IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re,

WILLIE CLIFFORD COLEY

On Habeas Corpus.

Supreme Court No.
S 185303

Los Angeles County Superior Court Case No. MA022987
The Honorable Dorothy Shubin, Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

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I.

INTRODUCTION

Petitioner was convicted of a sexual crime carrying the lifetime requirement that he register as a sexual offender. (Pen. Code, § 290.)[1] He was convicted of failing to comply with the registration requirement that he re-register his residence address within five days of his birthday, even though his address had not changed. (§ 290, subd. (a)(1)(A).) Petitioner registered his address during the first of the year, as required by law, but did not understand he had to register the same address a second time during the same year within five

[1] All statutory references are to the Penal Code unless otherwise indicated.

days of his birthday. He was convicted of a felony for this registration violation and sentenced to an indeterminate life sentence under the Three Strikes law as a third strike offender.

Petitioner's crime was an unintended violation of a highly complicated statute, amounting to a purely regulatory offense. (*People v. Carmony* (2005) 127 Cal.App.4th 1066; accord *Gonzalez v. Duncan* (2008) 551 F.3d 875.) No actual harm resulted from petitioner's failure to comply with the annual birthday registration requirement, as he had updated his registration at the beginning of the year and remained at his last registered address. His failure to register within five days of his birthday did not interfere with the ability of police to monitor his activities, as was proven by the fact the police arrested petitioner at his registered address. Under these circumstances, petitioner's indeterminate life sentence was grossly disproportionate to the offense, shocked the conscience of society, and offended the notions of human dignity. (*Solem v. Helm* (1983) 463 U.S. 277, 296.) The disproportionate punishment for this ministerial violation impinged petitioner's right against a cruel and unusual punishment. (U.S. Const., 8th amend.; Cal. Const., art 1, § 17.) Reversal of this unconstitutional sentence is mandated.

II.

ISSUE FOR REVIEW

Whether petitioner's sentence of 25 years to life under the Three Strikes laws for failing to update his sex offender registration within five days of his birthday constituted cruel and unusual punishment?

III.

SHORT ANSWER

Yes. Petitioner's indeterminate life sentence under the Three Strikes law for failing to update his sex offender registration within five days of his birthday constituted cruel and unusual punishment. Petitioner registered his address at the beginning of the year, and was living at that same address when the police arrested him. He had no intention of violating his registration requirements. Petitioner's omission arose from his confusion over having to register the same address twice during the same year. This unintended and hyper-technical administrative violation was not sufficiently egregious to qualify as the triggering crime for a life sentence. The sentence was grossly disproportionate to the predicate crime and, as such, constituted cruel and unusual punishment under the state and federal constitutions.

IV.

STATEMENT OF THE CASE.

On September 21, 2001, petitioner was charged by information with failing to register as a sexual offender (count 1; § 290, subd. (a)(1)(A)) and failing to update his registration annually (count 2; § 290, subd. (a)(1)(D)).[2] The

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[2] Former section 290 was recodified to section 290.012, which states:

(a) Beginning on his or her first birthday following registration or change of address, the person shall be required to register annually, within five working days of his or her birthday, to update his or her registration with the entities described in subdivision (b) of Section 290. At the annual update, the person shall provide current information as required on the Department of Justice annual update form, including the information described in paragraphs (1) to (3), inclusive of subdivision (a) of Section 290.015. The registering agency

information further alleged that petitioner suffered three prior serious or violent felony convictions within the meaning of the Three Strikes law. (CT 24-25.)

Following a jury trial, petitioner was acquitted of count 1, but found guilty of count 2. Petitioner admitted his three prior strike convictions and that he had been convicted of an offense requiring him to register as a sexual offender. (I CT 117-118, 120-121.) The trial court sentenced petitioner to a term of 25-years to life pursuant to the Three Strikes law. (I CT 250.)

The Court of Appeal, Second Appellate District, Division Five, affirmed petitioner's conviction and sentence on direct appeal. Petitioner filed a Petition for Review of the direct appeal, which was denied.

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shall give the registrant a copy of the registration requirements from the Department of Justice form.

(b) In addition, every person who has ever been adjudicated a sexually violent predator, as defined in Section 6600 of the Welfare and Institutions Code, shall, after his or her release from custody, verify his or her address no less than once every 90 days and place of employment, including the name and address of the employer, in a manner established by the Department of Justice. Every person who, as a sexually violent predator, is required to verify his or her registration every 90 days, shall be notified wherever he or she next registers of his or her increased registration obligations. This notice shall be provided in writing by the registering agency or agencies. Failure to receive this notice shall be a defense to the penalties prescribed in subdivision (f) of Section 290.018.

(c) In addition, every person subject to the Act, while living as a transient in California shall update his or her registration at least every 30 days, in accordance with Section 290.011.

(d) No entity shall require a person to pay a fee to register or update his or her registration pursuant to this section. The registering agency shall submit registrations, including annual updates or changes of address, directly into the Department of Justice Violent Crime Information Network (VCIN).

On July 16, 2009, petitioner filed a petition for a writ of habeas corpus in the Second District, Division Five, alleging that his conviction constituted cruel and unusual punishment under the Eight Amendment. Though he raised this claim at trial and on appeal, the petition was based on the subsequently decided cases of *Gonzalez v. Duncan* (2008) 551 F.3d 875 and *People v. Carmony* (2005) 127 Cal.App.4th 1066. Division Five denied the petition on the ground that the cruel and unusual punishment issue had been raised on direct appeal. Petition filed his petition for writ of habeas corpus in this Court. The Court issued an order to show cause why the relief in the petition should not be granted, returnable to Division Five. Division Five considered the petition on the merits. It denied the petition in a published decision. (*In re Coley* (2010) ___ Cal.App.4th ___ [114 Cal.Rptr.3d 311], review granted S185303.) This Court granted review on November 10, 2010.

V.

STATEMENT OF THE FACTS.

In 1988, petitioner was convicted of rape in concert with another defendant. His sentence consisted of a state prison term and a lifetime requirement that he register as a sexual offender under section 290. (I RT 231-238.) Petitioner was released from prison 11 years later on April, 1999. He was convicted in 2001 of failing to update his sexual offender registration within five working days of his birthday between the dates of May 28, 2001, and August 22, 2001, He had registered at the beginning of the year, and was arrested at his registered address.

