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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re CEDRIC TYRONE GREEN, On Habeas Corpus	A169842 (San Mateo County Super. Ct. Nos. SC041613A, HC3041)

In 2023, Cedric Tyrone Green, who was convicted by a jury in 1998 of an offense he now characterizes as nothing more than "purse-snatching"—legally, it was second degree robbery—petitioned our Supreme Court for a writ of habeas corpus on the ground that his aggregate prison term of 35 years to life under California's "Three Strikes" law is unconstitutional. Green attacked his sentence as a violation of equal protection; on grounds of ineffective assistance of counsel at sentencing; and because the sentence constitutes cruel or unusual punishment under article I, section 17 of the California Constitution (article I, section 17).

Earlier this year, the California Supreme Court issued an order to show cause, returnable to this court, directing the Secretary of the Department of Corrections and Rehabilitation (Secretary) to explain why Green is not entitled to relief based on his claim of cruel or unusual

punishment under article I, section 17, and specifically under *People v. Avila* (2020) 57 Cal.App.5th 1134 (*Avila*). The Secretary filed a return in this court arguing that Green's petition is procedurally barred as untimely and that his cruel or unusual punishment claim lacks merit.

We conclude that the petition is timely, but we agree with the Secretary that Green's cruel or unusual claim lacks merit. Our Legislature has designated robbery to be both a "serious" and "violent" offense for purposes of Three Strikes sentencing, and Green committed his offense against a 79-year-old woman who was accompanied by her 82-year-old husband when she was robbed. This offense was the latest in a string of crimes Green committed in the decade leading up to it, including two prior attempted robberies.

Before turning to an in-depth analysis of the parties' arguments as framed by the petition and the Supreme Court's order to show cause, we outline in broad overview our reasoning on the merits. The leading excessive punishment case under article I, section 17—and the primary case the *Avila* court relied on—is *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*). *Lynch* enunciates three "techniques" which California courts use as a measuring rod to determine whether a sentence "is so disproportionate to the crime for which it [was] inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Id.* at pp. 424, 425.)

The first *Lynch* technique turns on whether the punishment inflicted is wholly out of proportion to the "danger to society" presented by the offender, given the nature of the commitment offense and the offender's characteristics. (*Lynch*, *supra*, 8 Cal.3d at p. 425.) Applying this test, we cannot say the sentence here is constitutionally disproportionate to the danger presented by this offender and his crimes. (Part II.B.2.a, *post*, at

pp. 22–38.) Nor can we say, applying the second and third *Lynch* techniques, that Green's sentence is disproportionate compared to sentences imposed in this state for offenses of comparable seriousness (Part II.B.2.b., *post*, at pp. 39–46), or when compared to sentences imposed in other states for such offenses (Part II.B.2.c., *post*, at pp. 47–53).

We so hold, mindful of the holding in *Avila.* In that case—which arose on appeal rather than in a collateral review proceeding decades after sentencing—the defendant tried to shake down two fruit vendors and destroyed some oranges in an effort to scare the victims into turning over money, while making a veiled reference to his possible affiliation with gangs. (*Avila*, *supra*, 57 Cal.App.5th at p. 1139.) For this, he was convicted of attempted robbery and attempted extortion. (*Ibid*.) Under the Three Strikes law, attempted robbery is a "serious" felony, but is not a "violent" offense; attempted extortion is neither. (*Id*. at p. 1142.)

The *Avila* panel concluded the trial court abused its discretion by denying defendant Avila's motion under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*) to strike two prior strike convictions that occurred decades before sentencing, without regard to his relative youth when they were committed. "[N]o reasonable person could agree that the sentence imposed on Avila was just," the court explained. (*Avila*, *supra*, 57 Cal.App.5th at p. 1145.) "Avila's prior strikes were remote and committed when he was of diminished culpability based on his age, a factor the trial court erroneously concluded was inapplicable to the formulation of his sentence." (*Ibid*.)

Having found that the sentencing court abused its discretion in refusing to strike the prior strikes in that case, thus exposing defendant Avila to a Three Strikes term, the *Avila* panel proceeded to find that the

life sentence imposed on him was constitutionally excessive under *Lynch* techniques one and two. (*Avila*, *supra*, 57 Cal.App.5th at pp. 1145–1152.) Summing up its analysis, the panel concluded that "[c]rushing oranges, even for the purpose of trying to steal or to extort money, is not constitutionally worthy of the sentence imposed . . . ." (*Id.* at p. 1151.) "Life in prison for destroying fruit, even when done by someone with a criminal record in the course of an attempted robbery, robs recidivist sentencing of its moral foundation and renders the solemn exercise of judicial authority devoid of meaning." (*Ibid.*)

Using *Avila* as a benchmark, Green argues that the sentence imposed on him is, if anything, even more shocking to the conscience than the sentence imposed on defendant Avila. We cannot agree. We have no quarrel with the holding in or the reasoning of *Avila*, but we see a clear line distinguishing this case from that one in several respects. First, unlike defendant Avila, Green made a *Romero* motion but on appeal did not attempt to argue its denial was error. By his habeas corpus petition, Green effectively asks us to revisit that motion. At a distance of more than a quarter century, we see no reason to do so. We are not persuaded that, with the passage of time, it has become so clear Green's sentence falls below the evolving standards set by article I, section 17, that we must intervene.

No constitutional imperative requires us to look at Green's sentence and his dangerousness to society any differently than the sentencing court did in denying his *Romero* motion. Green emphasizes that, while his Third Strike offense is now legislatively classified as "violent" for Third Strike purposes, it was not so classified at the time of sentencing; that did not occur until the early 2000s, he observes. (See Prop. 21, § 15, approved by

voters, Primary Elec., Mar. 7, 2000, eff. Mar. 8, 2000; § 667.5, subd. (c)(9).) If anything, we believe, this legislative change cuts against him because, as an objective indication of the gravity of this offense for sentencing purposes, the later classification of robbery as a "violent" offense suggests upward evolution toward harsher punishment for robbery when it qualifies as a Three Strikes offense. We are aware of nothing in the more recent, legislative trend toward criminal justice reform generally that undercuts this specific legislative judgment about robbery. The deference we owe the Legislature under *In re Palmer* (2021) 10 Cal.5th 959, 971–972 (*Palmer*) prevents us from second-guessing that judgment on this record.

Although the absence of *Romero* error is the most significant respect in which this case differs from *Avila*, the nature of Green's commitment offense is materially distinguishable as well. While the sentencing court in *Avila* misapprehended the seriousness of the crimes committed by the defendant there (*Avila*, *supra*, 57 Cal.App.5th at pp. 1142–1143), we cannot say the same thing here. We are not persuaded by Green's insistence that his commitment offense should be considered, in fact, non-violent, despite its legislative classification as violent. He asks us to cast aside this legislative classification because he did not use a weapon, his victim was not injured, and the victim testified she never felt threatened. But he targeted and robbed an elderly person, which increased the danger that this vulnerable victim and her elderly husband faced.

Then there is Green's criminal history. While defendant Avila's criminal history could not "bear its share" of his Three Strikes sentence (*Avila*, *supra*, 57 Cal.App.5th at p. 1151), that is not the case here. Green downplays the seriousness of his two prior strike offenses, both attempted robberies, and both committed within the nine years preceding his

commitment offense. The recency of these offenses at the time of sentencing suggests he had significant criminal experience as a robber when he committed his Third Strike offense. This defendant, in short, is someone whose record of prior convictions indicates he was practiced at targeting robbery victims. That counts against him under the *Lynch* danger-to-society factor in a way that was not as evident in *Avila*, given the circumstances of the offenses and the staleness of the prior convictions at issue there.

We add one final observation by way of comparison to *Avila*. The 47-year-old defendant in that case received a sentence so long he would "likely die in prison" (*Avila*, *supra*, 57 Cal.App.5th at p. 1144), given his age at sentencing. Not so for Green, who was age 31 at sentencing, and has now served 26 years of his term. Thus, unlike defendant Avila, Green is not facing a de facto sentence of life without possibility of parole. To the extent he might no longer be a *current* danger to society, we see no reason why the diminished threat he poses to others cannot be featured as an argument for parole suitability (see *In re Lawrence* (2008) 44 Cal.4th 1181), at the appropriate time.

For all of the above reasons, as explained further below, we cannot conclude, on this record, that a violation of article I, section 17 " ' " 'clearly, positively and unmistakably appears.' " ' " (*Palmer*, *supra*, 10 Cal.5th at p. 972.) Although we grant that there are some superficial similarities to *Avila*, in the end we find the distinctions between the two cases to be more notable than the similarities. Green's commitment offense was more dangerous than the fruit-stand shakedowns in *Avila*, and his criminal history fairly supports an inference that he had a greater propensity to

endanger fellow citizens than appears to have been the case with defendant Avila.

I. BACKGROUND

A. *Green's 1998 Trial and Sentence*

In 1998, a jury in San Mateo County Superior Court found Green guilty of second degree robbery (Pen. Code,[1] § 212.5, subd. (c)), and found true the special allegation that he committed this offense against a person over 60 years old. The court denied Green's motion under *Romero*, *supra,* 13 Cal.4th 497, to strike his prior strike convictions. It sentenced him to 25 years to life under the Three Strikes law (§ 1170, subd. (c)(2)), and also two additional, consecutive five-year sentences for having been previously convicted of two serious felonies (§ 667, subd. (a)), for a total sentence of 35 years to life.

Evidence was presented at Green's 1998 trial that on September 18, 1997, the victim, a 79-year-old woman, left a Burlingame, California restaurant with her 82-year-old husband and walked down a sidewalk towards their car. She held her purse in her right hand with her arm at a 90-degree angle as she walked. It contained about eight credit cards, identification, a blank bank check of hers, four $20 bills in a compartment, and about $8 in cash in her wallet, among other things. Her purse also contained her husband's wallet, which had in it under $20 in cash and identification. As she walked, she heard a rush of steps behind her and felt someone snatch her purse from her with "some force," "just enough to detach it." She turned to see a man running away. He got into a nearby waiting car, which drove away. She was not threatened, hit, or injured

[1] Undesignated statutory references are to the Penal Code.

during the incident. Her husband chased after the man but was unable to catch him.

The victim's daughter was also at the scene of the incident. As she walked to her own car after leaving the restaurant, she observed the car defendant later got into acting unusually. She drove over to check on her mother, saw the suspicious car speeding away, learned of the robbery, followed the car, and contacted police. A short time later, the police arrested Green at the San Francisco International Airport and recovered the victim's purse and her and her husband's credit cards and identification. They also found cash from her purse in Green's possession. The victim and her husband identified Green to the police and at trial as the man who took her purse.

