In the Supreme Court of the State of California

In re – **WILLIE CLIFFORD COLEY,** **on Habeas Corpus.**	Case No. S185303

Second Appellate District, Case No. B224400
Los Angeles County Superior Court Case No. MA022987
The Honorable Dorothy Shubin, Judge

ANSWER BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
VICTORIA B. WILSON
Supervising Deputy Attorney General
JANET E. NEELEY
Deputy Attorney General
NOAH P. HILL
Deputy Attorney General
State Bar No. 190364
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-8884
Facsimile: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

ISSUE PRESENTED

Upon his release from state prison, petitioner failed to register as a sex offender and, at the time of his arrest, he was in violation of the terms of his parole and out of contact with his parole agent. The issue presented is whether the imposition of an indeterminate sentence of 25 years to life pursuant to the Three Strikes Law, based on petitioner's lengthy, violent history of recidivism and his triggering felony offense of failing to update his sex offender registration annually, violated petitioner's right to be free from cruel and/or unusual punishment under the federal and state Constitutions.

INTRODUCTION

Following petitioner's parole from state prison from his convictions for rape in concert, voluntary manslaughter, and robbery, petitioner moved in with a girlfriend he had just met, failed to register as a sex offender, and failed to report to his parole agent. Petitioner then failed to update his sex offender registration annually some five months later. A Los Angeles County jury convicted petitioner of failing to update his sex offender registration annually, but acquitted him of failing to register as a sex offender. Petitioner admitted the truth of three prior conviction allegations under the Three Strikes Law.

During petitioner's sentencing hearing, the trial court denied petitioner's request to strike his prior convictions in furtherance of justice, found that petitioner had never registered or intended to register as a sex offender following his release from state prison, and sentenced petitioner to an indeterminate term of 25 years to life pursuant to the Three Strikes Law.

The Court of Appeal denied petitioner's claim that the imposition of an indeterminate sentence of 25 years to life pursuant to the Three Strikes Law constituted cruel and/or unusual punishment. The Court of Appeal

found that petitioner's current offense and his lengthy history of serious and violent felony offenses warranted the lengthy sentence.

The Court of Appeal disagreed with the analysis of the Third Appellate District's majority opinion in *People v. Carmony* (2005) 127 Cal.App.4th 1066, in which a divided court held that, under the specific facts presented therein, an indeterminate sentence of 25 years to life under the Three Strikes Law based upon the defendant's triggering offense of failure to update his sex offender registration annually constituted cruel and/or unusual punishment. The Court of Appeal expressly disagreed with the analysis of *Carmony*, finding that the *Carmony* court: (1) improperly relied upon the dissenting opinion in *Ewing v. California* (2003) 538 U.S. 11, 29 [123 S.Ct. 1179, 155 L.Ed.2d 108]; (2) extended the holding of *Solem v. Helm* (1983) 463 U.S. 277 [103 S.Ct. 3001, 77 L.Ed.2d 637] to cases where a defendant's sentence contemplates the possibility of parole; and (3) assessed the gravity of a sex offender's failure to update registration without providing due consideration to the offender's prior criminal history.

PROCEDURAL HISTORY

On February 26, 2002, a Los Angeles County jury found appellant guilty of failing to update his sex offender registration annually (former Pen. Code, § 290, subd. (a)(1)(D), see Pen. Code, § 290.012; count II), and not guilty of failing to register as a sex offender (former Pen. Code, § 290, subd. (a)(1)(A), see Pen. Code, § 290.013; count I). Petitioner subsequently admitted the truth of allegations that he had suffered three prior convictions within the meaning of the Three Strikes Law (Pen Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). (1CT 24-26, 52, 75, 117-121, 137, 252-253; 4RT 1302-1306.)

The trial court denied petitioner's motion to strike his prior convictions in furtherance of justice, found that petitioner had never

registered or intended to register as a sex offender following his release from state prison, and sentenced petitioner to 25 years to life pursuant to the Three Strikes Law. (1CT 122-253; 4RT 1509.)

Petitioner appealed his conviction, alleging, among other claims, that his sentence constituted cruel and/or unusual punishment under the federal and state Constitutions. The Court of Appeal affirmed petitioner's conviction in an unpublished opinion. Petitioner filed a petition for review in this Court. This Court denied the petition for review.

Petitioner filed a petition for writ of habeas corpus in the Los Angeles County Superior Court raising his cruel and/or unusual punishment claim, which the court denied.

Petitioner then filed a petition for writ of habeas corpus in the Court of Appeal, raising the same cruel and/or unusual punishment claim. The court denied the petition, finding that the issue had been "previously raised on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 826; *In re Waltreus* (1965) 62 Cal.3d 218, 225)."

Petitioner filed the instant petition for writ of habeas corpus ("petition") in this Court. This Court ordered respondent to file an informal response on the merits and to address "petitioner's claim that he is entitled to relief under *People v. Carmony* (2005) 127 Cal.App.4th 1066." Respondent filed an informal response to the petition alleging that the petition was untimely, that the sole issue of the petition had previously been raised on appeal, and that petitioner's sentence did not constitute cruel and/or unusual punishment. Petitioner filed a reply to the informal response. This Court issued an order to show cause, and directed respondent to file a return in the Court of Appeal.

After further briefing, the Court of Appeal denied the petition and discharged the order to show cause in a published opinion. (*In re Coley*

(2010) 87 Cal.App.4th 138, review granted Sept. 7, 2010 (S185303).) This Court granted petitioner's petition for review.

STATEMENT OF FACTS

A. The Prosecution's Case

Petitioner was serving a state prison term for an offense that required him to register as a sex offender. (2RT 210.) On August 8, 1998, prior to petitioner's parole from state prison, petitioner was given a copy of a document entitled "Notice of Registration Requirement." The document informed petitioner that his duty to register as a sex offender included the obligation to register within five days of his release from prison, within five days of his birthday each year, and within five days of any change of address. Petitioner signed and dated the document. (2RT 219, 225; 1CT 62.) Petitioner subsequently signed notices of his duty to register as a sex offender on October 8, 1998, and January 6, 1999, while in state prison. Petitioner was released from, and subsequently returned to, state prison for violating the terms of his parole. (2RT 236-237; 1CT 55-66.)

