IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE CEDRIC GREEN, Petitioner, **ON HABEAS CORPUS**.	Case no. S279269

PETITIONER'S INFORMAL TRAVERSE

Michael Romano, SBN 232182
THREE STRIKES PROJECT
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
Tel: (650) 736-7757
Fax: (650) 723-8230
schampion@law.stanford.edu

Attorneys for Appellant
Cedric Green

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INTRODUCTION

On August 18, 2023, this Court ordered informal briefing on Petitioner Cedric Green's claims that his life sentence, imposed under the Three Strikes law, violates the Equal Protection Clause, the Sixth Amendment's guarantee of adequate legal representation, and the prohibition of disproportionate punishment in Article I, Section 17 of the California Constitution.

As discussed in Mr. Green's opening petition and in more detail below, his case raises novel issues under state and federal constitutional doctrine, new case law, and recent statutory reforms, and is thus appropriate for this Court's consideration.

Despite the novelty of these claims, despite Mr. Green's lack of education and poor access to legal materials for the past two decades, and despite the fact that Mr. Green only relatively recently received assistance of trained counsel, Respondent Attorney General maintains that Mr. Green was long-aware of the arguments presented herein and intentionally delayed filing his claims earlier, thus abusing the writ process. (Informal Response at 17-27.) Respondent's reasoning is flawed. Unlike capital defendants, who receive appointed post-conviction counsel and have every reason to extend and delay the habeas process,

Mr. Green has the strongest incentive possible to have his claims adjudicated expeditiously: his freedom. And despite the disadvantage of litigating from prison, Mr. Green has conscientiously pursued relief in the courts below. Moreover, since undersigned counsel agreed to represent Mr. Green pro bono, we have vigorously litigated his case in Superior Court, the Court of Appeal, and before the Board of Parole Hearings. This Court has long held that similar delays in filing habeas petitions should not bar a decision on the merits. *See*, *e.g.*, *In re Saunders*, 2 Cal. 3d 1033, 1040 (1970) (excusing years-long delay where the petitioner had not completed high school and "was without experience in education in law.")

On the merits, the Attorney General argues that Mr. Green has not established a prima facia claim for relief on any of his claims. But in so doing the Attorney General misrepresents Mr. Green's arguments, mischaracterizes the record, and misstates relevant case law.

First, the Attorney General argues that Mr. Green's equal protection claim is without merit because the legislature is free to enact prospective ameliorative sentencing laws with specific start dates. (Informal Response at 28-30.) The Attorney General seems

to misunderstand or misrepresent Mr. Green's claim. Mr. Green's argument has nothing to do with the effective date of Penal Code section 1172.75, the statutory scheme at the heart of his equal protection claim. As discussed in his opening petition and below, Mr. Green's equal protection rights are violated because he would be eligible for reconsideration of his entire sentence under section 1172.75 if, paradoxically, he had he received a longer sentence at the time of his conviction. (Petition at 19-21.) There is no rational basis to allow him to be fully resentenced under section 1172.75 had he received a longer punishment, but deny him that opportunity because he received a shorter one.

Second, the Attorney General argues that Mr. Green's ineffective assistance of counsel claim is without merit because he failed to provide documentary evidence of the childhood abuse and neglect that he endured. (Informal Response at 34-35.) Of course, at this stage of habeas litigation, Mr. Green does not need to present such documentary evidence. *See People v. Duvall*, 9 Cal. 4th 464, 474-75 (1995). The Attorney General does not dispute that Mr. Green's trial counsel was ineffective for failing to investigate such evidence. (Informal Response at 34-35.) And the Attorney General also does not dispute that such evidence

would entitle Mr. Green to a reduced punishment if it had been presented at his original sentencing hearing. (*Id.*) Thus, because the only issue in dispute revolves around factual allegations of childhood abuse, this Court should issue an Order to Show Cause. *Duvall*, 9 Cal. 4th at 474-75.

Finally, the Attorney General argues that Mr. Green's case is distinguishable from a recent decision by the Second District Court of Appeal, *People v. Avila*, 57 Cal. App. 5th 1134 (2020), which holds that "evolving standards of decency" render certain Three Strikes sentences unconstitutional under Article I, Section 17 of California Constitution, which prohibits disproportionate punishments. *Avila*, 57 Cal. App. 5th at 1151. *Avila* holds that some Three Strikes sentences that were once "routine" now violate the Constitution. *Id*. The Attorney General maintains that *Avila* and Article I, Section 17 do not apply to Mr. Green's case because of supposedly aggravating circumstances in his case that distinguish his situation from *Avila*. According to the Attorney General these aggravating circumstances include Mr. Green's "proficiency for evading capture" by "slouching down in the [getaway] car" and that his crime was "so brazenly" carried out because the "[the victim's] husband was nearby." (Informal

Response at 39-40.) As discussed below, a fair reading of *Avila* shows there is no material difference in that case—where the defendant was convicted on multiple counts involving threats of gang violence—and Mr. Green's case.

