

S287485

Case no. _____

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

In re

RANDY LYNN PAYNE,

on Habeas Corpus

Superior Court of the County of Merced, Case nos. SUF20408 &
SUF20409, The Honorable Mark V. Bacciarini

PETITION FOR WRIT OF HABEAS CORPUS

THREE STRIKES PROJECT
Stanford Law School
Michael S. Romano, Cal. Bar no. 232182
559 Nathan Abbott Way
Stanford, CA 94305
Tel: (650) 736-7757
Fax: (650) 723-8230
mromano@law.stanford.edu

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INTRODUCTION

What is the standard to be applied by the Board of Parole Hearings (“BPH”) in determining whether a person serving an indeterminate life sentence is suitable for parole?

This fundamental legal and constitutional question impacting thousands of people sentenced to life in prison has never been squarely addressed by any appellate court in California, leaving confusing and conflicting opinions below. *Compare In re Hunter*, 205 Cal. App. 4th 1529, 1536 (2012) (parole turns on “risk of future violence”) *with In re Reed*, 171 Cal. App. 4th 1071, 1081 (2009) (rejecting that violence is critical to parole and holding that that parole turns on any potential “antisocial” outcome).

While many issues regarding parole have been litigated over the decades, the core question—who should get out of prison and who should remain—is not squarely answered in any California statute, court decision or regulation.¹ The result is

¹ As discussed below, the statutes and regulations that purport to establish a parole standard (Penal Code section 3041 and section 2422(a) of title 15 of the California Code of Regulations) are internally inconsistent and vague.

arbitrary outcomes, conflicting rulings among lower courts, and a vague standard that violates Due Process according to *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson v. United States*, 576 U.S. 591 (2015).

Petitioner Randy Payne is serving a life sentence under California's Three Strikes law for violating Vehicle Code section 2800.2 (evading arrest), a nonviolent, nonserious felony. His prior "strike" convictions are burglaries and robbery.

Pursuant to Article 6, Section 10 of the California Constitution, this Court has original jurisdiction over this petition, which alleges that Mr. Payne's due process rights were violated by virtue of California's vague standard for determining parole eligibility and that sentence constitutes cruel and unusual punishment.

STATEMENT OF THE CASE

On April 22, 1997, Mr. Payne was convicted and sentenced to fifty years-to-life for violations of Penal Code section 666 (petty theft with priors) and Vehicle Code section 2800.2 (evading arrest).

On May 26, 1998, the fifth district court of appeal affirmed his convictions but ordered the punishment for the felony petty theft stayed pursuant to Penal Code section 654. *People v. Payne*, Case no. F026894 (unpub., May 26, 1998).

Twenty years later, in January 2018, Mr. Payne filed a proper petition for relief under Proposition 47 and Penal Code section 1170.18 and notified the court through his attorney that he wished to represent himself.

On February 11, 2019, Mr. Payne appeared without counsel and after brief argument the superior court reduced the petty theft count to a misdemeanor pursuant to Proposition 47 and Penal Code section 1170.18 but did not change the life sentence for evading. Mr. Payne appealed. *See People v. Payne*, Case no. F079012, 2021 WL 4270623.

On September 21, 2021, the Court of Appeal ruled that Mr. Payne did not make an intelligent waiver of his right to counsel under *Faretta v. California*, 422 U.S. 806 (1975). *Id.* The Attorney General agreed that Mr. Payne's *Faretta* rights were violated and also that the error was prejudicial—meaning Mr. Payne's sentence could have been reduced further with proper

representation. *Payne*, 2021 WL 4270623, at *7. The court of appeal agreed and explained that Mr. Payne was entitled to “full resentencing” on the evading charge, not just the petty theft conviction. *Payne*, 2021 WL 4270623 at *7.

On September 30, 2022, the superior court held an evidentiary hearing for Mr. Payne, which it described as a “Proposition 47, Proposition 36, and *Romero* hearing.” (Clerk’s Transcript (hereafter “CT”) 398.)