On April 11, 1999, petitioner was released on parole from state prison. James Chormicle, petitioner's parole agent, picked up petitioner from state prison and drove him to the parole office. Parole Agent Chormicle informed petitioner that his duty to register as a sex offender included the obligation to register within five days of his release from prison, within five days of his birthday each year, and within five days of any change of address. (2RT 231-232.) Parole Agent Chormicle explained to petitioner that each registration requirement was a separate, independent registration obligation that must be completed each time it arose. (2RT 232-233, 239.)

On April 12, 1999, petitioner registered as a sex offender at the Los Angeles County Sheriff's station in Lancaster. (2RT 246-247.) Petitioner

provided his address as the Tropic Motel, located at 43145 North Sierra Highway, Room 18, in Lancaster. (2RT 247, 265.) Ilene Anderson, a Law Enforcement Technician employed by the sheriff's department, registered petitioner and informed him of the registration requirements. Ms. Anderson explained to petitioner that each registration requirement was a separate, independent registration obligation. (2RT 243-247, 252-256, 264-270; 1CT 55.)

Petitioner subsequently returned to state prison on a parole violation. On August 17, 1999, petitioner was once again released from state prison on parole. Parole Agent Chormicle met with petitioner again, informed petitioner of each of his registration obligations, and explained to petitioner that each registration requirement imposed a separate, independent duty to register. (2RT 233-234.)

On August 19, 1999, petitioner registered as a sex offender at the Los Angeles County Sheriff's station in Lancaster. (2RT 246-247.) Petitioner provided his address as 43230 Gadson Avenue, Apartment 129C, in Lancaster. (2RT 247.) Los Angeles County Sheriff's Detective Maria Czarnocki registered petitioner. (2RT 277; 1CT 55.)

Petitioner subsequently returned to state prison on a parole violation. On January 9, 2001, petitioner was once again released from state prison on parole. Petitioner went to live at 2036 Cape Cod Lane, in Palmdale, with his girlfriend, Jo Adrian Hamilton, and her two children. (2RT 304-311, 340.) Petitioner failed to register as a sex offender following his release from prison in 2001, and did not register within five days of his May 22, 2001, birthday. (2RT 270, 343-345.)

On August 22, 2001, Los Angeles County Deputy Sheriff Robert Farkas and Parole Agent Steve Luce went to 2036 Cape Cod Lane in Palmdale. Petitioner was present at the residence. Parole Agent Luce found pay stubs from April of 2001, indicating that petitioner was residing

at the address, correspondence addressed to petitioner using the address, and an application and receipt from the Department of Motor Vehicles, dated August 8, 2001, listing petitioner's address as 2036 Cape Cod Lane. (2RT 328-335, 338.)

Deputy Farkas read petitioner his *Miranda*[1] rights and advised petitioner that he was being arrested for the failure to register as a sex offender. Deputy Farkas asked petitioner how long he had been living at the location. Petitioner told Deputy Farkas that he had been living at 2036 Cape Cod Lane since his release from prison in January of 2001. Deputy Farkas asked petitioner why he had not contacted the sheriff's department or the parole agency since his release from prison. Petitioner stated that he wanted to try to get through life without contacting the sheriff's department or parole agency. Petitioner told Deputy Farkas that he had not registered as a sex offender since his release from prison in January of 2001. (2RT 343-345.)

Michael O'Donnell, the custodian of records for the Department of Justice's sex offender registration files, reviewed petitioner's sex offender registration file and determined that petitioner had failed to register as a sex offender in 2001. (2RT 211-213; 1CT 54-67.) Parole Agent Chormicle also ran petitioner on a database of registered sex offenders in the parole agency and determined that petitioner had not registered as a sex offender in 2001. Although petitioner had previously provided Parole Agent Chormicle with receipts from his sex offender registration in 1999, petitioner did not provide Parole Agent Chormicle with any proof of registration in 2001. (2RT 234-237.)

---

[1] See *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

Ms. Anderson was in charge of registering sex offenders at the sheriff's department station in Lancaster from January to August of 2001. (2RT 278.) Ms. Anderson had no record of petitioner registering as a sex offender during that time period, and she determined that petitioner had not registered at the Lancaster station during that time period. (2RT 278-279.)

Nancy Dopirak, a Law Enforcement Technician employed by the sheriff's department, was the only person who registered sex offenders at the sheriff's department station in Palmdale. Ms. Dopirak did not register petitioner as a sex offender in 2001. (2RT 278, 294-296.) When Ms. Dopirak registers a sex offender, she provides the individual with a receipt, and immediately enters the registrant's information into the computer system. (2RT 295-296, 298-301.)

B. The Defense Case

Petitioner testified on his own behalf.[2] Petitioner registered as a sex offender in 1998 and 1999. Petitioner believed that he had an obligation to register as a sex offender once a year. Petitioner knew that he had a duty to register when he moved, and upon his release from prison, but he did not think that he had a duty to register within five days of his birthday if he had already registered once in the same year. (2RT 352, 371.)

On January 12, 2001, following his release from prison on parole, petitioner registered as a sex offender at the Los Angeles County Sheriff's Department in Palmdale, listing 2036 Cape Cod Lane as his address.[3]

---

[2] Petitioner was convicted of burglary in 1977 and 1978, and of voluntary manslaughter, rape in concert, and robbery in 1988. (3RT 925-927.)

[3] Ms. Hamilton testified that petitioner moved into her residence at 2036 Cape Cod Lane in February of 2001, and that he had not been living with her in January of 2001. Ms. Hamilton explained that she first met (continued...)

(2RT 352, 359; 3RT 911.) Ms. Dopirak registered petitioner and provided him with a receipt for his registration.[4] (2RT 370.)

Petitioner knew he needed to provide the sex offender registration receipt to his parole agent, but he failed to do so. (2RT 370.) Petitioner subsequently placed the receipt into the drawer of his nightstand in his bedroom and he believed that it was in the drawer at the time of his arrest. Petitioner did not know where the receipt was located at the time of trial. (2RT 354-355, 370; 3RT 911, 914.)

Petitioner did not register as a sex offender within five days of his birthday in 2001, which fell on May 22, because he did not believe that he had an obligation to do so. (2RT 371-373.) Petitioner never spoke with Deputy Farkas at the time of his arrest. (2RT 358; 3RT 925.)

C. The People's Rebuttal Case

Ms. Dopirak explained that the Palmdale sheriff's station only has a single set of double doors. Ms. Dopirak conducts all of the sex offender registration in a small interview room, approximately eight feet by eight feet, with no desks or partitions. Ms. Dopirak has never registered anyone in an area where there are desks separated by partitions. (3RT 930, 933, 939-941, 945.)