The trial court found true the special allegation that Green had suffered two prior strike convictions within the meaning of the Three Strikes law. That is, in April 1991, Green, then 24 years old, was convicted of attempted robbery, for which he was sentenced to a prison term of two years. In 1993, when he was 26 years old, Green pleaded guilty and was convicted of, among other things, another attempted robbery. The trial court sentenced him to a 13-year, four-month prison term for his multiple offenses but suspended that sentence, placed Green on probation, and as a condition of probation ordered him to successfully complete a two-year Delancey Street residential treatment program for his drug addiction.

The trial court also found true allegations made under sections 667, subdivision (a) (regarding five-year enhancements for prior serious crimes) and section 1203, subdivision (e)(4) (regarding probation ineligibility) that Green was convicted in 1989 of grand theft (former § 487.2) and possession of a designated controlled substance (Health & Saf. Code, § 11350); in 1990

of grand theft (former § 487.2); and in 1993, along with attempted robbery (his second strike), of driving in willful or wanton disregard for the safety of persons or property while fleeing from police (Veh. Code, § 2800.2), the unlawfully driving or taking of a vehicle (Veh. Code, § 10851), and escaping from a place of confinement (§ 4530, subd. (c)). The court also found that Green had served prison terms for his 1990 and 1991 offenses.[2]

At sentencing, the trial court, after referring to a probation report that is not contained in the record, stated without objection that "for the last 10 years at least, Mr. Green has either been in custody or has been on probation. And when he has been on probation, for the most part he has not, completed that probation successfully." It noted regarding his commitment offense and his prior strike convictions that attempted robbery and robbery, while not violent crimes (as we have noted, robbery has since been statutorily designated as a violent felony), were deemed serious felonies, and that the purpose of the Three Strikes law was to ensure that repeat offenders, particularly those who were previously granted probation and shown leniency, will not continue to commit crime.

The trial court said it could not find a valid reason to strike any of Green's prior convictions under *Romero* because it viewed Green as "an individual who's been granted numerous grants of probation, and has obviously done very poorly as it relates to that probation, and continues to commit crime. An individual who, for the last, 10 or 11 years, has either been in custody or on probation." The court, noting Green blamed his criminal behavior on his drug addiction, said, "So, one way of looking at it

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[2] The record suggests that Green also may have suffered other previous convictions, but we limit our discussion to those that in the 1998 case were alleged by the People and found to have occurred.

is, Mr. Green can say, 'Well, I committed this crime because I need money to go on with my drug habit that has the grips on me.' Another perspective would be, here is a man who has nine prior felony convictions, and he's a habitual criminal." It concluded it was "the latter one that . . . is the most appropriate inference to take, with all due respect to Mr. Green and his comments to the Court this morning." It then sentenced Green as we have discussed to a total term of 35 years to life, including a 25-year-to-life term under the Three Strikes law.

B. *Green's Subsequent Appeals and Petitions*

Green has filed various appeals and petitions since his 1998 conviction. He appealed that conviction to this court and we affirmed the judgment in an unpublished opinion. (*People v. Green* (Sept. 30, 1999, A082658) [nonpub. opn.].) *Romero* error was not among the grounds for reversal Green raised on direct appeal.

In 2014, the superior court denied Green's petition for recall of his sentence under section 1170.126 and we affirmed that denial. (*People v. Green* (June 30, 2015, A141549) [nonpub. opn.].) In 2019 and 2021, the superior court denied Green's petitions to recall his sentence under section 1170.91, subdivision (b), and we affirmed the 2021 denial upon Green's appeal of it. (*People v. Green* (July 29, 2022, A162342) [nonpub. opn.].)

In 2022, the superior court denied a habeas corpus petition from Green in which he contended that, in the second degree robbery case at issue here, he received ineffective assistance of counsel and his sentence violated the prohibition against cruel or unusual punishment. In early 2023, we denied a habeas petition attacking the same conviction and sentence on the same grounds, resolving the petition summarily.

C. *Green's Present Habeas Petition*

That brings us to the proceeding now before us. As noted above, in 2023 Green petitioned our Supreme Court for a writ of habeas corpus. The Supreme Court issued an order to show cause, returnable to this court, directing respondent to explain "why petitioner is not entitled to relief based on his claim that his 35 years to life sentence under California's Three Strikes Law is disproportionate to his culpability and constitutes cruel or unusual punishment under the California Constitution, [article I, section] 17, and *People v. Avila* (2020) 57 Cal.App.5th 1134." (*In re Green*, S279286, Supreme Ct. Mins., Feb. 14, 2024.)

The Secretary subsequently filed a return in this court and Green filed a traverse. Upon our request, the Secretary filed a supplemental brief responding to contentions Green made for the first time in his traverse. Also, we have considered an amicus curiae brief filed by Associate Research Scholar Daniel Loehr of Yale Law School on the role of eugenics in the passage of habitual criminal laws.

II. DISCUSSION

A. *The Secretary's Untimeliness Argument Lacks Merit*

We first address the Secretary's contention that Green's cruel or unusual punishment claim is procedurally barred because it is untimely. According to the Secretary, Green's claim is subject to, and fails to meet, the standard requirements that a petitioner seeking habeas relief file a petition within a reasonable amount of time, have good cause for any substantial delay, or raise a claim that comes within an exception to the untimeliness bar. (See *Robinson v. Lewis* (2020) 9 Cal.5th 883, 898.)

Green disagrees, arguing that he filed his habeas petition without any substantial delay in light of new developments in the law, particularly

the Second Appellate District's decision in *Avila*, *supra*, 57 Cal.App.5th 1134, which he contends held that a defendant convicted under circumstances virtually identical to his was sentenced to cruel or unusual punishment; that he was justified in any delay in filing his petition because of his relative lack of both education and legal knowledge; that the Supreme Court, by issuing its order to show cause, rejected the Secretary's untimeliness argument; and that in any event this court can and should consider Green's petition because he claims he has suffered excessive punishment.

We conclude the Secretary's untimeliness argument lacks merit for at least the last two reasons asserted by Green. As Green points out, our Supreme Court issued an order to show cause returnable to this court regarding only one of the arguments the parties made in their papers to the high court: whether Green is "entitled to relief based on his claim that his 35 years to life sentence under California's Three Strikes Law is disproportionate to his culpability and constitutes cruel or unusual punishment under the California Constitution, [article 1, section] 17, and *People v. Avila* (2020) 57 Cal.App.5th 1134." (*In re Green*, S279286, Supreme Ct. Mins., Feb. 14, 2024.)

Although it is not entirely clear from the face of this instruction whether the court rejected the untimeliness claim raised in the Secretary's informal reply to Green's habeas petition, we agree with the observation made by one appellate court, faced with similar circumstances, that "[w]ere there a valid procedural bar, we would have expected the California Supreme Court to deny the petition rather than issu[e] an order to show cause returnable before this court." (*In re Ramirez* (2019) 32 Cal.App.5th 384, 406, fn. 11.)

We base this expectation on instructions contained in two California Supreme Court cases. In *In re Robbins* (1998) 18 Cal.4th 770, cited by the *Ramirez* court (*In re Ramirez*, *supra*, 32 Cal.App.5th at p. 406, fn. 11), the court explained, "[W]hen in our orders we impose the bar of untimeliness, this signifies that we . . . have determined that the petitioner has failed to establish the absence of substantial delay or good cause for delay, and that none of the . . . exceptions . . . apply." (*In re Robbins*, at p. 814, fn. 34, italics omitted.) However, "when respondent asserts that a particular claim or subclaim . . . is untimely, and when, nevertheless, our order disposing of a habeas corpus petition does not impose the proposed bar . . . , this signifies that we have considered respondent's assertion and have determined that the claim or subclaim is not barred . . . ." (*Ibid.*)

If this instruction were not enough, our Supreme Court has instructed in another case, "Our issuance of an order to show cause returnable before a lower court is an implicit preliminary determination that the petitioner has made a sufficient prima facie statement of specific facts which, if established, entitle him to habeas corpus relief under existing law. [Citations.] When we order the respondent to show cause before the superior court why the relief prayed for in a petition for habeas corpus should not be granted, we do more than simply transfer the petition to that court and more than simply afford the petitioner an opportunity to present evidence in support of the allegations of the petition; we institute a *proceeding* in which issues of fact are to be framed and *decided*." (*In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4; quoted favorably in *People v. Williams* (1988) 44 Cal.3d 883, 936, fn. 30.)

We conclude from these instructions that our Supreme Court's order to show cause returnable to this court signals its rejection of the

Secretary's untimeliness argument and instruction that we consider the merits of Green's cruel or unusual punishment claim. This is the first, independent reason for our rejection of the Secretary's untimeliness argument.

Second, as Green also points out, our Supreme Court has long held that courts should consider the merits of habeas claims that a prisoner has suffered excessive punishment—even when the petitioner has long delayed raising the issue and could have raised it on direct appeal. For example, in *In re Ward* (1966) 64 Cal.2d 672, a habeas petitioner was convicted of several crimes and imprisoned. (*Id.* at p. 674.) Twenty years later, he petitioned for a writ of habeas corpus on the ground that he had been subjected to double punishment for the same act in violation of section 654. (*Id.* at pp. 674–675.) The court concluded the argument was "a proper matter for us to consider on a writ of habeas corpus, despite his delay." (*Id.* at p. 675.)

The *Ward* court reached this conclusion based on *In re Seeley* (1946) 29 Cal.2d 294, 298. (*In re Ward*, *supra*, 64 Cal.2d at p. 675.) In *Seeley*, our high court noted that "habeas corpus is the proper proceeding to test the question whether the petitioner was serving an excessive sentence by virtue of an unauthorized adjudication that he was a habitual criminal." (*Seeley*, at p. 298.) It continued, "The respondent fails to cite a case, and we have discovered none, in which the court has refused to examine into the petitioner's claim that the trial court exceeded its power by imposing an excessive sentence, when that claim was presented in a habeas corpus proceeding. Courts have inquired into the merits of such a claim in habeas corpus even where the question might have been determined on an appeal from the judgment of conviction." (*Ibid.*) After citing eleven cases, the

court further held that "that inquiry is not only justified, but is made imperative by the provisions of section 1484 of the Penal Code which gives the court broad powers on the investigation of the legality of the restraint under which a prisoner is held, and precludes the court from refusing to dispose of the prisoner's rights as the justice of the case may require and particularly when it appears that the sentence for which he could lawfully be held is less than that actually imposed upon him." (*Id.* at pp. 298–299.)[3]

Our high court confirmed this holding in *In re Huddleston* (1969) 71 Cal.2d 1031. There, the petitioner sought a writ of habeas corpus challenging the validity of a conviction about seven years after it was decided and over two years after our Supreme Court issued three opinions upon which he relied in his petition. (*Id.* at pp. 1032–1034.) The court rejected the People's argument that the defendant waited "an unreasonable time" after its issuance of the three opinions to file his petition. (*Id.* at pp. 1033–1034.) The court based this on its rejection of a similar argument in *In re Caffey* (1968) 68 Cal.2d 762, 773, quoting from *In re Caffey* that " 'to find a waiver in these circumstances would unduly restrict the right to relief from a substantial increase in punishment based on a constitutionally invalid conviction.' " (*In re Huddleston,* at p. 1034.)