In sum, Mr. Green is serving a life sentence for a purse-snatch robbery in which there was no injury or threats of violence, and his petition raises several novel constitutional issues that apply well beyond the specifics in his case, meriting attention from this Court, and issuance of an Order to Show Cause.

ARGUMENT

I. MR. GREEN'S CLAIMS ARE NOT UNTIMELY

The bulk of the Attorney General's informal response argues that each of Mr. Green's claims are procedurally barred as untimely, for various reasons. (Informal Response at 17-27.) The Attorney General is mistaken.

A. General principles of habeas law.

There are no statutes or firm, court-imposed deadlines for determining the timeliness of habeas corpus petitions. The general rule is that habeas petitioners must "exercise due diligence" in perusing their claims. *In re Clark*, 5 Cal. 4th 750,

779 (1993). A petitioner is expected to exercise due diligence only after "the petitioner or his counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *In re Robbins*, 18 Cal. 4th 770, 787 (1998).

Here, Mr. Green has been incarcerated since 1997. He is poorly educated, has limited access to law books or other legal resources, has not been represented by counsel for over two decades, and his claims are all based on new case law and recently enacted statutes. California courts recognize that a habeas petitioner may not be able to appreciate legal issues involved or file promptly for relief without counsel. *In re Saunders*, 2 Cal. 3d 1033, 1040 (1970) (excusing delay where the petitioner had not completed high school and "was without experience in education in law"); *In re Perez*, 65 Cal. 2d 224, 228 (1966) (excusing years-long delay because the petitioner had a low level of education and "knew nothing of legal rights or procedures.")

Indeed, Mr. Green has been diligently pursuing post-conviction relief in many venues since undersigned counsel began representing him on a pro bono basis in 2020.

B. Summary of litigation to date.

Prior to 2020, Mr. Green had no counsel, no regular access to legal materials, and certainly no incentive to delay adjudication of his claims. Since undersigned counsel began representing Mr. Green pro bono in 2020, we have vigorously and exhaustively litigated his post-conviction relief.

On August 8, 2019, Mr. Green filed a pro se habeas petition in San Mateo Superior Court. Because Mr. Green is a military veteran, on October 2, 2019, the court denied without prejudice Mr. Green's habeas petition and construed it as a petition for recall of sentence pursuant to Penal Code section 1170.91. (Petition Ex. A.)

Undersigned counsel began representing Mr. Green shortly thereafter, and we have been diligently litigating his case ever since.

On July, 20, 2020, we filed a brief on Mr. Green's behalf in San Mateo Superior Court addressing his eligibility for relief under section 1170.91, as directed by the court. On December 18, 2020, the San Mateo District Attorney filed an opposition, and undersigned counsel filed a reply on Mr. Green's behalf on January 8, 2021.

On January 29, 2021, the superior court denied Mr. Green relief under section 1170.91, concluding that this section did not apply to people who, like Mr. Green, were sentenced under the Three Strikes law. (Petition Ex. B.)

On March 29, 2021, Mr. Green timely appealed the Superior Court's decision. Undersigned counsel fully briefed and argued the case before the First District Court of Appeal.

While that appeal was pending, on September 15, 2021, undersigned counsel represented Mr. Green at a hearing before the Board of Parole Hearings, at which he was denied relief.

Also, while the appeal was pending, on April 29, 2022, Mr. Green filed a habeas petition in San Mateo County Superior Court on the basis that he was denied effective assistance of counsel at sentencing and that his sentence constituted cruel or unusual punishment. On July 8, 2022, the court denied the petition. (Petition Ex. D.)

On July 29, 2022, the First District Court of Appeal affirmed the superior court's order that Mr. Green was ineligible for relief under section 1170.91.

On August 10, 2022, Mr. Green filed a petition for habeas relief in San Mateo County Superior Court challenging his parole denial.

On August 24, 2022, Mr. Green filed a petition for habeas relief in the First District Court of Appeal on the grounds that he was denied effective assistance of counsel at sentencing and that his sentence constituted cruel or unusual punishment. On October 7, 2022, the court ordered informal briefing, and both parties briefed the questions raised by the court.

On November 22, 2022, the superior court denied Mr. Green's petition challenging his parole denial. And on January 24, 2023, Mr. Green filed a petition for habeas relief in the First District Court of Appeal on the parole issue.