At the time of petitioner's arrest, Parole Agent Luce told petitioner that he was being arrested for failure to register as a sex offender.

(...continued)
petitioner in January of 2001. (2RT 310-311, 313.) Deputy Farkas testified that Ms. Hamilton had told him that petitioner had moved into her residence sometime in January of 2001. (2RT 340.)

[4] Petitioner described the interior of the Palmdale station as having two sets of double doors. Petitioner testified that Ms. Dopirak conducted the registration in a room containing a number of desks separated by movable partitions. (2RT 359-361, 365-366.)

Petitioner did not offer any documentation to prove he had in fact registered. (3RT 950.) Parole Agent Luce searched petitioner's nightstand at the time of petitioner's arrest, and there were no sex offender registration receipts contained in the nightstand. (3RT 964.)

SUMMARY OF ARGUMENT

The Court of Appeal correctly concluded that the trial court's imposition of an indeterminate sentence of 25 years to life pursuant to the Three Strikes Law, based on petitioner's current offense of failing to update his sex offender registration annually and his extensive criminal history, did not violate his right to be free from cruel and/or unusual punishment. Petitioner's current offense of failing to update his sex offender registration annually was not merely a technical violation of the law, as petitioner had not registered as a sex offender upon his parole from state prison, and he was in violation of the terms of his parole and out of contact with his parole agent. Accordingly, petitioner had frustrated the very purpose of the sex offender registration laws, which are aimed at ensuring that offenders are readily available for police surveillance because the Legislature has determined that such offenders pose a continuing threat to society. (See *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) Under these circumstances, petitioner's indeterminate sentence of 25 years to life under the Three Strikes Law did not violate the federal or state Constitutions. (See *Lockyer v. Andrade* (2003) 538 U.S. 63, 66-77 [123 S.Ct. 1166, 155 L.Ed.2d 144]; *Ewing v. California*, *supra*, 538 U.S. at pp. 14-30; *Rummel v. Estelle* (1980) 445 U.S. 263, 265-266, 276-285 [100 S.Ct. 1133, 63 L.Ed.2d 382]; *People v. Nichols* (2009) 176 Cal.App.4th 428, 437; *People v. Meeks* (2004) 123 Cal.App.4th 695, 708.)

This Court need not expressly disapprove of the holding of *People v. Carmony*, *supra*, 127 Cal.App.4th 1066, in order to affirm the Court of

Appeal's denial of the instant petition, because the facts surrounding petitioner's failure to register as a sex offender and his personal criminal history are far more egregious than those present in *Carmony,* and this case does not concern the simple failure to update sex offender registration annually where the defendant has already registered his current address earlier in the same year. In fact, the very court that decided *Carmony* has concluded that imposition of an indeterminate sentence of 25 years to life under the Three Strikes Law for the failure to register as a sex offender under circumstances similar to those in the instant case does not constitute cruel and/or unusual punishment. (See *People v. Nichols*, *supra*, 176 Cal.App.4th at p. 437; *People v. Meeks*, *supra*, 123 Cal.App.4th at p. 708.) However, respondent submits that the Eighth Amendment analysis employed by the majority of the court in *Carmony* was mistaken, as explained by the Court of Appeal below, because the court in *Carmony* extended the holding of *Solem v. Helm*, *supra*, 463 U.S. 277, to cases where a defendant's sentence contemplates the possibility of parole, and weighed the gravity of a sex offender's failure to update registration annually against the sentence imposed without providing due consideration to the offender's prior criminal history.

ARGUMENT

PETITIONER'S INDETERMINATE SENTENCE OF 25 YEARS TO LIFE PURSUANT TO THE THREE STRIKES LAW, BASED ON HIS FAILURE TO REGISTER AS A SEX OFFENDER ANNUALLY AND HIS LENGTHY HISTORY OF COMMITTING SERIOUS AND VIOLENT FELONY OFFENSES, DOES NOT CONSTITUTE CRUEL AND/OR UNUSUAL PUNISHMENT

A. Petitioner's Sentence Does Not Violate the Eighth Amendment

Petitioner's Eighth Amendment challenge is clearly untenable in light of the United States Supreme Court's decisions in *Lockyer v. Andrade*,

supra, 538 U.S. 63 and *Ewing v. California*, *supra*, 538 U.S. 11. The high court held that, in noncapital cases, the Eighth Amendment contains a "narrow proportionality principle," which prohibits the imposition of a sentence that is "grossly disproportionate to the severity of the crime." (*Ewing v. California, supra*, 538 U.S. at pp. 20-21.) Only in those rare cases where a comparison of the crime committed (including the defendant's criminal record) and the sentence imposed leads to an inference of gross disproportionality are courts required to engage in intra-jurisdictional and inter-jurisdictional comparisons of punishments. (*Ibid.*)

In *Ewing*, the defendant was convicted of grand theft, a "wobbler" offense, for shoplifting three golf clubs, and was sentenced to 25 years to life under the Three Strikes Law. His prior "strikes" included three burglaries and a robbery. (*Ewing v. California, supra*, 538 U.S. at pp. 18-20.) A five-justice majority concluded that the sentence did not violate the Eighth Amendment. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, opined that the Eighth Amendment had a "narrow proportionality principle" applicable to non-capital cases, which prohibits only extreme sentences that are grossly disproportionate to the crime. (*Id.* at pp. 20-24.) In applying that principle to a recidivist sentencing scheme, both the current offense and the defendant's prior criminal record must be considered. Reaffirming the principles that deterring and incapacitating recidivist felons, regardless of the gravity of the new felony, are a legitimate basis for enhanced punishment and that state legislatures are entitled to deference in crafting punishments (*id.* at pp. 24-28), Justice O'Connor, writing for the Court, found the defendant's sentence did not even raise an inference of gross disproportionality (*id.* at pp. 28-31). In opinions concurring in the judgment, Justice Thomas opined that the Eighth Amendment contains no proportionality principle at all (*id.* at p. 32), and Justice Scalia maintained

that the Eighth Amendment merely prohibits "modes of punishment," not "disproportionate" prison terms (*id.* at pp. 31-32).

