

S185303

Supreme Court Number \_\_\_\_\_

SUPREME COURT  
**FILED**

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Frederick K. Ohlrich Clerk

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

In re

**WILLIE CLIFFORD COLEY**

on

Habeas Corpus

Deputy

Court of Appeal  
No. B224400

Superior Ct. No.  
MA022987

ORIGINAL PROCEEDINGS

*AMENDED* PETITION FOR WRIT OF HABEAS CORPUS

Honorable Dorothy L. Shubin, Judge Presiding

**PETITION FOR REVIEW  
AFTER A DECISION BY THE COURT OF APPEAL  
SECOND APPELLATE DISTRICT, DIVISION FIVE**

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By appointment of the Court of Appeal  
under the California Appellate Project's  
independent case system

Attorney for Petitioner

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**PETITION FOR REVIEW**

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE,  
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME  
COURT OF THE STATE OF CALIFORNIA:

Petitioner, Willie Clifford Coley, respectfully petitions this  
Honorable Court for review in the above-entitled matter following the filing  
of a published opinion by the Court of Appeal of the State of California,  
Second Appellate District, Division Five, on August 4, 2010, denying the  
petition for a writ of habeas corpus. A copy of the Court of Appeal's  
opinion is attached as exhibit "A."

### **ISSUE PRESENTED FOR REVIEW**

Review is required to settle the question of whether an indeterminate life sentence under the Three Strikes laws violates the Eight Amendment of the United States Constitution prohibiting cruel and unusual punishment, where the defendant's third strike is based solely on his failure to update his annual registration requirement as a sexual offender, and where the Court of Appeal declined to follow the reasoning of *People v. Carmony* (2005) 127 Cal.App.4th 1066, thereby creating a split of authority on this issue.

### **NECESSITY FOR REVIEW**

The Court of Appeal in this case created a split of authority by publishing its decision in this case. The Court's decision declined to follow the reasoning of *People v. Carmony, supra*. It held instead that the Eighth Amendment is not violated by imposing an indeterminate life sentence under the Three Strikes law for the felony offense of failing to update the annual registration requirement by a sexual offender within five days of his birthday. Review of this is required under California Rules of Court, rule 8.500, subdivision (b), to settle this important question of law.<sup>1</sup> Review is additionally necessary under rule 8.500, subdivision (b)(1), to secure uniformity of the decisional law addressing this issue.

Petitioner initiated this proceeding with the filing of a petition for a writ of habeas corpus in the Second Appellate District of the Court of Appeal, Division Five. The primary issue presented in the petition was whether petitioner's indeterminate life sentence under the Three Strikes law violated the constitutional prohibition against cruel and unusual punishment, where his third strike consisted of his failing to update his annual sexual offender registration requirement within five days of his

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<sup>1</sup> All rule references are to the California Rules of Court.

birthday. Petitioner based his claim on *Gonzalez v. Duncan* (2008) 551 F.3d 875 and *People v. Carmony* (2005) 127 Cal.App.4th 1066. (Pet., at p. 5.) Both of these cases were decided after petitioner received his sentence.

The Court of Appeal denied the petition on procedural grounds. Petitioner re-filed the petition in this Court. This Court granted the petition and ordered that the Attorney General show cause returnable in Division Five of the Second Appellate District. Division Five again denied the petition in a published opinion. The court's opinion challenges *People v. Carmony* as wrongly decided. (*In re Coley, supra*, typed opn., at p. 2.) The court also ignored the persuasive authority of *Gonzalez v. Duncan, supra*, 551 F.3d 875.

The Court of Appeal refused to apply the analysis set out in the *Carmony* decision in favor of a harmless error analysis. The court concluded that petitioner's overall criminal history justified a life sentence. In the words of the Court of Appeal,

After giving due weight to petitioner's serious criminal history, we find the gravity of the offense to be significant and the punishment of 25 years to life in state prison to be constitutional. In addition we respectfully disagree with the analysis in *Carmony* because it: (1) relies, in part, on a dissenting opinion, in *Ewing*; (2) extends the holding of *Solem v. Helm* (1983) 463 U.S. 277, to cases where a defendant's sentence contemplates the possibility of parole; and (3) assesses the gravity of a sex offender's failure to update registration without providing due consideration to the offender's prior criminal history.

(*In re Coley*, typed opn., at pp. 2-3.) Petitioner submits that this reasoning is unconstitutional.