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[3] Section 1484 states in relevant part that when a party is brought before the court on the return of a writ of habeas corpus, "[t]he court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process or subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case."

More recently, the court in *People v. Miller* (1992) 6 Cal.App.4th 873 (*Miller*) followed these holdings. The *Miller* defendants were convicted of conspiracy to commit murder and sentenced to 25 years to life in prison. (*Id.* at p. 876.) They appealed and filed petitions for writ of habeas corpus in state and federal court, all of which were rejected. (*Ibid.*) Ten years after their convictions, they filed a habeas petition in superior court, alleging their sentences were statutorily invalid. (*Ibid.*) The superior court granted the petitions and reduced their sentences to 15 years to life, and an appeal followed. (*Ibid.*)

The appellate court, relying on cases such as *In re Ward*, determined, "When the question raised in a petition for writ of habeas corpus 'is one of excessive punishment, it is a proper matter for us to consider on a writ of habeas corpus, despite [the defendant's] delay. [Citation.]' (*In re Ward* (1966) 64 Cal.2d 672, 675 [20-year delay]; see also *In re Huffman* (1986) 42 Cal.3d 552, 555.)" (*Miller*, *supra*, 6 Cal.App.4th at p. 877.) The court further explained, "This is because a defendant's delay in raising the issue of excessive sentencing 'works primarily to his own disadvantage.' (*In re Bartlett* (1971) 15 Cal.App.3d 176, 186.) Thus, 'It is difficult to conceive where the rights of the People have been harmed by [the defendant's] lack of diligence—unless they intend to sue him for the reasonable cost of his room and board during that time.' " (*Miller*, at p.877.)

These cases provide a second, independent reason for our rejection of the Secretary's untimeliness claim. Green gained no advantage, and put the State at no disadvantage, by raising his claim now, rather than five years ago, or ten years ago, or twenty years ago, or at sentencing. The Secretary tries to distinguish *Ward* and *Seeley* on the ground that they involved claims rooted in statute rather than constitutional claims. We are

not persuaded. This contention is contradicted by the *Huddleston* court's reliance on *Caffey*, where it quoted language from *Caffey* resolving a constitutional claim. (See *In re Huddleston*, *supra*, 71 Cal.2d at p. 1034, quoting *Caffey*, *supra*, 68 Cal.2d at p. 773.)[4]

Having found Green's habeas corpus petition to be timely, we now turn to the merits of Green's excessive punishment claim.

B. *Green's Cruel or Unusual Punishment Claim Lacks Merit*

Green focuses his cruel or unusual punishment challenge on his Three Strikes life sentence for his second degree robbery conviction.[5]

1. Legal Standards

"[W]e construe the state constitutional provision [article I, section 17] 'separately from its counterpart in the federal Constitution. [Citation.]' (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.) This does not make a difference from an analytic perspective, however. (*People v.*

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[4] We do not mean by our conclusions to imply that we reject Green's contentions that he diligently filed his habeas petition after *Avila* was published in 2020, and that any delay between the publication of *Avila* and his filing was justified. Rather, we have no need to address those issues in light of our conclusions.

[5] Green attacks his 35-years-to-life sentence as the imposition of cruel or unusual punishment under the Three Strikes law, upon which law he focuses all of his arguments. But only his 25-years-to-life sentence was imposed under the Three Strikes law; he also received two consecutive five-year terms for his prior serious felony convictions under section 667, subdivision (a), a habitual criminal statute that is not a part of the Three Strikes law. (*People v. Williams* (2024) 17 Cal.5th 99, 116 [identifying the Three Strikes law as consisting of §§ 667, subds. (b)–(i) and 1170.12].) He does not direct any of his arguments specifically at the law underlying those two five-year sentences. Accordingly, we address his arguments mindful of his total sentence but focus, as he does, on his Three Strikes law arguments.

Mantanez (2002) 98 Cal.App.4th 354, 358, fn. 7.) . . . The touchstone in each is gross disproportionality." (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82; cf. *Coker v. Georgia* (1977) 433 U.S. 584, 592 ["a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment"].) Whether a sentence is cruel or unusual punishment is a question of law subject to our independent review, but we view disputed facts in the light most favorable to the judgment. (*People v. Wilson* (2020) 56 Cal.App.5th 128, 166–167.)

The Penal Code defines second degree robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§§ 211, 212.5, subd. (c).) California law does not distinguish between unarmed and armed robbery. (See *People v. Bell* (2020) 48 Cal.App.5th 1, 14, fn. 4 [noting, "There is no such offense as 'armed robbery' " under California law.].) Defendants may be sentenced to a term in state prison of two, three, or five years for committing second degree robbery. (§ 213, subd. (a)(2).)

"The Three Strikes law was '[e]nacted "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses" (Pen. Code, former § 667, subd. (b), as amended by Stats. 1994, ch. 12, § 1, pp. 71, 72), [and] "consists of two, nearly identical statutory schemes." ' (*People v. Conley* (2016) 63 Cal.4th 646, 652.) In March 1994, the Legislature codified its version of the Three Strikes law by adding subdivisions (b) through (i) to Penal Code section 667. A ballot initiative in

November of the same year added a new provision, section 1170.12." (*People v. Henderson* (2022) 14 Cal.5th 34, 43.)

"Prior convictions for 'serious' or 'violent' felonies, as defined by the Three Strikes law, are referred to as 'strikes.' " (*People v. Dain*, *supra*, 99 Cal.App.5th at p. 409.) Under the Three Strikes law, any robbery—whether unarmed or armed, whether anyone has been injured or not—is statutorily designated as a "serious" and "violent" felony, and attempted robbery is a "serious" felony. (§§ 1170.12, subd. (b)(1), 667, subds. (b) & (c)(4), 667.5, subd. (c)(9), 1192.7, subd. (c)(19) & (39).)

The leading article I, section 17 excessive punishment case, as noted above, is the California Supreme Court's opinion in *Lynch*. *Lynch* held that a punishment is cruel or unusual if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Lynch*, *supra*, 8 Cal.3d at p. 424; Cal. Const, art. I, § 17.) To guide this determination, *Lynch* outlined three "techniques." (*Lynch*, *supra*, 8 Cal.3d at p. 425.) "Disproportionality need not be established in all three areas. (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38 (plur. opn.).)" (*Avila*, *supra*, 57 Cal.App.5th at p. 1145.) Under the *Lynch* three-part analysis, we first examine the nature of the offense and/or the offender with particular regard to the degree of danger both present to society; second, we compare the challenged penalty with the punishments for more serious offenses in California; and third, we compare the challenged penalty with the punishments prescribed for the same offense in other states. (*Lynch*, at pp. 425–427.)

While the United States Supreme Court has adopted a view of the Eighth Amendment that gives courts virtually no role in setting boundaries on cruel and unusual punishment (see, e.g., *Harmelin v.*

Michigan (1991) 501 U.S. 957, 996, 1004–1005 (conc. opn. of Kennedy, J.); *Rummel v. Estelle* (1980) 445 U.S. 263, 272; see also *Ewing v. California* (2003) 538 U.S. 11, 20–24), the flexible three-part *Lynch* test, on the other hand, recognizes that California courts carrying out their paramount duty to apply something similar to the "evolving standards of decency" standard enunciated in *Furman v. Georgia* (1972) 408 U.S. 238, 269 (conc. opn. of Brennan, J.) and *Trop v. Dulles* (1958) 356 U.S. 86, 100–101 (plur. opn. of Warren, C. J.) may properly intervene under the "cruel *or* unusual" clause of the California Constitution (Cal. Const., art. I, § 17, italics added) when a legislatively prescribed sentence has gone too far.

Thus, the state constitutional prohibition under article I, section 17 is broader than its federal cruel *and* unusual punishment counterpart. (*People v. Anderson* (1972) 6 Cal.3d 628, 634, superseded by constitutional amendment on other grounds as stated in *People v. Bean* (1988) 46 Cal.3d 919, 957.) Under *Lynch*, the distinction between the federal and state standards "is purposeful and substantive rather than merely semantic." (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085 (*Carmony II*), accord, *People v. Baker* (2018) 20 Cal.App.5th 711, 723 and *Avila*, *supra*, 57 Cal.App.5th at p. 1145, fn. 13.)

Though *Lynch*'s three specific methodological "techniques" guide the analysis under its tripartite framework, some overall principles must be kept in mind. "[T]he determination of whether a legislatively prescribed punishment is constitutionally excessive is not a duty which the courts eagerly assume or lightly discharge." (*Lynch, supra*, 8 Cal.3d at p. 414.) And " ' "mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their

unconstitutionality clearly, positively and unmistakably appears." ' " (*Id.* at pp. 414–415.)

Properly applied, the *Lynch* inquiry "grants the Legislature considerable latitude in matching punishments to offenses. This latitude derives in part from the premise that a statute specifying punishment, like any other statute, is presumed valid unless its unconstitutionality ' " 'clearly, positively and unmistakably appears.' " ' [Citation.] But it also accounts for a very particular context, one in which '[t]he choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will . . . .' [Citation.] A claim of excessive punishment must overcome a 'considerable burden' [citation], and courts should give ' "the broadest discretion possible" ' [citation] to the legislative judgment respecting appropriate punishment." (*Palmer*, *supra*, 10 Cal.5th at p. 972.)

When a showing of cruel or unusual punishment is made, however, "we must forthrightly meet our responsibility 'to ensure that the promise of the Declaration of Rights is a reality to the individual.' " (*Lynch*, *supra*, 8 Cal.3d at p. 415.)[6]

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[6] In his habeas petition, Green relies primarily on *Lynch*, but in his traverse he also cites *In re Rodriguez* (1975) 14 Cal.3d 639 (*Rodriguez*). *Rodriguez* involved a habeas corpus proceeding brought by an inmate sentenced to a term " 'prescribed by law' "—in his case, one year to life (*id.* at pp. 642, 645)—under the then-operative indeterminate sentencing scheme, which was superseded in 1977 (see *Palmer*, *supra*, 10 Cal.5th at p. 975). The *Rodriguez* petitioner's crime involved no aggravating factors; he suffered from mental limitations and emotional problems at the time of

2. Analysis

Green argues that his Three Strikes sentence constitutes cruel or unusual punishment based on each and all of the three *Lynch* techniques.

a. *The Nature of the Crime and the Offender*

For the core of his analysis, Green relies almost entirely on *Avila*, *supra*, 57 Cal.App.5th 1134, to argue that the nature of the offense and his nature (to be considered together under the first *Lynch* technique) indicate his Three Strikes sentence was cruel or unusual punishment. We do not

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the offense; and he had a long record as an exemplary prisoner. (*Rodriguez*, at p. 643–644 & fns. 6, 7.)