In *Andrade*, the petitioner was convicted of two counts of petty theft with a prior, and was sentenced to two consecutive terms of 25 years to life — in effect, 50 years to life — under the Three Strikes Law. His prior "strike" convictions were three counts of residential burglary. (*Lockyer v. Andrade, supra*, 538 U.S. at pp. 66-68.) The Supreme Court held that the state appellate court's rejection of an Eighth Amendment challenge to Andrade's sentence did not contradict or unreasonably apply clearly established federal law as determined by the Supreme Court, within the meaning of 28 U.S.C. § 2254(d). The Court noted that its prior decisions, including *Rummel v. Estelle*, *supra*, 445 U.S. at pp. 271-272; *Solem v. Helm*, *supra*, 463 U.S. at p. 303, and *Harmelin v. Michigan* (1991) 501 U.S. 957 [111 S.Ct. 2680, 115 L.Ed.2d 836], left the precise contours of Eighth Amendment proportionality unclear, and that the state court's ruling was not contrary to or an unreasonable application of those decisions. (*Lockyer v. Andrade, supra*, 538 U.S. at pp. 72-77.) In other words, the high court found that Andrade's was not the "extraordinary case" for which the "gross disproportionality" principle reserves an Eighth Amendment violation. (*Id.* at p. 77.)

Petitioner cannot distinguish the instant case from *Ewing* and *Andrade*, and as a result, his Eighth Amendment challenge should be rejected. First, petitioner's current offense is as serious as that in *Ewing* and *Andrade*. Petitioner

> 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. It is at least as serious as theft of three golf clubs.

(*People v. Meeks*, *supra*, 123 Cal.App.4th at p. 708 [25-year-to-life sentence under Three Strikes Law for sex offender's failure to register after changing address did not constitute cruel and/or unusual punishment]; see also *People v. Nichols*, *supra*, 176 Cal.App.4th at pp. 436-437; *People v. Poslof* (2005) 126 Cal.App.4th 92, 109; *Calloway v. White* (N.D. Cal. 2009) 649 F.Supp.2d 1048, 1053-1054.) This Court has previously explained that:

> [t]he purpose of [Penal Code] section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offense in the future. Plainly, the Legislature perceives that sex offenders pose a continuing threat to society and require constant vigilance.

(*Wright v. Superior Court*, *supra*, 15 Cal.4th at p. 527, internal citations and quotations omitted.)

Contrary to petitioner's repeated assertions, this case does not involve petitioner's mere failure to reregister as a sex offender within five days of his birthday after registering previously in the same year at the address where he was arrested. (AOB 6-8, 10-12, 27-28, 34-35.) Petitioner never registered as a sex offender in 2001 following his release from state prison on parole and he failed to contact his parole agent. Petitioner had never previously registered using the address where he was eventually arrested. (1RT 6-8; 2RT 270, 343-345; 3RT 913, 950, 964.) Although petitioner alleged that he registered as a sex offender in January of 2001 at the Los Angeles County Sheriff's station in Palmdale, he had no receipt for his registration, he had failed to provide his parole agent with proof of his registration, and he was in violation of the terms of his parole. (2RT 270, 343-345, 354-355, 370; 3RT 911.) Furthermore, Ms. Hamilton testified that petitioner had not even moved into her residence until February of 2001. (2RT 310-313.) The California Department of Justice

and the Los Angeles County Sheriff's Department had no record of petitioner's registration in 2001. (2RT 211-213, 234-237, 278-279.) In fact, petitioner told Deputy Farkas at the time of his arrest that he had not registered following his release from prison in 2001, and had not intended to register or contact his parole agent because he wanted to "try to get through life" without such monitoring or supervision.[5] (2RT 343-345.)

Respondent acknowledges that petitioner was acquitted in count I of the failure to register as a sex offender under Penal Code section 290, subdivision (a)(1)(A). However, the jury's verdict does not constitute a finding of factual innocence or demonstrate that petitioner in fact registered as a sex offender upon his release from prison. (See *United States v. Watts* (1997) 519 U.S. 148, 157 [117 S.Ct. 633, 136 L.Ed.2d 554] [unless specific findings are made, "the jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict"]; *People v. Towne* (2008) 44 Cal.4th 63, 86-88; *People v. Anderson* (2007) 152 Cal.App.4th 919, 932 ["For a defendant to be found not guilty, it is not necessary that the evidence as a whole prove his innocence, only that the evidence as a whole fails to prove his guilt beyond a reasonable doubt"].) In framing the argument as a mere failure to update his sex offender registration annually, petitioner is confusing acquittal with factual innocence regarding count I. The United States Supreme Court has explained that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." (*United States v. Watts*, *supra*, 519 U.S. at p. 157; see also *People v. Towne*, *supra*, 44 Cal.4th at pp. 86-88.)

---

[5] Respondent notes that petitioner had previously been released on parole from state prison in April of 1999, and was returned to state prison on a parole violation after failing to update his sex offender registration annually later that year. (2RT 237-238, 289, 291-292; 1CT 55.)

In the instant case, the evidence affirmatively established that petitioner failed to register as a sex offender following his release from prison in January of 2001. (2RT 211-213; 1CT 54-67.) Moreover, in sentencing petitioner, the trial court made the following evidentiary findings:

> [w]ith respect to [petitioner's] testimony that he went down to the Palmdale station and registered, and that for some reason the paperwork was lost or not completed, or the registrar failed to input his registration into the computer. [¶] I don't know if the jury accepted that testimony or not, but the court did not believe that testimony for a moment. [¶] So my review of evidence supports the fact that the only time that [petitioner] ever made an effort to register was either when he was in prison for a parole violation, or was taken to register by his parole agent. [¶] Petitioner is well aware of his obligation to register. He had been told about it on numerous occasions. [¶] He is the one that chose to risk the sanctions for having failed to register.

(4RT 1509.)

Thus, the instant case concerns a petitioner who failed to register as a sex offender upon his release from state prison, failed to update his registration annually five months later, and failed to report to his parole agent at any time following his release from state prison. In so doing, petitioner flaunted his registration obligation and transgressed the registration requirement's purpose of keeping sex offenders readily available for police surveillance at all times. (See *Wright v. Superior Court*, *supra*, 15 Cal.4th at p. 527.) Petitioner's "blatant disregard of the registration act and complete undercutting of the act's purpose is a serious offense." (*People v. Nichols*, *supra*, 176 Cal.App.4th at p. 437.)

