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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LOVIE TROY MATTHEWS, Defendant and Appellant.	B269079 (Los Angeles County Super. Ct. No. BA347305)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gail Ruderman Feuer, Judge. Affirmed.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael R. Johnsen and Paul M. Roadarmel, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

This appeal arises from a resentencing following the California Supreme Court's decision of *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*). Appellant Lovie Troy Matthews (Matthews) contends (1) the trial court abused its discretion in denying his motion to strike a prior felony conviction pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*), (2) his counsel was ineffective in failing to investigate evidence to support his *Romero* motion, (3) his sentence on remand of 80 years to life violates the law of the case doctrine, and (4) his sentence constitutes cruel and/or unusual punishment. We disagree and affirm.

BACKGROUND

The facts of this case are set forth in *Banks* and will not be repeated here, except for the following: "Here, defendant Lovie Troy Matthews acted as the getaway driver for an armed robbery [of a medical marijuana dispensary] in which Leon Banks and others participated. In the course of escaping, Banks shot one of the robbery victims. A jury found Matthews guilty of first degree murder under a felony-murder theory and found true a felony-murder special circumstance. The People did not seek the death penalty; consequently, Matthews received the mandatory lesser sentence for special circumstance murder, life imprisonment without parole [LWOP]." (*Banks, supra*, 61 Cal.4th at p. 794.) The *Banks* court found that because Matthews was no more culpable than the getaway driver in *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*), "the evidence was insufficient as a matter of law to support the special circumstance, and Matthews is statutorily ineligible for life imprisonment without parole." (*Banks, supra*, 61 Cal.4th at p. 794.) Accordingly, the *Banks* court reversed our prior decision (*People v. Banks* (Aug. 29, 2013, B236152 [nonpub. opn.]) and remanded for resentencing of Matthews.

The case was called for resentencing on December 16, 2015, by the same court that presided over Matthews's trial and imposed the original sentence. The trial court heard and denied Matthews's *Romero* motion. Matthews was resentenced to 80 years to life in state prison, consisting of 25 years to life for first degree murder, doubled to 50 years under the "Three Strikes" law, plus 25 years for a firearm enhancement, plus five years for a serious-felony prior conviction. The trial court imposed and stayed the 16-month sentences on count 2 (attempted second degree robbery) and count 3 (second degree commercial burglary).

DISCUSSION

I. Denial of *Romero* Motion

Matthews contends the trial court abused its discretion in denying his *Romero* motion to dismiss his prior robbery "strike" and sentencing him as a second strike offender to serve a total of 80 years to life in state prison.[1]

In *Romero, supra*, 13 Cal.4th at pages 529–530, our Supreme Court held that pursuant to Penal Code section 1385, subdivision (a),[2] a trial court may, "in furtherance of justice," dismiss or strike a finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony. In *People v. Williams* (1998) 17 Cal.4th 148, the

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[1] At the beginning of the resentencing hearing, the trial court noted that the preconviction probation report contains "a reference to two strikes when he was originally sentenced, and the court only found the allegation true with respect to one prior strike, and that is from 2005."

[2] All further statutory references are to the Penal Code unless otherwise indicated.

Section 1385, subdivision (a) states in part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

Supreme Court explained that in determining whether striking or vacating a prior "strike" conviction would be in the "'furtherance of justice,'" the trial court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of [the defendant's] background, character, and prospects, the defendant may be deemed outside the 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." (*Id.* at p. 161.)

In reviewing whether a trial court abused its discretion under section 1385, "we are guided by two fundamental precepts. First, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a "'decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377.)

In addressing the *Romero* motion on remand, the trial court stated the following:

"I need to look at three factors: The first is the nature and circumstances of the current offenses. We are looking at murder, which is

obviously a very serious offense. The arguments by defense counsel are that Mr. Matthews, while he was convicted of murder, he was an aider and abettor, he did not have a weapon on him and he was not the shooter . . . and, therefore, the court should consider it less serious than if he were the shooter and were present.