The evidence at trial proved that on August 10, 1988, petitioner was given a document while in prison entitled, "Notice of Registration Requirement." The document advised him of his duty to register as a sex offender within five days of

his birthday each year and within five days of any change of address. He signed the document. He was given similar advisements that he signed on January 26, 1999; July 19, 1999; and September 20, 2000. (RT 231-238.)

Petitioner's parole officer advised petitioner of his obligation to register yearly and within five days of his birthday when petitioner was released from prison on April 11, 1999, and again on August 17, 1999. (RT 231-233, 238.) Petitioner registered as required for four consecutive years on October 8, 1998; January 6, 1999; April 12, 1999; and August 19, 1999. (I CT 59-65; RT 235-236.) When he registered for the first time, petitioner acknowledged that he had to register annually within five days of his birthday for the rest of his life. (RT 238.)

Petitioner did not register from January 17, 2001, to August 22, 2001. (RT 278, 294.) According to petitioner's testimony at trial, he registered on January 12, 2001, at the sheriff's station in Palmdale. He believed he only had to register once a year if his address did not change, so when he registered in January he thought he had complied with his registration requirement. (RT 370-371.)

VI.

PETITIONER'S INDETERMINATE LIFE SENTENCE AS A THIRD STRIKE OFFENDER VIOLATED THE STATE AND FEDERAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT, WHERE PETITIONER'S THIRD STRIKE WAS BASED SOLELY ON HIS FAILURE TO UPDATE HIS ANNUAL REGISTRATION REQUIREMENT AS A SEXUAL OFFENDER.

A. Introduction.

Petitioner was convicted of failing to comply with the duplicate requirement of registering his residence address within five days of his birthday, even though he had registered his address at the beginning of the year. His address had not changed and the police arrested petitioner at his registered address. As a result of this violation, appellant received an indeterminate life sentence as a third strike defendant.

Under the state and federal constitutionals, sentences cannot constitute cruel and unusual punishment. (U.S. Const., 8th Amend.; Cal. Const., art. 1, § 17.) A sentence that is grossly disproportionate to the crime violates this constitutional prohibition. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 *Solem v. Helm* (1983) 463 U.S. 277, 290.) Petitioner's purely technical violation of failing to register his address for a second time in the same year is grossly disproportionate as a predicate offense to an indeterminate life sentence, where his address had not changed and he had no intention of violating his registration obligation. (*People v. Carmony, supra*, 127 Cal.App.4th 1066, 1073; *People v. Cluff* (2001) 87 Cal.App.4th 991, 994; accord *Gonzalez v. Duncan, supra,* 551 F.3d at pp.878-879.) Petitioner's life sentence must be reversed as constitutional infirm.

B. The Cruel and Unusual Punishment Standard of Review Under the Federal and State Constitutions.

1. The Eight Amendment of the United States Constitution.

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." While it is the Legislature's role in the first instance to define crimes and prescribe punishment, the Legislature's authority is circumscribed by the constitutional prohibition against cruel and unusual punishment. (See *Solem v. Helm* (1983) 463 U.S. 277, 290.) The Fourteenth Amendment makes the Eighth Amendment application to the states. (*Ewing v. California* (2003) 538 U.S. 11, 20; *Robinson v. California* (1962) 370 U.S. 660, 667.)

The proportionality concept embodied in the Eighth Amendment primarily applies to sentences of death, but the Eight Amendment does contain a "narrow proportionality principle" that applies to noncapital sentences. (*Ewing v. California, supra*, 538 U.S. at p. 20 [quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 72.) The issue is whether the sentence is " 'grossly disproportionate' " to the crime. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 1001.)

In applying the proportionality principle to noncapital sentences, courts are guided by objective criteria, including "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (*Solem v. Helm, supra*, 463 U.S., at p. 292.)

The gravity of the offense requires an analysis of the harm caused or

threatened by the defendant, his level of culpability, and the relative severity of the penalty. (*Ibid.*) State legislative policies directed at curtailing criminal recidivism is an important consideration and entitled to deference in weighing the "gravity of the offense." (See *Rummel v. Estelle* (1980) 445 U.S. 263, 276; see also *Solem v. Helm, supra*, 463 U.S. at p. 290.) Even so, the deference paid to state recidivism policies in Eighth Amendment cases is not unlimited. Under "exceedingly rare" and "extreme case[s]," sentences validly imposed under state statutes reflecting the state's policy regarding recidivism may still violate the Eighth Amendment. (*Lockyer v. Andrade, supra,* 538 U.S. at p. 73; *Ewing v. California, supra*, 538 U.S. at p. 23; *Harmelin v. Michigan, supra*, 501 U.S. at pp. 998, 1001 [Kennedy, J., concurring].) This is particularly true where the sentence had no counterpart in the same and other jurisdictions. (*Solem v. Helm, supra*, 463 U.S., at p. 292.)

In *Solem* v. *Helm, supra,* the United States Supreme Court invalidated a South Dakota court's sentence of life without parole for a seven-time convicted felon whose prior convictions had all been for non-violent offenses and whose most recent offense was passing a bad check of less than one hundred dollars. The court noted that the defendant had received "the penultimate sentence" for a relatively minor crime, and specifically rejected the state's contention that the length of a prison sentence was not reviewable under the Eighth Amendment. The court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *(Id.,* at p. 282.)

In *Harmelin v. Michigan, supra,* 501 U.S. 957, Justice Scalia's lead opinion, joined only by Chief Justice Rehnquist, expressed the view that *Solem* should be overruled because the Eighth Amendment contains no proportionality requirement. (*Id.,* at pp. 962.*)* Three concurring justices disagreed with the lead

opinion's rejection of a proportionality analysis, concluding instead that the Eighth Amendment required a "narrow proportionality" review. (*Id.*, at pp. 996-1009 [concurring opn. of Kennedy, S.].) Four dissenting justices applied the *Solem* analysis to conclude that the Michigan law was unconstitutionally disproportionate, disagreeing with the analysis of both the Scalia lead opinion and the Kennedy concurrence. (*Id.*, at pp. 1009-1027.)

The rule to be drawn from this authority is that the proportionality concept remains applicable to a narrow class of cases, where the sentence is so starkly unfair that it cannot be abided. Such is the case here.

