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7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**
9 **WESTERN DIVISION**

10 **CV 99-11018-JSL**

11 **MICHAEL BANYARD,**
12 **Petitioner.**

13 **v.**

14 **ERNEST ROE, Warden,**
15 **Respondent.**

)
) **PETITIONER'S SECOND**
) **SUPPLEMENTAL BRIEF IN SUPPORT**
) **OF SECOND AMENDED PETITION**
) **FOR WRIT OF HABEAS CORPUS**

) **Court: Hon. J. Spencer Letts**
) **Date: N/A**
) **Time: N/A**
)

16 _____)
17
18 **Petitioner Michael Banyard, by and through his counsel of record, Gregory**
19 **Nicolaysen, hereby files Petitioner's Second Supplemental Brief in Support of the**
20 **Second Amended Petition for Writ of Habeas Corpus.**

21
22 **DATED: April 14, 2003**

Respectfully submitted,

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24
25 **GREGORY NICOLAYSEN**
26 **Counsel for Petitioner,**
27 **Michael Banyard**
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1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I**

4 **INTRODUCTION**

5 **Petitioner Michael Banyard (“Banyard”) was sentenced to 25 years to life**
6 **imprisonment under the California “three strikes” law. Banyard unsuccessfully**
7 **challenged his sentence on direct and collateral review in the California courts.**

8 **After exhausting his state court remedies, Banyard petitioned this Court for**
9 **habeas relief under 28 U.S.C. § 2254. The operative petition is Banyard’s *pro se* Second**
10 **Amended Petition for Writ of Habeas Corpus (“SAP”).**

11 **In the SAP, Banyard claimed *inter alia* that his sentence is invalid because it is**
12 **cruel and unusual, in violation of the Eighth Amendment.**

13 **After an initial round of briefing,¹ a Report and Recommendation of United States**
14 **Magistrate Judge (the “Report”) issued. The Report found that Banyard’s sentence was**
15 **constitutional and recommended that this Court dismiss Banyard’s claim with prejudice.**
16 **This Court deferred ruling on the Report pending further briefing and appointed**
17 **undersigned counsel to represent Banyard in these proceedings.**

18 **At a July 9, 2002 status conference, the Court ordered the parties to re-brief the**
19 **following issue: whether Petitioner’s assault conviction under California Penal Code §**
20 **245 (a) properly constituted a strike under the California Three Strikes Law. On**
21 **August 19, 2002, Petitioner filed his Supplemental Brief in Support of SAP, which**
22 **addressed that issue.**

23 **At the request of counsel, the Court issued a stay on further briefing until the U.S.**
24 **Supreme Court issued its ruling on two cases that addressed the Eighth Amendment**
25 **“cruel or unusual punishment” issue with regard to California’s Three Strikes Law.**

26 _____
27 ¹ All of Banyard’s previously filed *pro se* pleadings on this matter are hereby adopted
28 and incorporated by reference. For purposes of judicial economy, Banyard’s arguments, while preserved, are not restated herein.

1 Those cases were: Lockyer v. Andrade, 123 S.Ct. 1166 (2003), and a companion case,
2 Ewing v. California, 123 S.Ct. 1179 (2003). On March 5, 2003, the Supreme Court
3 rendered decisions in both cases.

4 On April 3, 2003, in light of the Andrade and Ewing opinions, this Court ordered
5 the parties to re-brief the following issue: whether Petitioner’s three strikes sentence
6 constituted cruel and unusual punishment in violation of the Eighth Amendment. As
7 demonstrated *infra*, Petitioner’s sentence is unconstitutional on that ground.

8 Further, the state appellate court’s decision that Banyard’s sentence was
9 constitutional was contrary to, involved an unreasonable application of, clearly
10 established federal law, and was based on an unreasonable determination of the facts in
11 light of the evidence presented in the state court proceeding. Accordingly, the Report
12 should not be adopted and the SAP should be granted.

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15 II
16 ARGUMENT

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18 A. LEGAL STANDARDS

19 1. Federal Habeas Relief

20 Banyard’s federal habeas petition was filed after the enactment of the
21 Antiterrorism and Effective Death Penalty Act (“AEDPA”). Therefore, the provisions
22 of the AEDPA apply to the SAP. Lindh v. Murphy, 521 U.S. 320, 335, 117 S.Ct. 2059,
23 2068 (1997).