In the era of *Lynch* and *Rodriguez*, the former Adult Authority, which carried out the function of the current Board of Parole Hearings, had discretionary "term fixing" power to reduce an inmate's maximum term and grant parole. After 22 years in prison, petitioner Rodriguez mounted an article I, section 17 attack on the Adult Authority's refusal to grant him parole. Upholding his excessive punishment claim in that context, the Supreme Court found his sentence to be constitutionally disproportionate under all three *Lynch* techniques, and ordered his immediate release. (*Rodriguez*, *supra*, 14 Cal.3d at pp. 652–656.)

Rodriguez, together with more recent California Supreme Court precedent (see *Palmer*, *supra*, 10 Cal.5th at pp. 971–974; *In re Butler* (2018) 4 Cal.5th 728, 744 (*Butler*); *In re Dannenberg* (2005) 34 Cal.4th 1061, 1096) affirms the vitality of the constitutional principle that "an inmate sentenced to an indeterminate term cannot be held for a period grossly disproportionate to his or her individual culpability." (*Butler*, at p. 744.) Under these cases, article I, section 17 serves as the ultimate backstop in the parole process. But we do not see that they add anything to the foundational law we must apply here, beyond what we find in *Lynch* itself. To the extent *Rodriguez* and its progeny may apply, that is best determined on appeal from a parole suitability denial.

write on a clean slate here. So before discussing *Avila*, we first review the relevant Three Strikes cases that preceded it.

i. Relevant Case Law

Courts in California have regularly rejected claims that a sentence under the Three Strikes law is constitutionally excessive under article I, section 17, particularly when the current offenses are serious or violent in nature. (E.g., *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1375, 1382–1383 [115 years plus 444 years to life for 15 felony counts, including robberies, mayhem and attempted murder, plus firearm enhancements]; *People v. Ayon* (1996) 46 Cal.App.4th 385, 389–390, 396–401 [240 years to life for seven counts of robbery and two counts of attempted robbery, both with firearm enhancements, and three prior serious felony conviction enhancements], disapproved on another point in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1130, 1134–1137 [sentence of 375 years to life plus 53 years for 19 felonies, including assaults and sexual offenses, and numerous weapon use enhancements].) Additionally, the mandatory 25-year-to-life enhancement for personally and intentionally discharging a firearm and causing great bodily injury or death under section 12022.53, subdivision (d), is not cruel and/or unusual punishment. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1214–1216; *People v. Martinez* (1999) 76 Cal.App.4th 489, 493–498.)

Against this backdrop, *Carmony II*, *supra*, 127 Cal.App.4th 1066,[7] a case Green cites in addition to *Avila*, was the first of a series of Court of

[7] *Carmony II* followed *People v. Carmony* (2004) 33 Cal.4th 367 (*Carmony I*), in which our high court held that the trial court did not abuse its discretion in denying the defendant's *Romero* motion and remanded the

Appeal cases to address article I, section 17 claims in the context of non-violent Third Strike offenses. In *Carmony II*, defendant Carmony, convicted of a sex offense, was statutorily required to register as a sex offender after his release from prison and also to register annually within five working days of his birthday. (*Id*. at p. 1073.) He failed to comply with his duty to register in 1990 and 1997, when he was sentenced to 32 months in state prison. (*Ibid*.) Upon his release in 1999, he registered, and he registered again a week later when he moved to a new residence. (*Ibid*.) But about a month later, around his birthday, he did not register a third time. (*Id*. at p. 1073.) He was arrested at his registered address for this failure and convicted of violating the requirement that he register within five days of his birthday. (*Id*. at pp. 1073–1074.) He also admitted to having suffered one prior prison term and three prior strikes under the Three Strikes law—a sexual offense that he committed 16 years before his registration offense and two assaults on girlfriends that he committed seven years before—but he was not convicted of committing any serious or violent offenses after 1992 (although he was not crime-free). (*Carmony II*, at pp. 1074, 1080.) The court sentenced him to a term of 26 years to life, including 25 years to life under the Three Strikes law. (*Carmony II*, at p. 1074.)

The appellate court, in a two-to-one decision, concluded Carmony's Three Strikes sentence constituted cruel or unusual punishment under our state Constitution (as well as under the Eighth Amendment of the federal Constitution). (*Carmony II*, *supra*, 127 Cal.App.4th at pp. 1075–1089.)

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case to the appellate court for further proceedings consistent with its opinion.

The court emphasized that, because the sentence must be proportionate to the crime, "the current offense must bear the weight of the recidivist penalty imposed." (*Id*. at p. 1072.) Focusing on the nature of the offense, the court concluded that Carmony's failure to register within five working days of his birthday was a "passive, nonviolent, regulatory offense, which causes no harm and poses no danger to the public." (*Id*. at p. 1086.) The requirement was merely a "backup measure to ensure that authorities have current accurate information" and, in light of Carmony's recent updating of his registration and continued contact with his parole officer, his "failure to register was completely harmless," "no worse than a breach of an overtime parking ordinance," and "a felony in name only." (*Id*. at pp. 1079, 1087.) Further, his prior strike offenses were remote and irrelevant to his current offense, rendering them "poor indicators he [was] likely to commit future offenses that pose[d] a serious threat to public safety." (*Id*. at p. 1087.)

Regarding Carmony's nature, the court concluded that any potential risk he posed was further undercut by "the fact that he [had] not committed any further sex offenses and had recently updated his registration." (*Carmony II*, *supra*, 127 Cal.App.4th at p. 1087.) Also, he had acted "in a responsible manner" prior to the registration offense, having married, maintained a residence, participated in Alcoholics Anonymous, sought job training and placement, and received an excellent work review from his manager. (*Id*. at pp. 1087–1088.)

With all of these circumstances in mind, the court concluded that, "because a one-size-fits-all 25 years to life sentence does not allow for gradations in culpability between crimes, it is disproportionate to the current offense, where as [shown on that record], the offense is minor and

the prior convictions are remote and irrelevant to the offense." (*Carmony II*, *supra*, 127 Cal.App.4th at p. 1088.) It characterized Carmony's sentence as a "rare case, in which the harshness of the recidivist penalty is grossly disproportionate to the gravity of the offense." (*Id*. at p. 1077.) The court also concluded Carmony's punishment was excessive under its second *Lynch* technique analysis—a comparison of a defendant's punishment to that meted out for more serious or violent offenses in our state. (*Carmony II*, *supra*, 127 Cal.App.4th at pp. 1088, 1081–1082.) The court further concluded Carmony posed no more of a risk to public safety than a second strike offender who committed one of the violent crimes the court listed, who was subject to a substantially lower sentence. (*Id*. at pp. 1081–1082.)

Following *Carmony II,* an appellate panel in *People v. Nichols* (2009) 176 Cal.App.4th 428 (*Nichols*) reached the opposite result in a failure to register case. There, defendant Nichols, a Three Strikes offender, knowingly violated the statutory requirement that he register after he moved from the city in which he was registered—without his parole officer's permission—and ended up drifting around the country and " 'hiding out with the hippies' " until he was arrested. (*Nichols*, at pp. 430, 432–433 & fn. 2.) The appellate court—the same panel that decided *Carmony II*—concluded a Three Strikes indeterminate life sentence for this registration offense did *not* constitute cruel and/or unusual punishment under the state and federal Constitutions. (*Id*. at pp. 435–437.)

The *Nichols* court reasoned that, unlike Carmony's failure, Nichols's offense was a "blatant disregard of the registration act and [a] complete undercutting of the act's purpose," thereby constituting a "serious offense." (*Nichols*, 176 Cal.App.4th at p. 437.) Nichols's "failure to register thwarted the fundamental purpose of the registration law, thereby leaving the public

at risk," since " '[t]he purpose of the sex offender registration law is to require that the offender identify his present address to law enforcement authorities so that he or she is readily available for police surveillance.' " (*Id.* at p. 437; see also *People v. Meeks* (2004) 123 Cal.App.4th 695, 699–701, 708–710 [Three Strikes indeterminate sentence for sex offender's failure to register after a change of address, which followed his repeated failure to comply with registration requirements and a long and sometimes violent criminal history, was not cruel or unusual punishment]; but see *People v. Cluff* (2001) 87 Cal.App.4th 991, 994, 999 [trial court abused its discretion in denying a *Romero* motion to strike prior convictions brought by a generally law-abiding defendant who had neglected to update his registration around his birthday].)

In the wake of *Carmony II*, *Nichols*, *Meeks* and *Cluff*, , our Supreme Court, in *In re Coley* (2012) 55 Cal.4th 524 (*Coley*), considered whether a Three Strikes indeterminate sentence for a sex offender defendant, Coley, who also failed to register within five days of his birthday, constituted cruel and unusual punishment under the Eighth Amendment of the federal Constitution.[8] The court held it did not. It expressly chose not to decide the question under the circumstances outlined in *Carmony II* (*Coley*, at p. 531) and instead emphasized that, unlike Carmony, Coley was found by the trial court to have "never registered as a sex offender at his current

[8] The court declined to address petitioner's contentions that the sentence violated the cruel or usual punishment standard of our state Constitution because the petitioner did not raise the issue in his habeas petition and the Court of Appeal had expressly limited its review to the federal constitutional question. (*Coley*, *supra*, 55 Cal.4th at p. 537, fn. 8.)

address and had knowingly and intentionally refused to comply with his obligations under the sex offender registration law." (*Id.* at p. 530.)

Also, Coley "had a lengthy and very significant criminal history," having been previously convicted of such serious or violent felonies as voluntary manslaughter, acting in concert to aid and abet the commission of rape, and robbery, for which he was sentenced to a total of 35 years in state prison. (*Coley*, *supra*, 55 Cal.4th at pp. 531 & fn. 3.) Finding Coley's circumstances more like those discussed in *Nichols*, our Supreme Court concluded that his "conduct . . . demonstrated that, despite the significant punishment [he] had incurred as a result of his prior serious offenses, he was still intentionally unwilling to comply with an important legal obligation, and thus his triggering criminal conduct bore both a rational and substantial relationship to the antirecidivist purposes of the Three Strikes Law." (*Coley*, at pp. 531, 552.) The court held that, given that relationship and "the extremely serious and heinous nature of [Coley]'s prior criminal history," the imposition of the Three Strikes indeterminate sentence did not constitute cruel and unusual punishment. (*Id.* at p. 531.)