2. Cruel and unusual punishment under the California constitution.

Article 1, section 17 of the California Constitution also forbids the infliction of cruel or unusual punishments. Under California's constitution, a punishment may violate the constitution "not only if it is inflicted by a cruel and unusual method, but also if it is grossly disproportionate to the offense for which it is imposed." (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) Even a punishment, which is not impermissible in the abstract, may nevertheless be constitutionally impermissible under California's constitution if it is disproportionate to the defendant's individual culpability. (*Id.* at p. 478.)

Courts, as coequal guardians of the Constitution, shoulder the "imperative task" of condemning violations of the prohibition against cruel or unusual punishment. (*In re Lynch* (1972) 8 Cal.3d 410, 414.) In imposing a sentence, the trial court's sentencing discretion carries the concomitant burden of ensuring that the sentence fairly matches the defendant's criminal conduct, as well as his personal status. (See *Ibid.*)

Thus, in California a punishment may violate the California Constitution,

if, although it does not amount to cruel or unusual punishment in its method, the sentence "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra,* 8 Cal.3d at p. 424.) In this way, the analysis under the California Constitution is the same as the proportionality analysis under the Eighth Amendment.

C. Case Law Interpreting Cruel and Unusual Punishments in the Context of California's Three Strikes Law.

1. United States Supreme Court cases.

The United States Supreme Court has addressed the constitutionality of California's three strikes law in two theft related cases, *Lockyer v. Andrade* (2003) 538 U.S. 63 and *Ewing v. California* (2003) 538 U.S. 11.[3] In *Andrade,* a narrow majority of the Court concluded that imposition of two consecutive 25 year to life sentences for two counts of petty theft with a prior was not contrary to or an unreasonable application of Eighth Amendment jurisprudence as enunciated in *Solem, Harmelin* and *Rummel v. Estelle* (1980) 445 U.S. 263.

In *Ewing,* the same five members of the court concluded, this time with no

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[3] The cases were considered under different standards of review. *Andrade* was an appeal in a habeas corpus proceeding under 28 U.S.C. section 2254, subdivision (d). Thus, the petitioner in *Andrade* was entitled to relief only if the lower court applied an erroneous or unreasonable interpretation of clearly established federal law. *Ewing* was before the Court on direct review through a petition for certiorari from the California Supreme Court's denial of review.

majority opinion, that a sentence of 25 years to life was not cruel and unusual punishment of a defendant convicted of grand theft of three golf clubs, worth a total of $1,200.

Though the Supreme Court upheld the sentences in these two cases, the Court did not fully embrace California's Three Strikes law nor did it give carte blanche to sentence under it. In fact, the Court was deeply divided in both cases.

In *Ewing,* Justice O'Connor's plurality opinion was joined by Chief Justice Rehnquist and Justice Kennedy. These three justices conducted a proportionality review and found that the sentence did not violate the Eighth Amendment. Justices Scalia and Thomas concurred in the result and filed separate opinions rejecting the requirement of proportionality review altogether. Justice Stevens was joined in dissent by Justices Souter, Ginsburg, and Breyer, who all agreed that the Eighth Amendment requires proportionality review. Justice Breyer wrote a separate dissent in which Justices Stevens, Souter, and Ginsburg joined. The dissent concluded that the sentence in *Ewing* was grossly disproportionate to the crime, and violative of the Eighth Amendment..

In *Andrade,* the majority opinion was again written by Justice O'Connor and was joined by four justices. Dissenting opinions were joined by the same four dissenters as in *Ewing* and applied the same reasoning..

Thus, the most recent United States Supreme Court cases indicate that seven of nine members of the court have upheld the requirement of proportionality review, as defined by *Rummel, Solem* and *Harmelin,* in an Eighth Amendment claim made against a noncapital recidivists sentence.

The justices' primary disagreement in *Ewing* and *Andrade* centers around the amount of deference given to a state legislature's sentencing structures as they are applied in a particular case. Justice O'Connor's plurality opinion in *Ewing* recognized the right of a state legislature to develop laws that harshly

punish recidivism. Justice Breyer noted that "many experienced judges would consider Ewing's sentence disproportionately harsh, and pointed out the considerations contained in the United States Sentencing Commission guidelines. (*Id.*, at pp. 41-42.)

Likewise, Andrade, who received a 50 year to life sentence for two different shoplifting convictions in which he took videotapes worth a total of about $150, had been in and out of prison since 1982 when he was convicted of multiple counts of first degree burglary. (*Andrade, supra.* 538 U.S. at pp. 66-67.) The majority focused on whether his Eighth Amendment claim was foreclosed under the federal habeas statute, holding that it is clearly established that a "gross proportionality principle is applicable to sentences for terms of years" but "only in the exceedingly rare' and 'extreme' cases." (*Id.*, at p. 75.) It found that Mr. Andrade case did not meet this standard. (*Id.*, at pp. 76-77.)

Justice Souter found to the contrary in his dissent. He concluded that "the disproportionality review by the state court [in *Andrade*] was not only erroneous, but unreasonable, entitling Andrade to relief" (*Id.*, at p. 78 [Souter, J., dissenting].) Justice Souter used the *Solem* opinion as the "benchmark" in applying "objective proportionality analysis." (*Ibid.*) He found the facts in *Andrade* to be on all fours with *Solem.* Because the state court had improperly disparaged *Solem* as a point of reference, he found its ruling "wrong as a matter of law." (*Id.*, at p. 1177.) He also found that the imposition of consecutive 25 to life sentences for minor shoplifting crimes was "irrational" and "does not raise a seriously debatable point on which judgments might reasonably differ." (*Id.*, at 1178.)

As the dissenting opinions made clear, the overriding principles involved in all United States Supreme Court cases analyzing recidivist sentencing include, first, the recognition that the determination of an appropriate sentence is

primarily a legislative function to which the courts should accord "substantial deference" and, second, recidivist defendants may be punished more heavily when their criminal histories are considered in addition to the nature of their current crime. However, proportionality review also must squarely address the specifics of the crime and the defendant in the case at issue. (*Id.*, at pp. 18-79 [quoting *Robinson v. California* (1962) 370 U.S. 660, 667].)