The *Carmony* holding presents the better view, as it conforms to the

interpretation of the Eighth Amendment by the United States Supreme Court and Ninth Circuit Court of Appeals. The Court of Appeal's published decision in this case establishes a separate line of authority on this issue, thus requiring this Court to resolve which line of authority applies to this issue.

Further, petitioner presents his federal constitutional claims to this Court to exhaust his state court remedies. (*O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 843 [119 S.Ct. 1728, 144 L.Ed.2d 1].)

### **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)).<sup>2</sup>

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<sup>2</sup> 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 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

The 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.)

Division Five of the Second Appellate District affirmed petitioner's conviction and sentence on direct appeal. Petitioner's subsequent petition for review to this Court was denied.

On July 16, 2009, petitioner filed a petition for a writ of habeas corpus alleging that his conviction constituted cruel and unusual punishment under the Eight Amendment. Though he raised this claim at trial and on appeal, the instant petition was based on subsequently decided law. Division Five denied the petition on the ground that the cruel and unusual punishment issue had been raised on direct appeal. This Court

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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).

issued an order to show cause why the relief in the petition should not be granted, returnable to Division Five. The Court of Appeal denied the petition on substantive grounds. (*In re Coley* (Aug. 4, 2010) WL3025605.)

### **STATEMENT OF THE FACTS.**

In 1988, petitioner was convicted of rape in concert with another defendant. Petitioner was subsequently convicted in 2001 of failing to update his annual sex offender registration within five working day of his birthday between the dates of May 28, 2001, and August 22, 2001.

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, so when he registered in January he thought he had complied with his registration requirement. (RT 370-371.)

### **PETITION FOR REHEARING**

A petition for rehearing could have been filed in the Court of Appeal, because the decision was not final immediately upon its filing. Even so, petitioner found no grounds for a rehearing and did not file a petition for rehearing in the appellate court. (Rule 8.500, subd. (c).)

### **LEGAL DISCUSSION**

#### **REVIEW IS REQUIRED TO ESTABLISH THAT PETITIONER'S INDETERMINATE LIFE SENTENCE UNDER THE THREE STRIKES LAW CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT.**

Appellate received a life sentence under the Three Strikes law for failing to update his annual registration requirement within five days of his birthday. The facts of this case are identical to those of *People v. Carmony*. Petitioner respectfully submits that the *Carmony* decision was correctly decided and the opposite view expressed by the Court of Appeal in this case must be reversed.

#### **A. *People v. Carmony*.**

The defendant in the *Carmony* case was registered sexual offender. The appellate history of the *Carmony* case began with an unpublished decision reversing the trial court's refusal to strike the defendant's felony conviction for failing to comply with the annual registration requirement within five days of his birthday. (*People v. Carmony* (2003) 2003 WL

657703 (Cal.App. 3 Dist. Feb 28, 2003) (NO. C038802).)<sup>3</sup> This Court granted review of the unpublished decision on May 21, 2003, and found no abuse of discretion by the trial court in refusing to strike the conviction under the Three Strikes law. It reversed the Court of Appeal decision and remanded the case for resentencing. (*People v. Carmony* (2004) 33 Cal.4th 367.)

The defendant again appealed the case on the ground that the trial court's imposition of an indeterminate life sentence under the Three Strikes law because he failed to update his annual registration requirement violated the prohibition against cruel and unusual punishment under the Eighth Amendment. The Court of Appeal agreed and reversed the sentence in a published decision. (*People v. Carmony* (2005) 127 Cal.App.4th 1066.) This Court denied review of the second appeal.

The facts of *Carmony* are identical to the present matter. In *Carmony*, the defendant had registered his correct address as a sex offender 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. (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1073; § 290, subd. (a)(1)(C).) The defendant's parole agent was aware that the defendant's registration information had not changed and arrested him for the registration violation at the address he had registered with the police. (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1073.) The defendant 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

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<sup>3</sup> Petitioner recognizes this case is not citable for its legal authority, but provides the citation to the Court for the Court's convenience.

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.)