On December 8, 2022, the superior court issued a written order again reducing the petty theft conviction to a misdemeanor pursuant to Proposition 47 and Penal Code section 1170.18. (*Id.*) With regard to the felony evading count, the superior court “denied relief” under the retroactive resentencing provision of Proposition 36 (Penal Code section 1170.126) and ruled that it would not dismiss a strike under *People v. Romero*, 13 Cal. 4th 497 (1996). (*Id.*) The court invited Mr. Payne back to court to be resentenced in person. (CT 395.)

On February 24, 2023, the superior court once again sentenced Mr. Payne to a life term for the Vehicle Code violation. (CT 421.)

March 15, 2023, the Board of Parole Hearings determined that Mr. Payne was unsuitable for parole.

On May 10, 2024, the court of appeal affirmed Mr. Payne's life sentence. *People v. Payne*, Case nos. F085863 & F085865, 2024 Cal. App. Unpub. LEXIS 2914 (May 10, 2024).

On July 24, 2024, this Court denied review. (Exhibit (hereafter "Ex.") A.)

STATEMENT OF FACTS

A. Mr. Payne's commitment offense.

On February 10, 1996, Mr. Payne was observed shoplifting motor oil from a gas station in Merced. When police were called, he led a Highway Patrol Officer in a high-speed chase. Mr. Payne drove recklessly, causing other drivers to avoid him. He eventually lost control of the car, which flipped over and struck a power pole. No one was physically injured, and Mr. Payne was arrested at the scene. *People v. Payne*, 181 Cal. Rptr. 3d 474, 478 (Ct. App. 2014), *review granted and opinion superseded*, 344 P.3d 816 (Cal. 2015).

Mr. Payne's prior "strike" offenses are burglaries and a robbery. *Id.*

B. Mr. Payne's in prison conduct.

Mr. Payne has a low prison Classification Score ("CS"), reflecting years of cooperation with prison rules and regulations and participation in rehabilitative programming. Points are added to a CS for negative behavior and points are subtracted for sustained periods of rule compliance. At the time of his most recent parole hearing, Mr. Payne's CS was 30. The lowest and best-possible CS for a person serving a life sentence is 19.

Mr. Payne's file is replete with records of his extraordinary rehabilitative efforts through in-prison programming. He has participated in programs including Victim Awareness, Alternatives to Violence, Breaking Barriers, Anger Management and other self-help groups for at least two decades.

Mr. Payne has dedicated himself to work and the development of vocational skills, and his current supervisor believes he would be a credit to the community if released. Mr. Payne worked as a Prison Industry Authority (PIA) sewing machine operator where he received "exceptional" scores in all areas from supervisors. In 2022, he was working as a porter when his supervisor wrote that, "It's my professional opinion that

Randy Payne is more than ready to be back out in the community and that he would certainly be a credit to the community. He has impressed me more than once.” (Ex. B at 7.)

I. CALIFORNIA’S PAROLE STANDARD CONFLICTS WITH CONTROLLING STATUTES AND VIOLATES DUE PROCESS.

Last year, the non-partisan Legislative Analyst’s Office published a report warning that the laws governing California’s parole process are poorly defined, resulting in “[a] level of discretion [that] could result in biased decisions.” Cal. Leg. Analyst Report, “Promoting Equity in the Parole Hearing Process,” (Jan. 5, 2023). The California Committee on Revision of the Penal Code came to a similar conclusion, reporting that the statutes, regulations, and case law governing California’s parole process are “vague and internally inconsistent.” Cal. Comm. Rev. Pen. Code, Annual Report (2020) at 60. In fact, the highest executive officer of the Board of Parole Hearings has acknowledged that the laws controlling the state’s parole process are “muddled.” *Id.*

This is not surprising, given that the only instruction from this Court on how to apply California’s parole standard is for

BPH “to predict by subjective analysis whether the inmate [would] be able to live in society without committing additional antisocial acts.” *In re Rosenkrantz*, 29 Cal. 4th 616, 655 (2002). Indeed, lower courts sharply split on this “antisocial acts” standard. *See In re Reed*, 171 Cal. App. 4th 1071, 1082 (Cal. Ct. App. 2009) (holding that BPH is to determine if a prospective parolee would be in any way “antisocial” if released, including having ability to maintain regular employment); *In re Hunter*, 205 Cal. App. 4th at 1544 (holding that the ultimate question before BPH is whether there is “risk of future violence” if the prospective parolee is released).