24 Under the AEDPA, federal habeas relief is available if a state court’s
25 adjudication of the claim on the merits resulted in a decision that was: (1) contrary to,
26 or involved an unreasonable application of, clearly established federal law; or (2) based
27 on an unreasonable determination of the facts in light of the evidence presented in the
28 state court proceeding. 28 U.S.C. § 2254 (d).

1 A state court decision is “contrary to” Supreme Court authority if the state
2 court (1) reached a conclusion opposite to Supreme Court rationale on a question of law
3 or (2) decided a case differently than the Supreme Court on a set of materially
4 indistinguishable facts. Williams v. Gates, 2002 U.S. Dist. Lexis 9502 (N. Dist. Cal., May
5 8, 2002) (citing Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1518, 146 L.Ed.2d 389
6 (2000)).

7 A state court decision is an “unreasonable application of” Supreme Court
8 authority if it correctly identifies the legal principle from the high Court decision but
9 “unreasonably applies that principle to the facts of petitioner’s case.” Id.

10 There is a presumption of correctness to any factual determination made
11 by a state court. A petitioner may overcome this presumption with clear and convincing
12 evidence. Id.

13
14 **2. California’s “Three Strikes” Law**

15 Under Cal. Penal Code § 667 (the “three strikes” law), a defendant
16 convicted of a felony who has two qualifying prior convictions for “serious felonies”
17 receives a minimum sentence of 25 years to life. Monge v. California, 524 U.S. 721, 724,
18 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998).

19 “Serious” felonies for purposes of the three strikes law are enumerated in
20 Cal. Penal Code § 1192.7. Among them are Penal Code §§ 211 (robbery) and 245 (a)
21 (assault), both of which Banyard had been previously convicted. However, a violation
22 of Penal Code § 245 (a) (1) or § 245 (a) (2) constitutes a “strike” only if it is proven that
23 in the course of the offense, the defendant personally inflicted great bodily injury on a
24 person other than an accomplice or personally used a firearm or a dangerous or deadly
25 weapon. Penal Code § 1192.7.²

26 _____
27 ² In his original Supplemental Brief in Support of the SAP, filed August 19, 2002,
28 Banyard argued that his sentence is invalid because his prior assault conviction under California Penal
Code § 245 (a) should not have been counted under the California “three strikes” law.

1 **Although at least 40 states and the federal government have enacted three**
2 **strikes laws, only two states other than California – Washington and West Virginia –**
3 **permit the third strike to be any felony, regardless of whether it is serious or violent.**
4 **Other states do not expose an offender to enhanced three strikes sentencing for a third**
5 **strike that is passive or victimless. Therefore, Banyard could only have received a life**
6 **sentence in two other states out of 40 with legislation similar to California’s three strikes**
7 **law.**

8 **Moreover, Banyard’s triggering offense (possession of a *de minimis* amount**
9 **of cocaine) is not even included in the “serious” felonies enumerated in Cal. Penal Code**
10 **§ 1192.7 for purposes of the three strikes law. California reserves the sentence that it**
11 **imposed on Banyard for non-recidivist first-degree murderers. See Section 190(a) (West**
12 **Supp. 2003) (sentence of 25 years to life for first-degree murder).**

13 **Even the stringent Federal Sentencing Guidelines (“the Guidelines”)**
14 **reserve a Banyard-type sentence for recidivists who commit such onerous crimes as:**
15 **murder (section 2A1.2); air piracy (2A5.1); theft of more than \$100 million (2B1.1);**
16 **robbery involving discharge of a weapon, serious bodily injury, and approximately \$1**
17 **million (2B3.1); and drug offenses involving more than 20 pounds of heroin (2D1.1). For**
18 **recidivist drug offenses involving at least one pound of cocaine, the Guidelines reserve**
19 **10 years of real prison time (with good time credits) (2D1.1) – half of Banyard’s 25-year-**
20 **to-life sentence, for which he must serve a minimum of 20 years. Banyard also would**
21 **not have been subject to the federal three strikes law, 18 U.S.C. Section 3559 ©), under**
22 **which possession of one gram of cocaine is not a triggering offense.³**

23
24 **3. Cruel or Unusual Punishment**

25 **The Eighth Amendment prohibition against cruel and unusual punishment**
26 **is directed in part “against all punishments, which by their excessive length or severity**

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³ **Only “serious” drug offenses qualify under the federal three strikes law.**

1 are greatly disproportional to the offenses charged.” Weems v. United States, 217 U.S.
2 349, 371 (1910). This “narrow proportionality principle” applies to noncapital
3 sentences. Ewing v. California, 123 S.Ct. 1179 (2003) (citations omitted).