The court found the defendant's indeterminate life sentence to be a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1075.) The court interpreted the Legislative intent behind section 290 as providing law enforcement with the ability to conduct police surveillance of sexual offenders. The defendant in *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. (*People v. Carmony, supra*, at p. 1073.) There was no new information to update and the state was aware of that fact. The requirement that the defendant 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 a 25-year sentence under the Three Strikes law imposed for the sole reason that the defendant failed to provide duplicate registration information is grossly disproportionate to the offense, the sentence "shocks the conscience of the court and offends notions of human dignity . . ." It, therefore, constituted cruel and unusual punishment. 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 considered three factors: "(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.) In analyzing these factors, the court reasoned that the willful failure to register as a sex offender is a regulatory offense that may be committed merely by forgetting to register as required. Prior to 1995, the offense was punishable as a misdemeanor, but 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 violation 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 monitoring Petitioner’s activities. This is because the defendant correctly registered the proper information the month before. (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1081.)

The dual 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, which meant he had to serve 25 years in prison before he is eligible for parole. (See *In re Cervera* (2001) 24 Cal.4th 1073, 1076.) The court correctly concluded that gravity of the offense and the

harshness of the punishment were disproportionate. (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1081.)

**B. Gonzalez v. Duncan.**

Recently, the Ninth Circuit agreed with the conclusion reached in *Carmony*. In *Gonzalez v. Duncan, supra*, 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 was called on to address 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 initial the portion 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 sentenced Mr. Gonzalez to an indeterminate term of 28 years to life imprisonment. The California Court of Appeal affirmed the sentence and the California Supreme Court declined to hear the case on direct appeal. (*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 is instructive here.

The *Gonzalez* court analyzed this issue under United States Supreme Court law. The court began by noting that a proportionality analysis is not simply reserved for capital cases. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 72; see *Solem v. Helm* (1983) 463 U.S. 277, 284.) In *Solem*, the United States Supreme Court held that the imposition of a life sentence without the possibility of parole under South Dakota's recidivist sentencing statute was grossly disproportionate to the triggering offense of uttering a "no account" check for \$100. (*Solem v. Helm, supra*, 463 U.S. At pp. 281-282, 284.) In arriving at this decision, the Court announced three objective factors to guide review of a sentence for a term of years under the Eighth Amendment: gravity of the offense and the harshness of the penalty (*Id.*, at pp. 290-291); a comparison of sentences imposed on other criminals in the same jurisdiction (*Id.*, at p. 291), and the sentences imposed for the commission of the same crime in other jurisdictions. (*Id.*, at p. 291.)

Applying these factors, the court in *Gonzales* began by analyzing the gravity of Mr. Gonzales' offense in not registering within five days of his birthday. The court began by weighing the criminal offense and 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.) The court concluded that Mr. Gonzalez's crime of failing to register as a sexual offender within five working days of his birthday in involved "neither violence nor threat of violence to any person," (*Helm v. Solem, supra*, 463 U.S. at 296), and is 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 further reasoned that the purpose section 290 is to prevent

“recidivism in sex offenders” by assuring they are “available for police surveillance.” (See *Wright v. Superior Court* (1997) 15 Cal.4th 521.) The court explained that registering one’s address each year is necessary to meet this purpose, but registering a second time 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. (*People v. Carmony, supra*, 127 Cal.App.4th 1066.) Failing to comply with the annual birthday registration requirement is “the most technical violation of the section 290 registration requirement,” and “by itself, pose[s] no danger to society.” (*People v. Cluff* (2001) 87 Cal.App.4th 991.)

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. (*Id.*, at pp. 887-888.) Based on this analysis, 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.” Accordingly, the sentence “constitutes cruel and unusual punishment under both the state and federal Constitutions. (*Id.*, at pp. 885-886.)

**C. Petitioner’s Indeterminate Life Sentence under the Three Strikes Law Constitutes Cruel and Unusual Punishment.**

The Court of Appeal in the present matter declined to follow reasoning or conclusion of *Carmony*. In doing so, the court established a second line of authority on the same issue. Like *Carmony*, petitioner was

convicted of failing to update his registration within five days of his birthday. (CT 24-25.) There was no evidence at trial that he changed his registered address since complying with his annual registration requirement in January. Indeed, the police arrested him at his registered address. Though law enforcement advised petitioner of his dual registration requirements, he believed he only had to register once a year if he did not change his residence address. (RT 370-371.)

Petitioner's third strike 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 not to register 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 residence 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 was a purely regulatory offense born out of confusion with no criminal intent at all. It involved "neither violence nor threat of violence to any person" and is purely a regulatory offense. (See *Helm v. Solem, supra*, 463 U.S. at 296.)