A. U.S. Supreme Court precedent.

In *Swarthout v. Cooke*, 562 U.S. 216, 221 (2011), the United States Supreme Court held that California prisoners have a liberty interest in parole protected by the Due Process Clause. *See also In re Shaputis*, 53 Cal. 4th 192, 211 (2011); *In re Lawrence*, 44 Cal. 4th 1181, 1205 (2008). In *Johnson and Dimaya*, the Court established a two-part test to determine if a statute designed to evaluate a person’s dangerousness is sufficiently defined, in accordance with the Due Process Clause.

The two-part test provides that a statute is unconstitutionally vague if it fails to specify (1) what activity the legislature seeks to avoid *and* (2) what risk level of that activity is tolerable. *Johnson*, 576 U.S. at 597; *Dimaya*, 138 S. Ct. at 1223.

As discussed below, the statutes, regulations, and case law defining California’s parole creates a legal standard that is even more amorphous and unconstitutional than the statutes invalidated by the Court in *Johnson* and *Dimaya*.

B. Penal Code section 3041 governs the parole process.

Penal Code section 3041(b)(1) contains the statutory language governing suitability determinations by the Board of Parole Hearings (“BPH”).² It provides:

[BPH] shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.

² Section 3041(a)(2) provides additional instructions, namely that commissioners “shall normally grant parole” at parole hearings.

There is no other statutory language governing the parole suitability decision. The paucity of legislative direction is problematic for several reasons.

First, Penal Code section 3041(b)(1) appears to confine the parole suitability decision to a potential parolee’s criminal history only—excluding consideration of prison behavior or reentry plans. In particular, the statute directs that BPH “shall grant parole” unless “the timing and gravity of current or past convicted offense or offenses” indicates a risk to public safety. *Id.* Under a plain reading of the statute, parole depends on “the timing and gravity of current or past convicted offense or offenses” alone and cannot be denied on the basis of other factors, such as in-prison behavior, social history, or post-release plans.³ *See Blankenship v. Allstate Ins. Co.*, 186 Cal. App. 4th 87, 94 (2010) (“By long-standing rule of statutory construction, the Legislature’s omission of a term in a list of terms indicates the

³ This statutory language seems to contradict BPH regulations (discussed below), which specifically instruct commissioners to base suitability determinations on extrinsic factors. *See* Cal. Code Regs. tit. 15, § 2281. BPH commissioners here explicitly told Mr. Green: “[I]t’s no longer the crime that’s keeping you in prison. It’s your in-prison behavior that’s keeping you in prison.” (Ex. C at 117.)

Legislature did not intend to include the omitted term.”); *Kunde v. Seiler*, 197 Cal. App. 4th 518, 531 (2011) (“[I]f a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others. . . It is an elementary rule of construction that the expression of one excludes the other.”).

Second, the Penal Code appears to include a presumption favoring parole. Penal Code section 3041(a) directs that BPH “shall normally grant parole.” Yet that presumption is not reflected in BPH regulations or practice. *See* Comm. Rev. Pen. Code, Annual Report (2020) at 58-60 (noting that BPH grants parole in approximately twenty percent of cases even though over eighty percent of parolees are considered “low risk” by prison risk evaluations).

Third, the legislature eliminated language authorizing BPH to set parole suitability standards in 2015. According to this Court, BPH is empowered by Penal Code section 3041(a) to establish parole suitability criteria. *In re Vicks*, 56 Cal. 4th 274, 294 (2013). But in 2015, the legislature amended Penal Code section 3041(a) and deleted the language authorizing BPH to set

suitability criteria. *See* Penal Code § 3041(a); Sen. Bill 230 (Hancock, 2015). No court has addressed the validity of BPH regulations following Senate Bill (SB) 230. *See* Cal. Gov’t Code § 11342.1 (agency regulations must “be within the scope of authority conferred [by the legislature].”)