"The second is the nature and circumstances of the prior serious or violent felonies. On this factor, I will note that at the time of the offense when Mr. Matthews was apprehended, he had an ankle bracelet on. He was on parole for the robbery, which is of concern to the court. In looking at the probation report, Mr. Matthews has a series of offenses. He has juvenile offenses dating back to 1994. He has an adult history dating back to a receiving stolen property in 1996. He has the robbery conviction, which is both a violent [and serious] felony and he was on parole at the time of this offense.

"The third factor is defendant's background, character, and prospects. [The prosecutor] points out that Mr. Matthews was not only on parole at the time, that he was a member of the Rollin 30's [Harlem Crips gang]. The principal factor pointed out by [defense counsel] is that Mr. Matthews currently is 37, and if the court were to impose an additional 80 years, it would be a significant sentence keeping Mr. Matthews in custody for most of his life, and it may or may not be a different sentence ultimately than life without parole given the significant number of years." (The record shows that Matthews had just turned 38 years old.)

The trial court added: " So my tentative is to deny the *Romero* given the nature of the offense, the fact that Mr. Matthews was on parole at the time of the offense, the fact that the robbery—I don't have the facts regarding the robbery . . . but I am concerned that he was a gang member at

the time of the offense and was very involved in the current offense. [¶] While he was not the shooter, there was evidence that he dropped off the individuals who committed the robbery and murder, that he was in contact with, I believe, Mr. Banks during the course of the robbery, and then he picked up the individuals, one or more at the end of the robbery and murder."

After hearing argument, the trial court denied the *Romero* motion, stating: "In looking at the three factors: The nature of the current offense, the prior robbery for which Mr. Matthews was on parole at the time of this robbery, and his background as a gang member with nothing mitigating about the background, the only reason to strike the strike in this case would be to, in essence, show mercy. . . . [¶] . . . I do find in light of the three factors that Mr. Matthews is not outside the scheme [or] the spirit [of the law] in whole or in part and, therefore, he should not be relieved of the prior strike. So that is my ruling on the *Romero*."

Matthews's contention that the trial court abused its discretion in denying his *Romero* motion is without merit. While Matthews concedes that first degree murder is a serious and violent offense, he finds fault with the trial court's reasoning. Matthews argues that the court "impermissibly relied on certain findings that were not supported by substantial evidence." Specifically, he argues that the trial court was wrong in finding that he was "very involved in the current offense," and also argues that the court placed too much emphasis on both the calls between him and Leon Banks at the time of the attempted robbery and the fact that he is a gang member.

To support his position, Matthews relies on the findings in *Banks, supra,* 61 Cal.4th 788. *Banks* found that Matthews was a "quintessential 'minor actor'" (*id*. at p. 807), noting that "during the robbery and murder,

Matthews was absent from the scene, sitting in a car and waiting," there was no evidence that he saw or heard the shooting, that he had any immediate role in instigating it or that he could have prevented it, and there was also no evidence establishing his role, if any, in planning the robbery or in procuring weapons (*id*. at p. 805). Matthews also points out that *Banks* noted that while the record showed there were nine cell phone calls between him and Leon Banks, each lasting less than one minute and as many as six of which may have simply gone to voicemail, the calls indicated nothing about Matthews's awareness of or involvement in the shooting (*id* at pp. 806–807). With respect to his gang membership, Matthews points out that *Banks* also noted that no evidence was introduced showing that Matthews or his two fellow gang members (Leon Banks, the shooter, was not a member of Matthews's gang) "had themselves previously committed murder, attempted murder, or any other violent crime (*id*. at p. 805).

But it cannot be ignored that *Banks* was evaluating Matthews's conduct for the purpose of determining whether he was legally eligible for a sentence of LWOP under section 190.2, subdivision (d).[3] *Banks* made clear that the analysis was the same for a sentence of death. (*Banks, supra*, 61 Cal.4th at pp. 804–805.) Thus, *Banks* was not evaluating Matthews in the context of determining whether he fell outside the scheme or spirit of the

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[3] Section 190.2, subdivision (d) provides: "Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4."