The Court of Appeal, in refusing to apply the holding of *Carmony*, found the *Carmony* decision to be inconsistent with United States Supreme Court authority. (*In re Coley, supra*, typed opn., at pp. 4-6, 9-11.) Petitioner respectfully disagreed. The court in *Carmony* reasoned that United States Supreme Court authority established an Eighth Amendment violation for the imposition of an indeterminate life sentence based on the

failure to update an annual registration requirement in the same year where the defendant had not changed his address. (*People v. Carmony, supra*, 127 Cal.App.4th at p. 1069.)

The court in the present matter also found that petitioner's criminal history merited his spending the rest of his life in jail. (*Id.*, at pp. 6-7.) Thus, the appellate court replaced the reasoning of *Carmony* with a harmless error analysis. In other words, the court decided that petitioner's criminal history placed him outside the protection of the Eight Amendment. The court's contrary conclusion notwithstanding, constitutional due process requires that the Eighth Amendment be applied evenhandedly. The Eighth Amendment cannot be applied selectively based on the severity of the criminal offense. (See generally *In re Dannenberg* (2007) 156 Cal.App.4th 1387, 1401; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 653-654.) Review is critical to redress this erroneous reasoning, and eliminate the split of authority on this important legal issue.

### CONCLUSION

For the reasons stated above, petitioner respectfully requests that the Court grant review of the Court of Appeal's opinion.

Dated: August 16, 2010

Respectfully submitted,



NANCY L. TETREULT  
Attorney for Petitioner

**CERTIFICATE OF WORD COUNT**  
**(Cal. Rules of Court, rule 8.204, subdivision (c)(1))**

The text of this brief consists of 4,841 words as counted by the Corel WordPerfect version 10 word processing program used to generate this brief.

Dated: August 16, 2010

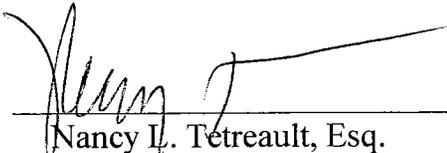
By  \_\_\_\_\_  
Nancy L. Tetreault, Esq.  
Counsel for Petitioner

EXHIBIT A  
COURT OF APPEAL OPINION

Court of Appeal, Second District, Division 5, California.  
In re Willie Clifford COLEY on Habeas Corpus.  
No. B224400.  
Aug. 4, 2010.

Background: Defendant convicted of failure to update sex offender registration within five days of birthday filed petition for writ of habeas corpus. The Supreme Court directed Director of Department of Corrections to show cause, before the Court of Appeal, as to why defendant was not entitled to relief.

Holding: The Court of Appeal, Kumar, J., held that sentence of 25 years to life under Three Strikes Law for failing to register as sex offender was not cruel and unusual.

Order to show cause discharged; writ denied.

ORIGINAL PROCEEDINGS. Petition for Writ of Habeas Corpus. Dorothy L. Shubin, Judge. Denied. Nancy L. Tetreault, under appointment by the Court of Appeal, for Petitioner. Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Janet E. Neely and Noah P. Hill, Deputy Attorneys General, for Appellant.

KUMAR, J. [FN\*]

#### I. INTRODUCTION

\*1 Petitioner was convicted of failing to update his sex offender registration within five working days of his birthday (former Pen.Code, § 290, subd. (a)(1)(D)) [FN1] and, due to his prior criminal convictions, was sentenced to 25 years to life pursuant to the Three Strikes law (Pen.Code, § 1170.12 subds. (b)-(i)). In response to an order issued by the California Supreme Court, we consider whether, in light of the holding in *People v. Carmony* (2005) 127 Cal.App.4th 1066, 26 Cal.Rptr.3d 365 (*Carmony*), petitioner's sentence violates the Eighth Amendment. We conclude petitioner's sentence does not violate the Eighth Amendment and respectfully disagree with *Carmony*.