C. Title 15, section 2281 provides BPH rules for applying Penal Code section 3041.

The most detailed directions controlling parole hearings are provided in section 2281 of title 15 of the California Code of Regulations. Section 2281(a) provides that parole shall be denied if the potential parolee poses an “unreasonable risk of danger to society if released from prison.”⁴ Cal. Code Regs. tit 15, § 2281(a).

Section 2281(b) specifies the evidence BPH must consider in making a parole determination, including: the prisoner’s social history, criminal history, present mental state, behavior while incarcerated, past and present attitude, “and any other

⁴ Note this language is slightly different from the language in Penal Code section 3041(b), which provides that parole should be denied if “consideration of the public safety” requires continued incarceration. The California Supreme Court has added a third way to pose the question, indicating that parole should be denied if the potential parolee might engage in “antisocial acts” if released. *In re Rosenkrantz*, 29 Cal. 4th 616, 655 (2002).

information which bears on the prisoner's suitability for release."

Cal. Code Regs. tit 15, § 2281(b).⁵

Section 2281(c) enumerates factors "tending to show unsuitability for release," including: if the prisoner's commitment offense was "heinous, atrocious, or cruel," if the prisoner engaged in "sadistic sexual offenses," if the prisoner has severe mental problems, and if the prisoner engaged in "serious misconduct" while incarcerated. Cal. Code Regs. tit 15, § 2281(c).

Section 2281(d) enumerates factors "tending to show suitability for release," including: if the prisoner has no juvenile criminal history, if the prisoner has a stable social history, if the prisoner expressed signs of remorse, if the prisoner lacks a significant history of violence, if the prisoner has realistic plans for community reentry, and if the prisoner followed prison rules. Cal. Code Regs. tit 15, § 2281(d).

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⁵ As noted, this regulation appears to exceed the legislative direction in Penal Code section 3041(b)(1), which states that parole depends on the potential parolee's criminal history.

D. California courts are split on interpreting the parole standard.

California courts have attempted to synthesize the parole suitability regulations and Penal Code instructions into a coherent standard.

As noted above, in *Rosenkrantz*, 29 Cal. 4th at 655, this Court interpreted Penal Code section 3014 and held that BPH was instructed “to predict by subjective analysis whether the inmate [would] be able to live in society without committing additional antisocial acts.” *See also Vicks*, 56 Cal. 4th at 295 (reiterating the “antisocial acts” standard).

In *Reed*, 171 Cal. App. 4th at 1082, the Court of Appeal interpreted the “antisocial acts” standard to go beyond whether a potential parolee poses a risk of committing a new crime if released. *Reed* holds that BPH is instead to determine if a prospective parolee would be in any way “antisocial” if released in ways that do not amount to crimes, including having ability to maintain regular employment. *Id.*

By contrast, the Court of Appeal in *Hunter*, 205 Cal. App. 4th at 1544, held that the ultimate question before BPH is

whether there is “risk of future violence” if the prospective parolee is released.

Thus, there is disagreement among courts of appeal as to what precisely BPH is to decide at parole suitability hearings.

E. California’s parole rules violate due process and the U.S. Supreme Court decisions in *Johnson* and *Dimaya*.

As noted above, the U.S. Supreme Court established a two-part test to determine if a statute is sufficiently defined, in accordance with the Due Process Clause. The two-part test provides that a statute is unconstitutionally vague if it fails to specify (1) what activity the legislature seeks to avoid *and* (2) what level of risk of that activity is tolerable. *Johnson*, 576 U.S. at 597; *Dimaya*, 138 S. Ct. at 1223.

Both *Johnson* and *Dimaya* held that legislatures have broad discretion for determining risk of dangerousness and risk, but that it is the combination of these two imprecise factors that invite “more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Johnson*, 576 U.S. at 592; *Dimaya*, 138 S. Ct. at 1216.

(1) What activity does the legislature seek to avoid?

The first part of the *Johnson* and *Dimaya* test asks whether the activity targeted by the legislature is sufficiently defined.

