pen. Code, § 3000.08, subd. (f).) In Palmer's case, the maximum punishment possible for a parole violation would be 180 days in county jail.

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[8] There are established procedures in place to protect a parolee's constitutional rights during the parole revocation process. (*Morrissey, supra,* 408 U.S. at p. 489; Pen. Code, §§ 3000.08, 1203.2).

(Pen. Code, §§ 3000.08, subds. (f)-(g).)[9] He cannot be returned to state prison for a parole violation, (*id.* at subd. (h)), and neither the length nor the circumstances of parole-violation custody render it comparable to the prison sentence that the Court of Appeal found disproportionate to his crime.

These differences demonstrate why the Court of Appeal's remedy here was improper. When a court determines whether an inmate's punishment is constitutionally disproportionate (*Lynch*, *supra*, 8 Cal.3d at pp. 414-415), the remedy should be tailored to the constitutional violation: that is, the remedy is limited to ending the cruel or unusual punishment (see *People v. Booth* (2016) 3 Cal.App.5th 1284, 1312 ["courts have broad discretion to formulate a remedy that is tailored to redress the particular constitutional violation that has occurred"]; *Milliken v. Bradley* (1977) 433 U.S. 267, 282 [federal remedy must be tailored to constitutional violation]). The State must reduce the punishment to a level that is not cruel nor unusual. (See, e.g., *Mendez*, *supra*, 188 Cal.App.4th at p. 68 [holding de facto life without the possibility of parole sentence was grossly disproportionate to the crime and remanding matter to trial court to reconsider the defendant's sentence]; *Nunez*, *supra*, 173 Cal.App.4th at p. 739 [vacating juvenile offender's life without the possibility of parole sentence for kidnapping and remanding to the trial court for resentencing]; *Dillon*, *supra*, 34 Cal.3d 441, 489 [reducing first degree murder conviction to second degree murder]; *Solem v. Helm* (1983) 463 U.S. 277, 282, 303 [affirming Court of Appeal's conclusion that sentence was cruel and

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[9] Palmer is eligible for discharge from parole after three years of continuous supervision unless the Board determines he should remain on parole for good cause. (Pen. Code, § 3001, subd. (b).)

unusual, and issuing the writ of habeas corpus unless state resentenced the offender].)

Palmer points to *Lynch*, *Rodriguez*, and *Wells* as examples of courts discharging an inmate's parole period (ABM 50-51) in response to an unconstitutional period of incarceration. His reliance on these cases is misplaced. In *Lynch*, after finding the inmate's one-year-to-life sentence was constitutionally disproportionate, the Court noted that the only potentially applicable statute made the crime punishable in state prison for a period not exceeding five years. (*Lynch*, *supra*, 8 Cal.3d at p. 439.) Because the inmate had served more than five years, the Court concluded he was "therefore entitled to his freedom" and discharged him from custody. (*Ibid.*) The Court's analysis reflects a ministerial application of the sentencing law then in effect and 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].)[10]

In *Rodriguez*, this Court did not explain why discharge from custody was the appropriate remedy. The Court opined that the inmate had "already served a term which by any of the *Lynch* criteria is disproportionate to his offense." (*Rodriguez*, *supra*, 14 Cal.3d at p. 656.) The Court then concluded that the inmate was "therefore entitled to be discharged from the term under which he is imprisoned." (*Ibid.*) Because the Court did not

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[10] The appellate court in *In re Wells* (1975) 46 Cal.App.3d 592, 604 relied on a similar analysis. There, the court found that the petitioner's crime carried a five-year maximum term based on subsequent changes in the law. (*Ibid.*) Because the petitioner had already served more than five years, the court held he was entitled to be freed from all forms of custody, including parole supervision. (*Ibid.*; see also OBM 46-47.)

explain why this remedy applied, *Rodriguez* cannot be authority for a proposition not considered. (*Ault, supra*, 33 Cal.4th at p. 1268, fn. 10.)