Avila is the only case we have found issued after *Coley* in which an appellate court held a Three Strikes indeterminate sentence imposed on an adult defendant constituted cruel or unusual punishment under the California Constitution. In *Avila*, the defendant, Avila, then about 46 years old, demanded money on two separate occasions from men who were separately selling fruit by a freeway off-ramp, in one case referring to the money as "rent." (*Avila*, *supra*, 57 Cal.App.5th at pp. 1139, 1144.) When each man refused, Avila squashed or stomped on some bags of oranges. (*Id.* at p. 1139.) A jury convicted him of attempted second degree robbery against one of the men and attempted extortion against the other. (*Ibid.*)

Avila admitted to three prior strike convictions: second degree robbery and assault with a knife committed 28 years before his robbery and extortion offenses, when he was 18 years old, and second degree robbery 26 years before, when he was 20 years old. (*Id.* at pp. 1140, 1148.) The trial court denied Avila's *Romero* motion to strike any of his strikes and sentenced Avila to 25 years to life, plus 14 years. (*Id.* at p. 1139.)

Reversing, the appellate panel began by sustaining Avila's argument that, in refusing to strike one or more of his three strike priors, the sentencing court abused its discretion. (*Avila*, *supra*, 57 Cal.App.5th at pp. 1140–1145.) About the prior strike offenses, the panel noted they were "from 1990 and 1992, so they were 28 and 26 years old, respectively, when he committed the current offenses in 2018," which was "a significant lapse of time to say the least." (*Id.* at p. 1141.) Finding an abuse of discretion under *Romero*, the panel faulted the trial court for failing to consider either "the nature and circumstances" of these remote crimes or the fact of Avila's young age (he was in his early 20s) when he committed them. (*Avila*, at pp. 1141, 1142.) The panel also faulted the trial court for characterizing the crimes as "violent," despite the fact that, although attempted robbery was a "serious" felony under the Three Strikes sentencing scheme, none of them were classified as "violent" for that purpose. (*Id.* at pp. 1142–1143.)

Having found a *Romero* violation, the *Avila* court turned to the issue of cruel or unusual punishment under the California Constitution. (*Avila*, *supra*, 57 Cal.App.5th at p. 1145.) Applying *Lynch*, the panel found that Avila's sentence was constitutionally excessive under the first *Lynch* "technique." (*Id.* at pp. 1145–1149.) Regarding the nature of Avila's commitment offenses (part of a first technique analysis), the court found they were not violent and extortion also was not serious, and they did not

involve threats; Avila merely "crushed" perhaps $20 dollars of the men's oranges and left. (*Id*. at p. 1146.) The victims were physically uninjured, if emotionally traumatized; the harm done to them was arguably less than that caused by the crime of indecent exposure, described in *Lynch* as a crime that was " 'minimal at most' and not a 'sufficiently grave danger to society to warrant the heavy punishment of a life-maximum sentence.' " (*Id*. at p. 1147, quoting *Lynch*, *supra*, 8 Cal.3d at p. 431.) Further, "[t]he unsophisticated nature" of Avila's commitment offenses was not comparable to that of armed robberies, which were "most heinous in nature." (*Avila*, at p. 1146.) The court concluded that, if the commitment offenses were "not at the bottom of the well" like the registration offense in *Carmony II*, they were "certainly in that neighborhood." (*Id*. at p. 1148.)

Given the minor nature of the offenses, the court reasoned that Avila's Three Strikes sentence was "primarily attributable to his recidivist nature" and turned to that issue. (*Avila*, *supra*, 57 Cal.App.5th at p. 1147.) The court determined that "discernable gradations of culpability among prior offenses . . . must be accounted for when imposing sentence." (*Id*. at p. 1148, citing *In re Grant* (1976) 18 Cal.3d 1, 10, 13 (plur. opn.) [10-year parole prohibition for recidivist narcotics offenders was cruel or unusual punishment under the state Constitution given the subject statute's absolute prohibition regardless of the gravity of the offense, the nature of the offender, or mitigating circumstances, and its disproportionality when compared to punishments in California and elsewhere].) It noted that Avila's prior strikes had occurred almost 30 years before his commitment offenses, that he married the victim of a subsequent conviction for unlawful sexual intercourse with a minor, and that his last felony

conviction, in 2008 for drug possession, had become a misdemeanor. (*Avila*, at p. 1148.)

As part of its first technique analysis, the court considered Avila's nature. It emphasized that he had struggled with drug addiction since childhood. (*Avila*, *supra*, 57 Cal.App.5th at pp. 1144, 1148.) Evidence submitted with Avila's *Romero* motion to the trial court indicated he started using drugs at age 12; his father, a substance abuser, gave him PCP and cocaine as a child; he received treatment for his addiction as a juvenile; he struggled with drug addiction after his 2004 release from prison but tried to become sober and worked as a trailer driver; after a 2016 car accident left him with neck and back pain, he began drinking and using drugs again; and he was in a second car accident that resulted in his losing his driver's license and job. (*Avila*, at p. 1144.) Thus, while Avila "clearly struggled with drug addiction since he was a child," it could not be said that he "never addressed it." (*Id*. at p. 1144.) The court thought this addiction history provided "a backdrop" to his criminal history. (*Id*. at p. 1148.) It acknowledged that "a defendant's drug problem may have little mitigating value where the problem is long-standing," but did not think that was "always necessarily the case." (*Id*. at p. 1143.)

The court concluded that the nature of Avila's commitment offenses and his nature as an individual showed his Three Strikes sentence lacked proportionality to his offenses. (*Avila*, *supra*, 57 Cal.App.5th at p. 1149.) And given that his sentence was based on his recidivism, the court considered it relevant that California's Three Strikes law "has been among the ' "most extreme" ' " of such laws in various states. (*Ibid*.) Finally, as part of a *Lynch* second technique analysis, the court considered the changing state of California's criminal jurisprudence as part of its

assessment of our evolving standards of decency. It noted that recently the Three Strikes law had been amended by referendum to apply only to a person whose Third Strike offense was serious or violent; that courts had been given the discretion to strike certain enhancements; that restrictions had been placed on the application of certain enhancements; that the treatment of juvenile offenders was evolving; and that culpability had been redefined for various crimes. (*Avila*, *supra*, 57 Cal.App.5th at pp. 1150–1151.) It concluded, "The sum of these changes show that legislators and courts are reconsidering the length of sentences in different contexts to decrease their severity," which changes "suggest disproportionality" in Avila's sentence, particularly since it "exceeds the punishment in California for second degree murder, attempted premeditated murder, manslaughter, forcible rape, and child molestation." (*Id.* at p. 1151.)

As noted above, the *Avila* court concluded, "Crushing oranges, even for the purpose of trying to steal or to extort money, is not constitutionally worthy of the sentence imposed where, as here, the defendant's criminal history on close examination cannot bear its share of such a sentence. [¶] Life in prison for destroying fruit, even when done by someone with a criminal record in the course of an attempted robbery, robs recidivist sentencing of its moral foundation and renders the solemn exercise of judicial authority devoid of meaning." (*Avila*, *supra*, 57 Cal.App.5th at p. 1151.) "There comes a time," the court emphatically summed things up, "when the people who populate the justice system must take a fresh look at old habits and the profound consequences they have in undermining our institutional credibility and public confidence." (*Id.* at pp. 1151–1152.) "In Avila's case," the court said, "the time is now." (*Id.* at p. 1152.)

ii. Analysis

Taking the same approach the defendant in *Avila* took in his case—where the primary focus was on the *Lynch* first technique—Green argues his Three Strikes sentence is cruel or unusual punishment under part one of *Lynch* tripartite analysis.[9]

In conducting this analysis, "We consider not only the offense in the abstract but also the facts of the crime in question—'i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts.' [Citations.] We also evaluate whether the punishment fits *the criminal*. [Citations, italics in original]. We examine the defendant 'in the concrete rather than the abstract . . . focus[ing] on the particular person before the court, [to ask] whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.' " (*People v. Baker* (2018) 20 Cal.App.5th 711, 724; *People v. Reyes* (2016) 246 Cal.App.4th 62, 87.)

Green claims the nature of his robbery offense is "materially indistinguishable" from the attempted extortion and attempted robbery

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[9] This focus is consistent with the Supreme Court's order to show cause, which directed the Secretary to address whether Green's sentence is disproportionate to his culpability and whether its constitutionality under the cruel or unusual punishment clause is governed by *Avila*. For completeness of analysis under *Lynch*, we gave the Secretary the opportunity, which he took, to file a supplemental brief addressing issues related to the second and third *Lynch* techniques after Green raised them for the first time in his traverse.

offenses that led to Avila's Three Strikes sentence, and that his current offense combined with his prior crimes are "less serious" than Avila's. He further claims that, like Avila's, his offense was "relatively minor," since he did not "verbally or physically threaten" anyone, touch his victim, or use a weapon. He used just enough force to detach his victim's purse from her hand by her own testimony, and his "purse snatching" was not comparable to a heinous crime such as armed robbery. Also, the consequences of his offense were even less severe than those in *Avila* because, unlike Avila's victims, Green's victim did not testify that she was frightened or otherwise traumatized by his actions.

We disagree with the comparison. Whatever Green's characterization of his commitment offense, the Legislature has designated any robbery as both a "serious" and "violent" offense (and designated attempted robbery as a "serious" offense). His contention that we should view his particular robbery as a "minor" crime, on this record, is unpersuasive. Any robbery involves the taking of property from a person by the use of force or fear. (§§ 211, 212.5, subd. (c).) There are dangers inherent in such a crime. Here, for example, while Green did not touch his victim, the force he applied to "detach" her purse from her hand when he sneaked up behind her could have caused her to suffer an injury or physical trauma. And her 82-year-old husband, in his chase of Green, also could have been similarly injured—whether because he caught Green, resulting in a physical struggle, or because he fell in running after him, or because of the trauma of the situation.

Further, the victim's advanced years made her particularly vulnerable to injury, which perhaps explains why Green was subject to a special allegation for committing a crime against an elderly person (see

§ 1203.09, subds. (a), (b)(2) [defendant who commits robbery against a person over 60 years of age not eligible for probation or suspension of sentence]). The obvious possibility that he could have caused significant injury to the victim or her husband demonstrates the rationality of the Legislature's decision to designate robbery as a serious and violent crime. This potential for injury was significantly less in Avila's case because he did not take anything of great value or directly from his victims.

