

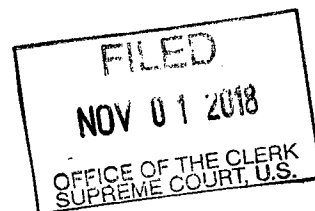
NO. 18-5722

IN THE SUPREME COURT OF THE UNITED STATES

Keith Robert Lugo,
Petitioner,

v.

California,
Respondent.



PETITION FOR REHEARING AND CONSIDERATION
UNITED STATES SUPREME COURT
RULE 44

PETITION FOR REHEARING AND RECONSIDERATION ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT FOR THE UNITED STATES OF AMERICA

INTRODUCTION

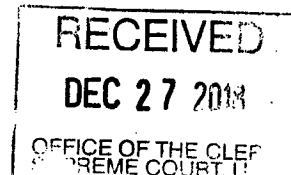
Petitioner, Keith Robert Lugo,¹ In Persona Pro Se, functioning under the disability of imprisonment at Valley State Prison, respectfully submits this Motion for Rehearing and Reconsideration in good faith and not to cause any undue delay or waste scarce judicial resources, pursuant to Rule 44(1) of the United States Supreme Court.

In addition, Petitioner hereby certifies to this United States Supreme Court that this petition for rehearing is presented in good faith, and that the intervening circumstances of substantial/controlling effect and the substantial ground(s) not previously presented are as follows:

(A). Petitioner asserts that the instant Motion for Rehearing and Reconsideration to this Highest Court is based on new decisional law not in existence at the time the Original Petition

¹There are no parties to the proceedings other than those named in the caption of the petition.

²United States Supreme Court, Rule 18(10).



for Writ of Certiorari was filed by this Court. Specifically, on September 13, 2018, following a remand by the Supreme Court for the State of California, The Court of Appeal of California, First Appellate District, Division Two, in the case of *In re Palmer*, Case No. A147177, handed down a decision that not previously presented and goes to the heart of the questions posed to this Court in Petitioner's Petition for Writ of Certiorari, requiring resolution by this Court to answer important questions of Constitutional Law. The Supreme Court for the State of California utilized the *Palmer* case, *supra*, to return to the Court of Appeal from that for reconsideration in light of its opinion cited by the controversial case of *In re Butler* (2018) 4 Cal.5th 728.²

The controversial case of Constitutional magnitude handed down by the Court in *Palmer* did not occur until two months after Petitioner submitted his Petition for Writ of Certiorari.

Petitioner certifies that the grounds contained within this petition are limited to circumstances of substantial/controlling effect and fall in line with the following questions presented to this Court:

(a). Whether the Board of Prison Terms Violated Senate Bill 261 for Failing to Apply the Legally Correct Standard of Analysis; and, in Doing so, Failed to Give the Requirement of 'Great Weight to the Diminished Culpability of Juveniles as Compared to Adults as a Youth Offender for Release on Parole Mandated by the Bill, in Violation of the Due Process Clauses Protected Under the State and Federal Constitutions, is an Important Constitutional Issue Requiring Resolution by This Court to Determine a Matrix Differentiating the Standard of Proof for Unsuitability Between a Juvenile and Adult.

(b). Whether the Board Failed to Meet the Minimum Burden of Proof Required in the Rule of 'Some Evidence' Under the Provisions Articulated in the Holding of *In re Lawrence* (2008) 44 Cal.4th 1181 when Balanced Against the Legal Criteria of Intent Legislated in Senate Bill 261.

OPINION BELOW

On August 1, 2018, this United States Supreme Court filed Petitioner's Petition for Writ of Certiorari, Case No. 18-5722, and docketed the case. On October 29, 2018, this Court Denied Petition for Writ of Certiorari.

Petitioner is unable to attached copies of the decision handed down on October 31, 2018, Case No. S251518, of the State Supreme Court's denial for review and the decision handed down on September 12, 2018, Case No. D074628, by the Appeals Court for the Fourth Appellate District of California to deny the Petition for Writ of Habeas Corpus.

Prison authorities have moved Petitioner several times since the decisions were rendered, causing a loss of property during transport.

JURISDICTION

Petitioner has corrected and submitted this new Motion as soon as humanly possible, within the 15 days of the date of the letter received, in accordance to Rule 44.6.

Petitioner received the letter from the Clerk, dated on December 4, 2018, RE: Lugo v. California, No: 18-5722, postmarked on December 4, 2018, not until December 12, 2018.