Second, like *Ewing* and *Andrade*, petitioner had a lengthy and serious criminal history. In 1977, petitioner was convicted of burglary and possession of marijuana and was placed on 18 months probation. Later that year, petitioner was convicted of possession of marijuana and placed on

18 months probation. In 1978, petitioner was convicted of burglary and sentenced to 15 years in state prison. In 1988, petitioner was convicted of voluntary manslaughter, rape in concert by force or violence, and robbery, and was sentenced to 20 years in state prison. (1CT 255-265.) Following petitioner's parole from state prison in 1998, he was returned to state prison on three separate occasions for violating the terms of his parole. In fact, petitioner was in violation of the terms of his parole at the time of his arrest in the instant case. (1CT 257.)

Moreover, the facts of petitioner's prior strike offenses are particularly egregious. On January 18, 1988, petitioner was selling cocaine out of an apartment along with two other men. Petitioner's codefendant accused a woman who had come to their residence of stealing cocaine, and he forced her to undress so that he could search her vagina and rectum. The woman relented to the search, but when she refused to be searched a second time, petitioner held down the woman's feet while his codefendant choked her until she was unconscious. Petitioner and his codefendant bound their victim's hands, feet, and neck with electrical cord, and went to sleep. The next morning, petitioner and his codefendant placed their victim's lifeless body into an inoperable freezer to avoid detection. Petitioner continued to live in the residence and used bleach and disinfectant to clean up fluids leaking from the freezer as the woman's body decomposed. (1CT 165-166.)

Four months later, on May 14, 1988, petitioner and the same codefendant entered another woman's residence at 3:00 a.m., armed with knives, and demanded money. Petitioner's codefendant bound and raped the woman while petitioner came in and out of the room telling his codefendant that he was making too much noise. Petitioner and his codefendant then summoned the victim's father to the residence, and held him hostage at knife-point, demanding more money. (1CT 168-169.)

In sum, petitioner's third-strike sentence is not grossly disproportionate to his crime and "is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." (*Ewing v. California*, *supra*, 538 U.S. at pp. 29-30; see also *Rummel v. Estelle*, *supra*, 445 U.S. at pp. 276, 284-285; *People v. Nichols*, *supra*, 176 Cal.App.4th at p. 437; *People v. Meeks*, *supra*, 123 Cal.App.4th at p. 708.) When the Legislature enacted the Three Strikes Law, it "made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at lease one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." (*Ewing v. California*, *supra*, 538 U.S. at p. 25.) Considering petitioner's lengthy criminal history and his failure to register as a sex offender at any time following his release from prison on parole in 2001, his indeterminate sentence of 25-years to life under the Three Strikes Law does not constitute the extreme case necessary to justify a finding that noncapital punishment violates the Eighth Amendment.

B. Petitioner's Sentence Does Not Violate the California Constitution

Petitioner's claim under the California Constitution fares no better. A defendant must overcome a considerable burden in a challenge under the cruel or unusual punishment provision of the California Constitution. (*People v. Wingo* (1975) 14 Cal.3d 169, 174; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.) The Legislature enjoys the power to define crimes and prescribe punishment; the judiciary may not interfere in this process unless it finds the statutory penalties so severe, relative to the crime, as to constitute cruel or unusual punishment. (*People v. Dillon* (1983) 34 Cal.3d 441, 477-478; *In re Lynch* (1972) 8 Cal.3d 410, 423-424.)

Such violations of the California Constitution occur only where the punishment is so disproportionate "that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra*, 8 Cal.3d at p. 424.)

In order to determine the proportionality of a given punishment, the reviewing court applies the three-prong test set out in *Lynch*: First, the court examines the nature of the offense and offender with particular regard to the degree of danger he or she presents to society; second, the court compares the challenged punishment with punishments for more serious crimes in the same jurisdiction; and third, the court compares the challenged punishment with punishments for the same offense in other jurisdictions. (*In re Lynch, supra*, 8 Cal.3d at pp. 425-427; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.) However, the courts do not mechanically apply these three factors; even if the comparison of the punishment with other offenses within the state or other jurisdictions suggests a disproportionate sentence, the first factor alone may suffice. (*People v. King* (1993) 16 Cal.App.4th 567, 573.)

Considerations relevant to the first factor are the defendant's age, prior criminality, personal characteristics, state of mind, the danger represented by the defendant to society, the defendant's motive, the extent of the defendant's involvement, and the seriousness of the offense. (*People v. Young* (1992) 11 Cal.App.4th 1299, 1308.) Lack of regard for rehabilitation during past probation periods may be a factor (*People v. Shippey* (1985) 168 Cal.App.3d 879, 887), as is recidivism (*People v. Cartwright, supra*, 39 Cal.App.4th at pp. 1136-1137; *People v. Karsai* (1982) 131 Cal.App.3d 224, 242, disapproved on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8).

Petitioner, as demonstrated by his prior criminal record and the instant offense, unquestionably represents a menace to the people of California.

His record of criminal behavior, which includes drug offenses, voluntary manslaughter, rape in concert, robbery, burglary, and the instant offense of failure to register as a sex offender, warranted further significant incarceration. All prior attempts at rehabilitation and deterrence (including extended periods of incarceration in state prison, as well as probation and parole periods) had met with abject failure. In sum, petitioner's sentence was properly based on his current crime, recidivist behavior, and lack of regard for rehabilitation. (See, e.g., *People v. Romero* (2002) 99 Cal.App.4th 1418, 1432; *People v. Cooper* (1996) 43 Cal.App.4th 815, 825-826.)

Petitioner's sentence is also not cruel or unusual even if California treats recidivist offenders, such as petitioner, more severely than other states. The proscription against cruel or unusual punishment does not require California "to march in lockstep with other states in fashioning a penal code" or to conform its Penal Code to a "'majority rule'" or to the "'least common denominator of penalties nationwide.'" (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516.) "Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*Ibid.*; see also *Rummel v. Estelle*, *supra*, 445 U.S. at p. 281 ["Even if we were to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States."].) As previously noted, the judiciary should not interfere with the legislative assessment of the proper punishment "unless a statute prescribes a penalty 'out of all proportion to the offense.'" (*People v. Martinez*, *supra*, 71 Cal.App.4th at p. 1516, quoting *People v. Cooper*, *supra,* 43 Cal.App.4th at p. 827; see also *People v. Romero, supra*, 99 Cal.App.4th at pp. 1431-1433.)