4 Every defendant facing life imprisonment under a three strikes law will at
5 some point in the past have committed at least two violent or serious felonies. However,
6 that fact alone is not dispositive. A state may be justified in punishing a recidivist more
7 severely than a first-time offender. Rummel v. Estelle, 445 U.S. 263, 276 (1980). Still,
8 recidivist statutes must undergo the same constitutional scrutiny as every other
9 sentencing statute. Solem v. Helm, 463 U.S. 277, 296 (1983).

10 One might argue that *any* crime committed by a recidivist is a serious
11 crime warranting a 25-year minimum sentence. But the Supreme Court rejected that
12 view in Solem v. Helm, 463 U.S. 277 (1983) and in Harmelin v. Michigan, 501 U.S. 957
13 (1991), with the recognition that “no penalty is per se constitutional.” Solem, 463 U.S.
14 at 290; Harmelin, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in
15 judgment).

16 17 4. The *Andrade* and *Ewing* Decisions

18 In Lockyer v. Andrade, 123 S.Ct. 1166 (2003) and Ewing v. California, 123
19 S.Ct. 1179 (2003), both decided on March 5 of this year, the Supreme Court considered
20 whether sentences under California’s three strikes law violated the cruel and unusual
21 punishments clause of the Eighth Amendment.

22 In deciding Andrade and Ewing, the Supreme Court merely upheld the
23 rights of states to enact three strikes laws. Although both cases affirmed three-strikes
24 convictions that had been challenged on Eighth Amendment grounds, the Court did not
25 rule that California’s three strikes law is *per se* constitutional. Rather, it found the law
26 constitutional as applied to the defendant-appellants in Andrade and Ewing.

27 In both cases, the Court’s inquiry was extremely fact-specific, weighing
28 the gravity of the triggering offense and the defendants’ prior records against the

1 severity of their sentences. On balance, the Court found that Andrade's sentence (50
2 years to life) and Ewing's sentence (25 years to life) did not violate the Eighth
3 Amendment. The triggering offense in both cases was shoplifting. Ewing's third strike
4 was stealing three golf clubs worth \$399 each from a golf course pro shop; Andrade's
5 was the theft of \$153 worth of videotapes from Kmart. The Court found it significant
6 that both defendants in those cases had lengthy criminal histories.

7 In Andrade, a habeas case, the Court held that the "only relevant clearly
8 established law amenable to the 'contrary to' or 'unreasonable application of'
9 framework is the gross disproportionality principle, the precise contours of which are
10 unclear and applicable only in the 'exceedingly rare' and 'extreme' case." Lockyer v.
11 Andrade, 123 S.Ct. at 1173.

12 In Ewing, the Court made clear that the offense to which gross
13 proportionality review should be applied should not be defined in terms of just the
14 triggering offense (i.e., the third strike), but that a defendant's record of recidivism is
15 also to be considered. Ewing v. California, 123 S.Ct. at 1189-1190.

16 Andrade and Ewing simply established a benchmark for determining
17 whether a particular three strikes sentence constitutes cruel or unusual punishment.
18 Therefore, the threshold issue before this Court is whether Banyard's conduct was less
19 egregious than that of Andrade or Ewing. As demonstrated below, because Banyard's
20 third strike was for a passive, victimless crime (unlike those of the defendants in
21 Andrade and Ewing), his sentence of twenty-five years to life is cruel and unusual in
22 violation of the Eighth Amendment.