As here, both *Johnson* and *Dimaya* involved criminal risk evaluations. In both cases, the first question was whether the individual's criminal activity constituted "violence." *Johnson*, 576 U.S. at 593 (discussing 18 U.S.C. § 924(e)(2)(B)(ii)); *Dimaya*, 138 S. Ct. at 1211 (discussing 18 U.S.C. § 16(b)).

The problem identified by the Court was that federal law required courts to imagine the "ordinary case" of a given statute to see if the crime amounted to "violence." *Johnson*, 576 U.S. at 597; *Dimaya*, 138 S. Ct. at 215. In *Johnson*, 576 U.S. at 597, Court complained that this standard was untenable: "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"

Here, the problem is not the abstraction caused by the "ordinary case" analysis discussed in *Johnson* and *Dimaya*. Instead, the issue is that the activity targeted at BPH hearings is

impossibly broad. As noted, this Court has repeatedly held that the activity targeted at a BPH hearing is whether a potential parolee will commit “antisocial acts” if released. *Rosenkrantz*, 29 Cal. 4th at 655; *Vicks*, 56 Cal. 4th at 295.

This “antisocial acts” standard is impossible to define and is far broader and more amorphous than the question of what constitutes an “ordinary case” risking violence in *Johnson* and *Dimaya*. For example, in *Reed*, the Court of Appeal held that unemployment is “antisocial.” 171 Cal. App. 4th at 1081. The court in *Reed* held further than BPH is not merely evaluating risk of committing a new crime. *Id.* What then constitutes an “antisocial act”? If unemployment is “antisocial” what about homelessness, poverty, or rude behavior?

But the difficulty in defining “antisocial acts” does not alone make the scheme unconstitutionally vague. *See Johnson*, 576 U.S. at 598; *Dimaya*, 138 S. Ct. at 1215. The “level of risk” must also be ill-defined. *Id.*

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(2) How much risk?

The second prong of the two-part test in *Johnson* and *Dimaya* asks whether “the level of risk” is sufficiently defined. *Johnson*, 576 U.S. at 598; *Dimaya*, 138 S. Ct. at 1215.

In *Johnson*, the level of risk was defined by statute as “serious potential risk.” 576 U.S. at 598. In *Dimaya*, the level of risk was defined by statute as “substantial risk.” 138 S. Ct. at 1214. In both cases, the Court held that these levels of risk were imprecise. *Johnson*, 576 U.S. at 592; *Dimaya*, 138 S. Ct. at 1216.

When the imprecise levels of risk were combined with the amorphous targeted activities, the result “create[d] more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Johnson*, 576 U.S. at 592; *Dimaya*, 138 S. Ct. at 1216.

Here, the question is whether a potential parolee’s release creates an “unreasonable risk” of “antisocial acts.” Cal. Code Regs. tit. 15, § 2281(a). California’s level of risk standard (“unreasonable risk”) is no more discernable than the “serious potential risk” or “substantial risk” language that the Supreme Court found problematic in *Johnson* and *Dimaya*. If anything, California’s “unreasonable risk” standard invites even more

unpredictability and arbitrariness than those invalidated in *Johnson* or *Dimaya*. The terms “substantial” and “serious” (from the federal statutes) indicate a level objectively “considerable in extent” or “weighty.” See “Substantial,” Black’s Law Dictionary (11th ed. 2019); “Serious,” Black’s Law Dictionary (11th ed. 2019). On the other hand, the term “unreasonable” in California’s BPH standard invites the adjudicator’s “subjective” assessment. See *Rosenkrantz*, 29 Cal. 4th at 655 (instructing BPH to “to predict by subjective analysis” whether a potential parolee will commit “antisocial acts” if released).

One BPH commissioner might think that a twenty-five percent risk is “unreasonable.” Another might deem *any* level of risk unreasonable.

In sum, the constellation of statutes, regulations, and case law that controls BPH’s suitability determinations fails the two-part test established by the Supreme Court in *Johnson* and *Dimaya*. First, the object of risk to be avoided—“antisocial acts”—is just as uncertain as the “ordinary case” standard scrutinized by the Supreme Court in *Johnson* and *Dimaya*. Second, the

amount of risk—“unreasonable risk”—is also equal to the federal standards from *Johnson* and *Dimaya*.