Three Strikes law such that it would be appropriate for a court to dismiss a prior strike, but in the far more serious context of whether he was death eligible.

Even if the trial court was incorrect in finding that Matthews "was very involved in the current offense," there was still substantial evidence of his involvement. The trial court was correct in finding that the preconviction probation report stated that Matthews drove his confederates near the marijuana dispensary, waited in a car nearby, made cell phone calls while waiting, and picked up one or more of his confederates after the failed robbery and shooting. We also find nothing wrong with the trial court's focus on Matthews's gang membership. He was, after all, attempting to commit a robbery with fellow armed gang members. The gang evidence presented at trial was that the Rollin 30's Harlem Crips gang engaged in violent criminal activities, including robberies, shootings, murders and gun possession, as well as its primary activity of narcotics sales.

In any event, Matthews's involvement in the current offenses is not the only factor to be considered in deciding a *Romero* motion. The trial court properly examined Matthew's prior offenses. Matthews asserts that his criminal record "does not reflect a truly violent person." But the preconviction probation report indicates that Matthews has an extensive criminal history dating back to 1994, when, as a juvenile, he suffered two adjudications for unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), and one apparent adjudication (the record is unclear) for petty theft (§ 484, subd. (a)). In 1996, as an adult, he was convicted of receiving stolen property (§ 496, subd. (a)) and, in 1999, only three years later, he was convicted of misdemeanor petty theft and tampering with a vehicle (Veh. Code, § 10852). In May and December 2002, he was convicted of felony

possession of cocaine base for sale (Health & Saf. Code, § 11351.5) and felony sale or transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)), respectively. In 2003, while on probation, appellant was again convicted of felony sale or transportation of a controlled substance; his probation was revoked and he was sentenced to prison. Upon being released from prison, appellant was convicted in 2005 of robbery (§ 211) (the strike at issue) and sentenced to three years in prison. He was on parole for that offense at the time he committed the charged crimes in the instant case on October 1, 2008.

Matthews's claim that "other than the prior strike offense, [his] history reflects he had a drug problem that went hand-in-hand with theft offenses," is not supported by the record. His criminal history indicates that he was actually a *seller* of drugs, with no known legal employment. But even if "'drug use appears to be an underlying factor in [appellant's] criminal behavior, and in fact may be the root cause thereof,' the record is barren of any attempts by [Matthews] to 'root out' such destructive drug dependency. Accordingly, his drug dependency does not fall into the category of mitigating circumstances." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 322.)

The fact that Matthews was on parole at the time he committed the current crimes shows that when he was released from prison, he returned to criminality. "[A] defendant who falls squarely within the law's letter does not take himself outside its spirit by the additional commission of a virtually uninterrupted series of nonviolent felonies and misdemeanors over a lengthy period. After all, the Three Strikes law was devised for the 'revolving door' career criminal, and was expressly intended 'to ensure longer prison sentences . . . for those who commit a felony' as long as they were previously

convicted of at least one strike. . . . Extraordinary must the circumstance be by which a career criminal can be deemed to fall outside the spirit of the very statutory scheme within which he squarely falls and whose continued criminal career the law was meant to attack." (*People v. Strong* (2001) 87 Cal.App.4th 328, 331–332, fn. omitted.)

Finally, Matthews argues that the trial court erroneously dismissed "out of hand" the consideration of his age at sentencing. To the contrary, the record shows the court considered this fact:

"THE COURT: Help me out on the following: So I hear your principal argument is that, if the court imposes hypothetically it would be 80 years to life—

"[DEFENSE COUNSEL]: Yes.

"THE COURT: —Mr. Matthews may never get out of custody given his current age. He has, actually, seven or eight years credit, which we'll get to later, but you're saying, in essence, that's the same as him getting a life sentence.

"[DEFENSE COUNSEL]: Yes."