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25 **B. BANYARD'S SENTENCE OF TWENTY-FIVE YEARS TO LIFE**
26 **IMPRISONMENT FOR A PASSIVE AND VICTIMLESS CRIME IS CRUEL**
27 **AND UNUSUAL IN VIOLATION OF THE EIGHTH AMENDMENT**

28 The instant case presents a question of first impression. There is no

1 binding authority on whether a third strike involving possession of a *de minimis* or
2 “personal use” amount of drugs, resulting in a sentence of life imprisonment with no
3 possibility of parole for 25 years, is cruel and unusual under the Eighth Amendment.

4 As demonstrated below, the factual scenario of Banyard’s case presents
5 “the rare case in which a threshold comparison of the crime committed and the sentence
6 imposed leads to an inference of gross disproportionality.” See Harmelin v. Michigan,
7 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in judgment).
8 Banyard’s sentence on its face imposes one of the most severe punishments available
9 upon a recidivist who subsequently engaged in one of the less serious forms of criminal
10 conduct.

11 Banyard’s conduct should be evaluated in terms of the factors that the
12 Supreme Court mentioned in Solem v. Helm, 463 U.S. 277 (1983): “the harm caused or
13 threatened to the victim or society,” the “absolute magnitude of the crime,” and the
14 offender’s “culpability.” Solem, 463 U.S. at 292-293. In respect to all three criteria,
15 Banyard’s sentence-triggering behavior ranks well toward the bottom of the criminal
16 conduct scale.

17 It is clear from the record that Banyard was not a drug trafficker but
18 merely an addict in need of rehabilitation. His triggering offense for three strikes
19 treatment was possession of one gram of cocaine, which is a personal use amount.
20 Moreover, as Banyard argued in the SAP and in his Opposition to the Magistrate’s
21 Report and Recommendation, the actual amount of cocaine attributed to him should
22 have been less than a gram. As his trial attorney described it, Banyard possessed an
23 amount of cocaine so small that it could fit under one’s fingernail. (RT 709)⁴ This
24 makes his sentence even more disproportionate to the offense.

25 Had this been a first or second offense, Banyard would have been eligible

27 ⁴ “RT” refers to the Reporter’s Transcript of Banyard’s state court trial. These
28 transcripts were previously lodged with the Court.

1 for the state's discretionary diversion program for offenders who possess small amounts
2 of drugs. After court approval and completion of a drug treatment program and
3 probation, the charges against him would have been dismissed. Simply because of his
4 prior strikes – none of which were drug-related – Banyard did not receive such help for
5 his addiction. Instead, he was punished with a cruel and unusual sentence: 25 years to
6 life for a *de minimis* amount of drugs that could be possessed only for personal use.

7 In contrast, drug cases in which the Supreme Court has upheld lengthy
8 sentences under the Eighth Amendment involved significant amounts of drugs. See,
9 e.g., Hutto v. Davis, 454 U.S. 370 (1982) (*per curiam*) (affirming 40-year sentence for
10 possession and distribution of nine ounces of marijuana); Harmelin v. Michigan, 501
11 U.S. 957 (1991) (affirming life sentence without possibility of parole for possessing 672
12 grams – over 1.5 pounds, or enough for 32,500 to 65,000 doses – of cocaine). Such
13 quantities were clearly possessed for the purpose of drug trafficking.

14 Banyard's offense conduct (possessing one gram or less of cocaine for
15 personal use) pales in comparison to that of the defendants in Hutto and Harmelin. This
16 renders Banyard's sentence unconstitutional because it is grossly disproportionate to
17 the gravity of his offense. Further, it distinguishes the instant case from Andrade and
18 Ewing, in both of which the triggering offenses were active (shoplifting) and had victims
19 (the merchants), rather than passive and victimless (possessing a *de minimis* amount of
20 drugs for personal use).

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23 **C. BANYARD'S SENTENCE OF TWENTY-FIVE YEARS TO LIFE**
24 **IMPRISONMENT, IN LIGHT OF HIS PRIOR CRIMINAL HISTORY, IS**
25 **CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AMENDMENT**

26 Significantly, both defendants in Andrade and Ewing had lengthy criminal
27 histories. The Court noted that Ewing had a string of convictions from 1984 to 1993 for
28 theft, battery, burglary, possession of drug paraphernalia, receiving stolen property,

1 trespassing, and unlawfully possessing a firearm. After that, he committed three
2 burglaries and one robbery at an apartment complex over a five-week period. He was
3 incarcerated and later released; he stole the golf clubs only 10 months later while on
4 parole, a factor the Supreme Court emphasized in finding his sentence constitutional.
5 The Court underscored that Ewing was “no stranger to the criminal justice system.”
6 Ewing v. California, 123 S.Ct. at 115.