Also, unlike Avila's crimes, Green's robbery showed a criminal sophistication that adds to the seriousness of his offense. Green's offense does not appear to have been an impulsive crime. Rather, the circumstances suggest he and an accomplice drove around the area looking for a vulnerable victim, spotted an elderly woman, and Green, with his accomplice waiting in the car, took advantage of her advanced years by taking her purse away from her and running back to the car, which then sped away.

We also disagree with Green that the consequences of the robbery he committed were less than was the case with the offenses committed by Avila. Whatever the psychological impact of his actions on his victim (who did not deny being emotionally affected by his robbery, although that may have been because she was not asked about it), Green did not merely damage a modest amount of fruit and leave; rather, he robbed an elderly woman of a purse that contained not only about $100 in cash, but also about eight credit cards and identification cards for both her and her husband. If Green had not been caught as a result of the victim's daughter's quick pursuit of the getaway car, it is reasonable to conclude the victim and her husband would have worried that he would use the credit cards and identification to wreak havoc on their finances and lives.

These potential consequences were more significant than those in *Avila*, particularly in an age of widespread identity theft.

As for Green's previous crimes, while they do not include the overtly violent assaults committed by Avila, they nonetheless show Green had a more persistent and recent recidivist nature than Avila did. Avila's Three Strikes offenses had been committed decades before he committed his commitment offenses, and since then he had been law-abiding. The court here found that Green, in the nine years prior to the robbery, had been convicted of nine violations of state law: grand theft and possession of a designated controlled substance (1989); grand theft (1990); attempted robbery (1991); driving in willful or wanton disregard for the safety of persons or property while fleeing from police, theft, the unlawful driving or taking of a vehicle, attempted robbery, and escaping from a place of confinement (1993). He served two prison terms, and only avoided the court's enforcement of a third for his 1993 offenses—a 13-year, 4-month term in state prison—by agreeing to successfully complete a substance abuse program. Obviously, his participation in that program, whether to a successful completion or not (again, the record is unclear) did not reduce his recidivist nature.

Moreover, at least three of Green's prior offenses involved direct threats to public safety—his two attempted robberies, which each constituted a strike offense, and his driving a vehicle with disregard to public safety in order to flee from police. A core purpose of the Three Strikes law is to protect the public from such recidivist criminality. (See, e.g., *People v. Acosta* (2002) 29 Cal.4th 105, 127 [stating as the purpose of the Three Strikes law "to increase punishment based on recidivism"].) This purpose was fulfilled in Green's case.

As for other aspects of Green's nature, he asserts that, like defendant Avila, his crime was financially motivated and driven by his drug use, as he told the court at his 1998 sentencing hearing. He further contends that, also like Avila, he long struggled with drug addiction and the effects of a difficult upbringing. Without citation to the record or any declaration, his appellate counsel recounts in briefing that Green grew up in a violent, neglectful environment in which his father was stabbed to death; his mother suffered from mental health disorders and died when he was 11 years old; his custodial grandmother repeatedly engaged in alcohol, drug, and gambling binges, and died when he was in high school; he and his brother thereafter fended for themselves and suffered with drug addiction; he then joined the Navy, sober, but suffered a spinal injury while serving, was given opioids for pain, triggering addiction, and was discharged for substance abuse; and he still suffers from chronic pain due to this spinal injury, uses a cane, and is classified as permanently disabled in prison. In his petition, Green also contends (in support of his second *Lynch* technique analysis) that he committed the robbery "while high on drugs."

This part of Green's argument is of no help to him because he does not identify any evidence, other than his own self-serving statements at the 1998 sentencing hearing, to support these contentions.[10] Rather, he relies entirely on his counsel's recounting of his purported background in briefing, plus an unsubstantiated allegation in his petition, unadorned by

[10] Green's trial counsel's failure to raise any aspects of Green's social history regarding Green's 1998 sentencing was the basis for Green's ineffective assistance of counsel claim in his habeas petition to the Supreme Court. The Supreme Court has not instructed the parties to address this issue in its order to show cause returnable to this court.

citation to the record or any declaration. " '[I]t is axiomatic that statements made in briefs are not evidence' [citation] and that reviewing courts 'do not consider' unsupported 'factual assertions' in appellate briefs 'that find no basis in the record.' " (*Turrieta v. Lyft, Inc.* (2024) 16 Cal.5th 664, 697; *In re Zeth* (2003) 31 Cal.4th 396, 413, fn. 11 [noting about facts asserted in a brief, "It is axiomatic that the unsworn statements of counsel are not evidence."].) And at this stage of these writ proceedings, we cannot simply accept a general, unsubstantiated allegation that drug intoxication mitigates Green's crime.

In short, the serious nature of Green's commitment offense of robbery and his frequent, recent recidivism, which includes multiple crimes that threatened public safety, his failure to reform despite serving multiple prison terms and having the opportunity to address any substance addiction that may have played a role in his commission of the robbery, merit our rejection of Green's argument that he has been subjected to cruel or unusual punishment based on a first *Lynch* technique analysis. Indeed, his circumstances are far more like those considered by our Supreme Court in *Coley* in its rejection of a cruel and unusual punishment challenge under the Eighth Amendment. The *Coley* court emphasized Coley's intentional violation of an important legal requirement and his significant recidivist history, as opposed to the mere technical violation of a "backup" requirement by a defendant otherwise compliant with his registration requirements discussed in *Carmony II*, a case upon which the *Avila* court heavily relied. (*Avila*, *supra*, 57 Cal.App.5th at pp. 1147–1148.)

Accordingly, we conclude that Green's first technique argument under *Lynch* is without merit.

b. *Comparison to Sentences for Other Offenses of Comparable Seriousness in California*

Green next asserts two reasons why his Three Strikes sentence is cruel or unusual punishment under a second *Lynch* technique analysis, in which we "compare the challenged penalty with the punishments prescribed in the same jurisdiction for different offenses which, by the same test, must be deemed more serious" (*Lynch*, *supra*, 8 Cal.3d at p. 426, italics omitted): first, his punishment is grossly disproportionate to what he calls his "purse snatching" offense, as indicated by the punishments meted out for more serious crimes and, second, the changing state of California's jurisprudence has increasingly reduced punishments for recidivist crimes, demonstrating how cruel or unusual his punishment is under our evolving standards of decency.

Green's argument that his sentence is grossly disproportionate as indicated by less severe sentences imposed for more serious offenses such as murder, rape, child molestation is unpersuasive. He not only fails to take into account the legislative determination that his commitment offense, the robbery of an elderly woman, is of a serious and violent nature, but also does not account for the increase of his sentence because of his extensive recidivism, the combatting of which is the core purpose of the Three Strikes law. (See, e.g., *People v. Acosta*, *supra*, 29 Cal.4th at p. 127.)

To the extent Green fails to weigh his prior strikes in the *Lynch* second technique analysis, we reject his argument as " 'inapposite to three strikes sentencing," because it is a defendant's " ' "recidivism in combination with current crimes that places him under the three strikes law. Because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare

[defendant's] punishment for his 'offense,' which includes his recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons." ' " (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433, quoting *People v. Cline* (1998) 60 Cal.App.4th 1327, 1338; accord, *People v. Sullivan* (2007) 151 Cal.App.4th 524, 571; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512; *People v. Gray* (1998) 66 Cal.App.4th 973, 993; *People v. Ayon*, *supra*, 46 Cal.App.4th at p. 400.)

Green further contends, relying on *Carmony II*, *supra*, 127 Cal.App.4th at p. 1082, that Three Strikes sentences should be viewed as "inherently 'suspect' because of the 'one-size-fits-all' approach of the recidivist sentencing scheme." We reject this contention for two reasons. First, as we have discussed, any such suspicion did not prevent our Supreme Court from concluding in *Coley*, *supra*, 55 Cal.4th 524, issued after *Carmony II* was decided, that a Three Strikes sentence for a crime of arguably less serious than Green's—a sex offender's failure to register as required upon moving out of town—was not cruel and unusual punishment under our federal Constitution.

Second, our present jurisprudence allows a defendant such as Green to challenge the recidivist sentencing scheme, to the extent it remains "one-size-fits-all,"[11] by filing a *Romero* motion to strike any or all of his prior strikes and thereby reduce his sentence. "In ruling on a *Romero*

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[11] When *Carmony II* was issued, any felony could trigger a Three Strikes sentence. Subsequently, Proposition 36, the Three Strikes Reform Act of 2012, was passed, limiting the circumstances in which a life sentence could be imposed for a third strike when the conviction is not a violent or serious felony. (*People v. Valencia* (2017) 3 Cal.5th 347, 353–354; § 667, subd. (e)(2)(C); § 1170.12, subd. (c)(2)(C).)

motion, the court must consider whether 'the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' " (*People v. Salazar* (2023) 15 Cal.5th 416, 428.) Green's argument is largely that his commitment and prior strike offenses are not the type of serious crimes that should be the target of the Three Strikes law. This essentially amounts to a *Romero* motion in the form of a habeas petition. But he already had *Romero* relief available and did not take full advantage of it.[12] The availability of *Romero* relief to defendants such as himself further demonstrates the underwhelming nature of his "one-size-fits-all" argument.

Green compares his sentence to that imposed in other cases. These comparisons are also unpersuasive. He cites *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, in which the Ninth Circuit affirmed the granting of habeas relief to a petitioner who received a Three Strikes sentence for felony theft. The court concluded the sentence was cruel and unusual punishment under the Eighth Amendment, in part because the sentence was more severe than that imposed for second-degree murder, voluntary manslaughter, rape, and sexual assault on a minor. (*Id.* at p. 770–772.) However, Green ignores that the court's decision was primarily based on the fact that the prisoner's strike offenses, while charged as second degree robberies, were nonviolent shoplifting offenses, the plea agreement the

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[12] At sentencing, Green's trial counsel made an oral, bare-bones *Romero* motion that was not granted by the court. As we have already discussed, in his habeas petition to our Supreme Court, Green argued he received ineffective assistance of counsel related to his trial counsel's motion, but the court has not directed the parties or this court to further address the issue.

prosecution offered for those prior strikes was for a jail sentence normally imposed for misdemeanor petty theft, and the prisoner had a "paucity" of a criminal history. (*Id*. at pp. 768–770.) These are materially different circumstances than those before us. Green is a recidivist robber and thief whose commitment offense, a robbery, has been classified by our Legislature as a serious and violent crime; he committed the robbery against a particularly vulnerable victim, an elderly person; and within a decade of committing this offense, he had committed other offenses that endangered public safety.