A careful review of the opinions in *Ewing* demonstrates two very favorable factors from petitioner's perspective. First, as indicated above, a clear majority of the court continues to endorse the notion that the Eighth Amendment compels a narrow proportionality analysis for noncapital sentences. (See *Ewing, supra,* 538 U.S. at p. 20-22 [plu. opn. of O'Connor, S.] and at pp. 35-37 [diss. opn. of Breyer, J.].) A second majority of the members of the court also concluded that the sentence imposed in defendant Ewing's ease - a punishment of 25 years to life for stealing golf clubs - is grossly disproportionate and constituted cruel and unusual punishment. (See *Ewing, supra.* at pp. 38-52 [diss. opn. of Breyer, J., joined by Ginsburg, Stevens & Souter, J.] and at p. 31 [conc. opn. of Scalia, S.] These justices concluded that the plurality's discussion of Ewing's punishment "in all fairness, does not convincingly establish that 25-years-to-life is a 'proportionate' punishment for stealing three golf clubs."

Thought Justice Scalia did not recognize the proportionality principle embraced by seven of his colleagues, neither of these sets of numbers added up to a majority in favor of defendant Ewing's Eighth Amendment claim. However, this confusing amalgam of opinions signifies that the matter is far from settled, and that Eighth Amendment proportionality arguments in noncapital cases, like the one advanced by petitioner here, continue to have vitality, and must be judged on a case-by-case basis.

As a final point, neither *Harmelin* nor *Ewing* constitute binding authority.

As our state Supreme Court has noted, "the reasoning of a plurality opinion 'lacks authority as precedent' (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 841; *Farrell v. Board of Trustees* (1890) 85 Cal. 403, 415-416), and the doctrine of stare decisis does not require us to defer to it." (*Board of Supervisors v. Local Agency Formation* (1992) 3 Cal.4th 903, 918.) "[U]nder settled doctrine, the judgment of an equally divided United States Supreme Court is without force as precedent." (*People v. McKinnon* (1972) 7 Cal.3d 899, 911, quoting *Eaton v Price* (1960) 364 U.S. 263, 264.)" Thus, for purposes of interpreting the Eighth Amendment, *Harmelin* and *Ewing* have no precedent to follow, and the proportionality analysis of *Solem* remains the controlling authority for Eighth Amendment analysis.

Following the *Ewing* and *Andrade* decisions, there was general speculation that the Eight Amendment did not apply to Three Strikes sentences. This has proven to be untrue. Since *Ewing* and *Andrade* were decided, federal courts and California state courts have found some Three Strikes life sentences to be cruel and unusual under their particular facts. (See *People v. Carmony* (2005) 127 Cal.App.4th 1066; *People v. Cluff* (2001) 87 Cal.App.4th 991; *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964; *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755; *Banyard v. Duncan* (C.D. Cal. 2004) 342 F.Supp.2d 865; see also *People v. Keogh* (1975) 46 Cal.App.3d 919 [holding that consecutive sentences amounting to a possible life-term for four counts of forgery of checks in an aggregate amount of less than $500 was cruel and unusual punishment].)

2. Lower court decisions reversing Three Strikes sentences as cruel and unusual punishment.

In *People v. Carmony, supra*, 127 Cal.App.4th 1066, the Third Appellate District found that a 25-year-to-life Three Strikes sentence was cruel and unusual under both the state and federal constitutions. (See *Id.*, at pp. 1073-1075, 1077, 1080, 1081; see also *People v. Carmony* (2004) 33 Cal.4th 367, 371-372.) The triggering offense in *Carmony* was the defendant's failure to update his sex offender registration with his address, which had not changed, within five days of his birthday. (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1071.) The reviewing court concluded that under these circumstances, "a 25-year recidivist sentence imposed solely for failure to provide duplicate registration information is grossly disproportionate to the offense, shocks the conscience of the court and offends notions of human dignity, it constitutes cruel and unusual punishment under both the state and federal Constitutions." (*Id.*, at p. 1073.)

The Court of Appeal in *People v. Carmony, supra,* 127 Cal.App.4th 1066 addressed a nearly identical issue as in the present case. Mr. Carmony registered his correct address with the police one month before his birthday, as required by law, but failed to "update" his registration with the same information within five working days of his birthday as also required by law. (*Id.*, at p. 1073; see § 290, subd. (a)(1)(C).) Mr. Carmony's parole agent was aware his registration information had not changed and arrested Mr. Carmony for the registration violation at the address he had registered with the police. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1073.) Mr. Carmony pled guilty to the charge of failing to register within five days of his birthday and admitted he had suffered three prior strike offenses. The trial court sentenced him under the Three Strikes law to an indeterminate prison term of 25-years-to-life, plus a one-year

consecutive term for a prior prison term. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1074.)

Mr. Carmony claimed on appeal, inter alia, that the application of the Three Strikes law to the offense of failing to duplicate his registration as a sex offender violated the state and federal prohibitions against cruel and unusual punishment. The Court of Appeal agreed. (*Ibid.*)

The court begin by noting it is a rare case that violates the prohibition against cruel and unusual punishment, but such a violation can occur if the constitutional prohibition is to have a meaningful application. The court found that the state and federal prohibitions against cruel and unusual punishment require proportionality between the crime and the punishment and, although the Legislature may impose increased penalties on repeat offenders, recidivism may not serve as the reason for imposing increased punishment where the predicate offense serves no rational purpose of the state. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1075.)

The court interpreted the Legislative intend behind section 290 as providing law enforcement with the ability to conduct police surveillance of sexual offenders. Mr. Carmony met this purpose by registering his address one month prior to his birthday and was present at his registered address when he was arrested for not registering his address within five days of his birthday. (*Id.,* at p. 1073.) There was no new information to update and the state was aware of that fact. The requirement that Mr. Carmony register again within five days of his birthday "served no stated or rational purpose of the registration law and posed no danger or harm to anyone." (*Ibid.*)

The court concluded that, because an indeterminate sentence of 25 years to life under the Three Strikes law, which was imposed for the sole reason that the defendant failed to provide duplicate registration information, is grossly

disproportionate to the offense. In the words of the court, the sentence "shocks the conscience of the court and offends notions of human dignity . . . ." The court issued the writ and order the sentence reversed. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1085.)

In arriving at this conclusion, the court relied on the three *Solem* factors, which included consideration of the gravity of the offense and the harshness of the penalty; the sentences imposed on other criminals in the same jurisdiction; and the sentences imposed for the commission of the same crime in other jurisdictions. (See *Solem v. Helm, supra,* 463 U.S. at p. 292.)