On February 16, 2023, the court of appeal summarily denied both of Mr. Green's petitions (one challenging his sentence, the other challenging his parole denial).

On March, 27, 2023, Mr. Green filed a petition for habeas relief in this Court challenging his parole denial. Two days later, on March 29, 2023, Mr. Green filed a petition for habeas relief in this Court challenging his sentence.

On August 18, 2023, this Court ordered informal briefing in both cases.[1]

C. New law.

All three of Mr. Green's claims for relief rely on recent law and appellate decisions that were enacted or handed down during the course of his protracted post-conviction litigation, which explains why they have only recently been presented in this case. *See In re Robbins*, 18 Cal. 4th 770, 787 (1998) (Timeliness "is measured from the time the petitioner or his counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim.")

(1) Mr. Green's equal protection claim turns on recently enacted Penal Code section 1172.75.

Mr. Green's claim that he is entitled to reconsideration of his sentence under the Equal Protection Clause depends entirely on the enactment of new Penal Code section 1172.75, which became effective January 1, 2022. Mr. Green thus could not have presented his equal protection claim any sooner. Section 1172.75

[1] This informal traverse addresses only those issues related to Mr. Green's sentencing.

provides a full reconsideration of sentences that include enhancements for prior prison terms imposed under Penal Code section 667.5(b). *See People v. Monroe*, 85 Cal. App. 5th 393, 402 (2022) (section 1172.75 "requires a full resentencing, not merely that the trial court strike the newly 'invalid' enhancements."). As discussed in his opening petition and below, the recent enactment of section 1172.75 violates Mr. Green's equal protection rights because it extends a benefit to a class of people who committed the exact same crimes, who have the exact same criminal histories, and were punished more severely—but denies the same benefit to Mr. Green. There is no rational basis to extend a benefit to a defendant who was deemed deserving of a harsher sentence yet deny the same benefit to an identically situated defendant who was deemed deserving of a lighter sentence. According to section 1172.75(c)(2), all eligible individuals are to be resentenced under its provisions by December 31, 2023. Thus, we are still in the window of time during which Mr. Green could be considered for resentencing under section 1172.75(c)(2). And, as discussed above, Mr. Green has been vigorously litigating various claims for resentencing relief since well before the enactment of section 1172.75.

Finally, Mr. Green's claim rests on a novel and contested theory of law regarding ameliorative criminal law reforms and the Equal Protection Clause, which is currently before this Court. *See People v. Hardin*, 84 Cal. App. 5th 273 (2022) (review granted at 522 P.3d 173, Jan. 11, 2023).

For all these reasons, this claim cannot be deemed untimely. *Robbins*, 18 Cal. 4th at 787.

(2) Mr. Green's Sixth Amendment Claim turns on *People v. Dryden* and *People v. Avila*, which were decided in 2021 and 2020 respectively.

Mr. Green's claim that he was deprived effective representation at his sentencing hearing relies on two recent Court of Appeal decisions: *People v. Avila*, 57 Cal. App. 5th 1134 (2020) (invalidating a Three Strikes sentence where the defendant was mentally ill and committed relatively nonviolent conduct), and *People v. Dryden*, 60 Cal. App. 5th 1007, 1031 (2021) (finding the imposition of a Three Strikes sentence an abuse of discretion due to the defendant's mental health issues, homelessness, addiction, and relatively nonviolent conduct). Prior to these decisions, there was no case law holding that mitigating circumstances including mental illness, homelessness, and

addiction could place a defendant "outside the spirit" of the Three Strikes law under *People v. Superior Court (Romero)*, 13 Cal. 4th 497 (1996) and *People v. Williams*, 17 Cal. 4th 148, 161 (1998). Thus prior to *Avila* and *Dryden*, it would be difficult (if not impossible) for Mr. Green to understand or appreciate that he was prejudiced by his attorney's failure to develop and present similar mitigating evidence in his case. And since *Avila* and *Dryden* were decided, in 2020 and 2021 respectively, Mr. Green has been represented by undersigned counsel who have vigorously litigated this claim. *See Robbins*, 18 Cal. 4th at 787.

(3) Mr. Green's claim of disproportionate punishment turns on *People v. Avila*, which was decided in 2020.

Mr. Green's claim that his sentence violates Article I, Section 17 of the California Constitution, which prohibits cruel or unusual punishment, turns on *Avila*, 57 Cal. App. 5th 1134, which as previously noted, was handed down in 2020. *Avila* holds that some Three Strikes sentences that were once permissible now violate the state's ban on cruel or unusual punishment due to "evolving standards of decency" as demonstrated by recent reforms to California sentencing laws. *Id.* at 1149. As noted

above, Mr. Green has been vigorously litigating his case in numerous forums since 2020 when *Avila* was decided.