Green adds two other citations in support of his *Lynch* second technique analysis. He points to *People v. William*s (2004) 34 Cal.4th 397, contending the defendant there received the "exact same sentence" as his, thirty five years to life, for the more serious crime of rape. But the defendant in *Williams* actually received three concurrent sentences of 25 years to life for three sex crimes and an additional 10 years for two prior serious felony convictions, all to run consecutively to another 35-year-to-life term imposed in a separate case, the sentencing for which occurred on the same day. (*Williams, supra*, 34 Cal.4th at pp. 400–401.) The case is inapposite. In addition, Green cites *In re Shaputis* (2008) 44 Cal.4th 1241, in which a defendant with a lengthy criminal history was sentenced to 15 years to life for the murder of his wife and an additional two years for firearm use, and *People v. Escobar* (1992) 3 Cal.4th 740, in which a defendant was sentenced to a 14-year term for rape, kidnapping, and assault with a deadly weapon, and related enhancements. These opinions are inapposite because they discuss sentences imposed before the Three Strikes law was enacted in 1994 (see *In re Shaputis*, at p. 1245; *People v. Escobar*, at p. 745; *People v. Henderson* (2022) 14 Cal.5th 34, 43).

In further support of his second technique analysis, Green argues his sentence is grossly disproportionate to his offense based on a chart prepared by his counsel and included in the traverse. This chart summarizes state inmate offenses over the past two decades from voluminous data Green's counsel received from the California Department of Corrections and Rehabilitation (CDCR), which data is an exhibit to counsel's declaration submitted with Green's traverse. Green contends this information shows he would be extremely unlikely to receive a Three Strikes sentence today for his commitment offense. We conclude this information is not sufficiently authenticated or explained to consider.

In her declaration, Green's counsel states, "As demonstrated by the attached letter, on July 10, 2019, my office submitted Public Records Act Request number 14722 to the California Department of Corrections and Rehabilitation (CDCR) seeking data on the entire California prison population housed by CDCR. [¶] Since our initial request, we have continued to receive updated responsive data. [¶] Our most recent response was received in February of 2023. The data attached . . . is a true and correct copy of the data we received pursuant to our most recent request."

Attached in one exhibit are two separate documents. The first is a July 10, 2019 letter from CDCR's Division of Correctional Policy Research and Internal Oversight, Office of Research (July 10, 2019 letter). It states, "This letter is in response to your request for a state prison population dataset on a semi-annual basis," and indicates the office is providing information in 23 data fields,[13] not all of which can be readily understood,

[13] Age; Gender; Ethnicity; Offense_Group; Offense_Category; Offense_Date; Sentence; Sentence_Type; Commitment_Type; Number-of-

and that certain information has been filtered out. The second is a 3,191-page document containing data, apparently for CDCR inmates one by one, separated along the lines of the fields identified in the July 10, 2019 letter (in 22 rather than 23 fields). This second document includes data for many inmates whose commitment offense occurred after 2019, making clear it was not attached to the July 10, 2019 letter. Was this data of the same type as that transmitted in the July 10, 2019 letter or were different filters applied? Who specifically sent the data? Counsel's declaration statement that "we have continued to receive updated responsive data" after the initial 2019 request is too vague for us to determine the answers to these questions. Given the 2019 cover letter, it is reasonable to infer that a cover letter or something similar (such as a business record) accompanied this data and could provide answers to these questions, but it has not been included. Without it, the data is part of an incomplete document that has not been properly authenticated, and we cannot determine its trustworthiness. (Evid. Code, § 1271).

Even if this data were properly authenticated, we would find it too opaque to consider. Green does not explain how his counsel determined from the voluminous exhibit (with its fields of data that are not all readily understandable) the information shown in the summary chart contained in the traverse. Without a sufficient explanation, we cannot determine the accuracy of the summary contained in the chart and counsel's related

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Commitments; Risk_Level; Commitment_County; Serious_Violent; Sex_Registrant; Bed_Code; DDP_Code; Housing_Security_Level; DPP_Code; Mental_Health_Code; Projected_Release_Date; Commitment; PRY, and; PRM.

assertions contained in the traverse. Thus, we will not consider this data further.

Finally, Green argues, as did the *Avila* defendant, that California's evolving criminal jurisprudence further demonstrates the gross disproportionality of his sentence. (See *Avila*, *supra*, 57 Cal.App.5th at pp. 1150–1151 [suggesting Avila's sentence was disproportionate based on changes in the Three Strikes law since 1994, discretion recently given to trial courts to strike certain sentence enhancements, recently enacted limitations on sentencing for certain prison priors and prior convictions, the evolving treatment of juvenile offenders, and the recent redefining of culpability for various crimes, such as felony murder].) He also notes post-*Avila* legislative reforms, such as the passage of Senate Bill No. 567 (see Stats. 2021, ch. 731, §§ 1.3, 2 [amending §§ 1170 and 1170.1]), which limited courts' ability to impose prison terms exceeding middle terms (§ 1170, subd. (b); 1170.1, subd. (d)), and Senate Bill No. 81 (see Stats. 2021, ch. 721, § 1 [amending § 1385]), which requires a trial court, in determining whether to dismiss an enhancement, to afford great weight to a defendant's evidence of the existence of certain mitigating circumstances and to the dismissal of an enhancement that would result in a sentence of over 20 years, unless doing so would endanger public safety (formerly § 1385, subd. (c)(3), revised, Stats. 2022, ch. 58, § 15, now subd. (c)(2)).

Of course, we recognize that in recent years our Legislature has instituted a wide range of important and meaningful criminal sentencing reforms. If we were dealing with a record presenting a closer article I, section 17 issue than Green's case does, these reforms might be pertinent—as they clearly were in *Avila*—since, under all of the *Lynch* techniques taken together, we must ultimately make a normative judgment about the

nature of the offense, the traits of the defendant, and the risk to society that the defendant poses; and in making that judgment, the actions of the Legislature can certainly provide some degree of guidance, at least insofar as some legislative reform or reforms shed some light on the gravity the Legislature appears to attach for sentencing purposes to the specific class of offenses we are dealing with in an article I, section 17 challenge.

But on this record, we do not think the legislative trend toward reform Green relies upon supplies a basis for concluding Green's sentence was constitutionally cruel or unusual punishment. (See *Palmer*, *supra*, 10 Cal.5th at p. 972 ["courts should give ' "the broadest discretion possible" ' [citation] to the legislative judgment respecting appropriate punishment"]. Here, we bear in mind that courts may grant *Romero* motions upon concluding that defendants' particular circumstances take them outside the spirit of the Three Strikes law, and that, in the parole process, if defendant sentenced to life for what Green claims is a "minor" robbery—to the extent there is such a thing—he may argue for parole suitability on the ground that he no longer presents a current public safety risk, and, absent indications to the contrary in his post-incarceration record, his commitment offense may not be used by the Parole Board to deny suitability on the ground he "*continues* to pose an unreasonable risk to public safety." (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1221, original italics.)

Green has not shown that he has suffered cruel or unusual punishment under a second *Lynch* technique analysis.

c. *Comparison to Sentences Imposed for Comparable Crimes in Other Jurisdictions*

Last, Green argues his Three Strikes sentence is cruel or unusual punishment under a third *Lynch* technique analysis, in which we "compare the challenged penalty with the punishments prescribed for the same offense in other states." (*Avila*, *supra*, 57 Cal.App.5th at p. 1145.) According to Green, his sentence is an outlier among the fifty states and the District of Columbia based on a table summarizing the sentencing laws in those jurisdictions (as well as under federal law) (table) for what he contends is the same offense and prior convictions as his own. Green contends that only one other state, Mississippi, would impose a sentence similar to his, that the vast majority of state statutes prohibit life sentences for Green's crime and criminal history, and that courts in many states have overturned sentences for habitual offenders as unconstitutionally disproportionate.

Green's arguments are unpersuasive because he bases them on the dubious contention, buried for the most part deep within his table, that in many states (such as Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, Utah, Vermont, and Virginia), his commitment offense would be classified not as robbery but merely as larceny, theft, or the like based on his claim that he used insufficient force or fear in snatching his victim's purse for his offense to constitute a robbery in those states. Based on this contention, he asserts a defendant convicted of committing the same crime as his in these states would be subject to far lower sentences than his. This, we think, amounts to an inappropriate

retrying of his case, one that cannot be maintained in light of the jury's finding that he did in fact commit a robbery and not a mere theft.

Specifically, Green ignores that his jury was instructed not only on robbery, but also on the lesser offenses of theft by larceny, grand and petty theft when the property is taken from the person, and theft. The jury was specifically told to find Green guilty of robbery only if the prosecution proved beyond a reasonable doubt that, among other things, he took property from a person and that this taking "was accomplished by either force or fear," an element that was not required to be proven for the jury to find Green guilty of the other, lesser offenses. The jury, faced with these choices, found Green guilty of robbery. And given that there was no evidence presented that the victim experienced fear and that she testified Green used force sufficient to detach the purse from her grip, the jury must have concluded that Green had used force sufficient to constitute commission of a robbery.

Green gives us no reason to question this jury finding. We reject his contention that he would not be convicted of robbery in many other states because he did not use sufficient force or fear in committing his offense. We will not retry his case in assessing his punishment. We will compare his sentence to what would be imposed in other jurisdictions on a defendant with an equivalent criminal history committing the same crime—robbery.

Once the law of these other states regarding robbery (in particular an unarmed robbery without injury, as was Green's offense)[14] is

[14] As the Secretary points out, some other states, unlike California, distinguish between armed and unarmed robbery.

considered, it becomes apparent that Green's sentence is not the outlier that he describes. As Green concedes, it is not always clear what punishment would be meted out in other states based on their particular laws. Nonetheless, in our independent research, we have determined that in at least 12 states, an unarmed robber such as Green, with a criminal record like his, would be subject to a sentence up to an indeterminate life sentence. In two of those states, Louisiana and Mississippi, the sentence would be life without parole. (La. Rev. Stat. Ann., §§ 14:2(B)(23), (24), 14:65, 14:65.1, 15:529.1(A)(3)(b); Miss. Code Ann. §§ 97-3-73, 97-3-75, 99-19-83, 97-3-2(1)(j).) In West Virginia, the sentence would be life in prison (W. Va. Code §§ 61-2-12(b), 61-11-18(a)(19), (d).) In Rhode Island, the sentence would be at least 35 years and up to life in prison for a robbery committed against an elderly person[15] (R.I. Gen. Laws §§ 11-39-1(a), (c)(2), 12-19-21). In Missouri, the sentence would be no less than 10 to 30 years in prison, or life imprisonment (Mo. Rev. Stat. §§ 569.030, 558.016, subds. 1(3), 2, 7, 558.011(1)(1).) In seven states, the sentence, while it could be for a term of 10 years or less, could extend to up to life (at least five years to life in Delaware (Del. Code. Ann. tit. 11, §§ 831(a), (b), 4201(c)(1), (2), 4205(b)(5), 4214(d)) and Idaho (Idaho Code Ann. §§ 18-6503, 19-2514); any term of years or life for robbery of an elderly person in Massachusetts (Mass. Gen. Laws ch. 265, § 19 (a)); up to life in Michigan (Mich. Comp. Laws §§ 750.88, 769.12(1)(a), (b), (6)(a)(iii), (6)(c)); 10 years to life in Oklahoma (Okla. Stat. tit. 21, §§ 791, 797, 799, 51.1(A)(1); tit. 57,

[15] We note the law regarding the elderly in this and a few other instances surfaced in our research, but we did not systematically research the laws of the other states for which states had additional sentence enhancements for crimes committed against the elderly.