Finally, *Lynch*, *Rodriguez*, and *Wells* were decided under a former sentencing scheme where incarceration and the parole period constituted a single form of punishment that could be adjusted and re-adjusted by the parole authority until the offender reached his maximum prison term, which included his incarceration and period of parole. (*Dannenberg, supra*, 34 Cal.4th at pp. 1077, 1096-1097; *Rodriguez, supra*, 14 Cal.3d at p. 646; Cont. Ed. Bar, *supra*, at pp. 514-515, 519-520; Cassou & Taugher, Determinate Sentencing in California: The New Numbers Game (1978) 9 Pacific L.J. 5, 28.) In comparison, today, an inmate's incarceration and parole supervision are two separate and distinct phases, serving both overlapping and separate purposes, and administered by two different, but co-equal, branches of government. (See, *supra*, at pp. 13-16; OBM 38-48.) These cases do not determine the outcome here.

Palmer also contends *Lira* does not apply because the claim and remedy were different in that case. (ABM 53-54.) But determining whether the parole period itself is cruel and unusual is consistent with this Court's opinion in *Lira* and the separation of powers between the judiciary and the Board's broad authority in parole matters. (OBM 39-44.) And as explained in the opening brief, *Lira*'s reasoning applies here—a judicial decision eliminating a parole period based on a disproportionality finding eviscerates the Board's authority in parole matters and deprives it of the opportunity to enforce the Legislature's stated purpose of parole. (OBM 39-44; *Lira, supra*, 58 Cal.4th at pp. 579, 583-584.) The Board's approach respects the Legislature's declaration that parole is critical to an inmate's successful reintegration into society, the Board's authority in parole matters, and the court's responsibility to determine whether an inmate's punishment is cruel or unusual. (OBM 38-48.)

Given the differences between incarceration and parole, the court must engage in an analysis of the *Lynch* factors as to each phase of punishment.[11] It is possible that in rare cases a court will find both continued incarceration and the parole period are constitutionally disproportionate to the inmate's individual culpability. But the Court of Appeal here erred in presuming that Palmer's five-year parole term was unconstitutional based on its conclusion that Palmer's continued incarceration had been cruel or unusual. (See *United States v. Bridges* (7th Cir. 1985) 760 F.2d 151, 154 ["The imposition of a lifetime parole term is neither tantamount to a sentence of life imprisonment nor *per se* cruel and unusual punishment."].) The Court of Appeal did not engage in the *Lynch* analysis as to Palmer's parole period and find that it was unconstitutional. (OBM 47-48.) Indeed, it is hard to believe that such an analysis would find the comparatively minor burdens of parole supervision disproportionate in Palmer's case, given the seriousness of his crime, his prior criminal record, and his disciplinary history in prison. (See OBM 12-14, 25-27.) Nor did the court, or Palmer, point to any statute permitting credit toward Palmer's parole term. (OBM 47-48.) Without these findings, the court should not have eliminated Palmer's parole period.

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[11] Palmer argues that *People v. Gaythe*r (1980) 110 Cal.App.3d 79 and *State v. Mossman* (2012) 294 Kan. 901, cited in the opening brief, did not hold that an individual's punishment had become constitutionally excessive when the individual challenged probation and post-release practices. (AMB 52.) But these cases are only intended as examples where courts have applied disproportionality principles to forms of restraint other than physical incarceration.

B. Eliminating the Parole Period May Have Serious Consequences for Victims and Deprive Offenders of Essential Services

Palmer's argument appears to rest on the assumption that whenever an inmate's incarceration exceeds the constitutional maximum, any further supervision by the criminal justice system would be unconstitutional because the State has, in a sense, used up its ability to exert any supervision over the inmate in response to his crime. (ABM 50-55.) The result would be to excuse an inmate from parole whose incarceration was excessive by even one day. (ABM 50-55.) But where an offender has been incarcerated for an extended period, release without parole deprives him of services that are essential to his reintegration into society, such as "medical and psychological treatment resources, drug and alcohol dependency services, job counseling, and services for obtaining a general equivalency certificate." (*Taylor*, *supra*, 60 Cal.4th at p. 1030; see also California Department of Corrections and Rehabilitation, Division of Adult Parole Operations, Parole Services, <https://www.cdcr.ca.gov/parole/parole/parole-services/> [as of Feb. 18, 2020].)