Applying these principles, the court in *Carmony* agreed that only in rare cases is the harshness of a recidivist penalty grossly disproportionate to the gravity of the offense. Even so, this case met that standard. The willful failure to register as a sex offender is a regulatory offense that may be committed merely by forgetting to register. Prior to 1995, the offense was punishable as a misdemeanor. It was later made into a felony, but with the "lowest triad of terms prescribed for felonies; a prison term of 16 months, or two or three years. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1080; see § 290, subd. (g)(2).)

Within the numerous possible violations of section 290, the court found the failure to discharge the duplicate registration requirement of re-registering one's address within five days of his birthday to be a "passive, nonviolent, regulatory offense" that posed no direct or immediate danger to society, and did not prevent the police from monitoring Mr. Carmony's activities. This is because Mr. Carmony registered the proper information the month before. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1081.)

The duel registration requirement was intended by the Legislature to address the problem of offenders who fail to notify authorities of an address *change* because they are no longer under active parole supervision. (*Id.,* at p.

1078.) When the defendant in *Carmony* failed to register within five days of his birthday, "he was still on parole, had recently updated his registration, had not moved or changed any other required registration information during the one month since he registered, and was in contact with his parole officer." Under such circumstances, his failure to register was "completely harmless and no worse than a breach of an overtime parking ordinance." For this, the defendant was sentenced to a term of 25-years-to-life in prison. This meant he had to serve 25 years in prison before he became eligible for his first parole consideration hearing. (See *In re Cervera* (2001) 24 Cal.4th 1073, 1076.) The court concluded that the gravity of the offense and the harshness of the punishment were grossly disproportionate. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1081.)

The court's conclusion was strengthened by its intrajurisdictional and interjurisdictional comparisons. The punishments within and outside of California for the same types of offenses, and more severe crimes proved the appellant's sentence to be "indisputably severe" by any standard of measurement. (*Id.,* at pp. 1082-1084, 1089.)

People v. Cluff (2001) 87 Cal.App.4th 991 provides another example of a California case in which the Court of Appeal reversed a Third Strike sentence triggered by the defendant's failure to properly register his residence address within five days of his birthday. In *Cluff*, the defendant was given an indeterminate life sentence under the Three Strikes law after he was convicted of failing to comply with his registration requirements by not registering his address within five days of his birthday. (*Id.,* at p. 994.) The defendant in *Cluff* had been released from prison in 1990 and properly registered a number of times over the next five years. Although he failed to update his registration after his birthdays in 1996 and 1997, which had become a requirement on January 1, 1995, he continued to reside at his last registered address. The police arrested him in

October 1997 at his registered address. (*Id.*, at pp. 994-996.)

The court in *Cluff* concluded from these facts that the trial court abused its discretion by denying defendant's motion to dismiss a prior strike conviction and imposing a third strike sentence. (*Id.*, at p. 994.) The court characterized the defendant's registration offense as "the most technical violation of the section 290 registration requirement we have seen." (*Id.*, at p. 994.) The *Cluff* court concluded that the imposition of a Three Strike indeterminate term for such conduct "appear[ed] disproportionate by any measure." (*Id.*, at p. 1004.)

The rule to be drawn from *Carmony* and *Cluff* is that the purely technical violation of failing to register as a sexual offender for a second time in the same year, where the registrant had no intention of violating the law and his address had not changed, is not sufficiently grave to trigger an indeterminate life sentence under the Three Strikes law. Such a sentence is grossly disproportionate to the predicate offense because it poses no direct or immediate danger to society, nor does it thwart society's interest in monitoring the activities of sexual offenders.

The federal bench also has reversed a number of Three Strikes sentences as disproportionally harsh under the Eight Amendment. Though this Court is not bound by such decisions, they provide instructive insights into the application of a proportionality analysis under the circumstances of this case. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.)

The Ninth Circuit in *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964 reversed a Three Strikes sentence where the defendant was convicted of perjury for making misrepresentations on a California Department of Motor Vehicles application after he filled out a driver's license application for his cousin. The defendant in *Reyes* had suffered prior convictions for nonviolent residential burglaries and an armed robbery. The perjury conviction constituted his third

strike, and resulted in the state trial court imposing an indeterminate life sentence. The defendant filed a petition for a writ of habeas corpus in the federal district court, which was denied. The Ninth Circuit reversed the District Court's finding by concluding that the facts necessary to evaluate the petition had not been sufficiently developed below. The matter was remanded to the District Court for further proceedings. (*Id.*, at pp. 964-965.)

In arriving at its decision, the Ninth Circuit said that neither the perjury offense of falsifying a driver's license application nor the defendant's prior conviction for an apparently nonviolent residential burglary threatened grave harm to society for purposes of justifying the extreme sentence. This left the District Court to decide if the defendant's prior armed robbery offense was a crime against a person or involved violence, and thus justified a life sentence for the subsequent perjury conviction. (*Id.*, at pp. 965, 966, 968, 969-970 and fns. 6, 7.)

The Ninth Circuit in *Ramirez v. Castro* (9th Cir. 2005) 365 F.3d 755 again struck down a Three Strikes sentence as unconstitutional under the Eight Amendment. (*Id.*, at pp. 769-770, 773.) The court described the *Ramirez* defendant as a "nonviolent, three-time shoplifter" who had been caught stealing a VCR valued at approximately $200. The defendant surrendered to authorities and the incident was entirely nonviolent. He had suffered two prior convictions related to shoplifting, which had been charged as robberies. The court concluded that the sentence was unconstitutional because the current offense was a "wobbler," and the defendant's two prior convictions were robberies only because the defendant pushed a security guard in one incident, and the accomplice ran over a security guard's foot with a shopping cart in the second incident. The court also noted that the defendant had never served a state prison term for either of the prior convictions. (*Id.*, at pp. 768-769.) Once again, the

lack of a violent recidivist record compelled the court's decision.

In *Banyard v. Duncan* (C.D. Cal. 2004) 342 F.Supp.2d 865, the Federal District Court, Central District, struck down a Three Strikes sentence of 25-years-to-life as "grossly disproportionate" for a defendant whom the California Court of Appeal had characterized as a recidivist with a history of repeated criminal behavior and repeated failure to reform. (*Banyard v. Duncan, supra*, 342 F.Supp.2d at pp. 867, 868, 871, 873, 875, 878.)

The defendant in *Banyard* was arrested for possessing a small amount of rock cocaine, which he purchased for his personal use. The defendant had two prior strike convictions for robbery and assault with a deadly weapon. The federal court found the state trial court's imposition of an indeterminate life sentence vastly disproportionate to the predicate offense. (*Id.,* at pp. 867-868, 878.)