Therefore, as in those Supreme Court cases, it is the combination of the two amorphous standards “unreasonable risk” of “antisocial acts” or “danger to society” that creates more uncertainty and arbitrariness than due process permits.

II. MR. PAYNE’S LIFE SENTENCE FOR EVADING VIOLATES THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION.

On February 14, 2024, this Court issued an Order to Show Cause why a Three Strikes sentence was not unconstitutionally disproportionate. *In re Cedric Green* (Case No. S279286) (Order dated Feb. 14, 2024). In that case, the petitioner was sentenced under the Three Strikes law for robbery. Comparing the conduct and punishment in that case to Mr. Payne’s conduct and punishment reveals that Mr. Payne’s sentence is even more disproportionate. Simply put, if the petitioner in *Green* was entitled to an Order to Show Cause, then so is Mr. Payne.

In *Ewing v. California*, 538 U.S. 11, 23 (2003), the United States Supreme Court held that the Eighth Amendment to the federal Constitution prohibits “extreme sentences that are

‘grossly disproportionate’ to the crime.” In *Ewing*, the Court nonetheless ruled that the sentence in that case, which was imposed under California’s Three Strikes law, did not amount to grossly disproportionate punishment. *Id.*

Each case is determined on its facts because “[n]o penalty is per se constitutional.” *Solem v. Helm*, 463 U.S. 277, 290 (1983).

Courts determine if a sentence is grossly disproportionate by examining three objective factors. *Id.* at 290-291. First, courts compare the gravity of the offense and the harshness of the penalty to determine whether there is an inference of disproportionality. *Id.* Second, courts compare the petitioner’s sentence with sentences for other crimes in the same jurisdiction. *Id.* Third, courts compare the petitioner’s sentence with punishment for similar crimes in other jurisdictions. *Id.*

A. The unjustified disparity between the minor nature of Mr. Payne’s offense and the severity of his punishment creates an inference of gross disproportionality.

To determine if a sentence gives rise to an inference of gross disproportionality courts conduct a threshold comparison of “the crime committed and the sentence imposed.” *Harmelin v. Michigan*, 501 U.S. 957, 960 (1991) (Kennedy, J., concurring).

Courts “must focus on the principal offense” when weighing the gravity of the offense against the harshness of the penalty.

Solem, 463 U.S. at 297, n. 21 (explaining that the defendant “already has paid the penalty for each of his prior offenses.”).

Here, Mr. Payne’s violation of Vehicle Code section 2800.2 is a so-called “wobbler” in that it can result in a misdemeanor or prison sentence of up to three years. *See People v. Statum*, 28 Cal. 4th 682, 685 (2002). A wobbler is the lowest level felony in California. Based on this measure, Mr. Payne’s crime is less serious than the offense in *Solem* (issuing a false check), which carried a maximum punishment of five years in prison. *See also Reyes v. Brown*, 399 F.3d 964 (9th Cir. 2005) (finding an offense with a maximum punishment of four years to be too minor to justify a life sentence, and remanding for more information on the defendant’s criminal history). Mr. Payne’s vehicle code offense is also less serious than the grand theft of nearly \$1,200 in merchandise committed by the defendant in *Ewing*.

It follows that Mr. Payne’s life sentence for evading police raises an “inference” of disproportionality under the first prong of the Supreme Court’s

B. Mr. Payne's sentence is far longer than punishments for far worse crimes.

The second consideration in determining proportionality under the Eighth Amendment requires courts to compare the defendant's sentence with sentences for other crimes in the same jurisdiction. *Solem*, 463 U.S. at 291.

The Three Strikes law undermines the concept of proportionality because it imposes a one-size-fits-all sentence, regardless of the severity of a defendant's crimes. For example, Mr. Payne received a twenty-five-to-life sentence for his third strike offense, a Vehicle Code wobbler, and a defendant convicted of three rapes would also receive a twenty-five-to-life sentence under the Three Strikes law. *See People v. Carmony*, 127 Cal. App. 4th 1066, 1082 (2005) (describing Three Strikes sentences as inherently "suspect" due to the one-size-fits-all approach).