§ 571(2)(r), (t)); five years to life in Utah (Utah Code Ann. §§ 76-6-301(2), (3), 76-3-203.5(1)(a), (b), (c)(i)(JJ)), (2)(b), 76-3-203(1)); and up to life in Vermont (Vt. Stat. Ann. tit. 13, §§ 608(a), 11.)

Further, in at least eight other states and the District of Columbia, a defendant with a criminal record such as Green who commits an unarmed robbery would be subject to a term of years that could result in a very lengthy sentence equivalent or greater than Green's minimum sentence of 25 years under our Three Strikes law. Such an unarmed robber could receive a sentence of five to 100 years in Montana (Mont. Code. Ann., § 45-5-401, 46-1-202(18), 46-18-502(1), 46-23-502(14)(xi)); three to 50 years in Nebraska (Neb. Rev. Stat. §§ 28-105 (Class II felony), 28-324, 29-2221(1)(c)); five to 30 years in Arkansas (Ark. Code Ann. §§ 5-12-102, 5-4-501(a)(1)(A)(ii), (a)(2)(C)); not less than 25 years in Maryland (Md. Code Ann., Crim. Law §§ 3-401(e), 3-402, 14-101(a)(9), (a)(19), (c)); and New Hampshire (N.H. Rev. Stat. Ann, §§ 636:1(I), 651:6(II)(a), III(a)); 15 to 25 years in New York (N.Y. Pen. Law §§ 160.05, 70.10(1), (2), 70.00(2)(C), (3)(a)(i); up to 21 years in Wisconsin (Wis. Stat. §§ 943.32(1), 939.50(3), 939.62(1)(c), (2); and 20 years in Georgia (Ga. Code Ann. §§ 16-8-40(a), (c), 17-10-7(c)). In the District of Columbia, the sentence could be up to 30 years. (D.C. Code §§ 22-1804a(1), 22-2801, 22-2802.)

Green also contends that state courts in a number of states have invalidated long recidivist sentences for crimes like or more serious than his under circumstances similar to his own, further demonstrating that his Three Strikes sentence is unconstitutionally disproportionate. Of course, these cases have no precedential authority. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 490.) Nor are they particularly persuasive in light of *Coley*, *supra*, 55 Cal.4th 524, in which, as we have discussed, our

Supreme Court upheld a Three Strikes sentence for a crime of arguably less seriousness than Green's—a sex offender's failure to register as required upon moving out of town—as not cruel and unusual punishment under our federal Constitution.

Further, all of the habitual offender cases Green cites involved commitment offenses that were not serious and violent offenses like robbery, involved prior offenses that did not pose a threat to public safety equivalent to attempted robbery, or involved mitigating circumstances not present in Green's case. (See *Wanstreet v. Bordenkircher* (1981) 166 W.Va. 523 [276 S.E.2d 205, 207, 213] [commitment offense was check forgery, and a prior felony offense was for forgery of an $18.62 check committed at 18 years old]; *State v. Lane* (2019) 241 W.Va. 532 [826 S.E.2d 657, 660] [commitment offense was delivery of a controlled substance (two counts), and a prior felony was conspiracy to transfer stolen property]; *State v. Miller* (1990) 184 W.Va. 462 [400 S.E.2d 897, 898] [per curiam] [prior felonies were breaking and entering at age 16, forgery and uttering, and false pretenses]; *State v. Mosby* (La. 2015) 180 So.3d 1274 [per curiam] [commitment offense was by a 72-year-old, non-violent offender who suffered from severe infirmities]; *State v. Bruce* (La.App. 2012) 102 So.3d 1029, 1036 [prior offenses were "non-violent, theft-related crimes" spread out over time]; *State v. Harris* (La.App. 1988) 535 So.2d 1131, 1132 [defendant only 20 years old when he committed the purse snatching commitment offense, and prior offenses were burglary and felony theft]; *State v. Wilson* (La.App. 2003) 859 So.2d 957, 959 [three prior offenses were illegal possession of stolen things and issuing worthless checks (two priors)]; *Crosby v. State* (Del. 2003) 824 A.2d 894, 896–897 [commitment offense was for second degree forgery, and prior offenses included second

and third degree burglary, second degree forgery, possession of a deadly weapon by a person prohibited, and possession with the intent to deliver]; *People v. Curry* (1985) 142 Mich.App. 724 [371 N.W.2d 854, 860] [commitment offense for "stealing $40 from an open car window"]; *Clark v. State* (Ind. 1990) 561 N.E.2d 759, 766 [main commitment offense was misdemeanor operating a motor vehicle while intoxicated and prior felony offenses were non-violent]; *People v. Gaskins* (Colo.App. 1996) 923 P.2d 292, 293 [commitment offenses were felony attempted theft and misdemeanor third degree assault]; *State v. Bruegger* (Iowa 2009) 773 N.W.2d 862, 866, 886 [court remanded for the defendant to present evidence as to the constitutionality of his sex offense, which he committed at age 21, and which was substantially lengthened by sexual misconduct he committed as a juvenile].)[16] In other words, the circumstances upon which the holdings in those cases rest are easily distinguished from those before us.

Collectively, our research indicates that Green's 25-years-to-life Three Strikes sentence (and his total sentence of 35 years to life[17]), while on the upper end of sentences that other jurisdictions impose on defendants found guilty of unarmed robbery with criminal histories equivalent to Green's, is not an outlier. At least 20 states and the District

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[16] Green also cites *State v. Stanislaw* (2013) 2013 ME 43 [65 A.3d 1242], but in that case the defendant was not sentenced under a habitual offender statute (*id.* at pp. 1246–1247).

[17] Green has not provided information regarding, and we did not in our research attempt to determine, whether in other jurisdictions an unarmed robber with Green's prior convictions would be subject to sentence enhancements such as Green's two additional five-year sentences for his prior serious felony convictions.

of Columbia mete out similarly severe sentences, in several cases as severe or more so than Green's. Thus, it cannot be said that Green's sentence is so grossly disproportionate to what is imposed in other states as to constitute cruel or unusual punishment.

III. DISPOSITION

The petition is denied.

STREETER, J.

WE CONCUR:

BROWN, P. J.
SIMONDS, J.*

* Judge of the Superior Court of California, County of Sonoma, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

STREETER, J., concurring:

Because, as I see it, this is a close case in which we have been asked to exercise one of the most profound powers we have—to declare that a legislatively authorized criminal sentence violates the California Constitution—I write briefly to emphasize three points.

First, while plain vanilla citations to our de novo standard of review in deciding article I, section 17 claims may be found in many cases, *In re Palmer* (2021) 10 Cal.5th 959 (*Palmer*), holds that "deference [to the Legislature] is an important element in disproportionality analysis. Regardless of whether an inmate challenges a sentence when first imposed" or later, "[s]uch an inquiry grants the Legislature considerable latitude in matching punishments to offenses." (*Id*. at p. 972.) For me, that is the dispositive consideration here. Although we have discussed and distinguished *People v. Avila* (2020) 57 Cal.App.5th 1134 (*Avila*) at length, this is not routine case-by-case adjudication. When dealing with article I, section 17 considerations, *Palmer* teaches that a tie or anything close to it goes to the Legislature.

Second, Green claims his Third Strike crime was in fact nonviolent despite its legislative classification as a violent offense, but given his criminal history it is unclear to me that that is a constitutionally meaningful distinction, even accepting the benign characterization of the crime facts he offers us. Perhaps there is a bright line distinction to be drawn between violent and nonviolent Third Strike offenses for purposes of *Lynch* disproportionality analysis (cf. *Coker v. Georgia* (1977) 433 U.S. 584; *Roper v. Simmons* (2005) 543 U.S. 551; *Graham v. Florida* (2010) 560 U.S. 48; *Miller v. Alabama* (2012) 567 U.S. 460), which would give article I, section 17 greater reach than the United States Supreme Court has given

to the Eighth Amendment (see *Ewing v. California* (2003) 538 U.S. 11). I might be inclined to favor such a holding on a clearer record, where the limits of the rule would be readily apparent, but if such a line is to be drawn on this record, I believe the California Supreme Court must draw it.

Under current law, I am unable to say that, for a person with Green's prior convictions, a life sentence with a parole possibility is " ' " 'clearly, positively and unmistakably' " ' " (*Palmer*, *supra*, 10 Cal.5th at p. 972) disproportionate to the public danger he presented at sentencing, drawing inferences, as we must, for the People. The *Avila* panel boldly drew such a line on a record that was more compelling than the one we have here. In addition to the many distinctions we have pointed out between this case and that one, however, it also seems significant that *Avila* was decided before *Palmer* was on the books.

Third, of all the arguments Green makes, the one I find to be the most troubling appears in his May 3, 2024 traverse, filed after the Supreme Court's issuance of the order to show cause, where he alleges as follows: "[I]n 1997, when Mr. Green committed his [Third Strike] crime, the number of robbery cases resulting in Three Strikes sentences was at its peak. [Record Citation.] 150 defendants were sentenced under the Three Strikes law for robberies committed that year. [Record Citation.] Of those defendants, an inordinate sixty-five percent were black men like Mr. Green. [Record Citation.] The number of robbery cases resulting in a life term under the Three Strikes law steadily declined over time and became vanishingly rare. [Record Citation.] Today, only five people are serving a Three Strikes sentence for robberies committed in 2020, three for robberies committed in 2021, and just one for robbery committed in 2022—throughout the entire state. [Record Citation.]"

These allegations describe an evolving landscape in which, nowadays, prosecutors rarely seek Three Strikes sentences for robbery; sentencing judges rarely accept robbery Third Strikes under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497; as a result, life sentences where robbery is the Third Strike are no longer imposed with anywhere near the frequency they once were; and—here is the kicker—those who were subject to such sentences when robbery was well-accepted as a Third Strike are mostly African American men, like Green. All of this suggests to me that Green may have a claim under the Racial Justice Act of 2020. (Pen. Code § 745; see *Young v. Superior Court* (2022) 79 Cal.App.5th 138.) But at the end of the day, while these allegations are very serious, the evidence adduced for them in this case is thin, and, on the record before us, the availability of a potential statutory remedy is yet another factor counseling against invalidation of his sentence on constitutional grounds.