Similarly, the Eastern District of the Federal District Court in *Duran v. Castro* (E.D. Cal. 2002) 227 F.Supp.2d 1121 struck down a Three Strikes sentence as disproportionately harsh. In *Duran*, the triggering offense was simple possession of heroin. The defendant had two prior kidnapping convictions stemming from the same incident. (*Duran*, 227 F.Supp.2d at p. 1124.) Notwithstanding the prior convictions for kidnapping, the district court concluded that the defendant's 25-years-to-life sentence was grossly disproportionate to the commitment offense of heroin possession. (*Duran v. Castro, supra,* 227 F.Supp.2d at pp. 1131-1132, 1136.)

In *Gonzalez v. Duncan, supra,* the Ninth Circuit expanded its Three Strikes reversals beyond defendants with nonviolent criminal histories. In *Gonzales*, the defendant was convicted of failing to update his annual sex offender registration within five working days of his birthday, in violation of section 290, subdivision (a)(1)(D). His prior violent and serious convictions

subjected him to a sentence of 28 years to life imprisonment under the Three Strikes law. The Ninth Circuit decided whether this sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment under clearly established federal law. (*Gonzalez v. Duncan, supra,* 551 F.3d at pp.878-879.)

The court in *Gonzalez* began by noting that California courts have characterized the state's sexual offenders' registration requirement as a "most technical violation" that "by itself, pose[s] no danger to society." (*Id.,* at p. 884; *People v. Cluff* (2001) 87 Cal.App.4th 991, 996.) The court cited *People v. Carmony*, for its conclusion that a Three Strikes sentence of 25 years to life for violating the sexual offender's registration requirement was "grossly disproportionate to the offense" and violated the Eighth Amendment. (*Gonzalez v. Duncan, supra,* 551 F.3d at p. 888; *People v. Carmony, supra,* 127 Cal.App.4th at p. 1069.)

The facts of the *Gonzalez* case are strikingly similar to the present matter. Mr. Gonzalez was a convicted sex offender and subsequently charged with two felony violations of section 290, subdivision (a). Count 1 alleged that he failed to properly register a change of address and count 2 alleged that he failed to update his registration within five working days of his birthday. He was also alleged to be a third strike offender under the Three Strikes law. (*Gonzalez v. Duncan, supra,* 551 F.3d at pp. 878-879.)

Testimony at trial proved the California Department of Corrections and Rehabilitation ("CDCR") notified Mr. Gonzalez of his duty to register annually within five working days of his birthday. Mr. Gonzalez registered his address on May 23, 2000, nine months before his February 24, 2001, birthday. He put his initials next to the part of the registration form stating, "I must annually, within 5 working days of my birthday, go to the law enforcement agency having jurisdiction over my location or place of residence and update my registration

information." Mr. Gonzalez did not update his registration until May 21, 2001, within one year of being advised of his duty to report annually, and three months after his birthday. (*Gonzalez v. Duncan, supra,* 551 F.3d at p. 879.)

The jury acquitted Mr. Gonzales of failing to register a change of address but convicted him of failing to update his registration annually within five working days of his birthday. The trial court determined the prior strike allegations to be true and of a violent nature. The court sentenced Mr. Gonzalez to an indeterminate term of 28 years to life imprisonment. The California Court of Appeal affirmed the sentence and this Court declined a petition for review. (*Id.,* at p. 880.)

Mr. Gonzalez filed state habeas petitions in the California Court of Appeal and the California Supreme Court, which were both summarily denied. Thereafter, he filed a petition for a writ of habeas corpus under 28 U.S.C. section 254 alleging that his sentence violated the Eighth Amendment of the United States Constitution. The petition eventually was heard by the Ninth Circuit, which certified the issue of "whether appellant's sentence of 28 years-to-life under California's Three Strikes law violates the Eighth Amendment." The court answered this question in the affirmative. (*Id.*, at p. 881-883.) The court's reasoning in *Gonzalez* provides persuasive authority for the issue facing this Court in the instant matter.

In considering Mr. Gonzalez's sentence, the court acknowledged the Eighth Amendment mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The court further recognized that the United States Supreme Court has interpreted this to mean that not only barbaric punishments are prohibited, "but also sentences that are disproportionate to the crime committed." (*Solem v. Helm* (1983) 463 U.S. 277, 284.)

The court in *Gonzales* adopted the *Solem* factors to analyze the Eighth Amendment issue. (*Solem v. Helm, supra,* 463 U.S. At pp. 281-282, 284.) Applying these factors, the court began by analyzing the gravity of Mr. Gonzales' offense in not registering within five days of his birthday. The court weighed this criminal offense against the resulting penalty "in light of the harm caused or threatened to the victim or to society, and the culpability of the offender." (*Gonzales v. Duncan, supra,* 551 F.3d at p. 801.) It concluded that Mr. Gonzalez's crime of failing to register as a sexual offender within five working days of his birthday involved "neither violence nor threat of violence to any person," (*Helm v. Solem, supra,* 463 U.S. at 296), and was purely a regulatory offense. (*Gonzalez v. Duncan, supra,* 551 F.3d at pp. 884-885; see *People v. Barker* (2004) 34 Cal.4th 345, 354.)

The court continued by noting that the purpose of section 290 is to prevent "recidivism in sex offenders" by assuring the offenders are "available for police surveillance." (See *Wright v. Superior Court* (1997) 15 Cal.4th 521.) The requirement of registering one's address each year is necessary to meet this purpose, but registering a second time during the same year within five days of one's birthday, where the person's address has not changed, is only tangentially related to the state's interest in ensuring that sex offenders are available for police surveillance. The birthday registration is merely a "backup measure to ensure that authorities have current accurate information." (*People v. Carmony, supra,* 127 Cal.App.4th 1066.)

The court concluded by finding no actual harm resulting from Mr. Gonzalez's failure to comply with the annual birthday registration requirement. (*Gonzalez v. Duncan, supra,* 551 F.3d at p. 887.) He updated his sex offender registration nine months before and three months after his February 24, 2001, birthday, and remained at his last registered address throughout that time period.

There was nothing to indicate that his failure to register within five days of his birthday could have interfered with the ability of police to monitor his activities. (*Id.*, at pp. 887-888.) The court concluded that Mr. Gonzalez's sentence of 28 years to life under the Three Strikes law was "grossly disproportionate to the offense, shocks the conscience of the court and offends notions of human dignity." The court concluded that the sentence constituted cruel and unusual punishment under both the state and federal Constitutions. (*Id.*, at pp. 885-886.)