7 With regard to Andrade, the Court similarly observed that he had “been
8 in and out of state and federal prison” from 1982 until his triggering offense in 1995.
9 Lockyer v. Andrade, 123 S.Ct. at 1170. He was convicted of a series of state
10 misdemeanors, and had two separate federal convictions for transporting marijuana,
11 first in 1988 and again in 1990. In 1991, Andrade escaped from federal prison and was
12 arrested for a state parole violation. After his triggering offense (shoplifting) in 1995,
13 a jury found Andrade guilty of two counts of petty theft with a prior conviction and
14 issued a special finding that Andrade had been convicted of three counts of residential
15 burglary (which qualifies as a serious or violent felony for purposes of California’s three
16 strikes law). Id.

17 Banyard’s criminal history, as compared to Andrade’s and Ewing’s, is
18 minor. Based on the probation report, Banyard had no juvenile history. As an adult,
19 he was convicted of three felonies and one misdemeanor. His first strike was for robbery
20 in 1988 (in which Banyard took only \$6.00 from a driver who had struck his car). The
21 details of Banyard’s record show that he has not been guilty of a violent act since 1992
22 (assault with a deadly weapon, his second strike). After that, Banyard committed only
23 nonviolent offenses which appear to be related to his drug addiction (including the
24 triggering offense).

25 Ewing requires that when performing a gross proportionality review, a
26 defendant’s record of recidivism be considered in addition to his triggering offense.
27 Ewing v. California, 123 S.Ct. at 1189-1190. Under that analysis, Banyard’s minor
28 criminal history and the nonviolent nature of most of his priors, in addition to the

1 passive nature of his triggering offense, render his sentence unconstitutionally cruel and
2 unusual.

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5 **D. THE STATE COURT’S FLAWED ADJUDICATION OF THE EIGHTH**
6 **AMENDMENT ISSUE WARRANTS FEDERAL HABEAS RELIEF**

7 _____ Because the Supreme Court of California provided no additional
8 enlightenment in its terse “postcard denial” of Banyard’s claims, this Court on federal
9 habeas review must assess the validity of the prior California Court of Appeal decision.
10 (People v. Banyard, #B1122066, Sept. 9, 1998 (unpublished opinion); attached as Return
11 to Petition, Exh. B.)

12 1. The State’s Adjudication of Banyard’s Claim Resulted in a Decision That
13 Was Based on an Unreasonable Determination of the Facts
14 in Light of the Evidence Presented in the State Court Proceeding

15 The state court’s adjudication of Banyard’s claim resulted in a decision
16 that involved an unreasonable application of clearly established federal law, as
17 determined by the U.S. Supreme Court because it correctly identified the legal principle
18 from a high Court decision but unreasonably applied that principle to the facts of
19 Banyard’s case. See, Williams v. Gates, 2002 U.S. Dist. Lexis 9502 (N. Dist. Cal., May
20 8, 2002) (citing Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1518, 146 L.Ed.2d 389
21 (2000)).

22 _____ For almost a century, the U.S. Supreme Court has held that grossly
23 disproportionate punishments violate the cruel and unusual clause of the Eighth
24 Amendment. Weems v. United States, 217 U.S. 349, 367 (1910); Atkins v. Virginia, 122
25 S.Ct. 2242 (2002). Andrade recently reconfirmed that principle, holding that the “only
26 relevant clearly established law amenable to the ‘contrary to’ or ‘unreasonable
27 application of’ framework is the gross disproportionality principle, the precise contours
28 of which are unclear and applicable only in the ‘exceedingly rare’ and ‘extreme’ case.”