Furthermore, Mr. Payne's sentence is significantly longer than the punishments imposed for the most violent crimes in California, including forcible rape, murder, and child molestation. *Carmony*, 127 Cal. App. 4th at 1081; *see also Ramirez v. Castro*, 365 F.3d 755, 770-71 (9th Cir. 2004) (vacating as unconstitutionally disproportionate a Three Strikes sentence for

felony theft because it would require the defendant to serve more time than those convicted of second-degree murder, voluntary manslaughter, rape and child molestation).⁶

C. No other state would impose a twenty-five-to-life sentence for a nonviolent crime.

Finally, Mr. Payne's sentence is grossly disproportionate because no other state would impose such a severe sentence for a nonviolent crime that could be punished as a misdemeanor.

In at least eight jurisdictions, courts have stepped in to restrain the application of state habitual offender statutes where the letter of the statutory law would constitute grossly disproportionate punishment. In each of these cases, courts invalidated long recidivist punishments for crimes that are more serious than Mr. Payne's.

⁶ See also, *In re Shaputis*, 44 Cal 4th. 1241, 1245-48 (2008) (defendant was sentenced to seventeen years-to-life for shooting his wife in the neck and killing her, after a lengthy criminal history including raping his sixteen-year-old daughter, jumping on his wife's stomach making her miscarry, and beating his second wife badly enough that she needed plastic surgery); *People v. Escobar*, 3 Cal. 4th 740, 743-45 (1992) (defendant sentenced to fourteen years after he kidnapped his victim at gunpoint from a bus stop, dragged her by the hair, threw her on the cement, pushed his fingers into her eyes and raped her, leaving her with bloody asphalt burns and unable to walk regularly for more than a week).

In West Virginia, courts have overturned mandatory life sentences on numerous occasions for crimes more violent than Mr. Payne's. *See, e.g., Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 213 (W. Va. 1981) (vacating as unconstitutionally disproportionate a life sentence for a habitual offender who was convicted of multiple charges of arson); *State v. Miller*, 400 S.E.2d 897, 898, 901 (W. Va. 1990) (vacating as unconstitutionally disproportionate a life sentence for a defendant who shot his houseguest in the hand and stomach).

In Louisiana, courts stepped in to overturn mandated minimum sentences under its Habitual Offender Law. *See, e.g., State v. Bruce*, 102 So. 3d 1029, 1031 (La. Ct. App. 2012) (vacating as unconstitutionally excessive a life sentence for aggravated arson by a fourth felony offender); *State v. Harris*, 535 So.2d 1131, 1132 (La. Ct. App. 1988) (vacating as unconstitutionally excessive a forty-year sentence for purse snatching for a habitual offender who had been convicted of four burglaries, felony theft, and had a juvenile record); *State v. Wilson*, 859 So.2d 957, 959 (La. Ct. App. 2003) (vacating as unconstitutionally excessive a life sentence for simple robbery for

a fourth felony offender); *State v. Mosby*, 180 So.3d 1274, 1274 (La. 2015) (vacating as unconstitutionally excessive a thirty-year sentence for distribution of cocaine by a fourth felony offender).

In Iowa, the Supreme Court vacated as unconstitutionally disproportionate a recidivist sentence of twenty-five years for two counts of sexual abuse with a prior sexual offense. *State v. Bruegger*, 773 N.W.2d 862, 867, 886 (Iowa 2009).

In Delaware, the Supreme Court vacated as unconstitutionally disproportionate a recidivist sentence of forty-five years for forgery and criminal impersonation, where the defendant had a prior record of two burglaries, forgery and possession of a deadly weapon. *Crosby v. State*, 824 A.2d 894, 896-97 (Del. 2003).

In Michigan, an appeals court vacated as unconstitutionally disproportionate a life sentence for breaking into a motor vehicle for a sixth-time felony offender with a record including assault with intent to do great bodily harm. *People v. Curry*, 371 N.W.2d 854, 859 (Mich. 1985).