D. The Court of Appeal's Decision *in re Coley* Was Incorrectly Decided by Unduly Limiting the Proportionality Analysis to Defendants with a Nonviolent Criminal History.

District Five of the Second Appellate District upheld petitioner's indeterminate life sentence in the present case. The primarily reasons were petitioner's criminal history and the court's rejection of the holding in *People v. Carmony* . The court concluded that *Carmony* was incorrectly decided because it relied, in part, upon the dissenting opinion in *Ewing v. California* rather than the plurality opinion which, in the court's view, applied the narrow proportionality analysis of *Rummel v. Estelle.* The court interpreted the *Rummel* proportionality analysis as requiring that courts weigh the defendant's criminal history together with his current offense in deciding if a third strike sentence is proportionate. (*In re Coley, supra*, 187 Cal.App.4th at pp. 313, 317-318; see *Rummel, supra,* 445 U.S. at pp. 271-284.) According to the court in *Coley,* the *Carmony* decision differed from Supreme Court precedents because it failed to use recidivism as a factor in determining the gravity of the *Carmony* defendant's current offense, which, in the court's view, was in direct conflict with the majority's opinion in

Ewing v. California. (*In re Coley, supra,* 187 Cal.App.4th at p. 317.)

The court further took issue with *Carmony* as failing to recognize that the *Solem* proportionality factors are limited to those instances where the defendant's triggering offense *and* criminal history involve nonviolent crimes. (*In re Coley, supra,* 187 Cal.App.4th at pp. 317-318; see *Solem, supra,* 463 U.S. at pp. 296-303.) *Coley* can be read as requiring an entirely nonviolent defendant before a proportionality analysis may be undertaken.

In affirming the sentence, the Court of Appeal looked at petitioner's prior criminal history together with his current offense. The court concluded that the public-safety interest of incapacitating and deterring recidivist felons made petitioner's life sentence constitutionally sound. (*Id.,* at p. 316.)

Petitioner respectfully disagrees with the court's reasoning in *Coley.* In *Solem,* the Supreme Court held "as a matter of principle" that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. (*Solem, supra,* 463 U.S. at p. 282.) While the nonviolent criminal history of the defendant in *Solem* certainly made his life sentence shockingly disproportional to his crime, *Solem* did not limit its proportionality analysis to nonviolent cases. As noted by Justice Souter in his dissenting opinion in *Andrade*, the *Solem* opinion supplies controlling authority for applying an "objective proportionality analysis" to determine if a sentence constitutes cruel and unusual punishment. (*Ibid.*)

Justice Souter is correct that *Solem's* proportionality analysis should be regarded as the controlling precedent for Eighth Amendment analysis. Many subsequent cases have struck down Three Strikes sentences as disproportionate under the Eighth Amendment. The defendant in *Gonzales* was convicted of prior violent sexual crimes. (*Gonzales, supra,* 551 F.3d 878.) The defendant in *Banyard* had prior convictions for assault with a deadly weapon and robbery. (*Banyard, supra,* F.Supp.2d at 865.) The defendant in *Duran* had two prior

convictions for kidnapping. (*Duran, supra,* 227 F.Supp.2d 1121.) The defendants in *Carmony* and *Cluff* were convicted of prior violent sexual crimes. (*Carmony, supra,* 127 Cal.App.4th 1089; *Cluff, supra,* 87 Cal.App.4th 991.) As the decisions in these cases make clear, the proportionality analysis of *Solem* is not limited to defendants with nonviolent histories.

Petitioner agrees the Legislature may impose increased penalties on repeat offenders, but recidivism alone is not a proper reason for imposing a life sentence where the triggering offense serves no rational purpose of the state. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1075.) Petitioner in the present matter, without question, has a violent criminal history. He served his prison time for these offenses and believed he had complied with his obligation to register his current residence address with the police. He registered his address at the beginning of the year and did not move from that address. He misunderstood that he had to re-register the same address within five days of his birthday. (RT 278, 294, 370-371.)

The Third Appellant District has come down on both sides of the sexual registration issue. That District's thoughtful analysis provides the better view. In *People v. Meeks* (2004) 123 Cal.App.4th 695, the same court that issued the *Carmony* decision held that a third strike sentence for failing to register as a sex offender did not violate either the state or federal prohibitions against cruel and unusual punishment. The defendant in *Meeks* moved three times over two years and later became a transient. He failed to register his address changes or his transient status. The Third District in *Meeks* held the defendant's sentence was not grossly disproportionate because, by failing to register three address changes or his transient status, he violated the purpose behind the registration requirement of providing law enforcement the information necessary to monitor the behavior of convicted sexual offenders. Hence, his actions "violated a law that is intended

to avoid, or at least minimize, the danger to public safety posed by those who have been convicted of certain sexual offenses." (*Id.*, at p. 708.)

Similarly, in *People v. Nichols* (2009) 176 Cal.App.4th 428 the Third District again upheld an indeterminate life sentence under the Three Strikes law for the defendant's failing to register a new address within five days of moving from his registered address.

The court in *Nichols* noted that it has been on both sides of the issue with its holdings in *People v. Carmony* and *People v. Meeks.* In *Carmony*, the Third District determined an indeterminate life sentence based on the failure to re-register the same address within five days of the defendant's birthday was unconstitutional. In *People v. Meeks*, the court concluded that an indeterminate life sentence imposed on a registered sex offender for failing to register a new address within five days of changing his address was not unconstitutional.

The court in both cases analyzed "an inference of gross disproportionality" (*Harmelin, supra,* 501 U.S. at p. 1005 [conc. opn. of Kennedy, J.]) by weighing the triggering crime against the defendant's sentence "in light of the harm caused or threatened to the victim or to society, and the culpability of the offender." (*Solem, supra,* 463 U.S. at p. 292.) The court also weighed the sentence against state law standards to decide if the sentence was so disproportionate to the crime that it "shocks the conscience" in light of the defendant's history and the seriousness of his offenses. (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

The key difference between the cases boiled down to the defendant's intent in failing to register, and the harm to public safety from the violation. In *Carmony,* the court found an inference of gross disproportionality because the defendant's registration error was a "passive, nonviolent, regulatory offense that posed no direct or immediate danger to society," because the defendant had

correctly registered the proper information the prior month. (*People v. Nichols, supra,* 176 Cal.App.4th at p. 435.) No address change had occurred in the intervening month, as the defendant was arrested at his registered address. The fact the defendant in *Carmony* did not evade or intend to evade law enforcement officers made offense "the most technical and harmless violation of the registration law we have seen." (*People v. Nichols, supra,* 176 Cal.App.4th at p. 436; see *People v. Carmony, supra,* 127 Cal.App.4th at p. 1078.)