STATEMENT OF THE CASE

Petitioner asserts that the new ruling handed down by the Court of Appeal for the State of California, First Appellate District, Division Two, in the Matter of *In Re Palmer*, Case No. A147177, is Worthy to Grant a Rehearing on The Petition for Writ of Certiorari

In the instant case, Petitioner prays that this United States Supreme Court will recognize the new ruling as intervening circumstances of substantial and controlling effect on a legal grounds worthy of this Courts desire to resolve important questions of Constitutional Law and to Harmonize conflicts of decisional law created by the California State Supreme Court which are either 'misapplied' and/or 'contrary to' existing precedent articulated by this U.S. States Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407; *Graham v. Florida* (2010) 560 U.S. 48.).

In light of the reasoning behind the decision handed down by the Court of Appeal, Petitioner asserts that the recent ruling of *In re Palmer*, Case No. A147177 is worthy of this Court's attention to rehear and reconsider its decision to deny Petitioner's Petition for Writ of Certiorari, on the basis that the *Palmer* Court specifically distinguished the 'some evidence rule' announced under the adult standard of *In re Lawrence* (2008) 44 Cal.4th 1181 from the requirement that the Board give "great weight" to the three youth offender factors—"the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and maturity of the prisoner—but also diminishes the Board's discretion to determine the bases upon which suitability or unsuitability for release may be determined. (cf. *In re Butler* (2018) 4 Cal.5th 728).

That court stated further, citing *People v. Martin* (1986) 42 Cal.3d 437, in pertinent part as follows: In the context of sentence disparity, *Martin* said, the court had to accept the Board's finding "unless there is substantial evidence of countervailing considerations which justify a disparate sentence....The Board's argument that it "is the soul decision-maker that considers and weighs the relevant factors under current law" ignores the fact that the direction to not only consider but accord "great weight" to the youth factors comes from the Legislature. (*United States Constitutional Amendments, 5, 9, and 14*)

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I.
REASONS FOR GRANTING THE PETITION FOR REHEARING

Petitioner Asserts that the Board of Prison Terms Violated
Senate Bill 261 and Precedent Established by the United States
Supreme Court for Failing to Give Great Weight to the Diminished
Culpability of Juveniles as Compared to Adults, in Violation of the
Due Process of Law and Equal Protection of Law Under the
Fifth and Fourteenth Amendments to the U.S. Constitution

Petitioner asserts the Board in the instant case failed to follow the legislative intent to “Give Great Weight to the Diminished Culpability of Juveniles” as mandated by Senate Bill 261 to deny Petitioner a parole date. Other than a sanitized synopsis of the Bill, nothing in the record supports that the Board even considered a conscientious litmus test and weigh the three youth offender factors with any true credibility to deny parole.

Following remand by the State Supreme Court for the State of California, in the case of *In re Palmer*, Case No. A147177, on September 13, 2018, the Court of Appeals did not only specifically distinguished the ‘some evidence rule’ announced under the adult standard of *In re Lawrence* (2008) 44 Cal.4th 1181 from the requirement that the Board shall give “great weight” to the three youth offender factors—“the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and maturity of the prisoner”—but also diminished the Board’s discretion to determine the basis upon which suitability or unsuitability for release may be determined.

Petitioner asserts that the decision handed down by *Palmer* Court goes directly to the heart of the issues raised herein by petitioner and precisely dovetails and better defines the previous precedent set by the U.S. Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407 and *Graham v. Florida* (2010) 560 U.S. 48, which falls in line with U.S. Supreme Court precedent, rather than the contrary to and misapplication of established law utilized by the Board of *In re Lawrence*, *supra*, during and after petitioner’s parole hearing.

The *Palmer* court stated further, citing *People v. Martin* (1986) 42 Cal.3d 437, in pertinent part as follows: In the context of sentence disparity, *Martin* said, the court had to accept the Board’s finding “unless there is substantial evidence of countervailing considerations which justify a disparate sentence....The Board’s argument that it “is the soul decision-maker that considers and weighs the relevant factors under current law” ignores the fact that the direction to not only consider but accord “great weight” to the youth factors comes from the Legislature.

This Court should note that the Board in its reduction in years for a denial discounted the 15-year denial in that such a lengthy denial did not apply to Petitioner’s case. The Board then dismissed the 10-year denial based on no remarkable disciplinary history. Petitioner’s education and obvious marketable skills removed the 7-year denial. The Board then wobbled

between 7 years 5 years and 3 years, stating that had Petitioner had one group they would have settled for the 3-year denial. Instead, the Board settled on a 5-year denial, the highest term legally allowable under the adult standard in this particular case. The Board specifically stated that it relied upon and based its decision to deny petitioner parole on *In re Lawrence* (2008) 44 Cal.4th 1181.