#### II. FACTUAL BACKGROUND

Petitioner was arrested as part of a "parolee at large sweep" and subsequently convicted of the above-referenced sex offender registration offense. He admitted having prior convictions for voluntary manslaughter, rape in concert, and robbery. After being sentenced to 25 years to life pursuant to the Three Strikes law, petitioner appealed the judgment of conviction arguing, inter alia, that the punishment violated the Eighth Amendment's proscription against cruel and unusual punishment. We rejected that claim, as well as others, and affirmed the judgment in 2003. Following the denial of petitioner's petition for review, the Third Appellate District of the Court of Appeal held, in *Carmony*, supra, 127 Cal.App.4th at pp. 1074-1084, 26 Cal.Rptr.3d 365, that the implementation of the Three Strikes law to trigger a sentence of 25 years to life violates the Eighth Amendment if the only current felony conviction (i.e., the felony triggering applicability of the Three Strikes law) is for failing to update sex registration within five working days of the defendant's birthday.

[1] On June 16, 2009, petitioner filed a habeas corpus petition in the California Supreme Court arguing that, as in *Carmony*, petitioner's sentence violates the Eighth Amendment. The Supreme Court, citing *Carmony*, issued an order directing the Director of the Department of Corrections to show cause, before this court, why petitioner is not entitled to relief. We now consider the merits of petitioner's Eighth Amendment challenge, in light of *Carmony*. [FN2]

In assessing an Eighth Amendment challenge to a 25-year-to-life sentence imposed pursuant to the Three Strikes law, the United States Supreme Court has held, even if the current offense is not serious, the sentence can be "justified by

the State's public-safety interest in incapacitating and deterring recidivist felons, and ... [the defendant's] own long, serious criminal record." (Ewing v. California (2003) 538 U.S. 11, 29, 123 S.Ct. 1179, 155 L.Ed.2d 108 (plur. opn. of O'Connor, J.))

Here, petitioner's criminal history is both lengthy and serious. Between 1978 and 2001 petitioner was: sentenced to prison for 15 years for committing burglary in Florida; sentenced to 20 years in state prison for committing manslaughter, rape in concert, and robberies; and returned to prison on three separate occasions for parole violations. After giving due weight to petitioner's serious criminal history, we find the gravity of the offense to be significant and the punishment of 25 years to life in state prison to be constitutional. In addition we respectfully disagree with the analysis in Carmony because it: (1) relies, in part, on a dissenting opinion, in Ewing; (2) extends 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) assesses the gravity of a sex offender's failure to update registration without providing due consideration to the offender's prior criminal history.

### III. DISCUSSION

#### A. United States Supreme Court Precedent

\*2 [2] Petitioner does not contend his sentence constitutes cruel or unusual punishment under the California Constitution (Cal. Const., art. I, § 17). Rather, his claim is that the punishment amounts to cruel and unusual punishment in violation of the Eighth Amendment to the federal Constitution. Thus, we turn to applicable United States Supreme Court precedent evaluating states' noncapital punishment schemes under the Eighth Amendment. For purposes of the Eighth Amendment, the question of whether punishment for a noncapital crime must carry a "proportionate" sentence is a "narrow principle." (Ewing v. California, supra, 538 U.S. at p. 21.) The United States Supreme Court has, "on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." [citation.] But, 'outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.' [Citation.]" (Ewing, supra, 538 U.S. at p. 21, italics added.)

This limited assessment of proportionality was applied in Rummel v. Estelle (1980) 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382. Rummel was convicted of theft of approximately \$120 by false pretenses. Due to his prior felony convictions for "fraudulent use of a credit card to obtain \$80 worth of goods or services" and "passing a forged check in the amount of \$28.36" (id. at p. 265), he was sentenced to life in prison with the possibility of parole (id. at p. 284-285). The court held the punishment did not violate the Eighth Amendment as it was not the "exceedingly rare" circumstance where a proportionality analysis rendered punishment for a noncapital offense unconstitutional. (Id. at p. 274, 292.) Indeed, the Supreme Court suggested great restraint should be placed on a finding that noncapital punishment amounts to cruel and unusual punishment by emphasizing that such a finding is only applicable in an "extreme" case such as a statute dictating a life term for a parking violation. (Id. at p. 274 & fn. 11.) In Ewing v. California, supra, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108, the Supreme Court adhered to this restraint in addressing the constitutionality of a 25-year-to-life sentence under the Three Strikes law for a relatively minor theft offense. Ewing was charged with stealing three golf clubs--a crime that was subject to prosecution as a felony or a misdemeanor. The offense was prosecuted as a felony and Ewing was convicted. The trial judge declined to reduce the offense to a misdemeanor and, because Ewing admitted to having been convicted of four "strike" offenses (e.g., three burglaries and one robbery), he was sentenced to 25 years to life pursuant to the Three Strikes law. (Id. at pp. 19-20.)