The trial court also asked the prosecutor to address the issue of age, stating: "The principal argument that would be useful to have you address is the question whether the court should impose a lesser sentence because, otherwise, it is, in essence, the equivalent of life without parole. So it would be helpful to address that." The prosecutor responded: "I know [defense counsel] is saying Mr. Matthews is 37 years old, he deserves some mercy here, but for this current strike, as the court has indicated, since 1994, the defendant has been in and out of trouble. This crime occurred in 2008. So for 14 years this defendant had a chance to show society and the court that he had reformed himself, and he didn't do that."

In sum, the trial court did not abuse its discretion in refusing to dismiss Matthews's prior "strike" conviction under the circumstances described here.

II. Ineffective Assistance of Counsel

Matthews contends that he "was denied his Sixth Amendment right to effective counsel . . . because his trial attorney failed to investigate and to present evidence supporting his *Romero* motion," and therefore the matter should be remanded for a new *Romero* hearing. Specifically, he argues that his attorney had "**nothing**" to offer the trial court about his character, background, or personal characteristics that might have taken him outside the scope or spirit of the Three Strikes law.

"To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 2068, 80 L.Ed.2d 674].)" (*People v. Scott* (1997) 15 Cal.4th 1188, 1211–1212; see also *People v. Kipp* (1998) 18 Cal.4th 349, 366; *People v. Ledesma* (1987) 43 Cal.3d 171, 214–218.) "Courts must in general exercise deferential scrutiny in reviewing such claims; the reasonableness of defense counsel's conduct must be assessed 'under the circumstances as they stood' at the time of counsel's acts or omissions; 'second-guessing' is to be avoided. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 449.)

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel . . . and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" (*People v. Lucas* (1995) 12 Cal.4th 415, 436–437; see also *People v. Mendoza* (2000) 24 Cal.4th 130, 158.) "A factual basis, not speculation, must be established before reversal of a judgment may be had on grounds of ineffective assistance of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 933.) A defendant must show that the alleged failures were not tactical decisions which a reasonably competent, experienced criminal defense attorney would make. (*Id*. at p. 936.) The means of providing effective assistance are many, and counsel has wide discretion in deciding as a matter of strategy which course to take. (See *People v. Ledesma, supra,* 43 Cal.3d at p. 216.) "Even the most competent counsel may from time-to-time make decisions or conduct himself in a manner which might be criticized by other equally competent counsel but that is not the measure of competency of counsel on review by an appellate court." (*People v. Wallin* (1981) 124 Cal.App.3d 479, 485.) Additionally, a defendant must prove prejudice that is a """demonstrable reality,""" not simply speculation. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

Initially, the People argue that Matthews's claim is not cognizable on appeal because the record sheds no light on why his defense counsel acted as she did. "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation." (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) The People argue that

Matthews's claim is more appropriately brought as a petition for writ of habeas corpus.[4]

But the reporter's transcript of the resentencing hearing shows that defense counsel did explain her strategy. After the trial court asked if there was anything about Matthews's "character or his past that the court should consider to take him out of the intent of the [T]hree [S]trikes law," defense counsel responded that she did not have any current information because "my thought was based on his record. The court would be[] looking more towards not striking the strike; so I was more emphasizing in the interest of justice . . . that, if the court decided to withdraw—strike the strike because he is still being sentenced to a good chance of never being outside of the walls of prison . . . but there is that opportunity if he were sentenced this way as opposed to imposing the strike."

We cannot say that defense counsel's strategy of focusing on the length of Matthew's mandatory sentence if the strike were not dismissed was so deficient that it fell below an objective standard of reasonableness. As noted above, a trial attorney has wide discretion in deciding what strategy to take. (*People v. Ledesma, supra,* 43 Cal.3d at p. 216.)

Contrary to Matthews's argument that defense counsel offered nothing to the trial court about the particulars of his background and character, defense counsel did state to the court that Matthews "does have factors relating to many individuals who grew up in poor neighborhoods that the gang lifestyle is almost a survival mechanism." Defense counsel apparently recognized that this common factor was not sufficient mitigating evidence.

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[4] Matthews did file a petition for writ of habeas corpus. We issued an order that the petition would be considered concurrently with this appeal and directed the People to file an informal response. A ruling on the petition will be issued concurrently with the filing of this opinion.

