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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF [COUNTY]**

10 THE PEOPLE OF THE STATE OF
CALIFORNIA

11 Plaintiff,

12 vs.

13 [DEFENDANT'S NAME]

14 Defendant
15

CASE NO. [CASE NUMBER]

DEFENSE SENTENCING MEMORANDUM

Date:

Time:

Dept.:

16 The defendant appears before the court convicted of numerous sex offenses, and subject to
17 a draconian sentencing scheme that would mandate a very lengthy sentence. The defense would
18 note that, consistent with the defendant motion for new trial, the defendant's Static 99 score is -1,
19 indicative of an extremely low likelihood of a future conviction. By statute, the defendant is not
20 eligible for probation. As argued herein, if the court finds that the statutory sentencing mandate
21 amounts to cruel and/or unusual punishment, it has the authority to impose an appropriate
22 sentence. It is the defense position that, in the absence of a New Trial, that the sentences on all
23 counts be run concurrently.

24 DATED:

25
26 _____
27 [NAME OF ATTORNEY
Attorney for Defendant
28

1
2 **IMPOSITION OF A SENTENCE OF TWENTY FIVE TO LIVE WOULD**
3 **VIOLATION THE CRUEL AND/OR UNUSUAL PUNISHMENT PROHIBITIONS OF**
4 **THE CONSTITUTIONS OF THE STATE OF CALIFORNIA AND THE UNITED**
5 **STATES**

6 The defense contends that the mandated minimum sentence of twenty five years to life
7 would violate the cruel and/or unusual punishment provisions of the State and Federal
8 Constitution. For these reasons, the defense requests the imposition of a probationary sentence.

9 In *In re John Lynch* (1972) 8 Cal.3rd 410, Justice Mosk addressed the question of
10 whether or not a life sentence for a second offense of indecent exposure violated the cruel or
11 unusual punishment clause. The case arose under California's former indeterminate sentencing
12 law. Factually, the matter did not involve an exhibitionist. In invalidating a life sentence for the
13 conduct, the court found that as the petitioner had already served more than five years, the Writ
14 was granted, and the petitioner was ordered released.

15 It is well settled a statutory punishment may violate the constitutional provision against
16 cruel and/or unusual punishment not only if it is inflicted by a cruel and unusual method, but also
17 if it is grossly disproportionate to the offense for which it is imposed. The Supreme Court had
18 held that a punishment may violate the California constitutional prohibition if, although not cruel
19 or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it
20 shocks the conscience and offends notions of human dignity. **In Re Lynch** (1972) 8 Cal 3d
21 410,424 105 Cal. Rpt. 217; **People v. Thompson** (1994) 24 Cal. App. 4th 299, 304, 29 Cal. Rptr.
22 2nd 847.

23 In **People v. Dillon** (1983) 34 Cal. 3d 441, 479, 194 Cal. Rpt. 390, the California Supreme
24 Court expanded its analysis of crimes and proportional punishments. The court explained that the
25 trial court must consider the specific facts of the crime in question, as compared with only
26 considering the crime in the abstract. In addition, the court must consider the nature of the
27 offender and ask whether the punishment is grossly disproportionate to the defendant's
28 culpability, taking into account factors such as age, prior criminality, personal characteristics, and

1 state of mind.

2 In *People v. Wingo*, (1975) 14 Cal.3rd 169, challenging the former six month to life
3 sentence for Penal Code section 245, assault by means of force likely to cause serious injury,
4 Justice Mosk reasoned that as the actual term would be set by the Adult authority, challenge on
5 direct appeal was inappropriate. If the Adult Authority was unreasonable, the constitutionality of
6 the sentence imposed could be challenged by Petition for Writ of Habeas Corpus.

7 In *In re Rodriguez* (1975) 14 Cal.3rd 639, the petitioner had served twenty two years on a
8 one year to life sentence for committing a lewd and lascivious act on a child. His Petition for
9 Writ of Habeas Corpus challenged his life sentence as disproportionate to the offense and
10 violating the constitutional provisions against cruel and unusual punishment. Chief Justice
11 Wright reasoned that section Penal Code §288 proscribe a broad range of activity, for some of
12 which a life sentence would be appropriate but in others would be excessive.

13 Although petitioner's characteristics at the time and the circumstances of
14 the offense he committed were, indisputably, non-aggravated, in other
15 circumstances grave injury and even death are sometimes inflicted on victims of
16 this offense. (*Id.* at p. 648.)

17 The court then had an obligation to look beyond the facial validity of the
18 statute to the possible unconstitutional administration since a law "fair on its face"
19 may be open to serious abuses.