Petitioner has failed to show that his case is that "'exquisite rarity'" where punishment offends fundamental notions of human dignity or shocks the conscience. (*People v. Kinsey, supra*, 40 Cal.App.4th at p. 1631, quoting *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) Therefore, his sentence does not violate the bar against cruel or unusual punishment under the state Constitution. Since petitioner fails to make a showing that his sentence was unconstitutional when evaluated under either federal or state standards, this Court must reject his claim. (See *Ewing v. California, supra*, 538 U.S. at pp. 29-30; *Rummel v. Estelle, supra*, 445 U.S. at pp. 276, 284-285; *People v. Nichols, supra*, 176 Cal.App.4th at pp. 435-437; *People v. Meeks, supra*, 123 Cal.App.4th at pp. 706-710; *People v. Poslof, supra*, 126 Cal.App.4th at p. 109.)

C. The Majority Opinion in *People v. Carmony* (2005) 127 Cal.App.4th 1066, is Factually Inapposite to the Instant Case and, in Any Event, its Holding is Based on an Eighth Amendment Analysis Which Fails to Provide Due Consideration to an Offender's Prior Criminal History and Improperly Extends the Holding of *Solem v. Helm* (1983) 463 U.S. 277, to Sentences Which Contemplate a Period of Parole

Petitioner relies upon the Court of Appeal's decision in *People v. Carmony, supra*, 127 Cal.App.4th 1066, for the proposition that the imposition of an indeterminate sentence of 25 years to life under the Three Strikes Law constitutes cruel and/or unusual punishment when the triggering offense is a defendant's failure to update his sex offender registration annually if the defendant has previously registered as a sex offender in the same year and was still residing at the same address where he last registered at the time of his arrest. (AOB 20-24, 32-36.) *Carmony* does not advance petitioner's cruel and/or unusual punishment claim, as petitioner did not register at all upon his release from prison on parole in

2001, and had never previously registered at the address where he was eventually arrested.

In *Carmony*, the court addressed "whether there is an offense so minor that it cannot trigger the imposition of a recidivist penalty without violating the cruel and/or unusual punishment prohibitions" of the federal and state Constitutions. (*Id.* at p. 1071.) In accordance with the requirements of Penal Code section 290, the defendant in *Carmony* registered his correct address with the police one month before his birthday. The defendant then failed to update his registration with the same information within five working days of his birthday as also required by law. The defendant's parole agent was aware that the information had not changed; in fact, he arrested the defendant at the address where he had previously registered. (*Ibid.*)

The defendant in *Carmony* pled guilty to failing to register within five days of his birthday and admitted that he had three prior serious felony convictions.[6] The defendant was sentenced under the Three Strikes Law to 25 years to life. (*People v. Carmony*, *supra*, 127 Cal.App.4th at pp. 1071-1072.) The reviewing court determined that the 25-year recidivist sentence based upon the defendant's failure to provide duplicate registration information constituted cruel and/or unusual punishment under the state and federal Constitutions. (*Id.* at p. 1073.) The court

---

[6] Carmony's prior strike offenses were two separate convictions of assault with a deadly weapon or by means of force likely to cause great bodily injury and one conviction for oral copulation by force or fear with a minor under the age of 14 years. (*People v. Carmony*, *supra*, 127 Cal.App.4th at pp. 1073, 1080.) Carmony's convictions for assault with a deadly weapon concerned one incident in which he punched and kicked his pregnant girlfriend, causing a miscarriage, and a second incident in which he punched another girlfriend and cut her hand with a knife. (*Id.* at p. 1081, fn. 9.)

acknowledged the case presented "no occasion to consider the appropriateness of a recidivist penalty where the predicate offense does not involve a duplicate registration." (*Id.* at p. 1073, fn. 3.)

The instant case does not involve "duplicate registration information"; rather, petitioner completely defeated the purpose of the registration law because he did not make himself "readily available for police surveillance." (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1072.) Unlike the situation presented in *Carmony*, here petitioner left state prison and moved into his girlfriend's residence sometime later without meeting his registration requirement, and he subsequently failed to update his registration within five days of his birthday, thereby concealing his location from authorities. When Deputy Farkas confronted petitioner about his failure to register following his release from prison, petitioner stated that he wanted to "get through life without contacting the sheriff's department or the parole agency." (2RT 211-213, 304-311, 340, 343-345.) Thus, petitioner's failure to register was not a "technical and harmless violation of the registration law." (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1078.) Instead, petitioner "intend[ed] to evade law enforcement officers" by his failure to register or reregister. (*Ibid.*; see *People v. Nichols*, *supra*, 176 Cal.App.4th at pp. 435-437; *People v. Meeks, supra*, 123 Cal.App.4th at pp. 706-710.)

This Court need not determine whether *Carmony* was correctly decided in order to affirm the judgment of the Court of Appeal in denying the instant petition, as *Carmony* is, by its own terms, expressly limited to those cases involving the failure to update sex offender registration annually where an offender has previously registered in the same year at the

same address where he continues to reside.[7] (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1073, fn. 3.) However, respondent submits that the court in *Carmony* erred in conducting its Eighth Amendment analysis by extending the holding of *Solem v. Helm, supra*, 463 U.S. 277, to cases where a defendant's sentence contemplates the possibility of parole, and assessing the gravity of a sex offender's failure to update his registration annually without providing due consideration to the offender's prior criminal history.

The majority opinion in *Carmony* begins its Eighth Amendment analysis by acknowledging that the Eighth Amendment "'does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime.'" (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1066, quoting *Ewing v. California, supra*, 538 U.S. at p. 23.) *Carmony* then discussed the respective holdings of *Solem v. Helm, supra*, 463 U.S. 277, in which the Supreme Court found the imposition of a sentence of life without the possibility of parole under a recidivist statute where the triggering offense was writing a bad check for $100 to be a violation of the Eighth Amendment, and *Ewing v. California, supra*, 538 U.S. 1, in which the Court upheld a sentence of 25-years-to-life under California's Three Strikes Law against an Eighth Amendment challenge where the triggering offense was the theft of three golf clubs. (*Id.* at pp. 1076-1077.) *Carmony* next quoted the dissenting opinion in *Ewing*, stating "in cases involving recidivist offenders, we must focus upon "the [offense] that triggers the life sentence," with recidivism playing a "relevant," but not necessarily

---

[7] Petitioner agrees that "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," without resulting in cruel and/or unusual punishment. (AOB 34.)

determinative, role' [Citation]." (*Id.* at p. 1077.) *Carmony* then immediately provides:

> [*a*]*pplying these principles*, we find, as did the court in *Solem*, that this is a rare case, in which the harshness of the recidivist penalty is grossly disproportionate to the gravity of the offense. Indeed, because defendant's offense was an entirely passive, harmless, and technical violation of the registration law, it was less serious than the offense of uttering a no-account check committed by the defendant in *Solem*.