Moreover, it is reasonable to assume that if any mitigating evidence were available, it would have been presented at the original sentencing hearing. There is nothing in the record to suggest that any investigation by defense counsel (assuming one had not been conducted) would have uncovered anything remotely helpful. Matthews also complains that his defense counsel had no "current" information for the court beyond what was included in his preconviction probation report prepared six years earlier for his original sentencing hearing. The obvious response to this complaint is that there was nothing current to add because Matthews had spent the last six years incarcerated. Even if the evidence showed that he was trying to better himself in prison since being convicted of the current offenses, he cites no authority indicating that postconviction behavior in prison is relevant to a *Romero* motion. We conclude that Matthews has not met his burden of demonstrating that his defense counsel provided ineffective assistance.

We also conclude that Matthews has not met his burden of demonstrating prejudice. At the beginning of the resentencing hearing, the trial court stated that its tentative ruling was to deny the *Romero* motion and sentence Matthews to 80 years to life, despite defense counsel having advocated a sentence of only 30 years to life in her sentencing memorandum. There is nothing to suggest that mitigating evidence—to the extent any existed—would have resulted in a more favorable sentence, in light of the seriousness of Matthews's crimes and the extent of his criminal history. Matthews has failed to prove prejudice that is a demonstrable reality and not simply speculation. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1241.)

III. Law of the Case Doctrine

Matthews contends the *Banks* decision, which reversed the felony-murder special circumstance and set aside his LWOP sentence, constitutes

"law of the case" and precluded the imposition of what he calls a "de facto life sentence" on remand. He argues that because he was sentenced to 80 years to life in prison when he was 38 years old, he will not be eligible for parole until he is 111 years old (calculated as 38 plus 80 (118) minus his presentence custody credit), which is beyond his natural life expectancy. We find no merit to Matthews's contention.

Our Supreme Court has defined the doctrine of law of the case as follows: "'That where, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal and . . . in any subsequent suit for the same cause of action . . . .'" (*People v. Murtishaw* (2011) 51 Cal.4th 574, 589, quoting *People v. Shuey* (1975) 13 Cal.3d 835, 841; see also *People v. Barragan* (2004) 32 Cal.4th 236, 246 ["an appellate court's determination 'that the evidence is insufficient to justify a finding or a judgment is necessarily a decision upon a question of law'"].) "The principle applies to criminal as well as civil matters." (*People v. Shuey, supra*, at p. 841.) But "law of the case 'does not extend to points of law which might have been but were not presented and determined on a prior appeal[.]'" (*Id*. at p. 843.)

Banks stated: "The issue before us is under what circumstances an accomplice who lacks the intent to kill may qualify as a major participant so as to be statutorily eligible for the death penalty." (*Banks, supra,* 61 Cal.4th at p. 794.) In addressing the issue, *Banks* observed: "Section 190.2[, subdivision] (d) was designed to codify the holding of *Tison v. Arizona* (1987) 481 U.S. 137 [95 L.Ed.2d 127, 107 S.Ct. 1676] [(*Tison*)], which articulates the constitutional limits on executing felony murderers who did not personally

kill. *Tison* and a prior decision on which it is based, *Enmund*[, *supra,*]458 U.S. 782 [73 L.Ed.2d 1140, 102 S.Ct. 3368], collectively place conduct on a spectrum, with felony-murder participants eligible for death only when their involvement is substantial and they demonstrate a reckless indifference to the grave risk of death created by their actions. Section 190.2[, subdivision] (d) must be accorded the same meaning." (*Banks, supra*, at p. 794.) "[B]y importing the *Tison-Enmund* standard, [section 190.2, subdivision (d)] permits [an LWOP] sentence only for those felons who constitutionally could also be subjected to the more severe punishment, death." (*Banks, supra,* at p. 804.)