In Colorado, an appeals court vacated as unconstitutionally disproportionate a life sentence for a defendant who broke

someone's nose and committed theft, with priors of assaulting a police officer, criminal trespass, and theft. *People v. Gaskins*, 923 P.2d 292, 295, 297 (Colo. App. 1996).

In Indiana, the Supreme Court vacated as unconstitutionally disproportionate a thirty-five-year recidivist sentence for driving drunk with priors of burglary, theft, and driving drunk and reduced the sentence to five years. *Clark v. State*, 561 N.E.2d 759, 766 (Ind. 1990).

In Maine, the Supreme Judicial Court vacated as unconstitutionally disproportionate a twenty-eight-year sentence for a defendant's repeated sexual abuse of five pre-teenage girls over the course of five years. *State v. Stanislaw*, 65 A.3d 1242, 1244-45 (Me. 2013).

As these examples illustrate, Mr. Payne's sentence is unconstitutionally disproportionate to the norm for punishment of similar recidivist crimes in jurisdictions outside California.

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CONCLUSION

For the foregoing reasons, this Court should grant Mr.
Payne's Petition for Writ of Habeas Corpus.

Dated: October 21, 2024

Respectfully submitted,

THREE STRIKES PROJECT
Stanford Law School
Attorneys for Randy Payne

By: /s/ Michael S. Romano
Michael S. Romano, SBN 232182

VERIFICATION

I, Michael S. Romano, declare under penalty of perjury that I am counsel for petitioner Randy Payne in his Petition for a Writ of Habeas Corpus. My business address is 559 Nathan Abbott Way, Stanford, CA, in Santa Clara County.

I am making this verification on his behalf because he is incarcerated out of county and because these matters are more within my knowledge than his.

I have read the Petition for a Writ of Habeas Corpus and declare that the contents of the petition are true to the best of my knowledge.

Dated: October 21, 2024

/s/ Michael S. Romano
Michael S. Romano

CERTIFICATE OF WORD COUNT

Cal. Rule of Court 8.024(c)

The text of this brief consists of 5081 words as counted by the Microsoft Office Word word processing program used to generate the brief.

Date: October 21, 2024

/s/ Michael S. Romano
Michael S. Romano

PROOF OF SERVICE

In re Randy Payne

Case no. _____

I, Susan Champion, declare that I am, and was at the time of the service hereinafter mentioned, at least eighteen years of age and not a party to the above-entitled action. My business address is 559 Nathan Abbott Way, Stanford, CA, in Santa Clara County.

On October 21, 2024, I electronically served the foregoing Petition for Writ of Habeas Corpus through the court's TrueFiling system to sacawttruefiling@doj.ca.gov

On October 24, 2024, I served the foregoing Petition for Writ of Habeas Corpus depositing copies in the United States mail at Stanford, California, with postage prepaid thereon, and addressed as follows:

Hon. Mark V. Bacciarini
Merced Cty. Super. Court
2260 N Street
Merced, CA 95340

Misty Compton, DDA
Merced Cty. Dist. Atty. Off.
550 W. Main Street
Merced, CA 95340

Randy Lynn Payne, J05903
California Healthcare Facility
P.O. Box 213040
Stockton, CA 95213

Dated: October 21, 2024

/s/ Susan Champion
Susan Champion

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In re Randy Payne**
Case Number: **TEMP-
QVBHJPEQ**

Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **schampion@law.stanford.edu**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
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PETITION FOR WRIT OF HABEAS CORPUS	BPH Habeas_Final (Payne)
EXHIBITS	[[Exs_Vol I of III (A-F)(Payne)]]
EXHIBITS	[[Exs_Vol II of III (G)(Payne)]]
EXHIBITS	[[Exs_Vol III of III (I)(Payne)]]

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Person Served	Email Address	Type	Date / Time
Susan Champion Three Strikes Project 295598	schampion@law.stanford.edu	e-Serve	10/21/2024 3:52:46 PM
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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

10/21/2024

Date

/s/Susan Champion

Signature

Champion, Susan (295598)

Last Name, First Name (PNum)

Three Strikes Project

Law Firm