II. MR. GREEN HAS ESTABLISHED A PRIMA VACIE CASE FOR RE-SENTENCING UNDER THE EQUAL PROTECTION CLAUSE

In his opening petition, Mr. Green explained why he is entitled to reconsideration of his sentence as a result of the recent enactment of Penal Code section 1172.75. (Petition at 17-19.) Under section 1172.75 people sentenced with enhancements imposed under old section 667.5(b) are now entitled to reconsideration of their sentences. *Monroe*, 85 Cal. App. 5th at 402.

At the time of his conviction in 1996, Mr. Green was eligible for an enhancement under section 667.5(b), but the court deemed it unnecessary given Mr. Green's conduct. That fateful decision to *reduce* Mr. Green's punishment now excludes him from relief under section 1172.75 (which applies only to people for whom the one-year section 667.5(b) enhancement was imposed). The benefit of section 1172.75 is huge because it opens reconsideration the defendant's entire sentence, not merely the one-year enhancement, and allows for the consideration of post-conviction conduct and other mitigating factors in that process.

Monroe, 85 Cal. App. 5th at 402. Because there is no rational basis to exclude Mr. Green from sentence reconsideration but allow reconsideration for people who committed the exact same conduct but received longer sentences, Mr. Green's exclusion from section 1172.75 violates his equal protection rights.

The Attorney General misunderstands or misrepresents Mr. Green's claim. According to the Attorney General, Mr. Green's claim "is based on a challenge to the timing of [section 1172.75's] effective date." (Informal Response at 28.) This is a strawman. Mr. Green's claim has nothing to do with the effective date of section 1172.75. Nor is Mr. Green asking that section 1172.75 operate retroactively, as the Attorney General incorrectly asserts. (Informal Response at 29-30.)

Mr. Green's claim is that there is no rational justification to offer the benefit of a new sentencing hearing to people who committed the exact same conduct and have the exact same criminal histories, but received longer punishment, and yet deny Mr. Green the same benefit. In this way, Mr. Green's claim is similar to and even stronger than the defendant's in *Hardin*, whose case is currently before this Court. *Hardin*, 522 P.3d at 173.

For these reasons, and for those provided in Mr. Green's opening petition, he has established a prima facie case that his rights under the Equal Protection Clause have been violated by his exclusion from relief under section 1172.75.

III. MR. GREEN HAS ESTABLISHED A PRIMA FACIE CASE THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

In its informal response, the Attorney General correctly summarizes Mr. Green's Sixth Amendment claim: "Petitioner alleges that trial counsel was constitutionally ineffective for failing to present mitigating evidence of petitioner's traumatic background and his character during the original *Romero* hearing to strike his prior strike convictions." (Informal Response at 32.) The Attorney General concedes, by not challenging Mr. Green's claim, that his trial attorney presented virtually no case on Mr. Green's behalf at his sentencing hearing. The Attorney General also does not contest that Mr. Green's counsel had a Sixth Amendment duty to investigate and present such evidence. (*Id.* at 32-35.) And, finally, the Attorney General does not contest that had such evidence been presented it would have changed the outcome of Mr. Green's sentencing hearing. (*Id.*)

Instead, the Attorney General argues that Mr. Green has failed to make a prima facie case for relief because he failed to present documentary evidence of his childhood neglect other than his verified petition. (*Id.* at 33-35.) Of course, evidence of childhood abuse and neglect is rarely documented and instead must be presented by witness testimony.

In a habeas proceeding, a petitioner is required "initially to *plead* sufficient grounds for relief, and then later to *prove* them." *Duvall*, 9 Cal. 4th at 474 (emphasis in original). Here, the Attorney General does not claim that Mr. Green failed to plead sufficient facts. The Attorney General only questions the quality of Mr. Green's evidence. This Court requires that a habeas petitioner supply documentary evidence along with their opening petition if the evidence is "reasonably available." *Id.* Here, it is not.

An Order to Show Cause should issue if "petitioner has pleaded sufficient facts that, if true, would entitle him to relief." *Id.* at 475. After issuance of an Order to Show Cause, a court should hold an evidentiary hearing where any disputed facts are litigated. *Id.* at 478.

At this stage of the litigation, the Attorney General only disputes the fact that Mr. Green did not present sufficient documentary evidence of his childhood trauma. Because such evidence is not, by its nature, usually documented, it is not "reasonably available." Because the Attorney General concedes that Mr. Green's trial attorney presented no mitigation and does not dispute that he had a duty to do so, and further that such evidence would have likely changed the outcome of Mr. Green's sentence, he is entitled to an Order to Show Cause and an evidentiary hearing where he may fully present the facts cited by the Attorney General.