Applying those principles to the facts of this case, *Banks* concluded that, "[b]ecause on the evidence in the record no rational trier of fact could have found Matthews's conduct supported a felony-murder special circumstance, the jury's special circumstance true finding cannot stand." (*Banks, supra*, 61 Cal.4th at p. 811.) The issue of whether a functional life without parole sentence could be imposed on remand was never raised or addressed. The reversal of Matthews's LWOP sentence was merely a necessary consequence of the Supreme Court's holding that insufficient evidence supported the jury's finding on the felony-murder special circumstance.

Banks did not suggest—much less hold—that in the absence of a valid special circumstance finding, the second-strike provisions of the Three Strikes law are inapplicable to defendants convicted of first degree murder. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 89 [the Three Strikes law "requires that a defendant who is convicted of a felony and has a prior conviction for a 'strike' (a violent or serious felony) be sentenced to double the prison term for the defendant's 'current felony conviction'"].) Indeed, courts

have routinely upheld lengthy sentences for recidivists convicted of far less serious crimes. (See, e.g., *In re Coley* (2012) 55 Cal.4th 524, 553–561 [upholding application of Three Strikes law where petitioner failed to register as a sex offender]; *People v. Barrera* (1999) 70 Cal.App.4th 541, 555 [upholding application of Three Strikes law to defendant who forged a check].)[5] In light of our conclusion, there is no merit to Matthews's claim that his counsel was ineffective in failing to raise the law of the case doctrine.

IV. Cruel and Unusual Punishment

Finally, Matthews contends that his sentence of 80 years to life constitutes cruel and/or unusual punishment under both the federal and state Constitutions.[6]

The federal and California constitutional proscriptions against cruel and/or unusual punishment forbid punishment that is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424; *Solem v. Helm* (1983) 463 U.S. 277; *People v. Dillon* (1983) 34 Cal.3d 441, 476–489.) A defendant "must overcome a 'considerable burden' to show the sentence is disproportionate to his level of culpability. [Citation.]

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[5] We note that if the trial court had dismissed Matthews's prior strike, his sentence would have been reduced by 25 years (since his 25-year-to-life murder sentence was doubled on the Three Strikes law) to 55 years to life. Again, given his age of 38 at sentencing, a 55-year-to-life sentence could also be viewed as a functional LWOP sentence.

[6] The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Similarly, Article 1, section 17 of the California Constitution provides that "Cruel or unusual punishment may not be inflicted . . . ."

Therefore, '[f]indings of disproportionality have occurred with exquisite rarity in the case law.' [Citation.]" (*People v. Em* (2009) 171 Cal.App.4th 964, 972.)

Matthews unquestionably represents a danger to society. "There can be no dispute that murder is a serious crime, and that armed robbery and the use of a gun by a gang member in the commission of a crime present a significant degree of danger to society." (*People v. Em, supra*, 171 Cal.App.4th at p. 972.) All prior attempts at rehabilitation and deterrence have proven unsuccessful; indeed, as previously noted, Matthews was on parole at the time he committed the charged offenses, including first degree murder. His "felonies are particularly egregious because they were committed for the benefit of a criminal street gang." (*People v. Leon* (2010) 181 Cal.App.4th 452, 469.) But, "without even considering the nature of his current offenses, [Matthews], at age [38], was before the trial court as a career criminal who had preyed on society and failed to benefit from multiple incarcerations and periods of parole and probation." (*People v. Ayon* (1996) 46 Cal.App.4th 385, 400.) His sentence was properly based on his current crimes, recidivist behavior, and lack of regard for rehabilitation. It does not shock the conscience. (See *People v. Leon, supra*, at p. 469 [sentence of 105 years to life for murder and attempted murder not cruel or unusual]; *Harmelin v. Michigan* (1991) 501 U.S. 957 [LWOP nonviolent felony of possessing more than 650 grams of cocaine not cruel and unusual].)

In making his contention, Matthews relies on his previous arguments, i.e., that *Banks* found he was not statutorily liable for LWOP, that his sentence of 80 years to life constitutes a de facto LWOP sentence, that his participation in the underlying robbery was minor, and that his counsel was ineffective in failing to raise the issue below. We have already rejected these arguments. Consequently, we find no merit to Matthews's cruel and unusual contention.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.*
GOODMAN

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