(*Ibid.*, italics supplied.)

Initially, to the extent that the majority opinion in *Carmony* was applying principles articulated in the dissenting opinion from *Ewing*, rather than the holding of the plurality opinion, as a justification to lessen the significance of recidivism in conducting Eighth Amendment analysis, it appears that the court erred. (See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352.) However, irrespective of the import of the *Carmony* majority's citation to the dissenting opinion in *Ewing*, its opinion demonstrates that it did not properly consider recidivism in determining the gravity of the offense for assessing whether the defendant's sentence was grossly disproportionate to that offense under the Eighth Amendment. (See *People v. Carmony*, *supra*, 127 Cal.App.4th at pp. 1071, 1079-1080.)

The plurality in *Ewing* found that in comparing the gravity of the offense to the harshness of the penalty for the purpose of an Eighth Amendment analysis,

> we must place on the scales not only [a defendant's] current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. [¶] In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal

> acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." To give full effect to the State's choice of this Legitimate penological goal, our proportionality review of [the defendant's] sentence must take that goal into account.

(*Ewing v. California*, *supra*, 538 U.S. at p. 29, quoting *Rummel v. Estelle*, 445 U.S. at p. 276, internal citations omitted.) The plurality in *Ewing* specifically noted that the defendant had "incorrectly frame[d] the issue," by focusing on his current offense in alleging an Eighth Amendment violation because:

> [t]he gravity of his offense was not merely "shoplifting three golf clubs." Rather, [the defendant] was convicted of felony grand theft for stealing nearly $1,200 worth of merchandise after having been convicted of at least two "violent" or "serious" felonies.

(*Ewing v. California*, *supra*, 538 U.S. at p. 28.)

Similarly, in *Rummel*, the Supreme Court noted that the appropriate weighing process for a reviewing court to engage in when considering whether punishment imposed under a recidivist statute is grossly disproportionate to the offense must consider not only the instant offense, but the instant offense in light of the defendant's particular criminal history. (*Rummel v. Estelle, supra,* 445 U.S. at p. 276.) Although the defendant in *Rummel*, like Carmony himself, focused only on his most recent offense, the high court explained that its focus was not merely on the defendant's most recent offense of "obtaining $120.75 by false pretenses," but on the commission of that offense after he had committed "and had been imprisoned for two other felonies." (*Ibid.*) The Court in *Rummel* explained the purpose of recidivism statutes is to deter repeat offenders and to segregate those offenders from society "for an extended period of time." (*Id.* at p. 284.) The Court explained, "[t]his segregation and its duration are

based not merely on that person's most recent offense but also on the propensity he has demonstrated over a period of time during which he was been convicted and sentenced for other crimes." (*Ibid.*)

Instead of employing the weighing process described by the Supreme Court in *Rummel* and *Ewing*, the majority in *Carmony* minimized the importance of recidivism by acknowledging that the Legislature may impose stiffer penalties for recidivist offenders but "because the penalty is imposed for the current offense, the focus must be on the seriousness of that offense." (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1079.) In support of this proposition, *Carmony* cites to *Witte v. United States* (1995) 515 U.S. 389, 402-403 [115 S.Ct. 2199, 132 L.Ed.2d 351] a case involving double jeopardy principles which is silent on the issue of proportionality analysis under the Eighth Amendment. (*People v. Carmony, supra,* 127 Cal.App.4th at p. 1079.)

The Court in *Witte* considered whether the double jeopardy clause prohibits a defendant from being convicted of a criminal offense where the conduct underlying that offense has been used in a prior case to enhance the defendant's sentence in the prior case. (*Witte v. United States, supra,* 515 U.S. at p. 391.) The Supreme Court held that the double jeopardy clause does not preclude the second prosecution because in circumstances "where the [L]egislature has authorized . . . a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment only for the offense of conviction for purposes of the double jeopardy clause." (*Id.* at p. 403.) Nothing in the Court's opinion in *Witte* suggests that it may be applied to assess the propriety of punishment for recidivism under the Eighth Amendment. In fact, both *Rummel* and *Ewing* have expressly cautioned against this approach in providing that any Eighth Amendment analysis concerning proportionality of a particular sentence to a triggering offense under a recidivism statute must take into

account a defendant's prior criminal history, and the state's interest in punishing a recidivist more harshly than a first offender. (See *Ewing v. California*, *supra*, 538 U.S. at p. 29; *Rummel v. Estelle*, 445 U.S. at p. 276; but see *Solem v. Helm*, *supra*, 463 U.S. at p. 297, fn. 21 ["We must focus on the principal felony - the felony that triggers the life sentence - since [the defendant] already has paid the penalty for each of his prior offenses. But we recognize, of course, that [the defendant's] prior convictions are relevant to the sentence decision"].) While *Solem* lends some support to the notion that the triggering felony should be the focal point of Eighth Amendment analysis under a recidivism statute, the Court also noted therein that a defendant's criminal history must be considered, and that "no one single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment." (*Solem v. Helm*, *supra*, 463 U.S. at 291, fn. 13).

The *Carmony* majority acknowledges that this Court has "declared that the purpose of the Three Strikes Law 'is to punish recidivism.'" (*People v. Carmony*, *supra*, 127 Cal.App.4th at p. 1080, citing *People v. Murphy* (2001) 25 Cal.4th 136, 155.) However, *Carmony* then states that, "[w]hen the purpose of a penalty is to punish recidivism and not the current offense, the penalty is for past crimes and as stated, is proscribed." (*Ibid.*) *Carmony*'s Eighth Amendment analysis conflicts with the holdings of *Rummel* and *Ewing*, as well as this Court's opinion in *Murphy*, and should be rejected. (*Ewing v. California*, *supra*, 538 U.S. at p. 29; *Rummel v. Estelle*, 445 U.S. at p. 276; *People v. Murphy*, *supra*, 25 Cal.4th at p. 155.) In fact, the Supreme Court has found that the Eighth Amendment is not violated when a legislative enactment, such as the Three Strikes Law, reflects "a 'deliberate policy decision . . . that the gravity of the new felony should not be a determinative factor in "triggering" the application of the

Three Strikes Law.'" (*Ewing v. California*, *supra*, 538 U.S. at p. 30, fn. 2; see also *Runnel v. Estelle*, *supra*, 445 U.S. at pp. 276-277.)