1 Lockyer v. Andrade, 123 S.Ct. at 1173.

2 _____ The state appellate court decision correctly identified the gross
3 proportionality principle. (People v. Banyard, #B1122066, Sept. 9, 1998 (unpublished
4 opinion); attached as Return to Petition, Exh. B at 18-20.) However, the state court
5 incorrectly applied that principle to the facts of Banyard’s case by failing to recognize
6 that his sentence of 25 years to life was grossly disproportionate to his passive, victimless
7 offense. Simply put, the state court erred in not recognizing the instant case as
8 significantly rare and extreme to warrant relief on disproportionality grounds.

9 _____ Therefore, the state court’s holding was an unreasonable application of
10 clearly established Supreme Court precedent. The state’s affirmance of Banyard’s
11 sentence, in light of the facially gross disproportion between the triggering offense and
12 Banyard’s penalty, was unreasonable within the meaning of Section 2254 (d).

13
14 2. The State’s Adjudication of Banyard’s Claim Was “Contrary to” Supreme
15 Court Authority

16 _____ The state court’s decision in the instant case was “contrary to” Supreme
17 Court authority because the state court reached a conclusion opposite to Supreme Court
18 rationale on a question of law. Williams v. Gates, 2002 U.S. Dist. Lexis 9502 (N. Dist.
19 Cal., May 8, 2002) (citing Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1518, 146
20 L.Ed.2d 389 (2000).

21 _____ Specifically, the state court concluded: “Although his sentence is harsh, in
22 view of Banyard’s history of criminal activity, we cannot conclude the sentence offends
23 fundamental notions of human dignity or shocks the conscience.” Return to Petition,
24 Exh. B at 20 (emphasis added). In so ruling, the state court applied the wrong test.
25 Although that standard applies to violations of the California Constitution (*In re Lynch*,
26 8 Cal.3d 410, 424 (1972)), Eighth Amendment jurisprudence does not set a federal
27 constitutional standard based upon whether a noncapital sentence “offends fundamental
28 notions of human dignity” or “shocks the conscience.” Rather, as set forth *supra*, the

1 appropriate test – and the only one that should have been considered dispositive by the
2 state court – is whether Banyard’s sentence was “grossly disproportionate” to his
3 offense.

4 _____ Because the state court based its conclusion on a state law standard that
5 is inapplicable to federal constitutional law, it reached a conclusion opposite to Supreme
6 Court rationale on a question of law. Accordingly, the state court’s decision cannot
7 survive habeas scrutiny by this Court because it was “contrary to” U.S. Supreme Court
8 authority.

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10 **E. _____ THE VIOLATION OF BANYARD’S EIGHTH AMENDMENT RIGHTS WAS**
11 **NOT HARMLESS ERROR**

12 _____ Because Banyard litigates his federal constitutional rights violation in a
13 habeas proceeding, it is subject to a harmless error analysis under Brecht v.
14 Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). See Bains v.
15 Cambra, 204 F.3d 964, 977 (Brecht standard should apply uniformly in all federal
16 habeas corpus cases under § 2254). Clearly the state court’s determination that
17 Banyard’s sentence was constitutional had a “harmful and injurious result” on the
18 outcome of his case: Banyard is in prison for at least 25 years, and possibly for the rest
19 of his life.

20 Therefore, under Brecht, the error was not harmless. Rather, the
21 constitutional error resulted in actual prejudice to Banyard and rendered his sentence
22 fundamentally unfair.

23
24 **III**

25 **CONCLUSION**

26 Based on the foregoing, Banyard’s sentence of twenty-five years to life was
27 cruel and unusual, in violation of the Eighth Amendment. Therefore, the Magistrate’s
28 Report and Recommendation should not be adopted and the SAP should be granted.

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DATED: April 14, 2003

Respectfully submitted,

**GREGORY NICOLAYSEN
Counsel for Petitioner,
Michael Banyard**

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PROOF OF SERVICE BY MAIL

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 16000 Ventura Blvd., Suite 500, Encino, CA 91436.

On April 14, 2003, I served the foregoing document described as PETITIONER'S SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS, by depositing a true copy in first-class U.S. mail, with sufficient postage attached, to:

**Stephanie A. Miyoshi
Deputy Attorney General
Office of Atty. Gen. of California
300 S. Spring Street, Suite 5000
Los Angeles, CA 90013-1230**

Executed on April 14, 2003, at Encino, California. I declare under penalty of perjury under the laws of the United States that the above is true and correct.

KAREN VAN HOEPEN