Following the approach in Rummel, Ewing engaged in a limited proportionality review. The court first explained the manner in which an appellate tribunal is to assess the gravity of an offense for purposes of an Eighth Amendment analysis. "In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." (Ewing v. California, supra, 538 U.S. at p. 29.) In this regard, between 1984 and 1999, Ewing had been convicted of "numerous misdemeanor and felony offenses, served nine separate terms [in either jail or prison], and committed most of his crimes while on probation or parole." (Id. at p. 30.)

\*3 Ewing then, in conducting a limited proportionality review, considered the gravity of the offense in light of the legislative objective behind the Three Strikes law and the severity of the punishment imposed. "To be sure, Ewing's

sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. The State of California 'was entitled to place upon [Ewing] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State.' [Citation.] Ewing's is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.' [Citation.]" (Id. at p. 30.)

## B. Application of Eighth Amendment Principles to Petitioner's Case

### 1. Petitioner's Criminal History

In 1978, petitioner was sentenced to 15 years in state prison for burglary committed in Florida. He was discharged from a Florida prison on June 17, 1986 and, at some point thereafter, moved to California. In January 1988, he committed voluntary manslaughter. Five months later, he committed rape in concert and two robberies. For his 1988 offenses, he was sentenced to 20 years in state prison.

He was released from state prison in 1998 but returned to prison on three separate occasions for parole violations before he ultimately committed the instant offense in 2001. The nature of the parole violations included positive narcotics tests for cocaine, PCP, and methamphetamine as well as absconding from parole and traveling to Florida without permission.

The facts underlying petitioner's manslaughter, rape, and robbery convictions bear mentioning as they are particularly callous. The manslaughter case arose out of a dispute between petitioner's roommate and a woman. Petitioner's roommate believed the woman had stolen some of the roommate's cocaine. The roommate struggled with the woman and called out to petitioner to lend assistance. Petitioner held the woman down as his roommate attempted to examine the woman's rectum and vagina for the missing cocaine. During the struggle, the woman was choked and fell unconscious. The two men tied an electrical cord around her hands, feet, and neck. Petitioner and his roommate went to sleep and, when they awoke, realized the woman was dead. Because she had defecated, they bathed her. The men cut the woman's fingernails in an attempt to destroy evidence under her fingernails (i.e., human skin) indicating she had scratched petitioner's roommate. After doing so, they moved the woman to an inoperable freezer where her body was stored.

Four months after committing the killing, petitioner and his roommate committed rape and robbery. They entered a woman's residence at 3:00 a.m. while she was sleeping. She was pulled from her bed, her hands were bound, and tape was placed across her mouth. Petitioner's roommate raped the woman while petitioner stood guard.

\*4 Petitioner's roommate then ordered the woman to call another man and invite him to the residence. When the man arrived, petitioner's roommate invited him inside and took him to the bedroom where petitioner was keeping the woman. Petitioner's roommate put a knife to the man's throat, threatened to kill him, and took his wallet.

The probation officer responsible for drafting the probation report prior to sentencing on these offenses wrote: "It is absolutely incomprehensible to understand how [petitioner] and [his roommate] could continue living in an apartment with a body decomposing in a freezer and dripping fluid on the kitchen floor." The probation officer indicated petitioner was "a man without a conscience" and that petitioner "show[ed] no remorse for his behavior and it is expected that he will re-involve himself in criminal behavior when he is released from State Prison." He concluded, petitioner was "an extreme danger to the community."

### 2. The Punishment is not Grossly Disproportionate to the Offense

When comparing the gravity of the offenses and the degree of punishment in Ewing and Rummel with that of petitioner, it is quite clear that petitioner's punishment does not violate the Eighth Amendment. In assessing the gravity of petitioner's offense we follow the blueprint provided by Ewing and consider, not only the current offense, but also petitioner's criminal history as it pertains to the legislative objective of public safety. Petitioner's current offense is not trivial. The California Supreme Court has assessed the importance of the sex offender registration legislation: "The purpose of 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 offenses in the future. [Citation.] [Citations.] Plainly, the Legislature perceives that sex offenders pose a 'continuing threat to society' [citation] and require constant vigilance. [Citation.]" (Wright v. Superior Court (1997) 15 Cal.4th 521, 527, 63 Cal.Rptr.2d 322, 936 P.2d 101.)