Moreover, the *Carmony* court's reliance upon *Solem* for the proposition that an indeterminate sentence of 25 years to life under the Three Strikes Law where the triggering offense is failing to update one's sex offender registration annually appears to be misplaced, as *Solem* was concerned with the imposition of a life term without the possibility of parole under a recidivist statute in which prior qualifying felonies were all nonviolent. (*Solem v. Helm*, *supra*, 463 U.S. at pp. 279-282, 296-297.) The Court in *Solem* noted that its opinion was "entirely consistent with this Court's prior cases - including *Rummel v. Estelle*" (*id.* at p. 288, fn. 13), and drew a sharp distinction between cases in which parole was available to a defendant and those where no possibility of parole existed (*id.* at 297, 301-303, fn. 32; see also *Lockyer v. Andrade*, *supra*, 538 U.S. at 74; *Ewing v. California*, *supra*, 538 U.S. at p. 22). In the instant case, parole is available to petitioner. (See *Lockyer v. Andrade*, *supra*, 538 U.S. at 74.) Moreover, the *Solem* Court found that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence," and that a defendant's history of violence may be taken into account in determining whether a sentence imposed under a recidivist statute violates the Eighth Amendment. (*Solem v. Helm*, *supra*, 463 U.S. at pp. 292-293, 296-297, fn. 21.) Because petitioner's sentence includes the possibility of parole, and because he has a history of violent criminal offenses, respondent submits that the proper Eighth Amendment analysis derives from *Rummel* and *Ewing*, and not from *Solem*.

Petitioner also relies upon *Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875, in support of his claim that his sentence of 25 years to life constitutes cruel and/or unusual punishment. (AOB 26-29.) In *Gonzalez*, the defendant was convicted of failing to update his registration annually

within five working days of his birthday, and was sentenced to a term of 28 years to life pursuant to the Three Strikes Law. (*Id.* at pp. 878-879.) Because the defendant had updated his registration both nine months before and three months after his birthday, and because he still resided at the same address at the time of the violation, the Ninth Circuit Court of Appeals concluded that the defendant's failure to register was a technical violation of the law that did not frustrate the purpose of ensuring that offenders are readily available for police surveillance. (*Id.* at p. 884.) Accordingly, the *Gonzalez* court concluded that a sentence of 25 years to life violated the defendant's right to be free from cruel and unusual punishment. (*Id.* at p. 889.)

Petitioner's reliance on *Gonzalez* is misplaced, as the defendant in *Gonzalez* had updated his registration both before and after failing to register within five working days of his birthday, and he remained in the same residence the entire time. (*Gonzalez v. Duncan*, *supra*, 551 F.3d at p. 884.) In the instant case, petitioner never met his registration requirement after being released from prison, and he subsequently failed to update his registration within five days of his birthday, thereby concealing his location from authorities. (2RT 343-345.) Petitioner's failure to register frustrated the very purpose of the laws requiring registration. (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1078.)

Respondent agrees with petitioner's contention 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." (AOB 18-19.) To the extent that *Carmony* stands for the proposition that a sex offender's failure to update his registration annually can never serve as the basis for an indeterminate sentence of 25 years to life under the Three Strikes Law, irrespective of the offender's individual criminal history, respondent respectfully requests that this Court

disapprove of the opinion. Instead, each case should be judged based on the circumstances of the triggering offense, and the relevant criminal history of the offender. (See *Solem v. Helm*, *supra*, 463 U.S. at pp. 292-293, 296-297, fn. 21; *Rummel v. Estelle*, *supra*, 445 U.S. at pp. 280-285.) In any event, this Court is not bound by the authority of lower appellate courts. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Petitioner's indeterminate sentence of 25 years to life under the Three Strikes Law does not violate the Eighth Amendment. (See *Ewing v. California*, *supra*, 538 U.S. at pp. 29-30; *Rummel v. Estelle*, *supra*, 445 U.S. at pp. 276, 284-285; *People v. Nichols*, *supra*, 176 Cal.App.4th at pp. 435-437; *People v. Meeks, supra*, 123 Cal.App.4th at pp. 706-710.) Petitioner has demonstrated that he is "simply incapable of conforming to the norms of society as established by its criminal law." (*Rummel v. Estelle*, *supra*, 445 U.S. at p. 276.) In light of petitioner's total failure to register as a sex offender following his release from prison, his refusal to comply with the terms of his parole, and his egregious history of violent felony offenses, it cannot be said that the instant case is an extraordinary one in which the sentence is "grossly disproportionate to the severity of the crime." (*Lockyer v. Andrade*, *supra*, 538 U.S. at pp. 72-77; *Ewing v. California, supra*, 538 U.S. at pp. 20-21.)

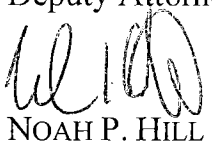
CONCLUSION

Accordingly, for the reasons stated, respondent respectfully requests this Court to affirm the judgment of the Court of Appeal denying the petition for writ of habeas corpus.

Dated: August 15, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
VICTORIA B. WILSON
Supervising Deputy Attorney General
JANET E. NEELEY
Deputy Attorney General



NOAH P. HILL
Deputy Attorney General
Attorneys for Respondent

NPH:vg
LA2010504942
60665849.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13 point Times New Roman font and contains 9,088 words.

Dated: August 15, 2011

KAMALA D. HARRIS
Attorney General of California

NOAH P. HILL
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In re Willie Clifford Coley on Habeas Corpus*** Number: **S185303**

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. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 15, 2011, I served the attached

ANSWER BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Nancy L. Tetreault, Attorney at Law
346 North Larchmont Boulevard, Suite 100
Los Angeles, CA 90004
Counsel for Appellant Willie Clifford Coley

California Appellate Project
520 South Grand Avenue, Fourth Floor
Los Angeles, CA 90071-2600

The Honorable Dorothy Shubin, Judge
Los Angeles County Superior Court
11234 East Valley Boulevard, Department 5
El Monte, CA 91731

Melita Montgomery, Deputy District Attorney
Los Angeles County District Attorney's Office
300 East Walnut Street, First Floor
Pasadena, CA 91101

BY HAND-DELIVERY
California State Court of Appeal
Second Appellate District, Division Five
300 South Spring Street, Second Floor, North Tower
Los Angeles, CA 90013

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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 August 15, 2011, at Los Angeles, California.

Virginia Gow
Declarant

Signature

NPH:vg
LA2010504942
60665849.doc