The registration violation in *Meeks* was very different. In *Meeks*, the Third District did not find an inference of gross disproportionality because the defendant moved three times and lived for a period of time on the street without ever registering any of these new addresses or his transient status. Thus, for a period of two years, the police had no idea where Mr. Meeks was living. (*People v. Nichols, supra,* 176 Cal.App.4th at p. 436; *People v. Meeks, supra,* 123 Cal.App.4th at pp. 700-701.) This made the triggering offense in *Meeks* not merely a technical violation like the offense committed by the defendant in *Carmony.* The triggering offense in *Meeks* was at least as egregious as the triggering offense in *Ewing,* which the Supreme Court found to be a constitutional sound basis for a third strike sentence. (*People v. Nichols, supra,* 176 Cal.App.4th at p. 436-437.)

The court concluded that the distinction between *Carmony* and *Meeks* supported the indeterminate life sentence in *Nichols.* By not registering his new residence address, Mr. Nichols deprived law enforcement authorities the ability to monitor his conduct. For a period of over eight months, Mr. Meeks' whereabouts were unknown. The court found that "[s]uch blatant disregard of the registration act and complete undercutting of the act's purposes is a serious offense." The court concluded under the circumstances of the *Meeks* case, the life sentence did not shock the conscience, nor was it cruel and unusual under the

federal or California Constitutions.

Petitioner urges this Court to adopt the reasoning of the Third District. The failure to re-register the same address in the same year does not thwart the fundamental purpose of the registration law. It is a purely "passive, nonviolent, regulatory offense that posed no direct or immediate danger to society." (*People v. Nichols, supra,* 176 Cal.App.4th at p. 435.) On the other hand, registration violations that result in the police not knowing the whereabouts of a sexual offender are sufficiently grave to serve as a trigger crime for a third strike sentence.

D. *Gonzalez* v. *Duncan* and *People v. Carmony* Are Indistinguishable from the Present Matter and Represent the Better View.

The purpose of the Three Strikes law is to punish recidivist behavior. (*People v. Diaz* (1996) 41 Cal.App.4th 1424, 1431; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631.) The purpose of the sexual offender registration requirement is to provide the police with the ability to monitor sexual offenders by knowing their current residence addresses. (*People v. Nichols, supra,* 176 Cal.App.4th at p. 435.) Neither of these purposes were served by petitioner's indeterminate life sentence for failing to re-register the same residence address in the same year.

The present case is the same, both legally and factually, as *Gonzalez* and *Carmony.* Here, petitioner was charged with failing to register as a sexual offender and failing to update his registration annually within five days of his birthday. The information also alleged that he was a third strike offender. (CT 24-25.) The jury acquitted petitioner of failing to register as a sexual offender,

but convicted him of failing to register a second time within the same year within five days of his birthday. There was no evidence at trial that appellant had changed his registered and, like *Carmony*, he was arrested at his registered address for the registration violation. Though law enforcement advised petitioner of his registration requirements, he believed he only had to register once a year, and believed he had complied with his registration requirement when he registered his address in January. (RT 370-371.)

Petitioner admitted his three prior strike convictions and was sentenced to a term of 25-years to life under to the Three Strikes Law. (I CT 250.) This Court affirmed the conviction and sentence on direct appeal, and his subsequent petition for review to the California Supreme Court was denied. The new law created by the *Gonzalez* and *Carmony* decision came after the conclusion of petitioner's direct appeal. His current habeas proceeding is based on this new law.

Petitioner's current conviction was for the "hyper technical" crime of failing to re-register as a sexual offender within five days of his birthday. (*Gonzalez v. Duncan, supra,* 551 F.3d at pp. 884-885.) This was a "most technical violation" that posed no danger to society, and was committed by petitioner with no intention of hiding his current address. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1069; *People v. Cluff, supra,* 87 Cal.App.4th at p. 996.) The imposition of an indeterminate life sentence for petitioner's failure to re-register the same resident address in the same calendar year was "grossly disproportionate to the offense" and violated the Eighth Amendment. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1069.) This purely regulatory offense arose from petitioner's confusion over the complicated and highly technical reporting requires.

Petitioner's registration violation did not violate the purpose behind

section 290. The police knew his current address, and was available for police surveillance. (*Wright v. Superior Court, supra,* 15 Cal.4th 521.) Petitioner's simply failed to comply with the "backup measure" written into section 290. (*People v. Carmony, supra,* 127 Cal.App.4th 1066.) Under these circumstances, petitioner's sentence of 28 years to life under the Three Strikes law was "grossly disproportionate to the offense, shocks the conscience of the court and offends notions of human dignity." Accordingly, the sentence constituted cruel and unusual punishment under both the state and federal Constitutions, and is shocking to the conscious. Reversal of this sentence is mandated.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court reverse the decision of the Court of Appeal in *In re Coley,* and reverse his indeterminate life sentence under the Three Strikes law as violating the prohibition against cruel and unusual punishment under the state and federal constitutions.

Dated: March 14, 2011

Respectfully submitted,

NANCY L. TETREAULT
Attorney for Petitioner

CERTIFICATE OF WORD COUNT

The text of this brief consists of 10,096 words as counted by the Corel WordPerfect version 10 word processing program used to generate this brief.

Dated: March 14, 2011

By _____
Nancy L. Tetreault
Attorney for Respondent

DECLARATION OF SERVICE BY MAIL

Re: ***In re Coley*** Case No. **S185303**

I, Nancy L. Tetreault, am employed in the County of Los Angeles, State of California. I am over 18 years of age, a member of the State Bar and not a party to the within action. My business address is 346 No. Larchmont Boulevard, Los Angeles, California.

I served a copy of the attached document, Opening Brief on the Merits, on all parties in this action by placing a true copy thereof in an envelope addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on **March 14, 2011**, at Los Angeles, California.

NANCY L. TETREAULT