The need to track petitioner and have him strictly comply with the registration and update requirements is elevated. Apart from his serious criminal convictions, he is a long-time drug abuser who is not able to conform his conduct to the rules and regulations required for parolees. Indeed, he was a "parolee at large" when he was apprehended in the instant case. Strict compliance with sex registration and update requirements are particularly important given these circumstances.

Moreover, assessing petitioner's recidivist history adds great weight to the gravity of the offense. Between 1978 and 2001 he was either in prison, committing felony offenses, or violating parole. During this 23-year period, the only time-frame petitioner was out of custody and appearing to conform his conduct to the norms of society was for a mere 18 months (between his release from a Florida prison and the commission of manslaughter). In addition, killing a human being and depositing the body in a freezer as well as sneaking into a woman's residence at 3:00 a.m. and participating in a rape and robbery are, even in the scheme of felony offenses, on the serious and vile end of the spectrum.

\*5 Thus, as in Ewing, petitioner's sentence 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, at 538 U.S. at pp. 29-30.) "When the California Legislature enacted the [T]hree [S]trikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." (Ewing, supra, 538 U.S. at p. 25.) This is not the "extreme" case necessary to justify a finding that noncapital punishment violates the Eighth Amendment.

#### C. The Carmony Decision

Like petitioner, Carmony was convicted of failing to update his sex offender registration within five days of his birthday. Carmony had three prior "strike" offenses--two for assault with a deadly weapon [FN3] and one for oral copulation by force or fear with a minor under the age of 14 years. (Carmony, supra, 127 Cal.App.4th at pp. 1073, 1080, 26 Cal.Rptr.3d 365.)

Citing a dissenting opinion in Ewing, Carmony indicates, "in cases involving recidivist offenders, we must focus upon 'the [offense] that triggers the life sentence,' with recidivism playing a "relevant," but not necessarily determinative, role' [Citation.]" (Carmony, supra, 127 Cal.App.4th at p. 1077, 26 Cal.Rptr.3d 365.) Carmony then states, "Applying these principles, we find, as did the court in Solem [v. Helm, supra, 463 U.S. 277], 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 [Carmony's] offense was an entirely passive, harmless, and technical violation of the registration law, it was less serious than the offense ... committed by the defendant in Solem." (Carmony, supra, 127 Cal.App.4th at p. 1077, 26 Cal.Rptr.3d 365.)

We respectfully disagree with this approach because: (1) the dissenting opinion in Ewing should have no persuasive impact on the Eighth Amendment analysis; (2) as recognized by the Ewing plurality, Solem is limited to the unique situation where a life sentence without the possibility of parole is imposed for a nonviolent felony; and (3) a sex offender's failure to update registration is neither "technical" nor "harmless."

First, we choose, as we think we must, to follow the plurality opinion in Ewing rather than a dissenting opinion. (Raven v. Deukmejian (1990) 52 Cal.3d 336, 352, 276 Cal.Rptr. 326, 801 P.2d 1077; Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 915, 153 Cal.Rptr. 854, 592 P.2d 341; see also Estate of Pittman (1998) 63 Cal.App.4th 290, 300, 73 Cal.Rptr.2d 622.) Thus, to the extent Carmony references the dissenting opinion as justification to lessen the significance of recidivism in an Eighth Amendment analysis, we decline to do so.

Second, the holding of *Solem* has been limited by the United States Supreme Court. In *Solem*, the defendant was convicted of "uttering a 'no-account check' for \$100." (*Solem v. Helm*, supra, 463 U.S. at p. 281.) Due to the defendant's prior convictions, he was sentenced to life in prison without the possibility of parole. After engaging in an analysis to determine whether the punishment was grossly disproportionate to the crime, the high court concluded the sentence amounted to cruel and unusual punishment. (*Id.* at pp. 296-303.)

\*6 The Supreme Court revisited *Solem* when deciding *Ewing*: "We specifically noted [in *Solem* ] the contrast between that sentence and the sentence in *Rummel*, pursuant to which the defendant was eligible for parole. [Citations.] Indeed, we explicitly declined to overrule *Rummel* .... [Citations.]" (*Ewing v. California*, supra, 538 U.S. at p. 22, italics added.) Thus, due to the fact that petitioner's sentence allows for the possibility of parole, the applicable Eighth Amendment analysis is derived from *Rummel* and *Ewing*, not *Solem*.