IV. MR. GREEN HAS ESTABLISHED A PRIMA FACIE CASE THAT HIS SENTENCE CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT

As discussed above and in Mr. Green's opening petition, in 2020, the Second District Court of Appeal held that the "evolving state of California's criminal jurisprudence" rendered some sentences imposed under the Three Strikes law unconstitutionally disproportionate under Article I, Section 17 of California Constitution. *Avila*, 57 Cal. App. 5th at 1150. The court acknowledged that life sentences may be "routine" under the Three Strikes law for relatively minor conduct, but that fact

"should not blunt our constitutional senses to what shocks the conscience and offends fundamental notions of human dignity," in light of new approaches to criminal law in California. *Id.* at 1151.

The Attorney General does not contest the central element of *Avila*: that the "evolving state of California's criminal jurisprudence" renders some Three Strikes sentences that were acceptable in the past intolerable under Article I, Section 17. Instead, the Attorney General argues that the facts of Mr. Green's case are distinguishable from *Avila*.[2] (Informal Response at 40-44.) The Attorney General maintains that Mr. Green's sentence is justifiable because his conduct is more serious compared to the defendant's conduct in *Avila*.

Again, the Attorney General is incorrect.

In *Avila*, the defendant was sentenced under the Three Strikes law following two convictions: one for attempted robbery and one for attempted extortion. 57 Cal. App. 5th at 1138. The defendant accosted multiple victims over the course of multiple

[2] The Attorney General also argues that Mr. Green's sentence is not disproportionate compared to several cases from the 1980's, which seems to miss the point of evolving standards of decency. (Informal Response at 37-39.)

days in multiple locations, invoking possible gang involvement. *Id*. at 1139. The sentencing court described the crimes as "brutal." *Id*. at 1142. The Court of Appeal acknowledged that the victims were "emotionally traumatized." *Id*. at 1147. The defendant's prior crimes included multiple robberies, assault with a deadly weapon, and unlawful intercourse with a minor under sixteen. 57 Cal. App. 5th at 1148. Nonetheless, the Court ruled that a life sentence for this conduct was grossly disproportionate under Article I, Section 17.

By contrast, Mr. Green stands convicted of a single count of robbery: a purse snatch where he did not touch or threaten his victim.[3] His prior strikes are two attempted robberies he committed in 1991 and 1993. In addition, as discussed above, Mr. Green suffered a traumatic childhood, which *Avila* recognizes as a mitigating factor. 57 Cal. App. 5th at 1148-49.

In short, there is no material difference between *Avila* and Mr. Green's case.

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[3] The Attorney General argues that Mr. Green's case involves aggravating circumstances, specifically Mr. Green's "proficiency for evading capture" by "slouching down in the [getaway] car" and that his crime was "so brazenly" carried out because the "[the victim's] husband was nearby." (Informal Response at 39-40.)

It goes without saying that no two cases are exactly the same. But if this Court accepts *Avila*'s evolving standards of decency analysis, as the Attorney General appears to do, there is no way to reasonably argue that the defendant's Three Strikes sentence in *Avila* was grossly disproportionate and unconstitutional under Article I, Section 17, and that Mr. Green's sentence for fewer convictions and less serious crimes is not.

CONCLUSION

For the foregoing reasons, this Court should issue an Order to Show Cause to allow Mr. Green the opportunity for a new sentencing hearing.

Dated: September 28, 2023

Respectfully submitted,

THREE STRIKES PROJECT
Stanford Law School
Attorneys for Petitioner,
Cedric Green

By: s/ Michael S. Romano
Michael S. Romano
Cal. Bar no. 232182

CERTIFICATE OF WORD COUNT

Cal. Rules of Court, Rule 8.204(c)(1)

The text of this brief consists of 4,188 words as counted by the Microsoft Office Word processing program used to generate the brief.

Dated: September 28, 2023

s/ Michael Romano
Michael Romano

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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.

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400 County Center, Dept. 12
Redwood City, CA 94063

First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102

San Mateo County DA
400 County Center
3rd Floor
Redwood City, CA 94063

Cedric Green, K93505
Correctional Training Facility
Soledad Prison Road
Soledad, CA 93960

Dated: September 28, 2023

/s/ Susan Champion
Susan Champion

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **GREEN (CEDRIC) ON H.C.**
Case Number: **S279269**
Lower Court Case Number:

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Champion, Susan (295598)
Last Name, First Name (PNum)

Three Strikes Project
Law Firm