20 Therefore, we reject both the suggestion that our task is complete once we
21 conclude that a statutory punishment is not excessive on its face, and the
22 proposition that our responsibility does not extend to an examination of the term-
23 fixing practices of the Authority to ascertain whether they comport with the
24 constitutional demands of the Eighth Amendment and article I, section 17, of the
25 California Constitution. (*Id.* At pp. 649.)

26 "We reach the conclusion that the 22 years of imprisonment served by
27 petitioner are excessive and disproportionate punishment by application of the
28 Lynch-Foss analysis briefly referred to above. Since the question posed involves
29 'proportionality' as measured by constitutional standards of cruel or unusual
30 punishment under article I, section 17, of the California Constitution, these
31 techniques are appropriate not only to the examination of statutes challenged on
32 their face, but also to terms as fixed by the Authority in individual cases." (*Id.* At
33 pp. 653-654.)

34 The first analytical technique that we suggested in Lynch was an
35 examination of the 'nature of the offense and/or the offender, with particular
36 regard to the degree of danger both present to society.' (*In re Lynch*, supra, 8
37 Cal.3d 410, 425, 105 Cal.Rptr. 217, 226, 503 P.2d 921, 930.) Among the relevant
38 factors noted there were the triviality of the offense, the absence of violence, the
39 age of the offender, and the offender's past history and individual personality. The
40 offense committed here is by no means 'trivial,' but the method of its commission
41 involved no violence and caused no physical harm to the victim. The episode
42 lasted only a few minutes. No weapon was involved and petitioner attempted none
43 of the dangerous offenses sometimes associated with violations of section 288.

1 Nor do the particular characteristics of this offender at the time of the
2 offense justify 22 years' imprisonment. He was only 26 years old at the time of the
3 offense. His conduct was explained in part by his limited intelligence, his
4 frustrations brought on by intellectual and sexual inadequacy, and his inability to
5 cope with these problems. He has no history of criminal activity apart from
6 problems associated with his sexual maladjustment. Thus, it appears that neither
7 the circumstances of his offense nor his personal characteristics establish a danger
8 to society sufficient to justify such a prolonged period of imprisonment. (Id. At
9 pp. 654-655.)

6 Having already served a term found to be in violation of the cruel and unusual punishment
7 provisions, the petitioner was ordered discharged from confinement. A similar result was reached
8 in *In re Kenneth James Wells* (1975) 46 Cal.App.3d 592, finding that a 1 year to life sentence for
9 a repeat violation of 647a (now 647.6) was so disproportionate as to violate as to render the
10 punishment cruel or unusual.

11 The importance of the individual characteristics of the defendant and the conduct is
12 emphasized by comparison of *Rodriguez to People v. Kingston* (1974) 44 Cal.App.3rd 624. In a
13 case involving actual intercourse with child under fourteen, and possible psychological damage,
14 the life sentence was found not to be cruel and unusual punishment.

15 The principles of *Lynch* continue to be cited by California courts. *In re Nunez* (2009) 173
16 Cal.App.4th 709, 725, *Lynch* and its successor cases were cited in a consideration of whether or
17 not the imposition of a life without possibility of parole violated Article I, section 17, of the
18 California Constitution. They were also cited by *People v. Em* (2009) 171 Cal.App.4th 964,976,
19 in ruling that a 50 year to life term for felony murder was not cruel and/or unusual punishment.

20 The defense is unaware of any case addressing this issue. One case, *People v. McNulty*
21 (1988) 202 Cal.App.3d 624, found that the denial of probation in pimping and pandering case,
22 effectively setting a mandatory minimum sentence of 3 years, was not cruel and/or unusual.
23 There is a substantial difference in the analysis of a 3 year term and a 25 to life term.

24 As cited above, life terms for child molestation have twice been found by our courts to be
25 cruel or unusual punishment. In each case the application of **Lynch** depended on the particular
26 facts related to the offense and the defendant. In the words of the prosecution, the conduct was
27 minimal. No force was use. No threats were made. The defendant has led an exemplary life and
28 poses no threat to reoffend. His Static 99 score is "1". The probation report filed in the instant

1 case indicates that Mr. Martin scored "1", but that the author of the report did not like the result
2 and arbitrarily raised it to "4". The Static 99 test is based solely on a statistical analysis and
3 permitting anyone to arbitrarily change the result distorts the meaning of the test and defeats its
4 validity. The court may wish to address this action by the probation department.

5 Imposing a life sentence on this defendant would be cruel or unusual punishment under
6 the California Constitution, and Cruel and Unusual Punishment under the United States
7 Constitution.

8 **CONCLUSION**

9 Attached to this Memorandum are letters from those who know the defendant herein,
10 attesting to his good character and offering support. Should the court feel that it is compelled by
11 the statutes to impose a state prison sentence, the defense request that all sentences impose be run
12 concurrently.

13 Dated: October 20, 2020

14 _____ William P. Daley
15 Attorney for Defendant.

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