Finally, we respectfully disagree with Carmony's characterization of the offense as "technical," "harmless" and "no worse than a breach of an overtime parking ordinance." (*People v. Carmony*, supra, 127 Cal.App.4th at pp. 1077, 1079, 26 Cal.Rptr.3d 365.) Such an assessment of the gravity of an offense for purposes of an Eighth Amendment analysis, does not, as is required by *Ewing*, place any weight on a defendant's recidivism. (*Ewing v. California*, supra, 538 U.S. at p. 29.)

Although Carmony addresses the defendant's recidivism, we respectfully disagree with the framework of the analysis. Carmony recognizes that recidivism is a consideration in an Eighth Amendment analysis but it does not use recidivism in determining the gravity of the offense. In fact, Carmony minimizes the importance of recidivism by acknowledging 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. [Citation.]" (*Carmony*, supra, 127 Cal.App.4th at p. 1079, 26 Cal.Rptr.3d 365.) In support of this proposition, Carmony cites *Witte v. United States* (1995) 515 U.S. 389, 402-403, 115 S.Ct. 2199, 132 L.Ed.2d 351. (*Ibid.*)

The issue in *Witte* was 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. The Supreme Court held 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 inquiry." (*Witte v. United States*, supra, 515 U.S. at p. 403.)

We respectfully disagree with the implementation of *Witte* in an Eighth Amendment analysis and the notion that, in assessing the propriety of punishment under the Eighth Amendment, an appellate tribunal must focus on the seriousness of the current offense. Indeed, *Ewing* expressly cautioned against this approach when it noted that the failure to include recidivism on the scale when weighing the gravity of the offense, "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 the conviction, or the 'triggering' offense: 'It 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.' [Citations.]" (*Ewing v. California*, supra, 538 U.S. at p. 29.) In light of Carmony's prior convictions, particularly the convictions involving the death of a fetus and using force or fear to orally copulate a minor under the age of 14 years, and the compelling legislative intent to track sex offenders and punish recidivist offenders, the gravity of his offense far exceeds that of a parking violation.

#### IV. DISPOSITION

\*7 The order to show cause is discharged and the petition for writ of habeas corpus is denied.

We concur: TURNER, P.J., and KRIEGLER, J.

FN\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the

California Constitution.

FN1. The requirement to update sex offender registration is currently codified in Penal Code section 290.012.

FN2. Generally, a habeas corpus petitioner may not raise an issue which has been previously raised and rejected on appeal. (In re Waltreus (1965) 62 Cal.2d 218, 225, 42 Cal.Rptr. 9, 397 P.2d 1001.) However, an "exception ... established by case law, [permits] a petitioner to raise in a petition for writ of habeas corpus an issue previously rejected on direct appeal when there has been a change in the law affecting the petitioner. [Citations.]" (In re Harris (1993) 5 Cal.4th 813, 841, 21 Cal.Rptr.2d 373, 855 P.2d 391.) Because Carmony was decided after petitioner's appeal and arguably constitutes a change in the law, we do not find petitioner's claim is procedurally barred.

FN3. Carmony's first conviction was the result of him punching and kicking his pregnant girlfriend, causing a miscarriage. His second conviction was for punching and kicking a different girlfriend as well as cutting her hand with a knife. (People v. Carmony, supra, 127 Cal.App.4th 1066, 1080, fn. 9, 26 Cal.Rptr.3d 365.)

**DECLARATION OF SERVICE BY MAIL**

Re: ***In re Coley***

Case No. **B224400**

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, **Amended Petition for Review**, on all parties in this action by placing a true copy thereof in an envelope addressed as follows:

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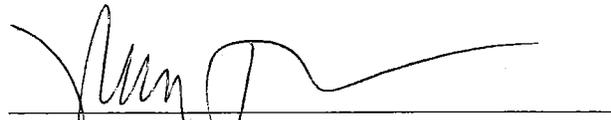
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Each envelope was then sealed, fully prepaid postage was affixed, and each envelope was deposited in the United States mail at Los Angeles, California, on **August 16, 2010**.

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

Executed on **August 16, 2010**, at Los Angeles, California.

  
\_\_\_\_\_  
NANCY L. TETREULT