When enacting Penal Code sections 3051, subdivision (f) (1) and 4801 (c), the Legislature specifically found and declared that "as stated by the United States Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407, 'only a relatively small proportion of adolescents' who engage in illegal activity 'develop entrenched patterns of problem behavior,' and that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,' including 'parts of the brain involved in behavior control.' The Legislature recognized that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gain maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262, and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48 ,and *Miller v. Alabama*, *supra*.

The Supreme Court in *Graham v. Florida*, 560 U.S. at ____ (slip op., at 17).5 reasoned that those findings - - of transient rashness, proclivity for risk, and inability to assess consequences - both lessened the child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "deficiencies will be reformed." *Id.*, at ____ (slip op., at 18) (*quoting Roper*, 543 U.S. at 570, *infra*.) Because "[t]he heart of the retribution rationale' relates to an offender's blameworthiness," the case for retribution is not as strong with a minor as with an adult." To the contrary, the Court further noted, "[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." (*Quoting Eddings*, 455 U.S., at 115-116, *infra*. So if as *Harmelin* recognized) "death is different," children are different too.

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II.

The Board Failed to Meet the Burden of Proof Required
Under the Recent Decision Rendered in the case of *In re Palmer*,
A147177, Defining the Youth Standard, which has Supplanted the
Adult Provisions Articulated in the Holding of *In re Lawrence* (2008)
44 Cal.4th 1181 on which the Board Relied on to Deny Petitioner Parole.

The case now presented to this court practically mirrors the decision rendered on September 13, 2018, by the Court of Appeals for the State of California, following remand by the State Supreme Court for the State of California, in the case of *In re Palmer*, Case No. A147177. That Court did not only specifically distinguished the ‘some evidence rule’ announced under the adult standard of *In re Lawrence* (2008) 44 Cal.4th 1181 from the requirement that the Board shall give “great weight” to the three youth offender factors — “the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and maturity of the prisoner” — but also ruled that the Board must apply the standard of ‘substantial evidence’ countervailing a reason to deny parole.

In addition, Petitioner asserts that the decision handed down by *Palmer* Court goes directly to the heart of the issues raised herein by petitioner and precisely dovetails and better defines the previous precedent set by the U.S. Supreme Court in *Miller v. Alabama* (2012) 183 L.Ed.2d 407 and *Graham v. Florida* (2010) 560 U.S. 48, which the Board completely ignored. Simply stated, the standard of *In re Lawrence*, *supra*, utilized by the Board violated Petitioner’s right to a meaningful parole hearing under any litmus test of constitutional measure.

The *Palmer* court stated further, citing *People v. Martin* (1986) 42 Cal.3d 437, in pertinent part as follows: In the context of sentence disparity, *Martin* said, the court had to accept the Board’s finding “unless there is substantial evidence of countervailing considerations which justify a disparate sentence....The Board’s argument that it “is the soul decision-maker that considers and weighs the relevant factors under current law” ignores the fact that the direction to not only consider but accord “great weight” to the youth factors comes from the Legislature.

Petitioner asserts that the Board’s reasoning that led to its decision to deny petitioner a parole date is fundamentally flawed and completely lacks empirical evidence to support its unreasonable conclusion of ‘future dangerousness’. (*Cal. Code Regs., Title 15, section 2281, subd. (b).*).

On its own admission, the Board specifically stated that the standard it applied to Petitioner’s Juvenile hearing rested solely on *In re Lawrence* (2008) 44 Cal.4th 1181, which not only is contrary to existing federal law but also misapplies federal law as established by the U.S. States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48 ,and *Miller v. Alabama* (2012) 183 L.Ed.2d 407.

The Board's interpretation of the evidence must be "reasonable" in the sense that it meets two imperatives: it must reflect "due consideration" of the relevant statutory factors and, also, it must not be "arbitrary", meaning that its analysis must be supported by at least a "modicum of evidence, not mere guesswork." (Id. At pp. 212, 219, 221). If the court concludes that the Board's decision violates due process, the court must grant the petition and remand the matter to the Board for further proceedings pursuant to *In re Prather* (2010) 50 Cal.4th 238, to determine whether or not petitioner is suitable for parole.

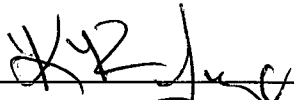
CONCLUSION

Wherefore, Petitioner prays that this Court will grant Petitioner's Petition for Reconsideration and Rehearing and proceed in accordance to law.

Executed on December 13, 2018, at Chowchilla CA 93610.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct to the best of my knowledge.

Respectfully submitted,



Keith Robert Lugo
In Persona Pro Se