Eliminating parole would also be inconsistent with the constitutional rights of former and potential future victims. Article 1, section 28 of the California Constitution provides victims are "[t]o be reasonably protected from the defendant[,]" (Cal. Const., art. I, § 28, subd. (b)(2)), and "to have the safety of the victim and the victim's family considered in fixing . . . release conditions for the defendant" (*id.* at subd. (b)(3)). (See also *id.* at subd. (b)(12), (15); see also Pen. Code, §§ 3003 (a)-(c), (f), (h) [consideration of victim's safety and well-being in deciding parolee's geographic placement on parole].) Releasing an inmate without any form

of supervision, and without analysis of whether the parole period itself is constitutionally excessive, is inconsistent with the spirit of this section.

Nor is the elimination of parole, in circumstances such as Palmer's, necessary to vindicate a defendant's underlying right to be free of constitutionally excessive punishment. Inmates can challenge their sentences as constitutionally excessive on direct appeal or through habeas corpus petitions shortly after their convictions. (See *Mendez*, *supra*, 188 Cal.App.4th at pp. 50-51 [direct appeal]; *Nunez*, *supra*, 173 Cal.App.4th at pp. 714 [habeas petition].) Challenging proportionality early places the trial and appellate courts in the best position to resolve the issue as *Lynch* requires courts to look at the nature of the offender and the offense at the time of the crime. (*Lynch*, *supra*, 8 Cal.3d at p. 425; *Dillon, supra,* 34 Cal.3d at p. 479; but see *Dannenberg*, *supra*, 34 Cal.4th at p. 1098.)

Finally, because society now better understands the characteristics of youth that contribute to juvenile criminality, punishment that was once tolerated for juveniles is no longer accepted. (*Roper*, *supra*, 543 U.S. at p. 575; *Graham*, *supra*, 560 U.S. at pp. 74-75; *Miller*, *supra*, 567 U.S. at p. 465; *Caballero*, *supra*, 55 Cal.4th at p. 268; *Contreras*, *supra*, 4 Cal.5th at pp. 367-370, 379.) Courts should undertake a more searching examination of a juvenile offender's sentence when presented with a disproportionality claim in an appropriate case. Such inquiries may result in more instances of court-ordered release from prison. Release without a proper integration plan, and needed guidance and supervision through established parole procedures, however, may ultimately undermine the benefits of this evolving view of incarceration of juvenile offenders by setting up the newly released inmate for failure. This concern is particularly apt for juvenile offenders, like Palmer, who served many years in prison throughout their

formative years and beyond, and for whom parole is particularly important.[12]

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[12] Palmer contends that parole may hinder a particular offender's reintegration. (ABM 52-53.) But as a general matter, this Court, like the Legislature, views parole as not only helpful, but necessary, to the successful reintegration of a previously incarcerated defendant. (Pen. Code, § 3000, subd. (a)(1) [declaring "that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship"]; *Lira*, *supra*, 58 Cal.4th at pp. 582-584 [discussing Legislature's determination of parole's importance].) Palmer's parole includes conditions that are indeed designed to aid his reintegration—such as transitional housing and treatment requirements—and the existence of Palmer's parole-enforcement proceedings illustrate that parole in his case includes active supervision. (See, e.g., Mot. for Judicial Notice at Exh. Aa at p. 11, Exh. Bb at pp. 16-17.) Although the existence of these parole conditions, proceedings, and documents is subject to judicial notice under Evidence Code § 452, the Board agrees with Palmer that such notice should not extend to the facts that those documents allege. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064, *overruled on other grounds in In re Tobacco Cases II* (1997) 41 Cal.4th 1257, 1276.)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: February 20, 2020

Respectfully submitted,

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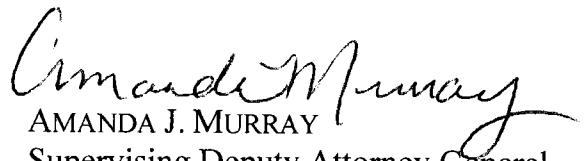

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 5,589 words.

Dated: February 20, 2020

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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 February 20, 2020, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with FED EX, 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 February 20, 2020, at San Diego, California.

J. Dinh
Declarant

Signature

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